

Military Enforcement of Arms Control in Iraq

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Abstract: The effects of the 1990 Iraqi invasion of Kuwait are felt strongly up to the present day. On numerous occasions, the inspection teams of the UN Special Commission (UNSCOM) have encountered serious problems and opposition by the Iraqi government when verifying the non-production of weapons of mass destruction in Iraq. Among the many legal questions raised by the Iraqi-Kuwait war's aftermath, a fundamental issue is whether – in the absence of an explicit Security Council decision – compliance by Iraq with its obligations may be enforced by military means. In this article, this question is addressed by examining whether military enforcement action can be based on Security Council resolutions adopted earlier in the course of the conflict, especially Resolutions 678 (1990), in which the Council authorised the use of 'all necessary means', and 1154 (1998), in which the 'Memorandum of Understanding' between the UN and Iraq was endorsed. It is argued that without a further mandate from the Security Council, military enforcement of arms control in Iraq under the present circumstances is prohibited by international law.

1. INTRODUCTION

The problems the inspection teams of the United Nations encountered when attempting to verify if Iraq had refrained from the production of weapons of mass destruction, have dominated world news for months. In the last months of 1997, the situation in Iraq was on the verge of an escalation when American arms inspectors were refused access to the inspection sites. Late February 1998, the crisis once again reached a critical point. The Secretary General of the United Nations, Mr Kofi Annan, only barely succeeded in preventing a military confrontation with Iraq. An Agreement was signed in which Iraq agreed to co-operate in implementing the Resolutions of the Security Council, and in particular, to allow immediate, unconditional, and unrestricted access to the inspection sites.¹ The legal discussion focused on the question of whether the United States and its coalition partners were allowed

to enforce the relevant Resolutions, 687 (1991) and 715 (1991) in particular, by military means without a further mandate from the Security Council to that effect being necessary.² In the present article it will be argued why, in our opinion, a military enforcement action in Iraq is not allowed in the absence of a new resolution from the Security Council, which explicitly permits the use of military means. Before we turn to this legal question, we shall focus briefly on the origins of the conflict and on the background of the weapons inspections in Iraq.

2. BACKGROUND OF THE ARMS CONTROL INSPECTION IN IRAQ

As is common knowledge, Iraq invaded Kuwait and occupied this state in 1990.³ The reaction of the international community was quite determined and in one massive attack the Iraqi army was defeated.⁴ In the course of this crisis, which became known as the second Gulf War,⁵ it became clear that Iraq was involved in a number of illegal weapons programmes, including the production of chemical and biological weapons. It was even suspected that Iraq was in the possession of the necessary materials for the production of nuclear weapons.⁶

2. See, D.A. Leurdijk, *De Verenigde Naties en Irak* (The United Nations and Iraq), 51 *Internationale Spectator*, 8-12 (1998); D.A. Leurdijk & R.C.R. Siekmann, *De rechtsbasis voor militaire actie tegen Irak* (The Legal Basis for Military Action Against Iraq), 52 *De Internationale Spectator* 208-212 (1998); and the same two authors in some major Dutch newspapers: *NRC-Handelsblad* (17 February 1998, 28 February 1998, and 26 March 1998), *de Volkskrant* (23 February 1998), and *Trouw* (10 March 1998). See also, our contributions in 52 *Internationale Spectator* (1998); *De Verenigde Staten en Irak* (The United States and Iraq), 27 *Transaktie* 5-8 (1998); and G. den Dekker in *de Volkskrant* (11 February 1998). Cf. also J. Dahlitz in *NRC-Handelsblad* (17 February 1998) and N. Schrijver in *NRC-Handelsblad* (7 March 1998).
3. At first, Iraq claimed that it was 'coming to the rescue of the people of Kuwait', assisting a new 'provisional, free Government of Kuwait', to maintain security and stability. Later, it simply declared the 'eternal and comprehensive merger of Kuwait with Iraq as its nineteenth province'. The Security Council decided that such annexation had "no legal validity" and was considered "null and void". See UN Doc. S/RES/662 (1990) of 9 August 1990. See, N. Schrijver, *The United Nations and the Use of Force: Comparing the Korea and the Gulf Crises From a Legal Perspective*, in P.J. van Krieken & Ch.O. Pannenberg (Eds.), *Liber Alkerman, In- and Outlaws in War* 255, at 260 (1992).
4. See for a survey of the relevant resolutions: D.A. Leurdijk & L. van Zandbrink, *Decision-making by the Security Council: The case of the Iraqi Invasion of Kuwait, 1990-1995. A Review of Resolutions, Clingendael-notitie* (June 1995). See also, *infra* para. 3.
5. Usually the term 'first' Gulf War is used to refer to the war between Iraq and Iran during the 1980s.
6. This last point is in fact remarkable, since the International Atomic Energy Agency (IAEA) had performed inspections in Iraq on the basis of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (Annexed to UN General Assembly Resolution 2373 (XXII) of 12 June 1968). As one of its tasks, the IAEA has to ensure that no material present in a state for the purpose of

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1. Memorandum of Understanding between the United Nations and the Republic of Iraq, UN Doc. S/1998/166 of 23 February (1998), paras. 1-3.

