

Non-Coercive Sanctions in the United Nations Charter: Some Lessons from the Gulf War

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1. The Gulf War has led to vigorous debate in the mass media and among pacifist groups about whether it complied with international law and in particular the United Nations Charter. Much attention was paid in particular to the question whether the Gulf War was a real war, or merely an international police action under UN auspices and whether, accordingly, countries intending to take action against Iraq ought to follow constitutional procedures governing the proclamation of a state of war.

The legality of the Gulf War is not the central problem that needs to be addressed. Rather, jurists ought to be considering if grave breaches of international law (such as aggression) can be prevented or stopped without recourse to the use of direct force against the state as a whole, thereby avoiding distress to innocent, unarmed populations. However, before considering this question, it has to be set more clearly against its background by examining the legitimacy of the Gulf War.

2. The Gulf War should be seen within the framework of Article 51 of the United Nations Charter, and may therefore be regarded as legally justifiable because it was an exercise of collective self-defence.

According to Article 51, self-defence is permissible when it repels an armed attack, and it is subject to a procedural limitation only in the sense that it must cease once the Security Council 'takes the necessary steps to maintain international peace and security'. It is clear that by Resolution No. 678 of 29 November 1990 the Security Council, by authorizing states to intervene militarily against Iraq to liberate Kuwait, removed this limit. In other words, in Resolution No. 678 the Security Council declared that it did not want, or rather no longer wanted, to take the 'necessary' measures to restore peace directly. This was undoubtedly a declaration of impotence. But ultimately Article 51, and self-defence actions, are nothing but an acknowledgment by the authors of the Charter of the Council's likely powerlessness,

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considering that even in 1945 it was easy to foresee that a system for centralizing the use of force only when there is unanimous agreement among the great powers, would be condemned to paralysis.

3. Accordingly, the Gulf War was an action of collective self-defence. It cannot be regarded – as has been maintained for purposes of political propaganda and also to keep it out of domestic constitutional procedures regarding a state of war – as an international police action under United Nations auspices.

The use of force by the Security Council is the *only* international police action recognized by the United Nations Charter. The methods for carrying out such action are set out in Articles 42, 43 and 47 of the Charter, which provide that the Council shall ‘undertake’ air, land and sea military operations, and that the necessary forces for such operations shall be made available to it by member states *on the basis of special agreements*. These forces are to be controlled by a command Committee which is in turn dependent on the Council.

In practice no international police action conducted by the United Nations has been carried out in this fashion. In the few cases where the Security Council has set up international forces, it has always delegated its powers to the Secretary-General, who has concluded agreements with member states to secure the armed contingents which have retained command of their operations. This was the case, for example, with the ONUC (Congo), UNFICYP (Cyprus) and UNIFIL (Lebanon) operations, although these were instances of considerably less importance than the Gulf War because the task of these forces was limited to acting as a buffer between the parties in conflict. Delegation of peace-keeping police actions to the Secretary-General by the Security Council is not explicitly provided for by the Charter, but it is nonetheless to be regarded as legitimate since involvement of the Secretary-General, an agency independent of any government, is bound to provide guarantees of objectivity, impartiality and conformity with Council directives.

That being said, it seems quite clear that the Gulf War cannot be treated as an international police action. Security Council Resolution No. 678 was in fact confined to ‘authorizing’ the use of force by individual states, leaving the command of the operations in their hands, and the Security Council thereby declined to carry out its responsibilities in the way provided for in Article 42 of the Charter.

4. As has been noted above, the most important problem highlighted by the Gulf War is whether and how it is possible, in the present international community, to prevent war and the use of force. This is the fundamental point. Whether war is waged by states in self-defence or by the Security Council undertaking actions using ‘air, land and sea forces’ against a state, does not seem to make any great difference. It is not only war waged by individual states that should be condemned as an instrument of death, but the United Nations Charter itself should also be placed under scrutiny. It should not be forgotten that in the area we are interested in, the Charter is unfair,

being subordinated to the interests of the great powers. Belligerent action by the Security Council, as disciplined by the Charter, must necessarily be problematic, given the absolute arbitrary power enjoyed by the Council.

