THE LEGALITY OF CIVILIAN FLIGHTS TO AND FROM IRAQ UNDER RESOLUTION 670 (1990) OF THE SECURITY COUNCIL: A COMMENTARY

By

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I. INTRODUCTION

The Security Council, as a result of the end of the cold war and the collapse of the Soviet Union as a major world power (1) has become very active in international disputes. It has activated its powers under Chapter VII of the U.N. Charter, and has imposed economic sanctions on various countries including Iraq. The economic sanctions imposed on Iraq for its invasion of Kuwait on August 2, 1990, were the most severe sanctions authorized by the U.N. against one of its members in the history of the organization. These sanctions present various questions of international law of tremendous importance to the world community because not only that they have far-reaching consequences with devastating effect on the innocent population of Iraq, but also that their misuse by States undermines their legitimacy as an appropriate instrument to compel

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(1) On the effect of bipolarity's demise vis-à-vis the Charter security regime, see Michael Reisman, "Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER (Lori F. Damrosch & David J. Scheffer eds. 1991); Michael N. Schmitt, The Resort to Force in International Law: Reflections on Positivist and Contextual Approaches, 37 A.F.L. REV. 105 (1994).

desired norms of international behaviour, and casts doubt on the credibility of the U.N. as an organization based on respect for international law, human rights, and justice. Powerful States in the Gulf War Coalition have taken various actions purporting to be in furtherance of the U.N. resolutions ranging from bombing Iraq on different occasions to imposing and enforcing No-Fly Zones in Northern and Southern Iraq.

This Article is intended to delineate the limits of economic sanctions imposed by the U.N. Specifically it will address the question of whether or not such economic sanctions include the prohibition of civil air flights to and from Iraq. Section two of this Article will discuss the power of the Security Council to impose economic sanctions under Chapter VII of the U.N. Charter. Section three will analyze Resolution 670 (1990) in accordance with the rules of interpretation under customary international law. Section four, will deal with the Travaux Preparatoires of Resolution 670 (1990).

The final part of the Article will conclude that the economic sanctions imposed by the Security Council against Iraq do not affect the legal rights of Iraq and third States under international law to operate civilian flights to and from Iraq, provided that the requirements for inspections provided for in Resolution 670 (1990) are met.

II. The Power of the Security Council to Impose Economic Sanctions

Article 39 of the U.N. Charter provides that the Security Council, "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security"[(2)]. The determination by the Security Council that an event or a situation represents a threat to the peace or breach of the peace or constitutes an act of aggression serves as a statement by the international community to focus international attention on the event or situation in order to

(2) U.N. Charter Art. 39.

encourage the relevant parties to seek an expeditious resolution,[3] and at the same time, it triggers the Security Council's ability to "pursue enforcement powers under Chapter VII of the Charter", namely Articles 40, 41 and 42.[4] An Article 39 decision by the Security Council is a condition precedent to any action to be taken by the Council to maintain or restore peace.[5]

In deciding to take action, the Security Council is required to exercise its authority under Article 39, and determine first that a situation threatens peace, has breached the peace, or constitutes an act of aggression.[6]

Immediately, following Iraq's incursion into Kuwait on August 2, 1990, the Security Council acting under Chapter VII of the U.N. Charter which provides the legal framework for international enforcement actions and the circumstances under which the Security Council may act to maintain or restore international peace and security,[7] adopted Resolution 660 of August 2, 1990. In this Resolution, the Security Council decided that there is a breach of international peace and security concerning Iraq's invasion and occupation of Kuwait, and utilizing its authority under Articles 39 and 40, it demanded an immediate and unconditional withdrawal of all its forces from Kuwait.[8] The Security Council in this Resolution also called upon the parties to the conflict to immediately begin intensive negotiations for settling their differences.[9]

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(3) Sean D. Murphy, The Security Council, Legitimacy and the Concept of Collective Security After the Cold War, 32 COLUM. J. TRANSNAT'L L. 201, 210 (1994).

(4) Id.

(5) Hans Kelsen, THE LAW OF THE UNITED NATIONS 294 (1950).