After the Gulf War, the Security Council, *inter alia*, decided in Resolution 687 (1991)⁷ that Iraq would have to accept unconditionally the internationally supervised destruction, removal, or rendering harmless of all chemical and biological weapons and of all ballistic missiles with a range above 150 kilometres. For the implementation of this decision, a 'Special Commission' was established⁸ as a subsidiary organ of the Security Council.⁹ The task of this United Nations Special Commission (UNSCOM) is to carry out immediate and on-site inspections of Iraq's biological, chemical, and missile capabilities, both at sites declared by Iraq, and at any additional locations designated by UNSCOM. Moreover, under the supervision of UNSCOM, Iraq will have to destroy all chemical and biological weapons as well as its missiles.

The Iraqi regime remained in control after the Gulf War. To prevent the future development of weapons of mass destruction by this regime, Resolution 687 provides for ongoing monitoring and verification of Iraq's compliance with its obligations.¹⁰ With regard to the prevention of the development of nuclear weapons, or nuclear weapons-usable materials, the Resolution provides that, with the assistance and co-operation of UNSCOM, all nuclear materials will be placed under the exclusive control, for custody and removal, of the IAEA.¹¹ UNSCOM's tasks and competencies were further elaborated in Resolutions 707¹² and 715 (1991).

Shortly after the adoption of Resolution 687 in 1991, the inspections started and incidents happened almost immediately.¹³ Discoveries by UNSCOM strengthened the suspicion that Iraq was involved in a secret programme for the development of weapons of mass destruction.¹⁴ Despite

producing nuclear energy is refined in such a way that it may be used to produce nuclear weapons.

7. UN Doc. S/RES/687 of 3 April 1991.

8. *Id.*, para. 9(b)(i).

9. UN Doc. S/RES/715 of 11 October 1991, para. 4.

10. UN Doc. S/RES/687 of 3 April 1991, para. 10.

11. *Id.*, paras. 12 and 13.

12. UN Doc. S/RES/707 of 15 August 1991.

13. During a raid by IAEA inspectors on the headquarters of the organisation responsible for Iraq's nuclear programme, 40,000 documents were found indicating the existence of an enormous armaments programme that had never been declared by Iraq. To prevent this information from becoming public, inspectors were held hostage at the parking lot of the building. They were released after two days, but had to leave the documents behind. In other cases, inspectors were refused access to production facilities and some of them were even shot at.

14. There were some unpleasant surprises, like the discovery of 35 SCUD missile heads filled with nerve gas. In addition 14,000 grenades filled with mustard gas were discovered, together with several 'katucha' missiles filled with nerve gas (which are difficult to destroy because of the fact that katucha missiles are made in one piece). Moreover, a peculiar 'super cannon' was found at the slope of a hill, possibly to be used for the launching of a nuclear weapon. On the other hand, nuclear arms were never found. For a long time there had been no proof of the existence of biological weapons either. When in 1995, one of Saddam Hussein's sons-in-law left

some successes of UNSCOM,¹⁵ the suspicion against Iraq did not fully disappear, and on top of this, the Iraqi government started to show more evasive behaviour, which was repeatedly condemned by the Security Council in clear terms.¹⁶ Earlier inspections had revealed Iraq's capability to produce, almost unnoticed, the most horrifying weapons of mass destruction. The recent actions by Saddam Hussein have reaffirmed the suspicion that Iraq has a number of hidden weapons systems. It is therefore understandable that the United Nations did its utmost to restart verification by way of inspections on the basis of the Security Council resolutions. After a number of unsuccessful peaceful attempts to convince Iraq of the need to allow access to the inspection sites, a group of states, headed by the United States, decided to force a solution. A fleet was directed towards the Gulf and plans were made for a new military operation under the name *Desert Thunder*. This display of military strength was accompanied by statements of high-ranking American officials, in which they claimed these states to have the right of unilateral military action on the basis of existing Security Council resolutions. A new resolution explicitly allowing for military enforcement was not deemed necessary by the United States. Other members of the Security Council, France and Russia in particular, were of a different opinion. These states continuously stressed the need for a new decision of the Council. Eventually, a military confrontation was avoided by Secretary General Kofi Annan through the conclusion of an agreement with Iraq. This agreement, the so-called Memorandum of Understanding, was endorsed by the Security Council in Resolution 1154 (1998).¹⁷

The question concerning the existence of a legal basis for a military enforcement action against Iraq remains relevant after the conclusion of this

Iraq, however, he took with him a lot of valuable information. This information, *inter alia*, revealed the existence of a large scale biological weapons programme, set up under the cover of a chicken farm. During a raid on the farm, 17 SCUD missile heads were found loaded with Aflatoxin, an extremely dangerous biological weapon which can be used for genocide purposes. A final example is the discovery of a production plant for biological weapons, located in the Iraqi desert. The plant was supposed to be part of the Institute for Foot-and-Mouth Disease in Baghdad. It is clear that there was a preference for using civilian covers for illegal arms production programmes.

