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**A critical analysis of the legal powers of the United Nations Security Council to use
force to implement its decisions with special reference to the Iraq-Kuwait situation
1990-1991.**

Current Issues and Research in International law

Law400

2009/2010

Semester A

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Abstract

This paper attempts to discuss the implementation of rules that is explained in Chapter VII of the United Nations Charter. Furthermore, it attempts to highlight the legal authorities in article 39. It considers the legal meanings which are shown in terms “determines” and “threat to the peace, breaches of the peace and acts of aggression.” It also attempts to shed light onto the scope articles 41 and 42 stipulated for forcible and non-forcible sanctions. Such type of study is classified as practical as it will highlight the legal authorities in article 39 in the light of Kuwait-Iraq situation in 1990-1991 and in particular consider UNSC resolution 678 (1990). It is worthy mentioning the UNSC 678(1990) has been applied without the necessary agreement between Member States and the United Nations as explained in the Charter under chapter VII. The paper will analyses the form and content of Resolution 678 and consider its affect on future UN authoritative actions. It will explain the point of views of Higgins and two other authors Lobel and Ratner (1999).

Introduction

The United Nations Organization is an international organization that aims at pushing forward and supporting a fair international law, world security, economic development, social development, human rights, and achieving of world peace. It was established in 1945 after World War II in order to replace the League of Nations, to prevent wars between countries, and to make a state of understanding between different nations.¹

The United Nations includes 192 member nations; in other words, all the independent countries of the world are belonging to United Nations. The United Nations makes its decisions through holding yearly regular meetings. The organization was divided into different administrative bodies. However, the current study sheds light onto "the role of the Security Council (a body for deciding certain resolutions on peace and security)"².

The Security Council takes its financial resources from the contributions of its member nations. It has six official languages: Spanish, French, English, Arabic, Russian and Chinese.

Under the Terms of Charter Article 25, the Security Council has the power of the binding decisions, which are known as United Nations Security Council resolutions.

¹ Higgins, R. (1995) Problems & Process International Law and How we use it. pp 169-185.

² The United Nations, the Security Council.

The Security Council includes 15 member states, consisting of 5 permanent members – the United Kingdom, France, Russia, China and the United States – and 10 non-permanent members, currently Austria, Burkina Faso, Costa Rica, Croatia, Japan, Libya, Mexico, Turkey, Uganda, and Vietnam³. The Veto power is limited to five member states of the Security Council, the United Kingdom, France, Russia, China and the United States. By such power, they can prevent the application or validity of any substantive draft council resolution, disregarding whether the resolution is supported by the international society or not. The veto is not applicable to procedural drafts; this means that the veto can not block the adoption of such procedural draft by the Security Council. There are ten temporary seats in the Security Council, each temporary seats is elected for a period of ten years by the General Assembly on a regional basis. The presidency of the Security Council change each month on an alphabetical basis.

Chapter VII of the United Nations Charter states that the UN Security Council has the power to keep the peace. It allows the Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to take military and nonmilitary action to "restore international peace and security".⁴

Chapter VII provides the Military Staff Committee with the responsibility of the military coordination of forces belonging to the UN Security Council. The Staff Committee is consisted of members of the permanent states of Security Council.

³ The UN, Introductory note.

⁴ Dupuy, P.-M. (1997) 'the Constitutional Dimension of the Charter of the United Nations Revisited', Max Planck UNYB 1, pp.21-24.

The main objective of the United Nations charter is to prevent any military action or any military attack made by any member State of the United Nations against the other member state. In other words, it exerts major force for preventing war.

Findings

A. The Iraq – Kuwait War 1990 – 1991

The Invasion of Kuwait or the Iraq-Kuwait leads to major trouble in the Gulf area, as Iraq occupied Kuwait for a period of seven-months. Therefore, United States-led forces in the Arab Gulf War in order to emancipate Kuwait from the Iraqi occupation.

The invasion started on August 2, 1990. The Iraqi armed forces managed to occupy the Kuwait lands within two days. The Kuwait citizens were either seized by the Iraqi military forces or fled outside their borders to Bahrain or Saudi Arabia. Thus, Saddam Hussein announced in a few days Kuwait is the 19th province of Iraq.⁵

B. The Role of the UN Security Council

1. The Legal Power of the Council:

Under Chapter Six of the Charter, "Pacific Settlement of Disputes", "the Security Council may examine any dispute or any trouble that results in international conflict. Thus, the council should take the suitable measures and procedures that

⁵ Gause, F. Gregory, III (2005). "The International Politics of the Gulf" in Louise Fawcett (ed.), "International Relations of the Middle East". Oxford: The University Press. pp. 263–274.

can prevent from the international conflict. However, such recommendations and procedures are not binding to the members”⁶.