(6) U.N. Charter Art. 39; Restatement (Third) of the Foreign Relations Law of the United States, Section 703, Comment g (1987); 2 Lassa Oppenheim, INTERNATIONAL LAW: A TREATISE: DISPUTES, WARS AND NEUTRALITY 163 (Hersch Lauterpacht ed., 1952).

(7) For the mechanics of Chapter VII of the U.N. Charter, see Derek Gilman, Comment, The Gulf War and the United Nations: Did the Security Council Fulfill its Original Mission? 24 CONN.L.REV.1131 (1992).

(8) See S.C. Res. 660, U.N. Doc. S/RES./660 (1990), reprinted in 29 I.L.M. 1325 (1990).

(9) See Paragraph 3 of Res. 660 (1990).

The characterization of the situation in Kuwait as a threat and a breach of international peace and security in Resolution 660 (1990) in accordance with Article 39 of the U.N. Charter, and the failure of Iraq to comply with the demands of the Security Council in this Resolution triggered the enforcement actions provided for in Chapter VII of the U.N. Charter and paved the way for the adoption of Resolution 661 of August, 1990.[10] Resolution 661 (1990) was adopted by 13 votes against none, with Cuba and Yemen abstaining, pursuant to Article 41 of Chapter VII of the U.N. Charter which provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.[11]

Resolution 661 (1990) not only prohibited trade with Iraq or Iraq occupied Kuwait, but also froze all Iraqi and Kuwaiti assets wherever held. It provided in relevant part, that the Security Council.. :

3. Decides that all States shall prevent:

   a) The import into their territories of all commodities and products originating in Iraq or Kuwait exported therefrom after the date of the present resolution;

   b) Any activities by their nationals or in their territories which would promote or are calculated to promote the export or transshipment of any commodities or products from Iraq or Kuwait; and any dealings by their nationals or their flag vessels or in their territories in any commodities or products originating in Iraq or Kuwait and exported therefrom after the date of the present resolution, including in particular any

(10) See S.C. Res. 661, U.N. Doc. S/RES/661(1990), reprinted in 29 I.L.M. 1325 (1990).

(11) U.N. Charter Art. 41. For a detailed discussion of the mechanics of this Article, see Oscar Schachter, United Nations Law in the Gulf Conflict, 85 AM.J.INT'L L.452, 454(1991).

transfer of funds to Iraq or Kuwait for the purposes of such activities or dealings;

c) The sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products, including weapons or any other military equipment, whether or not originating in their territories but not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs, to any person or body in Iraq or Kuwait or to any person or body for the purposes of any business carried on in or operated from Iraq or Kuwait, and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply of such commodities or products;

4. Decides that all States shall not make available to the government of Iraq or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that Government or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within Iraq or Kuwait, except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs;

5. Calls upon all States, including States non-members of the United Nations, to act strictly in accordance with the provisions of the present resolution notwithstanding any contract entered into or license granted before the date of the present resolution;

6. Decides to establish, in accordance with rule 28 of the provisional rules of procedure of the Security Council, a Committee of the Security Council consisting of all the members of the Council, to undertake the following tasks and to report on its work to the Council with its observations and recommendations:

a) To examine the reports on the progress of the implementation of the present resolution which will be submitted by the Secretary-General;

b) To seek from all States further information regarding the action taken by them concerning the effective implementation of the provisions laid down in the present resolution;

7. Calls upon all States to co-operate fully with the Committee in the fulfillment of its task, including supplying such information as may be sought by the Committee in pursuance of the present resolution.[12]

The Security Council, on August 25, 1990 in a show of its resolve and support for the enforcement of international trade embargo against Iraq adopted Resolution 665(1990) and authorized certain Member States to enforce its Resolution 661 (1990).[13] Resolution 665 (1990) in relevant part provided that:

> The Security Council calls upon those Member States cooperating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargos and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990).[14]

As a result of Iraq's non-compliance with the previous resolutions of the Security Council which are intended to force Iraq to reverse its actions in Kuwait, and restore the sovereignty, territorial integrity, and political independence of Kuwait, the Security Council approved four additional resolutions in September of 1990 including Resolution 670 (1990)[15] which indicated a greater commitment by the international community to tighten the trade embargo by extending its application to the aerial regime.[16]

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(12) supra note 10.