15. Many production facilities have been dismantled and the missiles and their heads that were found have been destroyed. Furthermore, in the framework of the ongoing supervision of the implementation by Iraq of the relevant Resolutions, more than 300 video camera's were installed, allowing for *live* monitoring of strategic sites. In addition, helicopters and U-2 intelligence aeroplanes monitor the sites from above. See for a survey of the inspections in 1991 and 1992 by UNSCOM and IAEA: K.C. Bailey, *The UN Inspections in Iraq. Lessons for On-Site Verification* (1995).

16. See, e.g., UN Doc. S/RES/707 of 15 August 1991, para. 1, in which the Security Council "Condemns Iraq's serious violation of a number of its obligations under section C of resolution 687 (1991) and of its undertakings to co-operate with the Special Committee and the IAEA, which constitutes a material breach of the relevant provisions of resolution 687."

17. UN Docs. S/1998/166 of 23 February 1998 and S/RES/1154 of 2 March 1998.

agreement as well. The United States has maintained the opinion that the adopted resolutions provide a sufficient basis for military enforcement measures. In the next paragraphs, this view will be put to the test.

3. THE LEGAL BASIS FOR MILITARY ACTION

3.1. Introduction

Military enforcement measures form the coping stone of the system of collective security as laid down in the United Nations Charter. The unique nature of these measures is once more underlined by the fact that military enforcement on the authority of the Security Council, together with self-defence (Article 51 of the Charter), are the only exceptions to the general obligation not to use force in international relations (Article 2(4)). It is clear that such explicit exceptions to a pivotal norm deserve to be dealt with cautiously, otherwise, the central norm will lose its authority.

After a brief survey of the obligations that were violated by Iraq, we shall analyse whether Resolutions 678 (1990) and/or 1154 (1998) can serve as a legal basis for military action.

3.2. Obligations violated by Iraq

Resolution 687 (1991) contains the conditions necessary to secure peace and security in the area and declares that a formal cease fire is effective once Iraq has accepted the provisions of the Resolution. An integral part of the Resolution relates to a mechanism of "ongoing monitoring and verification" of the observance by Iraq of its obligations under paragraphs 10, 12, and 13 of Resolution 687.¹⁸ In addition, Resolution 707 (1991) demands complete transparency regarding all aspects of Iraq's weapons programmes;¹⁹ Resolution 715 (1991) endorses the plans for an ongoing monitoring and verification.²⁰ Non co-operation by Iraq with these provisions, for instance, by not allowing the inspectors access to certain areas or sites, or by laying down conditions regarding the inspection, is in violation of the terms of Resolution 687. The members of the Security Council have frequently labelled these forms of non co-operation as a 'material breach' of Resolution 687.²¹

Also more recent violations with respect to the arms inspection regime in Iraq were linked to Resolution 687, a reason to regard this Resolution as the basic resolution for the arms inspection regime in Iraq.

There are no clues in Resolution 687 indicating the possibility of an enforcement by military means. In fact, in paragraph 34, the Security Council decided to take such further steps as may be required for the implementation of this Resolution and to secure peace and security in the area.²² The same holds for the subsequent resolutions that were adopted between 1991 and 1998. Nowhere can a reference to an 'authorisation' or a 'decision' to use force be found; the only reference is to the existence of a "firm intention" of the Security Council to "take further measures as may be required for the implementation of [this] resolution."²³ The obligations imposed on Iraq all find their basis in Security Council Resolutions. The recent crisis concerned the refusal of Iraq to allow access by UN inspectors to so-called 'presidential sites'. The remaining part of this article will focus on the question of whether the resolutions predating or post-dating the establishment of the weapons inspection regime can provide a legal basis for military actions against Iraq.

3.3. Military action and Resolution 678 (1990)

Most commentators mention Resolution 678 (1990) of 29 November 1990, as the legal basis for possible military action against Iraq. Resolution 678

authorizes Member States co-operating with the Government of Kuwait [...] to use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.²⁴

A number of elements in this resolution deserve further analysis in order to make clear that the assertion that the link between this Resolution and Resolution 687 renders military enforcement of the latter possible is not tenable.²⁵

22. Earlier drafts of this Resolution referred to the use of "all necessary means", but even this reference was soon used in relation to possible future action. Instead of granting an explicit authorisation, the Security Council in the end merely decided to take action later and the reference to "all necessary means" was deleted in the final version. See H. Freudsenschuß, *Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council*, 5 EJIL 492, at 500 (1994).

