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THE UNITED NATIONS SECRETARIAT

AND THE

USE OF FORCE IN A UNIPOLAR WORLD

by

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FIRST LECTURE:
Introduction and the Iraq-Kuwait Conflict
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INTRODUCTION

1. In an interview with the BBC World Service on 16 September 2004 Secretary-General Kofi Annan said that the United States-led invasion of Iraq in 2003 had been an illegal act that contravened the United Nations Charter. The remarks which were teased out of him by a persistent interviewer provided an unexpected coda to a long-running saga whose origins could be traced back more than a decade.

2. The furor caused by these remarks in the United States was not due to the use of the word "illegal" but to their timing. The characterization of the invasion of Iraq as illegal

* *The statements contained in these lectures reflect the personal views of Mr Zacklin and do not necessarily reflect the views of the United Nations. An expanded version of these lectures will be published in due course by Cambridge University Press as a book within the Hersch Lauterpacht Memorial Lectures series.*

was hardly news. It is true that hitherto, the Secretary-General had done his utmost to avoid using so direct a condemnation of the war but he had made it clear on numerous occasions that absent a specific authorization of the Security Council the use of force in the 2003 invasion of Iraq would not be and was not in conformity with Charter. The timing of the remarks, however, a few short weeks before a closely contested Presidential election had been seen by some in the Bush administration and by many in the neo-con community as a deliberate attempt to influence the outcome of the election.

3. It is doubtful, to say the least, that any Secretary-General would be rash enough to attempt to influence the outcome of an election in any member state least of all in the United States but the BBC interview and the uses to which it was put by the media and the chattering classes, especially in the United States, demonstrated the vulnerability of high-level international officials to pressure from both inside and outside government.

4. The interview had long-term and very damaging consequences for the United Nations as an institution and for the Secretary-General both in his capacity as the chief administrative officer of the Organization and personally. It contributed to the unleashing of a campaign against the Secretary-General and the Secretariat the likes of which had not been seen since the days of McCarthy and through a witch-hunt otherwise known as the Volcker Inquiry came within a paragraph of forcing the resignation of the Secretary-General. Kofi Annan in fact became the second Secretary-General within less than a decade to fall victim to American presidential politics, Boutros Boutros-Ghali having been forced out of office by an American veto during the 1996 presidential campaign.

5. What had attracted such visceral distaste of the Secretaries-General by the world's only super-power? Both Boutros-Ghali and Annan had been appointed like all Secretaries-General with the support of the United States and had enjoyed for a time excellent relations with Washington. But both had had the misfortune, or the challenge, of occupying the office of Secretary-General in the post-Cold War period when the use of

force with or without Security Council authorization had become more prevalent in a variety of situations. Both had exhibited a tendency towards independence of thought which Washington found difficult to accept in what one commentator has described as an era of "foreign policy evangelicalism". The importance of multilateralism, of the principles enshrined in the United Nations Charter and a preference for peaceful settlement of disputes over use of force except in the very last resort all created a fertile ground for differences between the dominant member state and the Secretaries-General appointed to head the Secretariat.

6. In the title of these lectures I refer to the Secretariat of the United Nations rather than to the Secretary-General. The term Secretariat is used here in the sense of Articles 7 and 97 of the Charter, i.e. the Secretariat as a principal organ of the United Nations comprising a Secretary-General and such staff as the Organization may require. There is a threefold significance in this for the purpose of these lectures.

7. Firstly, the Secretariat's capacity to act autonomously which stems from the organic nature of the Organization. The very ambiguity of the role of the Secretariat as outlined in Chapter XV of the Charter lends itself to such a view. More precisely there are a number of elements contained in Chapter XV which underscore such a role: the absence of clear indications as to the limits of the Secretariat's role; the broad implied powers of the Secretary-General under Article 99; and the exclusively international character of the responsibilities of the Secretary-General and of the staff. Historically, the powers of the Secretary-General and the concept of the international civil service have been the pillars on which the Secretariat's role has been constructed.

8. Secondly, while it is true that the Office of Legal Affairs has existed in one form or another from the inception of the Organization, and it is through that Office that formal legal advice is provided throughout the Organization, the Office of Legal Affairs is by no means the only Secretariat department which contributes to the formation of legal

statements and pronouncements by the Secretary-General. This is especially true of the period covered by these lectures and when major policy speeches of the Secretary-General were being crafted.

9. Thirdly, if the Secretariat is to play a role in the public legal discourse it must have a voice and that voice can only be the Secretary-General. While all Secretaries-General develop their own conception of the office and the degree to which the law may play a role in their individual conception may vary, historically all of them have identified with and understood the importance of the Charter principles and the role of international law in the exercise of their functions. This is particularly true of the three Secretaries-General who held office in the post-cold war period. As Stephen Schwebel has noted, when the powers established by Article 99 are taken together with the "strategic world position" of the Secretary-General as the person who "more than anyone else will stand for the United Nations as a whole" it can be said that Article 99 together with Article 98 provides a legal base for the "political personality" of the Secretary-General.