Under Chapter Seven, the council has the authority to take the necessary measures and procedures if there are any "threats to the peace, breaches of the peace, or acts of aggression". Accordingly, the Council is not limited issue recommendations but also it has to take the necessary actions such as the use of armed force "to maintain or restore international peace and security ". Such measures were taken by the Council as during Korean war in 1950. It has help solved such war through the military action under the control of UN armed action. In addition, during the Iraqi invasion of the Kuwait lands, the UN the uses coalition forces in order to emancipate Kuwait. Chapter Seven of the UN charter allows the Security Council to impose economic sanctions on the aggressor.

2. CHAPTER VII: Action With Respect To Threats To The Peace⁷

The following Articles are typically show the threats that may face peace and whether such articles are applicable to Iraqi invasion of Kuwait or not.

1-Article 39

The Security Council shall fix any threat and conflict to the peace, contravention of the peace, or any betray. Accordingly, the Security Council takes the suitable procedures and steps in terms of Articles 41 and 42, to keep international peace and security.

⁶ The Jewish virtual library. The United Nations.

⁷Erika de Wet,(2004) The Chapter VII Powers of the United Nations Security Council (Oxford and Portland: Hart.

II. Article 41

The Security Council may think about which type of measures should be issued, not related to resort to power that may affect positively the issued decisions and pushing them forward and help apply these decisions by the members of UN. These measures may be limited to economic punishments such hanging completely or partly the economic exchange, imposing economic sanctions, affecting badly the means of communications such as radio, telegraph, sea, rail, and postal and blocking the diplomatic relations.

III. Article 42

If the Security Council thinks that the procedures explained in Article 41 is not enough to restore or to keep peace, then he is forced to resort to power, using air forces, sea forces or land forces that helps to prevail peace and impose it by power. Such actions may include economic sanctions, demonstrations, air and land sieges.

3. The Iraq- Kuwait Instance:

Following a few hours from invasion, Kuwaiti and U.S. delegations asked for holding a meeting at the UN Security Council. Thus, the UN Security council

passed Resolution 660 that condemns the invasion. In additions, it asks for the departure of Iraqi troops from the land of Kuwait. “ On the 3rd of August, the Arab League passed its own resolution, calling for settling the crisis of invasion through the Arab League. It paid attention to the harm resulting from the foreign intervention. On the 6th of August UN Resolution 661 imposed economic sanctions on Iraq”.⁸

United Nations Security Council Resolution 665 imposes a naval blockade to support the economic sanctions against Iraq, summed up as follows “use of measures commensurate to the specific circumstances as may be necessary in order to stop all outside and inside sea shipping for checking their cargoes and knowing about their place of arrival and to make sure that resolutions 661 has been carried out effectively ”⁹.

UN Security Council resolutions and Arab League passed a set of resolutions on the invasion of Kuwait. One of the most important was Resolution 678, passed on 29 November 1990, stipulated that the Iraqi withdrawal deadline shall not exceed 15 January 1991, and empowered the necessary tools to implement Resolution 660 that authorizes the use of force if Iraqi troops refused to withdraw from Kuwait.

The United States decided to emancipate Kuwait by force; accordingly, it formed a coalition of forces from a different world states in order to resist Iraqi invasion and to free Kuwait. The Coalition forces consist of the military forces of 34

⁸ Bediaoui, M. (1994) The new world order and the security council.p 518

⁹ The same above mentioned source.

nations from around the world including Arab countries such as Saudi Arabia and Egypt. It is evident that such coalition force formation is based on the international legal rules governing the use of force shown in Article 2(4) of the U.N. Charter stipulating that “All members shall abstain from using power or threatening the territories or the borders or the independence of other state or using any manner that is incompatible with the Purposes of the United Nations. So, it forbids any nation from using military force or power against another. The only exception to such case is that of self-defense (Article 51) or when the Security Council empowers the use of force to keep international peace and security (Chapter VII).

At the beginning, many of the coalition forces refuse to join the war against Iraq as they thought that the war is an internal Arab affair. Furthermore, they did not like to participate to increase U.S. influence in the Middle East. However, at the end, many nations were persuaded that Iraqi army is the aggressor; thus, in the first place, their act against Iraq is humanistic; in addition, they were promised to get economic aids, debt forgiveness¹⁰.