23. S/RES/1137 of 12 November 1997, para. 8.

24. UN Doc. S/RES/678 of 29 November 1990, para. 2.

25. See *contra*, D.A. Leurdijk & R.C.R. Siekmann, *De Verenigde Naties en Irak* [The United Nations and Iraq], *Internationale Spectator*, at 8-12 (1998), and in *de Volkskrant* (23 February 1998).

18. UN Doc. S/RES/687 of 3 April 1991.

19. UN Doc. S/RES/707 of 15 August 1991.

20. UN Doc. S/RES/715 of 11 October 1991.

21. See, UN Doc. S/PV.3058 of 28 February 1992, the 3058th Meeting of the Security Council, 28 February 1992, Statement of the President on behalf of the Council; and UN Doc. S/24113 of 17 June 1992, Statement of the President on behalf of the Council following consultations held on 17 June 1992.

3.3.1. The purpose of the use of force in Resolution 678

Resolution 678 (1990) reveals that states co-operating with Kuwait are authorised to use force with a view to uphold and implement Resolution 660 and to restore international peace and security in the area. The aggression by Iraq and the occupation of Kuwait resulted in a violation of Article 2(4) of the UN Charter, to which the Security Council reacted by means of Resolution 660 (1990) and some subsequent resolutions. The primary purpose of Resolution 678 was to restore the sovereignty and territorial integrity of Kuwait after it had become clear that, despite all efforts by the United Nations, Iraq refused to adhere to its obligation to “comply fully with Resolution 660 (1990) and all subsequent relevant Resolutions” that demanded Iraq’s immediate and unconditional withdrawal from Kuwait.²⁶ The authorisation to use force, therefore, was not unlimited, but explicitly linked to the liberation of Kuwait.²⁷ The means necessary for liberating Kuwait were obvious: only military action was sufficient to get Iraq out of Kuwait. However, this does not imply that the scope of the authorisation to use force includes the enforcement of all resolutions that have been adopted after Resolution 678 and that are not related to the liberation of Kuwait.²⁸ As has been rightly observed:

[i]ndeed, the coalition did adopt a reasonable interpretation of Resolution 678 limiting the military action to the enforcement of Resolution 660 and other Resolutions of the Security Council aimed at securing the withdrawal of Iraq from Kuwait.²⁹

After all, Resolution 678 explicitly refers to the resolutions that had to be implemented by Iraq before 15 January 1991, in order to prevent the use of force by the international coalition.³⁰ Obviously, no reference could be made

to resolutions post-dating Resolution 678. The authorisation to use force was explicitly given to “Member States co-operating with the Government of Kuwait” with the explicit purpose of upholding and implementing Resolution 660 and subsequent “relevant Resolutions”.³¹ The reference to “relevant resolutions” is to the Resolutions mentioned in the preamble of Resolution 678, and not to any resolution to be adopted sometime in the future.³² This is confirmed by Resolution 686 (1991), in which the period of authorisation to use force appears to be linked to Iraq’s compliance of with demands related to its withdrawal from Kuwait and to its respect for the border between Kuwait and Iraq.³³ This is once more underlined by the fact that the authorisation was given to states co-operating with Kuwait. Hence, it is asserted that the reference to an implementation of “subsequent relevant Resolutions” in Resolution 678 cannot be said to encompass Resolution 687, or indeed any resolution adopted after Resolution 678 itself.

This, however, does not deny the existence of a link between Resolution 678 and Resolution 687, a link revealed by the necessity to establish the arms inspection regime in order to attain the second substantive objective mentioned in Resolution 678, *viz.* to restore (and secure) international peace and security in the area. Indeed, Resolution 707 (1991) refers to Resolution 687 as the Resolution “which established a cease-fire and provided the conditions essential to the restoration of peace and security in the region.”³⁴ As a consequence and in conformity with international law, the UN was able to impose an arms inspections regime on Iraq strongly limiting Iraq’s sovereignty because of the aggression displayed by it. Had this aggression not

after Resolution 660 and that are referred to in the preamble of Resolution 678 (661, 662, 664, 665, 666, 667, 669, 670, 674, and 677). These are the Resolutions that are recalled and reaffirmed by the Security Council.

31. UN Doc. S/RES/678 of 29 November 1990, para. 1.

32. See, e.g., S.A. Alexandrov, *Self-defence and the Use of Force* 270 (1997): “[i]t was clear that necessary means included the use of armed force to bring about Iraq’s withdrawal and compliance with the twelve resolutions adopted between August 2 and November 29, 1990.”; O. Schachter, *United Nations Law in the Gulf Conflict*, 85 AJIL 459 (1991): “[i]t was amply clear that necessary means included the use of armed force to bring about Iraq’s withdrawal and compliance with other provisions of the twelve resolutions adopted between August 2 and November 29.”; and, McCoubrey & White, *supra* note 16, at 131: “[i]t may [...] be noted that the Coalition action in the 1990-1991 Gulf Conflict [...], authorized by Resolution 678 [...], which set a deadline [...] after which ‘all necessary means’ [...] could be used to secure compliance with earlier Resolutions, was undertaken.” (emphasis added).