10. The role of international law and of the international lawyer in the Secretariat of the United Nations is a complex one. It is after all a political organization. Needless to say the profile of that role has undergone considerable change over the years as the practice of the Organization has evolved but also as a reflection of the personalities, predilections and knowledge of individual Secretaries-General. In 1948, the British Year Book of International Law published an article entitled 'The Development of International Law through the Legal Opinions of the United Nations Secretariat'. The author was Oscar Schachter who at the time held the position of Senior Legal Counselor in the United Nations Legal Department.

11. Schachter had very clear, one might say audacious, views as to the place of law in the United Nations and the role of the Secretariat. Notwithstanding the political character of the United Nations Charter, the actions of member states and of the organs of the

United Nations were not, in his view, simple "acts of policy", free of legal restraints. For whatever reason, members of the United Nations found it necessary to "maintain that their acts are in conformity with legal principles and procedures". In the context of a rules and law-based Organization, as he saw it, the Secretariat of the United Nations had a particular role to play because apart from the International Court of Justice, the Secretariat is the only principal organ which is not composed of member states. Its members like the Court serve in an individual capacity and they are required by the Charter not to seek or receive instructions from any government or any external authority. In other words as international civil servants they had a duty to give impartial legal advice independent of the interests of individual governments.

12. This role was quite different from that of the International Court of Justice because as Schachter put it "…in practice there is a need for impartial legal advice which can be given at the time a question is under consideration and which does not have the formality of a judicial pronouncement". There was no formal authority for this general legal advisory function but the Secretariat at that very early stage in the history of the Organization had adopted a role which filled a practical need to provide day-to-day legal advice to the organs of the Organization.

13. The proposition that the United Nations Secretariat could or should perform such a general legal advisory function would today be regarded by many as a fantasy. Indeed the confident assertion in the 1948 British Year Book article that the competence of the Secretariat to furnish legal advice, even in connection with controversial political issues before the Security Council, had been confirmed by the practice of that organ as early as 1946 today reads more like a historical artifact than a recognizable description of the role of the Secretariat. As Michael Wood observed in his 2006 lectures here, the Security Council is not given to legal introspection and when it does seek legal advice it relies almost exclusively on the legal advisers of the missions and not the Secretariat.

14. If that is the case and the legal advice of the Secretariat is not generally sought by the Security Council, or for that matter the General Assembly, on controversial political issues why do the views of the Secretariat on the use of force matter? There are many reasons why these views matter and not only in a theoretical sense but in a very real political and operational sense. Firstly, as we have already pointed out the Secretariat through the Secretary-General's political personality has an important voice in the public discourse concerning the legal aspects of use of force. This was abundantly clear during the prelude to and the aftermath of the Iraq war when the media was virtually saturated with opinions on the question of the legality of the war. It is a truism as Schachter among others pointed out that member states as a general rule like to maintain that their acts are in conformity with the Charter and international law and in that sense the views of the Secretary-General are extremely important in the market place of public opinion. Secondly, even if the Secretariat's views are not solicited directly by the Security Council on matters involving the use of force, the fact that the Secretariat has a particular view on a given question becomes known to member states in a variety of ways and may very well influence their approach to that particular issue. Thirdly, the international organization lawyer, as the late Sir Arthur Watts observed, occupies a unique position within the Secretariat of an organization like the United Nations in the space that he described as lying between the politically desirable and the legally defensible. It is from this vantage point that the lawyers are frequently called upon to provide legal advice to the Secretary-General and to the Secretariat departments. The legal advice to departments such as the Departments of Political Affairs and Peacekeeping has significant political and operational consequences while the advice given to the Secretary-General shapes his actions and informs his public pronouncements.

15. In these lectures I will examine the role and the views of the Secretariat regarding the use of force during a period of time that became known as the unipolar world. Specifically, the period in question is bracketed by the Iraq-Kuwait war of 1991 and the Iraq war in 2003 but it also included Somalia, Rwanda, Bosnia and Kosovo. Over the

course of these three lectures I will discuss the Secretariat's position regarding the use of force in three of these conflicts, the Iraq-Kuwait war, which will be the subject of today's lecture ,Bosnia and the Iraq war each of which presented the Secretariat with very different challenges and sets of issues. The first of these presented itself as the dawn of a new world order but soon came to be seen by the Secretariat as an incipient breakdown of the old order represented by the Charter in the face of a new kind of imperialism. The Bosnia conflict which grew out of the breakup of the Yugoslav Republic in the early 1990's placed wholly unrealistic expectations on United Nations peacekeeping and resulted in confusion and a disconnect between political decision-making by the Security Council and the realities on the ground. The relationship between the Security Council and the Secretariat in these years was fractured and polemical. Finally, the Iraq war presented the Secretariat with the challenge of a use of force which it perceived as lacking in legitimacy and which to all intents and purposes was illegal since it was in breach of fundamental Charter principles.