3.1. Resolution 678

The Security Council in its 2963rd session held on 29 November 1990 approved Resolution 678; such resolution is set forth to apply the former resolution 660 that stipulates the unconditional withdraw of the

¹⁰ Khadduri M. & Ghareeb E (1997) War in the Gulf 1990-1991 The Iraq-Kuwait.pp 232-244

Iraqi forces from Kuwait. Thus, the resolution 678 is considered last chance for Iraq to withdraw from Kuwait. And if Iraqi forces do not withdraw from Kuwait, the Coalition forces shall start its war against it.

The resolution 678 gave the coalition forces the legal approval for waging the freedom war against the Iraqi forces. It is considered as the starting point for forming global military coalition under the authority of UN Security Council for fighting the aggressive states that want to occupy other lands such as the Second Iraq War 2003, ambivalent UN role in the events following it and other hot spots such as North Korea and Afghanistan.

C. Controversy

It is clear that UN charter, in particular chapter VII, provided the Security Council with a powerful authority for combating aggression and threats to the peace. Paradoxically, such rules are not applicable to the permanent members of the United Nations; they are just applied to poor states. However, in a few case, they can be applied to permanent states but after great difficulty.

Following the Iraqi occupation of the Kuwaiti lands, the United Nations began to take very serious steps and to issue legal acts toward combating such acts of aggression, in which a state wants to occupy the lands of other state.

Professor Higgins (1995) points out that international law is distinguished for its variety of legislations. First, international law did a great effort to make its legislations, which based on highly expert intellectuals in such a field. The legislators of the international law consider many factors before issuing any legislations ranged from historical, social, cultural, political and even religious conditions.

Second, international law best described as systematic which means that it consists of a set of norms, values and principles which should be homogenous with each other.

In her book, *Problems and Process: International Law and How We Use* (1994) Higgins pointed out the great role played by the legal system of the United Nations for solving the problems arising between nations and how such legal system is applied at the time of crisis. She states the United Nations Security Council decisions for the intervention in the crisis or the aggressive of one nation against other is made by voting; the members states shall vote over it , and the majority of voting shall settle it. Furthermore, the new rules of UN shall be issued by the voting system.

Furthermore, she has explained how the resolutions are made within the United Nations Security Council as it is only considered as a limited part of the normative efforts of international organizations. Furthermore, she explains the processes in which the resolutions are made in the United Nations including exchanging views, taking positions publicly, expressing reservations on views

taken by others, and preparing drafts intended to become legal instruments in the form of treaties, declarations, binding resolutions, or even codes. These steps represent the basis for the process of making the final decision¹¹.

Jules Lobel and Michael Ratner in their essay entitled "*Bypassing the Security Council: Ambiguous Authorizations to Use Force, Ceasefires and the Iraq Inspection Regime, American Journal of International Law*" (1999)¹² pointed out there is a state of contradiction in the resolutions issued by the Security Council as they are mostly made in favor of the super world power and in many cases, it does not consider the needs of the oppressed states. Furthermore, she has recommended that Security Council resolutions should make clear difference between the aggressed regimes and their peoples, as their peoples are innocents citizens, so the economic sanctions in such a case is considered as collective punishment that will affect, in the first place, on the innocent nations, for example, the case with the Iraqi economic sanction that started from 1990 till 2003, leading to the starvation of many families and a great deaths number of infants.

However, others think that Sanctions as a better alternative to force. They may be bloodless but it leads to collective death that is over than the use military force. The military is mainly concentrated in the battlefield; so it does not affect

¹¹ Higgins, R. (1995) Problems & Process International Law and How we us.

¹² Jules Lobel and Michael Ratner, Bypassing the Security Council: Ambiguous Authorizations to Use Force, Ceasefires and the Iraq Inspection Regime, American Journal of International Law, Vol. 93, No. 1 (1999), 124-154.

the civilians in the same way as the sanctions. Sanction is considered "weapons of mass destruction."

Conclusion

In many respects, it is clear the resolutions issued by the Security Council is made by expert intellectuals in the field of international law and they are subject to different process of revising, criticizing, handling and organizing; however, in some cases, they were subjected to the interests of superpower states.

Reservations and suggestions have been given by many researchers such as Rosalyn Higgins (1995) and Jules Lobel and Michael Ratner (1999) to ensure better Security Council is operated under well -defined and set International legislations that are fair and not biased and consider the morality aspect of the applied law. Furthermore, the use of force should be made within a set of explicit norms and laws that should be mainly objective and fair and consider the interest of the entire human it, not to boiled for the favor of certain nations.