33. UN Doc. S/RES/686 of 2 March 1991, para. 4. According to Freudenschuß, *supra* note 22, at 499, this was to be interpreted as confining the coalition to the terms of the original authorisation granted under Resolution 678. See also, Schrijver, *supra* note 3, at 261, who noted with regard to Resolution 686, UN Doc. S/RES/686 of 2 March 1991: “Iraq had to notify the Secretary-General and the Council when it had taken the required actions; up to that moment the authorization to ‘use all necessary means’ contained in Resolution 678 (1991) would continue to apply” (emphasis added).

34. UN Doc. S/RES/707 of 15 August 1991, preamble.

26. UN Doc. S/RES/678 of 29 November 1990, para. 1.

27. Some authors question whether the purpose of strengthening international peace and security in the area is to be regarded as an ‘autonomous’ goal of Resolution 678 and assert that it is to be seen as a ‘general’ confirmation of the fact that action has to be carried out in line with the purposes and principles of the UN, as laid down in Arts. 1 and 2 of the UN Charter. See, e.g., Schrijver, *supra* note 3.

28. See *contra*, B.H. Weston, *Security Council 678 and the Persian Gulf Decision Making: Precarious Legitimacy*, 85 AJIL 516, at 526 (1991): “in Resolution 678, the Security Council gave the UN Members carte blanche vis-à-vis Iraq after January 15, including the waging of war or whatever terms and in whatever ways they might choose.”

29. H. McCoubrey & N.D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* 18 (1996).

30. See, UN Doc. S/RES/678 of 29 November 1990, paras. 1 and 2: “[The Security Council] Authorizes [...] to use all necessary means [...] unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions”. Para. 1 of Resolution 678 demands full compliance of Iraq with Resolution 660 (1990) and all subsequent resolutions. The latter part of this sentence can only relate to the Resolutions that were adopted

taken place, the position of Iraq would not have been much different from any other state not party to relevant arms control agreements.³⁵ In principle, these states enjoy freedom of behaviour with regard to their national armaments.³⁶

3.3.2. Resolution 678 and Chapter VII

Some authors who hold the view that the enforcement of the weapons inspection regime by military means would not require a new Security Council authorisation to use force, also point at a link between the Resolutions 678 and 687. Leurlijk and Siekmann, for example, assert that international peace and security in the area will only be restored after a full implementation of Resolution 687 and that therefore the authorisation to use force automatically extends to upholding the arms control regime.³⁷ They, however, do not recognise the fact that the imposition of the arms inspection regime was the means chosen by the Security Council to restore (and secure) international peace and security in the area. It is true that in the eyes of the Security Council after the Gulf War a situation has remained which forms a

threat to the international peace and security, even after the restoration of the territorial integrity of Kuwait. Hence, it is a situation which does not require a confirmation of the applicability of Chapter VII of the UN Charter on the basis of Article 39 of the Charter. In this respect, it is important to keep in mind the systematic, layered structure of Chapter VII of the UN Charter. After the determination of the existence of a threat to the peace,³⁸ the Security Council may decide on measures not involving the use of armed force (economic and/or political measures),³⁹ which may be followed by military measures should the *Security Council* consider that the previous measures would be inadequate or have proven to be inadequate.⁴⁰ The system of collective security as laid down in the UN Charter clearly does not grant an automatic right to use military force. The layered structure of Chapter VII is reflected in the reaction to the occupation of Kuwait. The adopted resolutions show that only after a formal determination of the existence of a breach of the peace had been made, and after non-military measures had been imposed on Iraq for several months, the Security Council decided on an authorisation to use military means for the limited purposes mentioned earlier.⁴¹

As said, by the adoption of a number of new resolutions, the Security Council repeatedly reacted to the violations of the provisions of Resolution 687 (1991). None of these resolutions, however, go beyond the condemnation of Iraq's behaviour and the issuing of a warning. For any further-reaching action a decision of the Security Council is needed, in which the Council decides on economic or military enforcement measures by way of reaction to these violations. The mere determination that a certain situation endangers international peace and security is an insufficient legal basis for military force; after all, depending on the situation, non-military measures may also be sufficient.

The question of whether a legal basis for military action against Iraq can be found in Resolution 678 (1990) with regard to the enforcement of the im-

35. Relevant agreements in this respect are the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction, Annexed to General Assembly Resolution 2826 (XXVI) of 16 December 1971 and the 1993 Convention on the Prohibition of the Development, Production and Stockpiling of Chemical Weapons and on Their Destruction Chemical Weapons Convention, 32 ILM 800 (1993). Iraq has not signed the CWC, but it is a party to the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods in Warfare, XCIV LNTS No. 2138, prohibiting the use of chemical and -bacteriological weapons in wartime. It signed the BWC, but has not yet ratified it. Furthermore, Iraq is a party to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, Annexed to UN General Assembly Resolution 2373 (XXII) of 12 June 1968. At this point it may be illustrative to point at the fact that the Geneva Protocol has no law enforcement system and that the BWC refers to the Security Council as the institution for supervision and enforcement. A reaction of the international community on the violation by Iraq of its obligations under these treaties would therefore have had consequences comparable to the actions of the Security Council in upholding and implementing the weapons inspection regime as laid down in Resolution 687 (1991). This also holds true for the enforcement by the IAEA on the basis of the NPT.