16. In tracing and examining the role of the Secretariat with regard to the use of force in these three conflicts my perspective is, of course, legal. But whether the legal issues raised were of a broad constitutional nature or of a very specific operational nature, they cannot be disassociated from the overall political framework and context in which they arose. I have attempted to present the issues as they arose and without the benefit of hindsight and I make no particular claim as to the wisdom of the Secretariat's views. History will be the ultimate judge of that.

THE IRAQ-KUWAIT CONFLICT

1. The Security Council's actions in response to Iraq's invasion of Kuwait in 1990 were in many respects the model of what collective security under the Charter could be in a kind of post-modern interpretation of Chapter VII enforcement. After decades of cold war paralysis the Security Council appeared to have been revitalized. Charter provisions which had previously been held in abeyance or only sparingly utilized were being implemented. The Security Council took centre stage and the establishment of a new world order, however improbable, appeared possible. No one serving in the Secretariat at that time had ever seen anything like it.

2. The euphoria did not last long. Within a short time, serious differences began to emerge between the Secretariat and the main coalition partners concerning both the process and the content of the Security Council's actions. By the end of the 100 hours ground phase of the combat in February 1991 the Secretary-General had begun to raise questions about the compatibility of certain tactics with the laws of war and humanitarian law. What had started out as an enforcement action under Chapter VII with the imprimatur of the United Nations had evolved into a military engagement by third parties over which the Security Council exercised little or no control. Within days of the end of combat operations the Secretary-General publicly distanced the United Nations from Desert Storm. How had the public perception of a successful United Nations intervention come to be seen by the Secretariat as undermining the values and principles contained in the Charter.

Between peace and war

3. Following the occupation of Kuwait by Iraq on 2 August 1990 the Security Council had moved with unaccustomed efficiency to adopt a series of decisions which drew sequentially on the measures available to it under Chapter VII, specifically Articles 39, 40

and 41. It made a determination of the existence of a threat to international peace and security, decided on provisional measures and imposed sanctions. Within days it had declared Iraq's annexation of Kuwait null and void and had authorized forcible measures to enforce compliance with sanctions. That particular resolution (665) had also requested Member States to use the Security Council's Military Staff Committee to coordinate these activities. Very few people outside of the United Nations knew or remembered that such a Committee existed, let alone functioned. The Committee was never convoked for that purpose, however, and it was the last time that an attempt was made to bring the forcible measures regime under the formal control of an inter-governmental United Nations organ.

4. All five Foreign Ministers of the P5 were present at a meeting of the Security Council on 25 September 1990. That was an extremely rare event in those days and was taken as a sign of the new-found cohesion of the P5 and of the importance they attached to the role of the Security Council in the post-cold war world. At that meeting the Council further tightened the sanctions on Iraq (by explicitly confirming that they applied to all means of transportation, including aircraft) but that meeting was notable for one other reason.

5. The Secretary-General (Perez de Cuellar) interjected a cautionary note into the proceedings by drawing attention to the manner and the scale in which the Council was employing Chapter VII enforcement provisions. He was concerned that the United Nations needed to demonstrate that "the way of enforcement is qualitatively different from the way of war…that it strives to minimize undeserved suffering…and that it does not foreclose diplomatic efforts to arrive at a peaceful solution…"

6. While to some extent this statement must be viewed in the context of the Secretary-General's then on-going exercise of his good offices functions in the conflict, it was nevertheless noteworthy for its use of the phrase the" way of war " which contrasted sharply with the collective enforcement provisions and seemed to summon up a pre-

Charter view of international relations, and his emphasis on the necessity to protect the civilian population caught up in the armed conflict or as victims of a draconian sanctions regime, and the absolute priority of reaching a settlement through diplomatic means rather than use of force.

All necessary means

7. In a final attempt to secure full compliance with its decisions the Security Council met again at the Ministerial level on 29 November 1990. The Council offered Iraq a clear choice between peace and war. Resolution 678 decided to allow Iraq "one final opportunity, as a pause of goodwill "to fully implement on or before 15 January 1991 resolution 660 and all subsequent resolutions. In the event of its failure to do so the Council authorized Member States cooperating with the Government of Kuwait " to use all necessary means " which was understood to mean military force to uphold and implement the resolutions and to " restore international peace and security in the area ".