(13) See S.C. Res. 665, U.N. Doc. S/RES/665(1990), reprinted in 29 I.L.M. 1329 (1990).

(14) Id.

(15) See S.C. Res. 670 , U.N. Doc. S/RES/670(1990)

(16) Id. At Paragraph 2 of the resolution. For an excellent review of the Security Council resolutions on the crisis created by Iraq in its invasion of Kuwait, see Jeffrey Di Amico, Note, Iraq – A Step by Step Analysis and =

Resolution 670 (1990) in relevant part provided that the Security Council:

> 3- Decides that all States, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted before the date of the present resolution, shall deny permission to any aircraft to take off from their territory if the aircraft would carry any cargo to or from Iraq or Kuwait other than food in humanitarian circumstances, subject to authorization by the Council or the Committee established by resolution 661 (1990) and in accordance with resolution 666 (1990), or supplies intended strictly for medical purposes or solely for UNIIMOG.
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> 4- Decides further that all States shall deny permission to any aircraft destined to land in Iraq or Kuwait, whatever its State of registration, to overfly its territory unless:
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> a) The aircraft lands at an airfield designated by that State outside Iraq or Kuwait in order to permit its inspection to ensure that there is no cargo on board in violation of resolution 661 (1990) or the present resolution, and for this purpose the aircraft may be detained for as long as necessary; or
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> b) The particular flight has been approved by the committee established by resolution 661 (1990); or
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> c) The flight is certified by the United Nations as solely for the purposes of UNIIMOG...[17]

Differences, however, have arisen between Iraq and the U.N. as well as between France and Russia on the one side and the U.K. and the U.S. on the other over the interpretation and application of these resolutions and other resolutions formalizing the cease fire agreements ending the Gulf War for the liberation of Kuwait. It is beyond the Scope of this Article to address all the issues raised under all the resolutions on Iraq resulting from its invasion and

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= What Should Be Done in the Future, 5 New ENG. INT'L & COMP. L.A. (1990).

(17) Id. At Paragraphs 3 and 4 of the resolution.

occupation of Kuwait. The Article will concentrate only on the issues raised by the interpretation and application of Resolution 670 (1990) and its relationship to Resolution 661(1990).

Precisely the Article will deal with the question of whether or not Resolution 670 (1990) requires the approval of Resolution 661 (1990).[18] In other words, the Article will attempt to answer the legal question of whether civilian flights to and from Iraq are prohibited unless authorized by the Committee established under Resolution 661 (1990).

The questions posed in this Article will be dealt with by reference to the analysis of the wordings of the text of Resolution 670 (1990), and the legal obligations imposed by this Resolution, utilizing the traditional rules of interpretation under customary international law,[19] and the Travaux Preparatoires of the resolution.[20]

III. The Analysis of the Wordings of Resolution 670 (1990) and the Obligations Imposed by this Resolution

A. The Rules of Interpretation under Customary International Law

The International Court of Justice, in the case Concerning the Territorial Dispute Between Libyan Arab Jamahiriya and Chad,[21]

(18) According to Res. 666 (1990), the Security Council alone or acting through the Committee established under Res. 661 (1990) is responsible for determining the exception to the application of Res. 661(1990). In the preamble of the resolution, the Security Council emphasized that "it is for the Security Council , alone or acting through the Committee, to determine whether humanitarian circumstances have arisen". See S.C. Res. 666, U.N. Doc. S/RES/666 (1990).

(19) For a detailed study of the rules of interpretation under customary international law, see Shabtai Rosenne, THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION (1970); Ian Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES, 2nd Ed. (1984).

(20) On the relevance of the travaux preparatoires of a treaty for determining the attitudes of the parties and the reality of the situation which the parties wished to regulate under the treaty, see Yasseen, L'interpretation des Traites d'apres la Convention de Vienne sur le Droit des Traites, 151 Recueil des Cours 90 (1976-III).

