

The Fallacies of Occupation: Iraq's Invasion of Kuwait

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Introduction

After World War II, there was an established new world order on the prohibition of the use of force against another state's territorial integrity enshrined in Article 1 and 2 of the United Nations Charter (UN Charter). However, Iraq's invasion of Kuwait directly challenged the new world order with complete disregard for international law. On 2nd August 1990, Iraqi forces successfully overwhelmed Kuwait's defence allowing for a successful invasion. Subsequently, the United Nations Security Council (UNSC), through resolution 660, condemned the invasion and demanded Iraqi troops' immediate withdrawal from Kuwait. To make Iraq comply, the UNSC imposed a worldwide trade ban on Iraq via resolution 661. Iraq's response to the economic sanctions was formally annexing Kuwait by declaring it the 19th province of the Republic of Iraq on 8th August 1990. What ensued was a seven-month period of intensive diplomacy to mediate the conflict between Iraq and Kuwait. However, Iraq's continued ignorance towards UN resolutions and diplomacy resulted in the UNSC passing resolution 678 authorizing the use of force. Resolution 678 was passed on 29th November 1990 and gave Iraq until 15th January 1991 to withdraw from Kuwait. If they failed to, UNSC authorized member States to take *all necessary measures* to restore international peace and security in the Middle East. Saddam Hussein's ignorance of the 15th January deadline resulted in two weeks of armed conflict between Iraq and a U.S led UN coalition known commonly as Operation Desert Storm.

The UN coalition deployed in the Gulf Air (Operation Desert Storm), land (Operation Desert Sabre) and naval forces of about 700,000 troops drawn from twenty-eight states. They engaged in a six-week military campaign driving the Iraqi armed forces out of Kuwait. Seven months after the Iraqi invasion, Kuwait's government was restored to power and liberated. However,

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the invasion and annexation of Kuwait took most States and international organizations by surprise. Primarily because in the new era of prohibition of armed conflicts to uphold international peace and security, there was no legal basis for Iraq's invasion and annexation of Kuwait. Therefore, the conflict must be analyzed against the background of Iraq's claims and justifications that led to the invasion on 2nd August.

Territorial Claims

Iraq has long claimed that Kuwait was a part of the Republic of Iraq and has made claims over the territory during Kuwait's independence in 1961. Iraq believed that Kuwait's existence as a separate State was a product of British colonialism to prevent an Arab nation from holding large amounts of resource-rich land and strategic access to the Gulf. Iraq maintained that Kuwait came under Wilayat of Basra, one of the three Ottoman provinces which later made the State of Iraq. Additionally, Iraq states that Kuwait was separated from Basra by the British, who concluded a secret treaty with the Sheikh of Kuwait in 1899 and 1914, recognizing Kuwait as a separate State. Kuwait status as a British protected State was terminated in 1961, after which Iraq claimed Kuwait as part of its territory.

Iraq moved troops to the border to block Kuwait's admission into the Arab League and United Nations in 1961. However, British forces were sent to Kuwait to prevent military action. It became clear that most Arab States rejected Iraq's claim over Kuwait due to an Arab League peacekeeping force, eventually replacing the British troops. Kuwait, being admitted to both the UN and Arab League, resulted in the international community recognizing Kuwait as an independent State. Additionally, Iraq in October of 1963 accepted Kuwait's independence in an UN-brokered agreement between the two countries known as the Agreed Minutes Regarding the Restoration of Friendly Relations, Recognition and Related Matters. However, Iraqi's encroachment on Kuwait's border in 1973 and annexation in 1990 witnessed the consistent Iraqi claim that the former agreement is invalid as Iraq's constitution at the time did not ratify it.

Nevertheless, if the Iraqi government in 1961 failed to comply with the constitution when agreeing to ratify the agreement, it would still not be sufficient ground to invalidate the agreement today. The Vienna Convention on the Law of Treaties, 1969 (VCLT) emphasizes in Article 46 that States invoking a violation of its domestic law in order to invalidate consent to a treaty can only do so if the violation was manifest to any State conducting itself in good

faith and concerned a rule of the domestic law of fundamental importance. Additionally, Article 45 of VCLT prohibits a treaty's invalidation if the State has agreed—expressly or implicitly—to the treaty's validity after becoming aware of relevant facts. In 1958 an Interim Constitution was invoked in Iraq with a pending permanent law yet to be promulgated after a free referendum. The interim Constitution seemed talented as the powers of legislation and executive were vested in the Council of Ministers.