8. This decision was achieved by a vote of 12 in favour, 2 against and 1 abstention. It represented only the fourth time in the history of the United Nations that it had decided to authorize the use of military force by Member States. Although one permanent member had abstained (China), United Nations practice had long since treated an abstention or non-participation by a permanent member as a non-veto. Hardly anyone paid much attention to the two negative votes by Cuba and Yemen, countries that were considered to be of little significance in the great scheme of things. In fact, their opposition which was on the grounds that the Council's authorization of military action would not be subject to the command and control of the United Nations could be seen as an important position of principle.

9. The formulation of 678 presented the Secretary-General with something of a dilemma. How should the measures authorized by that resolution be characterized from the Charter point of view? They obviously went beyond Article 41 but did they constitute

an action under Article 42 absent United Nations command and control? Unlike the measures decided in 665 which had been placed under the authority of the Security Council, no such reference was to be found in 678. Apart from a request to the states concerned to keep the Security Council regularly informed on the progress of action taken it appeared that the Council had effectively surrendered or contracted out its authority to the coalition. The logical conclusion was that that from the Charter perspective 678 was closer to an authorization of collective self-defence than to a genuine collective enforcement action. In other words the right to collective self-defence provided for in Article 51 which had been suspended by Security Council action as a consequence of 661 now found itself re-instated by 678.

10. The immediate consequences of this situation in terms of the responsibility of the Security Council and the United Nations soon became apparent when the air-phase of the war began on 17 January 1991. The Secretary-General publicly aired his concerns on the issue of proportionality in regard to the means used to bomb civilian areas. He also expressed concern over the inability of the Council to exercise any influence or control over the continued bombardment of the Iraqi army after it had crossed back into Iraq from Kuwait.

A failure of collective diplomacy

11. For the Secretary-General the failure to avert war had been a failure of collective diplomacy. While at first sight the actions taken through the Security Council appeared to validate the relevance of the collective security system, on closer analysis the actions taken seemed to contain the seeds of future difficulties and far from reflecting the inherent strengths of the Charter system revealed a number of weaknesses. These included the severity of the effects of sanctions on third states and the inadequacy of Article 50 to deal with this problem, the increased vulnerability of civilian populations in a time of increased technological power, and the need for the Security Council to preserve for itself what the Secretary-General described as " the authority to exercise guidance, supervision

or control with respect to the carrying out of actions authorized by it." Politically the Council had functioned effectively in response to a clear violation of the fundamental principles of the Charter but militarily the system lacked the means to operate collectively as foreseen in the Charter.

12. Secretaries-General of the United Nations do not lack for public forums in which they can advance their ideas or relay messages to member states in an indirect way. Dag Hammarskjold's Oxford University address in 1960 in which he defended the international civil service and rebuffed a Soviet attack on him personally is a celebrated example of this use of a public platform. Universities, think tanks, professional associations and elected bodies are ideal conduits for reaching out to wider audiences to express views that may not be welcome if addressed directly to the Member States.

13. So it was that in April 1991 following the adoption of resolution 687, the aptly named mother of all resolutions, the Secretary-General used speeches at the European Parliament in Strasbourg and at the University of Bordeaux to reflect upon the handling of the conflict by the Security Council and to attempt to draw the appropriate lessons from this experience. What did the apparent success of the coalition's actions in the Iraq-Kuwait conflict mean for the United Nations? Was the authorization granted by the Security Council to a coalition of the willing an expression of multilateralism or a new form of unilateralism? The answers to these and other questions were not self-evident.

Lessons learned

14. In the Secretary-General's view the Gulf conflict had served to highlight the dangers inherent in short-range policies. It was necessary not only to win the war but to win the peace. To achieve peace it was necessary to base actions on a framework of law and justice. As he saw it, the international community was attempting to create a new order just as it had at the end of two World Wars but the outline of this new order remained unclear. In his view that order could only be the exact image of that established in the

Charter of the United Nations, in other words an order founded on principles that expressed shared common values applied consistently and not selectively. He warned that a principle invoked in a particular situation but disregarded in a similar one was as good as no principle at all, a clear reference to the inability of the United Nations to come to grips with the Palestinian problem.

15. As far as the action against Iraq was concerned, he did not see it as a victory for the United Nations "… because this war was not its war. It was not a United Nations war". The success was "the result of a multilateral action authorized and, therefore, legitimized by the United Nations but it had not been directed and controlled by the United Nations. In that sense the Organization's prestige and credibility might well be seen to have been damaged.