What then, is to be done to prevent the use of military force? What mechanisms need to be strengthened for this purpose?

A serious study should immediately be done on measures not involving the use of force, that is, on the system of sanctions provided for in Article 41 of the Charter and on the modifications necessary in order to strengthen it. It is Article 41 that should be made the centre of the United Nations collective security system. In this connection, it is perhaps best to recall that during the Gulf War many wondered whether, by adopting Resolution No. 661 of 6 August 1990 on the embargo against Iraq (supplemented by Resolutions Nos. 665 and 670, on the sea and air blockade respectively), the Security Council had done everything possible in terms of non-military sanctions against Iraq. And indeed not everything was done. Apart from the embargo, none of the other sanctions provided for by Article 41 (which as we know includes interrupting all communication by sea, air, rail, post, telegraph etc., in other words *total isolation* of the culprit country) were taken. On the contrary, right up to the day before the start of the war, Iraq appeared as a country fully linked with all others. It is odd that total isolation was declared by the Security Council in the less important case of Southern Rhodesia by the adoption of Resolution No. 253 of 1968 (perhaps the sole precedent for adopting serious sanction measures not involving the use of force). The Resolution was adopted because Southern Rhodesia's racist government was regarded by the Council as a threat to peace. The measures decreed (going as far as an obligation on states to prohibit entry to their territory by Rhodesian citizens or permanent residents of Rhodesia) lasted for over ten years and were revoked by Resolution No. 460 of 1979, following the conclusion of agreements between the white minority and the black majority under British mediation, to set up a democratic, representative government.

Drawing from the experience of the Gulf crisis, the strengthening of non-coercive measures could be pursued along the following lines.

First, limits should be set on the Security Council's absolute discretion. It is not conceivable in today's international community for it to be an agency *legibus solutus*. Can it be possible for the Security Council to continue to operate under the formula coined for absolute monarchies by the theory of absolutism: *Les Etats ne dépendent de personne sur la terre, ils ne dépendent que de Dieu*? Clearly checks are necessary. At the San Francisco Conference a few states proposed that Security Council decisions, like other major resolutions of the United Nations, should be made subject to verification of legitimacy by the International Court of Justice; a proposal rejected by the majority of governments.¹ It is certainly difficult to envisage a role for a judicial agency in peace-keeping actions. It is possible, however, to imagine the setting up of political controls, which could be entrusted only to the General

¹ Cf. United Nations Conference on International Organizations, Vol. 13, at 645.

Assembly, though it would have to be reorganized on more democratic foundations to represent peoples rather than governments.

Another point to consider is that the system of non-coercive measures outlined in Article 41 is conceived above all to respond to breaches of international law that have *already been committed*. The system ought instead to operate *preventively*, that is, with measures aimed at discouraging grave breaches of international law and able, for instance, to intervene to control the arms trade. In Iraq's case the country was first allowed to arm and then had a destructive war unleashed on it. The UN ought to be in a position to avert all activities pursued in the preparation for war by applying both sanctions and security measures.

Finally, non-coercive measures should be supplemented by UN *forces* able to verify that states are actually applying them. In other words, *the forces mentioned in Article 42 of the Charter ought to be set up and employed not only for military action but in furtherance of measures under Article 41*, that is, for inspection or policing (internal policing) actions aimed at ensuring that measures barring arms trading or introducing an embargo or isolation of a state threatening peace are respected. UN forces (or possibly forces of international organizations used by the Security Council in pursuance of Section VIII of the Charter) ought, for instance, to carry out functions like those that Resolution No. 665 of 1990 mentioned above assigned to states: as we know, this covers all (police) measures aimed at preventing any vessel from transporting goods from or to the Iraqi coast.

These are merely starting points. Yet they touch on questions crying out for solution at a time when the whole of humanity (including those who, in January 1991, considered that the point had been reached at which war was necessary) agrees on putting an end to the destruction of human lives. It is needless to add that what has been said so far may be utopian, particularly to anyone who knows how fruitless efforts to amend and improve the United Nations Charter have been to date, and how interminable have been debates within the relevant United Nations Committee. However, was there not a time when the abolition of the death penalty in domestic law was considered utopian?