(21) See the Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad, I.C.J. Reports (1994).

has restated the rules of interpretation under customary international law as follows:

> In accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.[22]

Accordingly, we shall proceed to the analysis of the wordings of the text of Resolution 670 (1990), and it appears from the reading of the operative paragraphs of this Resolution that it imposes two different obligations which are binding upon all Members[23] and even Non-Members of U.N.[24] One of those obligations relates to the question to take off from the territory of States to land in Iraq, and the other relates to the question to overfly the territory of States to land in Iraq.

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(22) Id. At PP. 21 – 22 Para 41.

(23) Article 24 of the U.N. Charter Provides that:

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purposes and principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.
3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Article 25 of the U.N. Charter states that:

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

(24) Paragraph 5 of Resolution 661 (1990) provides that the Security council:

Calls upon all States, including States non-members of the United Nations, to act strictly in accordance with the provisions of the present resolution notwithstanding any contract entered into, or license granted before the date of the present resolution;

B- The Question of the Obligation Not to Allow Any Aircraft to Take Off from the Territory of States

> 'The Security Council ... decides that all States ... shall deny permission to any aircraft to take off from their territory if the aircraft would carry any cargo to or from Iraq or Kuwait other than food in humanitarian circumstances, subject to authorization by the Council or the Committee established by Resolution 661 (1990) and in accordance with Resolution 666 (1990), or supplies intended strictly for medical purposes or solely for UNIIMOG...'

The rules of interpretation of customary international law as provided for in the Vienna Convention on the Law of Treaties[25] have placed emphasis on the consideration that the starting point in interpretation is the elucidation of the text of the treaty which is presumed to be the authentic expression of the intentions of the parties.[26] Accordingly, the starting point for delineating the nature and contents of the obligation imposed on Member States and Non-Members of the U.N. by this Paragraph of Resolution 670(1990) referred to above which is the main task of this Article will be the elucidation of the text of the Paragraph which is presumed to be the authentic expression of the intention of the Security Council. In proceeding to elucidate the meaning of the text of this Paragraph, one will immediately note certain important legal words, which are determinants of the nature and contents of the obligation provided for in the Paragraph. Among these words is the word "If".

" If "

It introduces a conditional clause. Generally speaking, when the word 'If' is used in providing for an obligation in an international instrument, such obligation does not exist unless and until the condition exists. In other words if that condition does not exist, neither does the obligation exist.

> 'States ... shall deny permission to any aircraft to take off from their territory if the aircraft would carry any cargo to or from Iraq or Kuwait...'

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(25) Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 344.

(26) Ian Sinclaire, op. cit., note 19 at 115, 141.

Applying the rule referred to above to the case at hand, it is clear that the obligation imposed by this Paragraph on States Member and Non-Members of the U.N.[27] is to deny permission to any aircraft to take off from their territory to land in Iraq if the aircraft is carrying cargo in violation of Resolution 661 (1990). This obligation is made conditional upon the existence of the prohibited cargo on board the aircraft and not passengers on board the aircraft. What is prohibited by this Paragraph of Resolution 67 (1990) is the existence of the prohibited cargo on board the aircra on the way to Iraq as provided for under Resolution 661 (1990).

It will be absurd to argue that the Security Council intended to include passengers within the meaning of "cargo" provided for in Resolution 670 (1990). Such an interpretation will be inconsistent with the ordinary meaning to be given to the term "cargo" according to the rules of the interpretation of customary international law referred to earlier. Moreover, such interpretation will be inconsistent with the language used in the Chicago Convention[28] which regulated the very subject matter of international air transport and which represents the heart of the subject in question here. The Chicago Agreement on International Air Transport of Dec. 7, 1944 administered by the International Civil Aviation Organization (ICAO) has used different language. It referred explicitly to "cargo", "passengers" and "mail" in dealing with the question of international air transport. Article I, Section I of the International Air Transport Agreement provides that:

> Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services:
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> (1) The privilege to fly across its territory without landing;

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(27) Paragraph 5 of Resolution 661 (1990) provides that the Security Council "calls upon all States, including States Non-members of the United Nations, to act strictly in accordance with the provisions of the present resolution notwithstanding any contract entered into or license granted before the date of the present resolution. (Emphasis added).