16. The Iraq-Kuwait war had the dubious distinction of being the first real test of the United Nations in the post-Cold War era. The Secretary-General was therefore right to engage the prestige of his office in examining the relationship of unilateral power to the international system and to recall the importance of the role of the United Nations and the Charter principles in upholding the universal values of that system. He made it clear that in his view "… international security can only be collective in nature, and that a military Power cannot engage in hostilities without multilateral support, without the support of other states and without the legitimacy that only the United Nations can confer on its action. "Multilateralism must not be a disguised form of unilateralism: a means of camouflaging the pursuit of national or regional interest.

17. The Secretary-General's speech to the European Parliament had been conceived essentially as a reflection and analysis on the future of the United Nations in the light of the lessons learned from the Security Council's actions in dealing with Iraq's aggression against Kuwait. But even as this statement was under preparation new events underscored

many of the dangers he highlighted and new problems arose in his dealings with the members of the coalition.

18. A formal cease-fire had finally come into effect on 11 April 1991 with the acceptance by Iraq of the provisions of 687 which had been adopted on 3 April. This resolution affirmed all the previous 13 resolutions including 678 which had authorized the coalition to use "all necessary means". Thus, while the Security Council had now engaged itself and the United Nations system in a wide-ranging series of initiatives including such matters as boundary demarcation, disarmament and compensation, the means by which Iraqi compliance with these measures could be forcibly compelled remained beyond the Security Council's direct supervision or control.

Humanitarian intervention

19. A humanitarian crisis had developed almost immediately after the suspension of military operations in Kuwait and Iraq as a result of the unrest in the northern and southern parts of Iraq and its repression by the central government. By early April 1991 more than 1.5 million Iraqi citizens had been displaced internally towards the borders with Turkey and Iran.

20. In response to this crisis the Security Council on 5 April 1991 adopted resolution 688 by a slim majority of 10-3-2 (with China and India abstaining) in which it had demanded that Iraq end the repression of the civilian population and allow immediate access to humanitarian organizations to all those in need of assistance. The resolution had not been adopted under Chapter VII.

21. These developments prompted questions concerning the legal nature of the proposed humanitarian intervention and whether there was a sufficient legal basis both for the intervention of the coalition and for a United Nations Inter-Agency Programme, questions on which the Secretariat and the coalition states were not entirely in agreement.

22. The Secretary-General approached this issue as one of striking a balance between the sovereign rights of states as confirmed by the Charter and the rights of individuals as confirmed by the Universal Declaration of Human Rights. While he believed that there had been a shift in the public attitude towards the protection of the rights of the individual especially in cases involving large-scale violations such as the events unfolding in Iraq, he nevertheless doubted that this had yet been translated into law as generally understood and applied by States.

23. It was therefore a matter which required both prudence and boldness: prudence because the principles of sovereignty if radically challenged could result in international chaos and boldness because a stage had been reached in the evolution of international society in which the massive and deliberate violation of human rights could no longer be tolerated.

24. The balancing of moral virtue and international law was very quickly put to the test because the Secretary-General was under pressure from the coalition states which had deployed their forces and was at the same time confronted with the practical problem of the proposed deployment of the Inter- Agency personnel of the United Nations within Iraq without an explicit mandate and against the wishes of the Government. Eager to see their own personnel replaced by United Nations personnel as quickly as possible the coalition countries put forward the rather surprising proposition that the Secretary-General had, under the Charter, a general power to establish police units without a specific mandate. The Secretary-General therefore sought guidance from the Legal Counsel as to the possible legal basis for humanitarian intervention in post-war Iraq.

25. The Legal Counsel was ready to concede that the proposed intervention was for humanitarian purposes but how could this be reconciled with Charter principles such as non-interference in internal affairs whose wording and intent clearly ruled out such

intervention. The evolution of the protection of human rights since 1945 had been far-reaching and had no doubt greatly reduced the *domaine reserve* of Article 2 (7) but it could not be said that it had brought about a revival of the admissibility in international law of humanitarian intervention as practiced in the 19th and early 20th centuries. Nevertheless the scale of the crisis in Iraq was such that in his view it might well be possible to find a justification for the intervention of the coalition countries under international law where the violations taking place were both massive in scale and deliberate in intent intervention.

26. This conclusion, however, did not mean that the Organization could simply decide that in a given situation it would embark upon a humanitarian intervention. Although the United Nations had some supranational competence when acting under Chapter VII, it remained an intergovernmental organization whose activities required mandates. Such mandates did not automatically follow from the Charter as had been suggested and the Secretary-General did not have a general power to deploy peace-keeping or police units without a specific mandate.

27. The question therefore was whether resolution 688 provided such a mandate. It had been suggested that 688 contained an implied mandate because it had condemned the repression of the civilian population in Iraq "the consequences of which threaten international peace and security". Inconveniently, however, the resolution was not couched in terms of Chapter VII nor did it contain the necessary elements which would have permitted the conclusion that it was intended to allow action under Chapter VII. In particular, while the " consequences " of the actions of the Iraqi Government were described as threatening international peace and security in the region no determination of a threat as such was made.