36. In the Nicaragua case, the International Court of Justice affirmed that no rules of international law exist related to a limitation of the level of armaments of sovereign states apart from the rules that have been accepted by the state involved. See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, 1986 ICJ Rep. 14, at 135. However, this can not prevent the Security Council from labelling certain weapons as forming a threat to the international peace and security. See, T. Marauhn, *The Implementation of Disarmament and Arms Control Obligations Imposed upon Iraq by the Security Council*, 52 ZaöRV 783 (1992).

37. See Leurlijk & Siekmann, *supra* note 2, 52 *Internationale Spectator* 208-212 (1998). The preventive nature of the measures based on Resolution 687 fall within the system of collective security as foreseen by the UN Charter. Art. 1(1) of the Charter mentions as one of the purposes of the UN "to take effective collective measures for the prevention and removal of threats to the peace." (emphasis added).

38. Or, according to Art. 39, "a breach of the peace, or an act of aggression". On the basis of Art. 40, the Security Council may decide on provisional measures. Both provisions were referred to in Resolution 660 (1990) of 2 August 1990, the day of the Iraqi invasion in Kuwait.

39. See Art. 41. In the case of Iraq, non-military sanctions were decided on in Resolution 661 (1990), 665 (1990), and 670 (1990).

40. See Art. 42. According to Alexandrov, *supra* note 32, at 273, such determination is explicitly required when force is authorised under the terms of Art. 42. This view is shared by Schrijver, *supra* note 3, at 262.

41. The determination on the basis of Art. 39 can be found in Resolution 660 (1990) of 2 August 1990. Economic sanctions, in the form of a trade and financial embargo were established by Resolution 661 (1990) of 6 August 1990 and subsequently complemented by Resolution 665 (1990) of 25 August 1990 (supervision of the implementation), and Resolution 670 (1990) of 25 September 1990 (air transport embargo). Only on 29 November 1990, these measures were followed by Resolution 678, which even allowed Iraq ("as a pause of goodwill") until 15 January 1991, to co-operate and to implement all earlier relevant resolutions.

plementation of the weapons inspection system is therefore to be answered in the negative.

The above analysis showed the existence of different opinions regarding the scope of Resolution 678. The confusion concerning the scope of the Resolution seems to be first and foremost caused by the terms used: an *authorisation* by the Security Council to use all necessary means.

3.4. The scope of Resolution 678: The meaning of an authorisation by the Security Council

The collective security mechanism of the UN originally included the formation of a UN army, consisting of armed forces and facilities contributed by the member states (Article 43 UN Charter). This Article, and the related subsequent provisions, have remained a dead letter. One consequence is that the Security Council cannot decide to 'take action' itself, as Article 42 seems to imply. Nevertheless, practice has shown the development of another option, according to which a 'coalition of the able and willing' may use military force on the basis of an authorisation given by the Security Council.⁴² However, this does not result in a fundamental differentiation between a *decision* to take action on the one hand, and an *authorisation* to take action, on the other hand.⁴³ The very essence of the system of collective security is the central regulation of the use of force in international relations. The Security Council is the institution deciding on questions of whether and when to use force, and it is also the one responsible for the manner in which this decision is taken. Hence, a 'carte blanche', by which the responsibility for the use of force is being transferred to the member states, is in sheer conflict with the system provided for in the Charter of the United Nations. Power and responsibility necessarily go hand in hand. The political character of the Security Council cannot release this organ from the observance of the treaty provisions established by the Charter when these constitute limitations on its powers, or criteria for its judgment.⁴⁴ The UN Security Council is itself a constitutional organ, i.e. one controlled or limited by a constitu-

42. See on the legality of an authorisation, e.g., N.M. Blokker, *Grenzen aan de macht (iging)? [Limits to the Authority (Authorisation)?]*, 33 NJB 1547-1533 (1997); and N.M. Blokker, *Is the Authorization Authorized? Towards More Control by the UN Security Council over Operations by 'Coalitions of the Able and Willing'*, unpublished paper (1998); N.D. White & Ö. Ülgen, *The Security Council and the Decentralised Military Option: Constitutionality and Function*, 44 NILR, 378-413 (1997); H. Freudenschuß, *supra* note 22; and H.O. Agarwal, *Legality of the Security Council Resolution 678 (1990)*, 29 Indian Journal of International Law 277-297 (1989).