(28) See International Civil Aviation Conference, Chicago, Ill., November 1 – December 7, 1944: Final Act and Related Documents, pp. 71-78, 86, Department of State Publication 2282, Conference Series 64; also Convention on International Civil Aviation, Department of State Publication 2816, Treaties and Other International Acts Series 1591.

(2) The privilege to land for non-traffic purposes;

(3) The privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses;

(4) The privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory.[29]

The language of this International Agreement clearly demonstrates that if the Security Council had intended to prohibit civilian flights carrying passengers to Iraq, it could have included a reference to "passengers" as this Agreement has done in Article I cited above. Such an omission could not be an oversight on the part of the Security Council. Resolution 670 (1990) was the subject of careful draftsmanship and deliberation behind the scenes among the Permanent Members of the Security Council. Moreover, the Security Council was aware of the Chicago Agreement. The Security Council has referred to the Chicago Agreement in Paragraph 7 of Resolution 670 (1990) where it called upon all States to co-operate in the implementation of this Resolution and Resolution 661 (1990). Paragraph 7 of Resolution 670 (1990) provides that the Security Council.. :

> Calls upon all States to co-operate in taking such measures as may be necessary, consistent with international law, including the Chicago Convention, to ensure the effective implementation of the provisions of resolution 661 (1990) or the present resolution...[30]

What the Security Council has in mind is the prevention of the weakening of the economic embargo against Iraq and the smuggling of the prohibited goods through the sea and the air. The Security Council was "determined to ensure by all necessary means the strict and complete application of the measures laid down in Resolution 661(1990)."[31] It has taken steps to prevent smuggling of the contraband through the sea. The Security Council has

(29) Id.
(30) See supra note 15.
(31) Id. At the preamble of the resolution

authorized certain Member States co-operating with the Government of Kuwait to use force to halt all inward and outward maritime shipping in the Gulf in order to inspect and verify their cargoes and destinations. Paragraph 1 of Resolution 665(1990) provides that the Security Council.. :

> Calls upon those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661(1990); ...[32]

Resolution 670(1990) of the Security Council is the final step to prevent the smuggling of the prohibited goods to Iraq through the air by extending the application of Resolution 661(1990) "to all means of transport, including aircraft". In this respect, the movement of "passengers" to and from Iraq was not covered in Resolution 661(1990) and that Resolution 670(1990) did not affect the movement of "passengers" as the language of the latter resolution clearly demonstrates, for it refers only to "cargo" and not to "passengers".

The construction of the Paragraph under discussion to include the prohibition of civilian flights carrying "passengers" to and from Iraq is possible only if Resolution 670(1990) is deemed to be a resolution of "interruption" intended to produce complete or partial "interruption" of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations under Article 41 of the U.N. Charter.[33] These measures of interruption are considered a milder form of economic sanctions to be applied by the Security Council before applying stronger economic embargo, if it decides that such economic embargo is not necessary. This is not the case here. The Security Council has decided that strong economic embargo is necessary in order to compel Iraq to comply with its

(32) See supra note 13.

(33) For a discussion on Article 41 of the U.N. Charter, see Timothy P. McIlmail, No-Fly Zones: The Imposition and Enforcement of Air Exclusion Regimes over Bosnia and Iraq, 17 LOY.L.A. INT'L & COMP. L.J. 35, 41 (1994).

international obligations, and has even authorized the use of force against Iraq for that purpose. This view has support in the fact that Resolution 670(1990) did not prohibit flights per se. But rather it requested States to deny permission to any aircraft to take off from their territory "If" the aircraft would carry any cargo to or from Iraq.

C- **The Question of the Authorization by the Security Council or Its Committee for the Exception to the Application of Resolution 670(1990).**

> '... other than food in humanitarian circumstances, subject to authorization by the Council or the Committee established by resolution 661(1990) and in accordance with resolution 666(1990), or supplies intended strictly for medical purposes or solely for UNIIMOG;...'