28. The Legal Counsel, therefore, concluded that in this resolution the Security Council had not mandated an intervention. Furthermore, even if the Government of Iraq

acquiesced in or signified its agreement with United Nations participation in the humanitarian programme this would not obviate the necessity of obtaining a mandate from the Security Council as the competent organ. No individual state or group of states could authorize or obligate the United Nations to undertake such activities absent the decision of the competent organ.

29. This legal opinion was not, and did not purport to be an authoritative interpretation of the resolution and had no binding effect on member states as regards their own conduct. But as far as the Secretary-General was concerned he could choose to be guided by it in regard to his functions as the Chief administrative officer of the Organization. In other words, it could have a direct consequence on his decision to deploy the inter-agency personnel. This was a difficult situation. The United Kingdom, for example, had stated that the resolution gave "firm backing "to the Secretary-General to deliver aid to the Iraqi population and Prime Minister Major, among other European leaders, had openly criticized the Secretary-General's reluctance to deploy United Nations personnel. It would obviously have made the Secretary-General's relationship with the three Western permanent members much easier if the Legal Counsel had found a legal justification for intervention. The Secretary-General, however, held firm to the position that 688 was not a sufficient legal authority to empower him to intervene in Iraq without the consent of the Government.

30. The underlying legal problem was resolved by the United Nations Secretariat over the following weeks. A legal framework for the humanitarian agencies working in Iraq was established through a MOU which permitted the deployment of a United Nations Guards Contingent to protect United Nations personnel and assets. Although the immediate crisis surrounding 688 gave way to a *modus vivendi* between Iraq and the United Nations, the interpretation of 688 remained problematic for a further reason.

The establishment of the air exclusion zones

31. In order to enforce and monitor compliance with their interpretation of 688 the United States, United Kingdom and France unilaterally created an air exclusion zone north of the 36th parallel. This was later extended to a southern air exclusion zone below the 32nd parallel. They maintained that the cease-fire agreement ending the war empowered them to impose controls over Iraqi military flights and that 688 provided the necessary authority for the imposition of a ban on over flights by Iraqi fixed wing and rotary military aircraft.

32. The combined effect of the two so-called no-fly zones resulted for all practical purposes in the continuation of a low-level armed conflict with Iraq for well over a decade. While initially justified by the humanitarian crisis in April 1991 the no-fly zones very quickly became a convenient tool for the states concerned to maintain pressure on the Government of Iraq in the name, if not with the express approval of, the Security Council. For the Government of Iraq the existence of these zones was a perpetual reminder of its humiliation and the violation of its territorial sovereignty. For the United Nations Secretariat which had been given responsibility for administering UNIKOM, border demarcation, sanctions, compensation and disarmament, the no-fly zones were a constant and serious irritant in its dealings with Baghdad since Iraqi officials never lost an opportunity to raise with the Secretary-General their views regarding the illegality of the no-fly zones.

33. The Secretary-General avoided taking any position on this matter publicly for as long as possible but when pressed he or his spokesman would state that the interpretation of Security Council resolutions was a matter for the Council which alone was competent to determine whether its resolutions provided a lawful basis for the zones. The issue was never resolved but the maintenance of the no-fly zones by the coalition and the largely passive acquiescence by the Security Council despite the lack of a clear legal basis

underscored the strength of the coalition's sway over the Security Council at this time and their ability to make full use of constructively ambiguous decisions.

The question of the renewal of the use of force

34. Humanitarian intervention and the legality of the no-fly zones were important questions on which legal differences emerged as between the members of the Security Council and the Secretariat. However, there was one other issue which lurked in the background following the adoption of 687 and which in time came to dominate all others, namely the possible renewal of the use of force against Iraq in order to bring about compliance. There were many elements of 687 which imposed significant and onerous obligations on Iraq but none more intrusive than Section C which created a programme of Iraqi disarmament and weapons control unprecedented in the history of the United Nations.

35. The main instrument of this programme was the United Nations Special Commission (UNSCOM) which was established as a subsidiary organ of the Council with a mandate that extended to chemical and biological weapons, ballistic missiles and nuclear activities. Although it was a subsidiary organ of the Council and therefore staffed by officials and experts under the authority of the Secretary-General and subject to United Nations staff rules, UNSCOM in factrapidly became subverted and the Secretary-General was able to exercise only nominal control over its activities. This had become clear from the very early stages of its establishment not only in its staffing and recruitment policies but also in relation to the manner in which it would seek and receive legal advice.