43. See also, Weston, *supra* note 28, at 521, who puts the two terms on an equal footing: "The Security Council, in Resolution 678, made an *authorization* (or *decision*), not a *recommendation*."

44. Cf., Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion, 1948 ICJ Rep. 57, at 64. This case related to the interpretation of Art. 4 of the Charter.

tion: the UN Charter.⁴⁵ This underlines the fact that it can never have been the intention of the (indeed broadly formulated) provision in Resolution 678 to give an unconditional, unlimited, and unending authorisation to use military force.⁴⁶ Asserting the opposite would defy the Charter by eliminating the responsibility of the Security Council under the Charter and would lead to absurd situations, for instance, to the conclusion that UN member states would still be allowed to intervene in Korea on the basis of Resolution 83 (1950).⁴⁷

Regardless of the formulation chosen by the Security Council, it remains responsible for the use of force, which excludes the possibility of handing out blank cheques through which individual member states would be granted the power to judge whether or not the behaviour of another state is in line with Security Council resolutions and when the time for military action has come. It is clear that perceptions and opinions between member states can differ and that their ideas on what constitutes the 'necessary' reactions to deviant state behaviour are not always undisputed. It is exemplary that a majority of the members of the Security Council (including permanent members) in contrast to the United States view, did not consider Iraq's frustration of the arms inspections sufficiently serious to require military action.⁴⁸ The rules of the collective security system of the UN (with a veto for each permanent member) have to date, prevented a situation from occurring in which the Security Council could decide on the renewed use of 'all necessary means' against Iraq.

45. See on limitations on the power of the Security Council in general, T.D. Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers Under Chapter VII of the Charter*, 26 NYIL 33, at 70-72 (1995), where he identifies as limitations, *inter alia*, specific provisions contained in the Charter and fundamental principles referred to in the Charter.

46. Resolution 678 can be criticised in many ways. The rules on reporting to the Security Council are extremely weak: the states involved are requested "to keep the Security Council regularly informed on the progress of actions" (para. 4). See for a critical review of Resolution 678: Weston, *supra* note 28, at 527, who asserts that, despite the legally technical unrestricted character of Resolution 678, "from a perspective that values UN autonomy and authentic progress toward multilateral responsibility for world peace and security, especially the actual waging of war, it [the unrestricted character] cannot be said to have been legitimate."

47. UN Doc. S/RES/83 of 27 June 1950 provides: "[The Security Council] *Recommends* that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area". See on a legal comparison between the Korea and the Gulf Crises in general: Schrijver, *supra* note 3, at 255-266.

48. Russia, France, and China in particular preferred a peaceful solution and openly turned against the United States opinion that the existing resolutions formed a sufficient basis for the use of military force.

3.5. Military action and Resolution 1154 (1998)

The recent Resolution 1154 (1998) of 2 March 1998, in which the Memorandum of Understanding between the UN and Iraq is endorsed, confirms the absence of a legal basis for military action. The Resolution refers to "severest consequences" in case Iraq does not live up to the Agreement.⁴⁹ A number of Security Council members made it clear that this does not imply an automatic authorisation to use force.⁵⁰ On the contrary, the permanent members China and Russia had announced their veto should the Resolution contain the term 'all necessary means'. It was clear that the term 'severest consequences' was not to be seen as a synonym for 'all necessary means'. To stress this, even a reference to 'the severest consequences' did not make it to the final version of Resolution 1154. The conclusion should therefore be that Resolution 1154 cannot be seen as providing a legal basis for military action.⁵¹

3.6. A note on interpretation of Security Council Resolutions

The interpretation of Resolution 678 (1990) and/or Resolution 1154 (1998) advocated by the United States led coalition insists on a legal basis for unilateral military action. The interpretation favoured by most other UN Members does not. Comparable to the rules relating to the interpretation of treaties, Security Council resolutions should be interpreted in accordance with the ordinary meaning to be given to their terms in their context in the light of their object and purpose. This can be considered a general rule of interpretation.⁵² However, the *power* to interpret a Security Council resolution, a resolution being a decision of an organ of an international organisation, is arranged differently from the power to interpret a treaty. A well-known general principle of international law states: "*eius est interpretare legem cuius*

condere".⁵³ This means that as a principle, he who has the legal power to take a decision, also has the power to interpret this decision. In the case of Iraq, it is obvious that there has been no consensus (or decisive majority) in the Security Council on the interpretation of the meaning of Resolution 678 in conjunction with 687 or other resolutions (e.g. the wordings "severest consequences" in Resolution 1154) relative to the use of military force. It can be put forward that the United States is the permanent member which has contributed more of its military resources than any other UN member state for the restoration of the sovereignty of Kuwait. This, however, does not grant decisive weight to the interpretation of Security Council resolutions favoured by the US, let alone some kind of exclusive power of interpretation. As a consequence, the US cannot rely on its own interpretation so as to provide a solid legal basis for the unilateral use of force.