Abd al-Karim Qasim resumed the prime minister's role shortly after the interim Constitution came into force in 1958. However, he had a complete disregard for the constitution as his administration descended into autocracy promptly. In this context, therefore, the 1963 Iraqi constitutional arrangements and the concentration of power in General Qasim makes it unlikely that Iraq met the requirements of Article 46 to invalidate the treaty. Additionally, Iraq continued to transact with Kuwait as an independent State until 1990 and therefore forfeited the right to invalidate the treaty via domestic law violation under Article 45 of VCLT. Additionally, even if Iraq's historical claim to Kuwait had merit, the invasion would not be justified under international law. The use of force to assert historical claims to territory against a State goes against Article 2(3) of the UN Charter that conditions all Members to settle international disputes by peaceful means, not to hinder international peace and security.

Additionally, Iraq further suggested that boundaries between the Arab States should be considered temporary demarcations between parts of a holistic Arab nation. However, this argument has no legal substance in domestic or international law. The duty to respect international boundaries is not inapplicable to the Arab States, which is clear from the Pact of the Arab League. The Pact of the Arab Leagues aims to strengthen close relations which bind the Arab States. However, the Pact is also determined to support and stabilize these relations based on respect for all States independence and sovereignty. Iraq was one of the founders of the Arab League and therefore participated in recognizing sovereignty. Therefore, it is clear that Saddam Hussein tends to contradict Iraq's current position against the ones taken by previous Iraqi governments.

Economic Claims

Another popularly cited reason for Kuwait's invasion is the economic-related disputes between the two countries leading up to the invasion. Iraq had engaged in an eight-year war with Iran that ended in 1988. What ensued was a weak economy and enormous international debt Iraq

owed to Kuwait, Saudi Arabia and the other Arab States who supported Iraq in the war. The international debt is estimated to be around \$80 million, with roughly \$30 million owed to Kuwait and \$50 million to other Arab monarchies and creditors. Furthermore, during the Iran-Iraq war, Iraq initiated a large-scale economic liberalization and privatization program that resulted in high inflation, unemployment, shortages of essential goods, visibly high economic inequality and the rise of a black market in foreign currencies. Kuwait was a small country with a weak military; however, wealthy due to large oil reserves. Therefore, Kuwait was strategically valuable and a monetary prize for Iraq, especially after the war with Iran.

In furtherance, Iraq, who was before the war with Iran, wealthy due to oil, now claimed to have found itself in an international conspiracy. Iraq accused Kuwait of exceeding the Organization of Petroleum Exporting Countries (OPEC) oil production quotas that caused the collapse of oil prices due to overproduction. This cost Iraq billions of dollars in revenue, which would have been used towards reconstruction post the Iraq-Iran war. Additionally, Iraq also accused Kuwait of stealing oil from the Rumaila oilfield in southern Iraq worth \$2.4 billion. To reduce Iraq's foreign debt, Saddam Hussein used the abovementioned reasons to ask Kuwait outrightly to forgive the debt, which Kuwait rejected. Kuwait's rejection and Iraq's economic instability are the most cited reasons for the invasion on 2nd August; however, there are no legal grounds for the invasion and annexation.

The prohibition of the use of force is maintained in Article 1(1) of the UN Charter that upholds the objective of international peace and security. Additionally, Article 2(4) maintains that Members should refrain from the threat or use of force against any state's territorial integrity. Territorial integrity is an element of Statehood that refers to the 'wholeness' of a State and is a norm of international law to protect the territorial framework and sovereignty of an independent State. Territorial integrity, if violated, is associated with the territory, land or sea, to come under another States sovereignty or control. Therefore, Article 2(4) prohibits annexations and occupations of one State by another and is the legal provision that would apply to Iraq's invasion and annexation of Kuwait.

Additionally, the prohibition of the use of force is a peremptory norm of general international law. This means that the international community recognizes the prohibition on using force as a norm from which no derogations are allowed. A peremptory norm, also known as *jus cogens*, is modified only by a subsequent norm of general international law with a similar character. In

the hierarchy of international law, peremptory norms occupy the uppermost tier. Additionally, the 1966 Draft Articles on the Law of Treaties, the International Law Commission (ILC) identified the provision prohibiting the use of force in the UN Charter to be a '*conspicuous example of a rule of international law having the character of jus cogens*'. Therefore, the prohibition on the use of force has been on top of the international law hierarchy and is a dangerous norm to violate with no legal basis.