36. The attempts to implement Section C of 687 by UNSCOM and its eventual successor UNMOVIC provided fertile ground for mischief by both sides and ultimately lead to the invasion of Iraq in 2003. While other aspects of 687, even such hugely sensitive issues as boundary demarcation and compensation moved forward with some degree of cooperation, the work of UNSCOM from the very beginning met with

resistance and obstruction. As early as August 1991 the Security Council in resolution 707 expressed grave concern over what it termed Iraq's material breaches of its obligations in relation to disarmament. Iraq's response to such expressions of concern was invariably to cooperate just enough to avoid further Council action.

37. Incidents multiplied. At times it seemed that Iraq pursued tactics that were deliberately designed to provoke the use of force or at least to test the limits of the Security Council's determination to implement its decisions. The position of the Security Council was not helped by a perception among many member states that UNSCOM was not an independent United Nations organ but had become an instrument of the United States and to a lesser extent the United Kingdom.

38. In July 1992 the Iraqi authorities refused access by an UNSCOM inspection team to the Ministry of Agriculture building which according to UNSCOM contained archives relating to proscribed activities. This and similar incidents had raised the very real prospect of coercive action to implement 687. By this time one resolution(707 of 15 August 1991 adopted in the aftermath of the incident at the Agriculture Ministry) and two Presidential Statements of the Security Council had described Iraq's failures to implement 687 as a material breach of its obligations and had spoken of serious consequences. It was in this context that in August 1992 the Legal Counsel provided the Secretary-General with his views on the legal and procedural basis for a renewal of the use of force against Iraqi.

The legal and procedural basis for a renewal of the use of force

39. The fundamental question was whether the Council could rely on the authority of the existing resolutions or would have to authorize the use of force in a new enabling resolution. The answer to this question rested on an analysis of the original authorization to use force and the effect of the cease-fire on that authorization.

40. The original authorization contained in paragraph 2 of 678 had authorized Member States cooperating with the Government of Kuwait "…to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area". This authorization in the view of the Legal Counsel was limited in the sense of its objective but not in time; it was not addressed to a defined group of states except for the vague notion of states cooperating with Kuwait; and as for the meaning to be attached to the use of "all necessary means" it had been clear at the time of the adoption of the resolution that it included the use of armed force. 678 had provided the legal platform for the actions carried out in Kuwait and Iraq under Operation Desert Storm.

41. The question posed by the adoption of resolutions following the termination of Desert Storm was whether the authorization which had been provided in 678 continued beyond the cease-fire. Resolution 686 of 2 March 1991 which had brought about a provisional end to hostilities characterized the situation thus created as "the suspension of offensive combat operations" and, therefore, left intact the authorization of the use of force. Operative paragraphs 2 and 3 of 686 imposed a number of demands on Iraq and operative paragraph 4 expressly recognized that during the period required for Iraq to comply with these demands the provisions of paragraph 2 of 678 remained valid.

42. A month later the Council had adopted 687 which imposed additional obligations on Iraq with the objective of restoring international peace and security in the area. Operative paragraph 33 of that resolution declared that upon official notification by Iraq to the Secretary-General and the Security Council of the acceptance of 687 "a formal cease-fire is effective between Iraq and Kuwait and the Member States cooperating with Kuwait…". 687 thus laid down the conditions to be fulfilled in order to accomplish the aim of restoring international peace and security in the area.

43. The ordinary meaning of 687 therefore allowed of the conclusion that once the Security Council was satisfied that Iraq had complied with all of its obligations under 687, the authorization to use force would lapse because the objective of 687 would have been realized. However importantly,687 did not by itself terminate that authorization either by express language or by inference. On the contrary operative paragraph 1 of 687 had affirmed all 13 of the resolutions previously adopted including, of course, 678.

44. The fact that 687 had established a formal cease-fire did not alter this situation. A cease-fire by its very nature was a transitory measure. The notion of formality related only to the formal declaration of the cease-fire and the establishment of the conditions set out in 687.However, the cease-fire did supersede, for its duration, the lawful implementation of the authorization. The promise contained in a cease-fire to cease hostilities under certain conditions did create an international obligation which as long as those conditions pertained excluded the recourse to armed force. Under general international law the obligation so created could be terminated only if the conditions on which it had been established are violated.

45. The Legal Counsel concluded therefore that the use of force authorization originating in 678 was a continuing one. It had not been set aside by the cease-fire or by the later resolutions 686 and 687and a sufficiently serious violation by Iraq of its obligations under 687 would withdraw the basis for the cease-fire and re-open the way to a renewed use of force. This, however, raised the question of how and in what form such a determination would be made.