4. *NOTA BENE*: PROPORTIONALITY AND NECESSITY

In case the Security Council decides to adopt a new resolution⁵⁴ authorising member states to use force against Iraq, one additional aspect deserves our attention. Should force be used, either by way of (collective) self-defence, or within the framework of collective security, the principles of proportionality and necessity need to be heeded. Whenever the Security Council decides on military action, the necessity is implied. The proportionality, however, is not assured *a priori*. Hence, a reasonable balance has to be struck between the goal of a decision, on the one hand, and the means used to implement it, on the other hand.

The operation planned by the United States under the name *Desert Thunder*, aims at enforcing access to suspicious weapons inspection sites by means of a large scale air raid. One could seriously question the proportionality of this action, albeit that it is difficult to imagine any proportional use of military means in this respect.

49. See UN Doc. S/RES/1154 of 2 March 1998, para. 3: "[The Security Council] Stresses that compliance by the Government of Iraq with its obligations, repeated again in the memorandum of understanding, to accord immediate, unconditional and unrestricted access to the Special Commission and the IAEA in conformity with the relevant resolutions is necessary for the implementation of resolution 687 (1991), but that any violation would have severest consequences for Iraq."

50. See, e.g., No Authorisation for Use of Force, *CNN World News Special: Security Council Unanimously Endorses Annan's Deal*, 2 March 1998 (<http://cnn.com>) and 'VS behouden zich het recht voor tot militaire actie' [US reserves the right to take military action], *de Volkskrant*, 4 March 1998.

51. Or, as expressed by Secretary General Kofi Annan: "Washington did not win the automatic right to use force, as it has insisted", see *UN Sets Ground Rules in Iraq*, *International Herald Tribune*, 10 March 1998.

52. Cf., Art. 31 of the 1969 Vienna Convention on the Law of Treaties, 8 ILM 679 (1969).

53. *Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina)*, Advisory Opinion of 6 December 1923, 1923 PCIJ (Ser. B) No. 8, at 37. See V.D. Degan, *Sources of International Law* 54 (1997).

54. This is not entirely theoretical; in Resolution 1154 (1998), para. 5, the Security Council decides "to remain actively seized by the matter, in order to ensure implementation of this resolution, and to ensure peace and security in the area."

5. CONCLUDING OBSERVATIONS: THE PRAGMATISM OF MILITARY THREAT

Leurdijk and Siekmann rightly draw attention to the fact that the UN Charter not only forbids the use of armed force, but also the threat of force.⁵⁵ Hence, if military action against Iraq is not possible because of the lack of a necessary legal basis in resolutions of the Security Council, the same would hold for the threat of force. The display of power in the Gulf by the United States, supported by a (small) coalition, could therefore be seen as a violation of international law. The problem, however, lies in the difficulty to judge this threat 'objectively'. Moreover, the legal consequences of an illegal military threat are difficult to establish and in this respect there appear to be more questions than answers. Is the coalition led by the United States responsible *vis-à-vis* Iraq because of its presence in the Gulf? Are the coalition partners to withdraw from waters that do not fall under the authority of Iraq, just because the threat is obviously directed at Iraq? What exactly are the legal consequences of an illegal threat of force when a 'legitimate' aim is pursued? In short, it is hardly possible to qualify the consequences of an illegal threat in legal terms. From a pragmatic point of view the threat of force that took place in the Gulf was helpful in forcing a breakthrough in the stalemate situation that existed between Iraq and the UN (United States?).⁵⁶ The nasty aftertaste nevertheless caused by this operation, follows from the fact that non-proliferation is on top of the national security agenda of the United States.⁵⁷ In a world in which only one superpower is left,⁵⁸ a continuing guard against the identification of international law and national political interests is indispensable.

55. See Leurdijk & Siekmann, *supra* note 2, 52 *Internationale Spectator* 208-212 (1998).

56. *Cf.*, the comments on Art. 2(4) of the Charter in B. Simma (Ed.), *The Charter of the United Nations, A Commentary* 118 (1994), in which it is asserted that one of the reasons that threats of force are often tolerated is "that they play the role of a ritualized substitute for the use of armed force and, as such, may help to speed up the peaceful settlement of disputes".

57. *Cf.*, also the stronger terms of Weston, *supra* note 28, at 525: "[i]hus, the process by which the Security Council Resolution 678 was won, while perhaps legally correct *stricto sensu*, confirms how complete the power of the United States over the UN policing mechanism had become in the absence of Cold War opposition".

58. See M. van Rossem, *De Verenigde Staten 'An Indispensable Nation'? De enige overgebleven supermogendheid* [The United States 'an Indispensable Nation'? The Only Superpower Left], 52 *Internationale Spectator* 63-66 (1998). See also, Weston *supra* note 28, at 535, who refers to a "unipolar world of unbridled American power in which Washington will enforce its economic and strategic policies world-wide in whatever way it sees fit".