The prohibition on the use of force is not an absolute one and is liable to exceptions enshrined in Chapter VII of the UN Charter. Use of force may be permitted only if (i) authorized by the UNSC under Article 42 of the UN Charter or when a State is acting in self-defence under Article 51 of the UN Charter. The UNSC may authorize the use of force if softer measures under Article 41 of the UN Charter, such as sanctions, fail to enforce compliance. UNSC resolution 661 imposed economic sanctions on Iraq; however, it failed due to non-compliance by Iraq. Therefore, UNSC's resolution 678 authorizing the use of force under Article 42 gave the UN coalition legal validity to attack Iraq.

However, Iraq's invasion of Kuwait does not conform to the exceptions enshrined in Chapter VII of the UN Charter. The economic claims cited by Iraq for the invasion was not recognized by the West nor UNSC to be valid. Furthermore, Iraq could not claim the second exception of self-defence as Iraq initiated the use of force. A self-defence claim is only valid if a nation acts in retaliation to a threat or armed attack. An economic set back does not amount to a threat and therefore the self-defence claim is negated. Therefore Iraq failed to find a legal ground in the UN Charter to apply force in Kuwait, resulting in the violation of *jus cogens*.

Additionally, annexation refers to the acquisition of territory via the threat or use of force and is strictly prohibited under Article 2(4) of the UN Charter. This principle has been supported in the Friendly Relations Declaration (1970) adopted unanimously by the UN General Assembly, declaring '*the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal*'. The UN Charter does not mention reasons for which use of force may be allowed in pursuance of the objective of international peace and security. Therefore, even if Iraq's insecurities regarding an international conspiracy crippling its economy was correct, the act of annexation violates international law.

Political Claims

Iraq is guilty of being fickle-minded on reasons for the invasion of Kuwait. Iraq has cited territorial claims dating back to before Kuwait's independence. Saddam Hussein's eccentric personality then derives the conclusion that the invasion took place due to economic instability and Kuwait's rejection of forgiving international debt. However, before the territorial and economic claims were made and annexation took place, Iraq claimed that it had intervened at the request of elements in Kuwait who opposed the Emir rule and formed the Provisional Government of Free Kuwait (PGFK). This seemed like an odd justification for intervention as the PGFK consisted of men unknown in Kuwait and, in most cases, were Iraqi army officers. Additionally, these men boycotted prominent figures in Kuwait's opposition and never experienced acceptance in Kuwait.

However, even if the factual matrix favoured Iraq's claims, it would not have legitimized Iraq's invasion of Kuwait. The UN Charter prohibits intervention by use of force in another country, especially to replace the government. Article 2(4) of the charter maintains that '*all Members should refrain from the threat or use of force against ...political independence of any state*'. Political independence is the other element of Statehood required for recognition of a State in the international community. The use of force to threaten the political independence of a nation is associated with intervention aimed at expelling a government to install another in its place, changing the political composition of the State. Iraq's invasion with the objective to aid an opposition group in Kuwait would be conducted with the aim to expel the sitting Emir. Therefore, Iraq's invasion based on a request made by PGFK is expressly against Article 2(4) of the UN Charter as it tends to alter the political composition and threaten Kuwait's political independence. The invasion based on political claims has no legal basis. The claim is further meritless as Iraq quickly relinquished the PGFK collaboration to maintain an outright annexation based on an old claim that Kuwait was historically part of Iraq.

Conclusion

Iraq's invasion of Kuwait was conducted with complete disregard for international law. This is evident as the three commonly cited claims of Iraq, which are territorial claims over Kuwait, economic disputes with Kuwait and political request by the PGFK, have no legality in the international law framework. The UN Charter in Article 1 and 2 prohibits the use of force to uphold the objective of international peace and security. There are no provisions that allow the use of force based on requests for intervention made by elements in the other State, nor is the

use of force allowed based on socio-economic claims. The UN Charter only allows the use of force when the UNSC authorizes it, or a State is acting in self-defence.

Additionally, before and during the conflict, Iraq behaved with absolute ignorance towards the international community and the UN's diplomacy and sanctions. Therefore, the Iraq and Kuwait conflict are a unique case study in international law. More so because it put the shortcomings of international laws response to despotic dictators forward. Comparatively, a democratic country is favoured due to the ease of compliance with international law through soft and hard measures enumerated in Chapter VII of the UN Charter. Failure to comply with the international communities and the UN's objectives is seen as a detriment to any democratic administration, who can be debated about and replaced in a democracy due to popular will. Therefore, democracies are more open to a compliant dialogue when such conflicts arise. The political composition of autocracy functions on unilateral decision-making without consideration for the rule of law. Therefore, to make a despot comply is difficult within the framework of international law. This is true in the Iraq and Kuwait conflict as well. The UN and the international community reacted swiftly and in compliance with the law, which was unprecedented. Nevertheless, they were unable to render fast remedies.

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