Indeed, the Security Council resolution for imposing sanctions was very oppressive because it leads to very bad results on the innocents, elderly, and infant and civilians. Many children starved to death, a lot of elderly was died. It is a collective punishment that should be taken. But the Security Council is obliged to apply such punishment because its grave is less than that of wars.

Iraqi regime was insisting on its aggression against its neighboring a powerless Kuwait state, and without the intervention of the world supreme power, the

Kuwait lands will not be emancipated from the Iraqi aggression. Furthermore, the resolution of punishment is either sanction or war. Therefore, when the Iraqi regime refused to submit for the economic sanctions imposed on it, and refused to withdraw from Kuwait lands, the Security Council was forced to wage a comprehensive war against Iraq.

So the researcher believes that the problem does not rest in resolution of sanctions or the resolution of war, because Iraqi state is a aggressor state and the Kuwait state called for the international intervention. The problem is that resolutions of the security can not be applied to all countries of the world, they are carried according to the agreement and satisfaction of the supreme world power, as USA affect the resolution draft and it has the ability to cancel it or validate it disregarding the case is fair or foul. Many times, USA intervention has nullified different resolutions issued by Security Council because such resolution may cause damage to the interests of USA.

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Research Diary

**A critical analysis of the legal powers of the United Nations
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My topic subject is a critical analysis of the legal powers of the United Nations Security Council to use force to implement its decisions, with special reference to the Iraq-Kuwait situation 1990-1991.

In the first draft of this topic I chose International Law in Islamic countries. I was to investigate the Islamic school of Law (what is Islamic?) and look into what International Law is. I also planned to discuss the history and the subject of International Law. I would briefly discuss the significance of the doctrine of Jihad, as well as what the relationship is between an Islamic country and a non-Islamic country. I also was to briefly discuss Hulf Alfathal. Professor John Stawson suggested that I write about an assessment of Islamic law as a source of International Law, and that I begin with the books which he gave to me, some of which I had read.

In the second draft I chose War Conditions from an Islamic Perspective. I looked to address the conditions of war from an Islamic perspective. The first area concerns the foundation of Islamic law; in this topic I would briefly discuss the Islamic law of nations. The second area is about fundamental human rights in Islamic law; in this topic I aimed to examine the provision of human rights from an Islamic perspective. The third area is about prisoners' rights of war in Islamic law. In addition, I was to discuss how Islam looks at the treaties among other countries. Professor John Stawson requested that I go to see him to clarify my proposal as he saw it as far too wide ranging. When I visited him, he suggested to me that I should write about a topic of international law, and explained to me what publications I should read; as well as what I should discuss in my topic on the

course, relevant to current issues and international research. Therefore, after meeting the professor, I was able to clarify and come up with other ideas for my topic.

On the third occasion, I chose Human Rights under Islamic and Public International Law (the rights of education, health and food). I endeavoured to prove that Islam is a defender of human rights, and that Islam recognised the issue of human rights far before the UN existed. This would involve discussing how Islam itself has many human rights laws in Shar'ia Law, where issues such as education, health and food are integrated into the law of Islamic countries. Knowing that these rights are evident in Islamic law, and knowing that they are also enforced in many Islamic countries, allows citizens to enjoy a better way of life. I looked to discuss how Islam defended human rights before the existence of the UN. Professor John Stawson explained to me that the topic was still too wide ranging, and not really appropriate for the module, and so suggested a further meeting.

The fourth time I chose Prisoners' Rights of War in Islamic Law (rights to fair treatment and rights to a fair trial).

This was to provide an argument about prisoners' right of war in Islamic law. Firstly, I aimed to discuss what Jihad actually means. This topic was to contain a brief discussion about the idea of Jihad, and look at whether Jihad is only for war purposes. Secondly, was to examine prisoners' rights of war in Islamic law. In this topic I looked to discuss the rights to fair treatment and rights to a fair trial. Finally, I briefly discussed prisoners' rights of war in the UN. Also, in this topic, I looked to discuss the rights to fair treatment and rights to a fair trial; in addition, to discussing how Islam defended that before the existence of the UN.

The fifth time, I chose An Assessment of Islamic Law as a Source of International Law. The first area concerned the foundation of the Islamic school of law; I was to look at discussing what Islamic law is; as well as looking to the religious framework of Islamic law. For the second area, I was to present briefly, and very shortly discuss, international law. Thus, I was to look at the history and the subject of International Law and Islamic International Law. In third area there was to be a discussion of international law and human rights, as well as Islamic human rights. The fourth area was to cover an assessment of Islamic law as a source of international law. Unfortunately it was not what Professor John Stawson suggested I write about, so he suggested to me that I write about the law of war in the most appropriate area.