(a) **Is Authorization for Civilian Flights Carrying Passengers to and from Iraq Required According to the Paragraph under Discussion?**

This question must be answered by an analysis of the Paragraph under discussion in the light of Resolution 666(1990).[34] The logical reading of the wordings of this Paragraph under discussion according to their ordinary meaning to be given to them in conformity with the rules of interpretation under customary international law is that flights to and from Iraq carrying prohibited cargo under Resolution 661 (1990) are Prohibited in the ordinary circumstances. But flights carrying food to Iraq in humanitarian circumstances subject to authorization by the Security Council or the Committee established by Resolution 661 (1990) and in accordance with Resolution 666 (1990), or supplies intended strictly for medical purposes or solely for UNIIMOG are not prohibited by these wordings. These wordings, however, indicate that the exception of flights carrying food is made conditional upon the existence of humanitarian circumstances and the authorization by the Security Council. The question then that poses itself is who shall have the right to determine the existence of humanitarian circumstances and the right to send food on board any aircraft to Iraq. In this respect it is a well-known rule of international law that States are not the judges of themselves.[35] Rather, it is up to the Security Council to determine the existence of humanitarian

(34) See S.C. Res. 666, U.N. Doc. S/RES 666(1990).

(35) See Hersch Lauterpacht, L. Oppenheim, International Law (8th ed.), Vol. I, pp.298-299 (1955); Ahcene Boulesbaa, The U.N. Convention on torture and the Prospects For Enforcement, pp. 58-64 (1999).

circumstances in Iraq, and in fact the Security Council has reserved that decision for itself alone. The Security Council in the Preamble of Resolution 666 (1990) has "emphasized that it is for the Security Council alone or acting through the Committee to determine whether humanitarian circumstances have arisen" [36] in Iraq.

Therefore, it is clear that the question of authorization by the Security Council is tied up to the existence of humanitarian circumstances as determined by the Security Council in accordance with Resolution 666 (1990) and to supplies intended strictly for medical purposes or the flight is certified by the U.N. as solely for UNIIMOG. These questions were not linked in anyway to the question of flying only "passengers" for there is no mention of "passengers" in neither Resolution 661 (1990) nor Resolution 670 (1990) or Resolution 666 (1990).

The language of the Paragraph under discussion and the language of Resolution 666 (1990) establish a link between "humanitarian circumstances" and the "authorization by the Security Council to allow flying food on board any aircraft to Iraq" in order to alleviate human suffering. There is no mention of "passengers" in these resolutions, and consequently, there is no link between the authorization to fly food on board any aircraft to Iraq in humanitarian circumstances as determined by the Security Council and flights, carrying "passengers" only in ordinary circumstances. There is support for this view in the language of Resolution 666 (1990). Paragraph 1 of this Resolution provides that the Security Council.. :

> Decides that in order to make the necessary determination whether or not for the purposes of paragraph 3 (c) and paragraph 4 of resolution 661 (1990) humanitarian circumstances have arisen, the Committee shall keep the situation regarding foodstuffs in Iraq and Kuwait under constant review; ... [37]

IV- The Question of the Obligation of States to Deny Permission to Any Aircraft Destined to Land in Iraq, Whatever Its State of Registration, to Overfly Their Territory

The Security Council ...

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(36) supra note 34

(37) Id.

'4 Decides further that all States shall deny permission to any aircraft destined to land in Iraq or Kuwait, whatever its State of registration, to overfly its territory unless:

(a) The aircraft lands at an airfield designated by that State outside Iraq or Kuwait in order to permit its inspection to ensure that there is no cargo on board in violation of resolution 661 (1990) or the present resolution, and for this purpose the aircraft may be detained for as long as necessary; or

(ii) The particular flight has been approved by the Committee established by resolution 661 (1990); or

(iii) The flight is certified by the United Nations as solely for the purposes of UNIIMOG; ...'