46. Since the original authorization had emanated from the Security Council acting under the powers vested in it by the Charter, in the Legal Counsel's view the precondition for any renewed use of force was that the Security Council must agree that such a violation had taken place. This did not necessarily require a new resolution, it could, for

example, take the form of a Presidential Statement. The important point was that there needed to be an institutional finding of the Security Council acting as a collective organ.

47. As far as the content of the finding was concerned, the Legal Counsel was of the view that the Security Council must make it clear that the violation of 687 was such that all means deemed appropriate by member States were justified in order to bring about Iraqi compliance. This assessment could not under any circumstances be left to individual Member States. Since the original authorization had been granted by the Council its reactivation could not be left to the subjective evaluation of individual Member States and their governments.

48. Applying his analysis to resolution 707 of 15 August 1991, in which the Council had reacted to the failure of Iraq to provide full disclosure of its weapons programmes and its obstruction of weapons inspections by expressing grave concern for Iraq's "flagrant violation" and "material breaches" of its obligations under 687, the Legal Counsel concluded that despite the use of strong condemnatory language the Council had not in fact indicated what remedies might be authorized to secure Iraq's compliance and that 707 did not, therefore, provide a sufficient basis for the resumption of the use of force.

49. The legal opinion established a very high threshold for the Security Council in order for it to be able to lawfully resume the use of force pursuant to the original authorization. The gravity of such a decision and the central role of the Security Council in the collective security system justified such a standard. A decision to resort to force in the implementation of the Council's decisions, even when that decision relied on an authorization previously granted, had to be made unequivocally. It could not be made by inference and even less so by an individual state or a group of states purporting to act on behalf of the Council.

50. An opportunity to test the standards of the August 1992 opinion soon presented itself. In January 1993 two serious incidents arose in the implementation of 687 which lead the Council to adopt two Presidential Statements. The first of these on 8 January 1993 dealt with the refusal by Iraq to allow UNSCOM to transport its personnel into Iraq using its own aircraft, a prohibition which effectively prevented UNSCOM from carrying out short-notice inspections. The second on 11 January 1993 was in response to an Iraqi incursion into the UNIKOM - established demilitarized zone during which missiles and other equipment were removed. Unlike resolution 707 in which similar condemnatory language had been used but without any indication of consequences, and unlike two previous statements of 19 and 28 February 1992 in which the warnings of serious consequences had been conveyed in indirect language, these statements contained a direct warning of serious consequences. The Presidential Statements declared that Iraq's actions constituted an unacceptable and material breach of relevant provisions of 687 and warned of "serious consequences" that would ensue from a failure to comply with its obligations.

51. Iraq as usual prevaricated but this time the United States, the United Kingdom and France fortified by the Presidential Statements carried out large-scale air and missile strikes against Iraqi targets on 13, 17 and 18 January. Simultaneously, the Secretary-General sought the opinion of the Legal Counsel as to the legal basis of these actions. On this occasion the Legal Counsel noted that the Presidential Statements of 8 and 11 January quite explicitly demonstrated that the Council members were agreed that Iraq's violations of the cease-fire resolution which were described as material breaches had re-opened the way to the original authorization to use force. This was a possible legal construction that had in fact been foreseen in the August 1992 opinion. The only question was whether the content of the finding made it clear that the serious consequences indicated included all necessary means i.e. the use of force. It was difficult to provide an unequivocal answer to this question but the opinion concluded that on balance it did. The Council had succeeded in adopting a Presidential Statement that linked the material breach of Iraq's obligations to serious if unspecified consequences. This was probably as far as the Council could go

in achieving common ground, a suitably opaque phrase that was sufficient to make possible an agreement on the text of a Presidential statement and which at the same time contained sufficient ambiguity to provide the necessary legal basis for the air strikes. On the assumption that the Presidential Statements had provided the necessary legal basis for the resumption of the use of force, the opinion concluded that the only question that remained was that the use of force should be proportional to the violation.

52. The legitimacy of this limited resumption of the use of force was borne out by the fact that there was a marked absence of protest on the part of member states even when the air strikes continued for a third wave. By issuing repeated warnings to Iraq in the form of Presidential Statements which conveyed the sense of the Security Council as a collective organ, the Council had clearly signified its agreement to the course of action which had been taken. Indeed, the semi-official United Nations history of the Iraq-Kuwait conflict, the so-called Blue Book published in 1996 cites the Presidential Statement of 11 January as the basis for the air strikes.

53. The legal opinions of August 1992 and January 1993 did not constitute authoritative interpretations of Security Council resolutions but they had considerable significance in terms of the Secretariat's interpretation of the inter-play of the decisions to authorize use of force and the establishment of the cease-fire. They came to be seen, even in 1993 as the basis for the argument that a resumption of the use of force could not be automatic. Not everyone agreed, and the United States in particular did not share the interpretation but many Council members did. These opinions would assume a far greater significance a decade later.

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