Finally, due to the difficulties I encountered in choosing a topic, Professor John Stawson helped with the decision to write about “A Critical Analysis of The Legal Powers of The United Nations Security Council to use force to implement its decisions with special reference to the Iraq-Kuwait situation 1990-1991.” Therefore, I am looking at producing an essay on the enforcement powers that the Security Council is granted in Chapter VII of the United Nations Charter. It will focus on the scope of the legal powers in article 39, and consider the implications of the terms “determines” and “threat to the peace, breaches of the peace and acts of aggression” as well as the scope articles 41 and 42 in providing for forcible and non-forcible sanctions. The discussion of these issues will take place in the context of the legal debates over the Kuwait-Iraq situation in 1990-1991, and in particular consider the UNSC resolution 678 (1990). The latter resolution was adopted in the absence of any agreements between Member States and the United Nations, as envisaged in the Charter under chapter VII. The paper will analyze the form and content

of resolution 678 and consider its implications for future UN enforcement actions. It will review the opinions of Higgins and two other relevant authors, as well as engaging with the arguments of Lobel and Ratner (1999).

When I chose this topic, I visited many libraries and spent a lot of time in them studying this area of Law. I visited Dank House Library, the British Library, Library of London School and Economics, the Library of King Fahad, the Library of King Abdul-Azaz and the Library of Brains Salman at King Saud University. In the library of London School of Economics, I found a lot of books which I needed, and so I spent much time there. I visited the British Library, but I did not enjoy this because if I needed some books I had to spend a lot of time there to get them. As well as this, I found a lot of books in the library of London School of Economics. I visited the Library of King Fahad, the Library of King Abdul-Azaz and the Library of Brains Salman at King Saud University, in order to read some books in Arabic. In fact, the English legal language is very difficult to digest and understand. I read Arabic books to understand it better in my own mind, and returned to reading the books in English afterwards, especially when I read about a threat to the peace, breaches of the peace and acts of aggression.

When I was writing about the Security Council, I provided too much information, so it is necessary for me to concentrate on writing less. I also need find some more information that supports fair International Law and world security. Furthermore, it needs to attempt to highlight the legal authorities in article 39. It should consider the legal meanings, which are shown in the terms- determines and threat to the peace, breaches of the peace and acts of aggression .It should also attempt to shed light on the scope articles 41 and 42 stipulated for forcible and non-forcible sanctions.

I was to explain Chapter VII of the United Nations Charter which states that the UN Security Council has the power to keep the peace. It allows the Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to take military and nonmilitary action to "restore international peace and security".

When I wrote about threats to the peace, breaches of the peace or acts of aggression, under chapter seven, it seems that the Security Council has the authority to carry out the necessary measures and procedures. By such power, they can prevent the application or validity of any substantive draft council resolution, disregarding whether the resolution is supported by the international society or not. In fact, it is very important to identify when the Security Council can use these powers.

Under chapter VII of the United Nations, the charter states that the UN Security Council has the power to keep the peace. I Read The Constitutional Dimension Of The Charter Of The United Nations by Pupuy, who wrote about determining the existence of any threat to the peace, breach of the peace or act of aggression; and taking military and nonmilitary action to restore international peace and security. I did not find this book in the British library or London School of Economics, so when I visited my home country I borrowed this book from a friend. I also read some books online from Google, for example I read the book: The new world order and the Security Council, and the book: War in the Gulf 1990-1991 The Iraq-Kuwait.

When I wrote about the Iraq-Kuwait war, I needed to read a lot of books in Arabic. I read the Security Council resolutions 1990, and explained resolution 660, resolution 661 and resolution 665.

The resolution 678 gave the coalition forces the legal approval for waging a freedom war against the Iraqi forces. It is considered as the starting point for forming a global military coalition under the authority of the UN Security Council for fighting the aggressive states that want to occupy other lands, such as in the second Iraq war in 2003, and an ambivalent UN role in the events following it and to other hot spots such as North Korea and Afghanistan.

I read that professor Higgins points out that international law is distinguished by its variety of legislations. In fact I did not understand her point very well when I was studying international law with my professor, so I read her points in an Arabic book and came back to read it in English. When I return home, I always stay in the libraries to read some Arabic books about my essay, especially about the Iraq-Kuwait war; as well as the role of the UN Security Council, such as the legal power of the council, and the scope of articles 41 and 42 in providing for forcible and non-forcible sanction.