This paragraph under discussion must be read in conjunction with the previous paragraph discussed earlier. The wordings of this Paragraph confirm the analysis and conclusions reached earlier on the previous paragraph that flights are not prohibited per se and that the prohibition that Resolution 670 (1990) is intended to cover extends to the presence of prohibited cargo on board any aircraft. Resolution 670 (1990) was intended to tighten the economic embargo against Iraq and prevent smuggling through the air.

The obligation of States to deny permission to any aircraft destined to land in Iraq to overfly their territory is not absolute. They are under the obligation to make arrangements for landing at an airfield designated by them outside Iraq in order to permit its inspection to ensure that there is no cargo on board in violation of Resolution 661(1990). This is an obligation of results to achieve the prevention of smuggling prohibited cargo under Resolution 661(1990) on board any aircraft to Iraq. This obligation has nothing do with "passengers" because "passengers" are not included in the paragraph under discussion and "passengers" are always referred to separately when they are intended to be covered. The Chicago Convention on International Air Transport has referred to "passengers", "cargo" and "mail".[38] If the Security Council had intended to include "passengers" in Resolution 670 (1990), it would

(38) supra note 29.

have done so as the Chicago Convention has done, considering the fact that the Security Council was aware of this Convention.

Therefore, according to this paragraph there is nothing to prevent States from operating flights for passengers to and from Iraq if they designate an airfield outside Iraq for inspection in order to make sure that such flights for passengers are not used also for defeating the purposes of Resolution 670 (1990) which are to ensure that there is no cargo on board the aircrafts in violation of Resolution 661 (1990).[39] This conclusion finds support in the fact that according to the Paragraph under discussion the basis for the possibility of the legality to overfly the territory of States is made conditional upon the arrangements by States for designating an airfield outside Iraq for inspection of aircrafts in order to ensure that there is no cargo on board in violation of Resolution 661 (1990) rather than the authorization by the Committee established by this Resolution. The authorization by the Committee of particular flights on humanitarian grounds, as discussed earlier, was in fact made a separate and independent basis for permission to overfly the territory of States under paragraph 4(b).

IV- The Travaux Preparatoires of Resolution 670 (1990)

The Travaux Preparatoires of Resolution 670 (1990) support the arguments presented in this Article that passengers on board any aircraft flying to and from Iraq are not included within the scope of the prohibition (cargo on board) of Resolution 670 (1990) and that this Resolution was intended to tighten the economic embargo against Iraq.

During the debate on Resolution 670 (1990), the Foreign Ministers of France and China, which represent two of the Five Permanent Members of the Security Council indirectly recognized the possibility of the presence of passengers on board aircrafts flying to and from Iraq, and they had emphasized the safety of passengers. The Foreign Minister of France, Mr. Dumas said that "The resolution we have just adopted, resolution 670 (1990), strengthens, for air transport, means of control similar to those which resolution 665 (1995) laid down for sea transport: by linking authorization for aircraft heading for Iraq... to overfly national

(39) infra notes 42, 43, 44 and 45.

airspace to an obligation to touch down for inspection, and by also authorizing a number of restraining measures within limits compatible with international law and without endangering passengers or the security of the aircraft."[40] The Foreign Minister of China, Mr. Qian Qichon said that "I wish to stress here in implementing the provisions of resolution 670 (1990), concerning civil aircraft, the countries concerned should strictly abide by the relevant stipulations of International Law and take rigorous steps to prevent any action that may endanger the safety of civil aircraft and the people on board.[41]

If the Security Council had any intention whatsoever to include passengers in the scope of the prohibition of Resolution 670 (1990) (cargo on abroad), it would have included them in the text of the resolution as it did with respect to cargo and the Chicago Convention, and these representatives would not have emphasized the importance of the safety of the passengers on board the aircraft. Moreover, the emphasis by these representatives on the safety of the passengers and the aircraft despite the intention of the Security Council to include passengers in the scope of the prohibition of Resolution 670 (1990) would have been considered a violation of the resolution, and other Permanent Members like the U.S. and the U.K. would have objected to these statements. There are no objections to these statements by these countries in the Travaux Preparatoires of Resolution 670 (1990).

The Taravaux Preparatoires reveal that there is a universal consensus among the Members of the Security Council that the purpose and objective of Resolution 670 (1990) is to strengthen the economic sanctions against Iraq. The U.S. Secretary of State, Mr. James Baker stated that "Today the United States, together with other Members of the Council, supports a new resolution and additional measures. First, we explicitly state that resolution 661 (1990) will include commercial air traffic. This demonstrates once again that the international community is prepared to plug any loophole in isolating Iraq".[42] The Foreign Minister of Canada said that "the resolution we have adopted today tightens the sanctions

(40) See U.N. Doc .S/PV. 2943, p.32 (1990) (Emphasis added).
(41) Id. At 49 – 50 (Emphasis added).
(42) Id. At 28 – 30

imposed against Iraq and sets out the means by which their effectiveness is to be assured. But it does more than that. It underlines to the Government of Iraq that its continued failure to comply with the resolutions of this Council could lead to further action by the Council under the Charter of the United Nations, with potentially severe consequences".(43) The Minister for Foreign Affairs of the United Kingdom of Great Britain and Northern Ireland stated that "it is precisely by passing this resolution, by tightening sanctions and making them more effective that we are working for peaceful reversal of aggression and for a peaceful end to this crisis".(44) The Foreign Minister of Malaysia said that " Malaysia has been equally painstaking in examining this resolution. To apply sanctions on air traffic and transportation is risky and complicated. It was for that reason that Malaysia insisted that in operative paragraph 7 the resolution refers to the Chicago Convention. We realize that the thrust and objective of this resolution is, as in previous cases, to make sanctions effective and ensure compliance; that is the sole reason why Malaysia felt duty-bound to support the resolution."(45)

V- CONCLUSION:

This is a scholarly Article. It is not a political position in support of or against any State involved in the disagreement over the interpretation of Resolution 670 (1990) and other Resolutions. The conclusions reached here are the results of the interplay of the rules of interpretation under customary international law.

The obligation of States to deny permission to any aircraft to take off from their territory to land in Iraq is conditional upon the existence of cargo on board such aircraft in violation of Resolution 661 (1990). There is no reference whatsoever to "passengers" within the meaning of "cargo" provided for in Resolution 670 (1990). Such interpretation will be inconsistent with the ordinary meaning to be given to the term "cargo" according to the rules of interpretation under customary international law, and will be contrary to the Chicago Convention. The Chicago Convention has

(43) Id. At 38.
(44) Id. At 41.
(45) Id. At 61.

referred to "cargo", "passengers" and "mail" in dealing with the question of international air transport.

The question of authorization by the Security Council to fly to Iraq is tied up (linked) to the question of providing food to Iraq in humanitarian circumstances, and such circumstances shall be determined by the Security Council alone. These questions were not linked in anyway to the question of flying only "passengers" for there is no mention of passengers in either Resolution 661 (1990) or Resolution 670 (1990) or Resolution 666 (1990). The language of Resolution 670 (1990) and the language of Resolution 666 (1990) establish a link between "humanitarian circumstances and the "authorization by the Security Council to allow flying food to Iraq" in order to alleviate human sufferings there.

The obligation of States to deny permission to any aircraft destined to land in Iraq to overfly their territory is not absolute. They are under the obligation to make arrangements for aircrafts at an airfield outside Iraq so that they may be inspected in order to ensure that there is no cargo on board in violation of Resolution 661 (1990). This is an obligation of results to achieve the prevention of smuggling prohibited cargo under Resolution 661 (1990) on board any aircraft to Iraq.

Therefore, according to this construction of Resolution 670 (1990) there is nothing to prevent States from operating flights for passengers to and from Iraq if they designate an airfield for landing outside Iraq for inspection to ensure that such flights are not used also for defeating the purposes of Resolution 670 (1990) which is to ensure that there is no cargo on board the aircrafts in violation of Resolution 661 (1990).

The conclusions reached in this Article find support in the Travaux Preparatoires of Resolution 670 (1990). During the debate on Resolution 670 (1990), the Foreign Ministers of France and China indirectly recognized the possibility of the presence of passengers on board aircrafts flying to and from Iraq, and they had emphasized the safety of passengers.