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## UNILATERAL ENFORCEMENT OF RESOLUTION 687: A THREAT TOO FAR?

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### I. INTRODUCTION

On February 23, 1998, Iraq agreed with the United Nations (UN) Secretary General in a Memorandum of Understanding<sup>1</sup> to accept Security Council Resolutions 687<sup>2</sup> and 715,<sup>3</sup> and agreed to cooperate fully with the United Nations Special Commission on the disarmament of Iraq (UNSCOM). The carrot offered to Saddam was the addition of diplomats to UNSCOM (labeled by the press “UNSCOM plus suits”)<sup>4</sup> and the prospect of sanctions being lifted with UNSCOM’s work being completed in a reasonable time. However, this article is more concerned with the “stick” that preceded the agreement, namely, the threat of devastating airstrikes if Iraq did not cooperate with UNSCOM. Those threats were made by the United States and the United Kingdom with the support, mostly political, of about twenty

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1. 37 I.L.M. 501 (1998).

2. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. at 8, U.N. Doc. S/RES/687 (1991).

3. S.C. Res. 715, U.N. SCOR, 46th Sess., 3012d mtg. at 2, U.N. Doc. S/RES/715 (1991).

4. Ed Vulliamy, *He Doesn't Want a War, Neither do They*, OBSERVER, Feb. 15, 1998, at 18.

States.<sup>5</sup>

The focus of this article will be the threats that preceded the February 1998 agreement, though in assessing the legal issues surrounding this crisis, reference will be made to earlier threats and uses of force against Iraq, as well as those that followed the February crisis, namely the threats made by the United States and the United Kingdom in November 1998, followed by the actual attacks against Iraq in December 1998. The February crisis remains crucial to an understanding of the legality of threats, given that on that occasion, the threat was not quickly followed by a use of force, thus making it possible to examine the threat in isolation from the more overpowering uses of force.

The legal basis of the threat of force against Iraq can be assessed on two levels. The first is whether the threat *prima facie* falls foul of the international legal prohibition of threats of force. If it does, then the second determination is whether there is a justification for the threat that saves it from illegality. In this context, such a justification would come in the form of authorization from the Security Council to issue the threats.

## II. A THREAT OF FORCE?

The prohibition on *threats* of force has been the neglected younger sibling of the more well-known (and discussed) prohibition on the *use* of force. When the Pact of Paris<sup>6</sup> was drafted, it seemed that the reason for the omission of an explicit prohibition of threats of war was due quite simply to the drafters not having considered it. It was left to subsequent practice to show that the parties intended to include it.<sup>7</sup> This oversight was not repeated by the drafters of the UN Charter who, in Article 2(4) remedied various shortcomings in the Pact of Paris prohibition. This included creating an express proscription of “the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”<sup>8</sup> This, of course, raises the question of what is prohibited. Before this can be discussed, however, a more fundamental challenge relating to the normative status of the prohibition must be met.

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5. See Ed Vulliamy & Patrick Wintour, *Saddam's Last Stand: They Both Blinked at the Brink of War*, OBSERVER, Feb. 22, 1998, at 9. Canada and Australia were the most vociferous in their support.

6. General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 94 L.N.T.S. 57 (1929).

7. See IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 89 (1963).

8. U.N. CHARTER, art. 2, para. 4.

### A. *The Status of the Prohibition of Threats of Force*

Notwithstanding the ban on threats of force having been enshrined in treaty law, it remains the case that occasions involving the threat of force are frequently less noted and commented upon than instances of the employment of force. As a commentator noted in 1994, “[t]hreat of force has received far less consideration in legal writings than the use of force.”<sup>9</sup> States also betray a “relatively high degree of tolerance towards mere threats of force.”<sup>10</sup> This is reflected in the practice of international organizations, such as the UN, where express condemnation of such threats has been rare.

When added to the general controversy relating to the normative status of Article 2(4),<sup>11</sup> this has led some commentators to claim that the rule in Article 2(4) relating to the threat of force no longer represents the law.<sup>12</sup> This is not the case and demonstrably so. In relation to the absence of condemnation for certain threats, Romana Sadurska makes much of this, claiming: “[i]t seems that as long as the threat of force does not jeopardize peace or lead to massive violations of human rights, international actors demonstrate varying degrees of approval or more or less reluctant tolerance for unilateral threats.”<sup>13</sup>

Bearing in mind that the rule is an existing treaty obligation, and, as the International Court of Justice (ICJ) noted, practice need not be “in absolutely rigorous conformity with the rule,”<sup>14</sup> there is a practice of States upholding the rule. Turkey was condemned in the UN for its threats in relation to Cyprus prior to its invasion in 1974.<sup>15</sup> The Council went further in 1986, condemning South Africa’s threats of aggression, and noting the urgent need to prevent further threats of force by South Africa.<sup>16</sup> At the unilateral level, in 1969, the United Kingdom complained to the UN Secretary General of a threat of force by Spain in relation to Gibraltar.<sup>17</sup> Other examples of condemnation by individual States include Argentina asserting that the United Kingdom’s exclusion zone around the Falkland Islands after the armed conflict of 1982 was an unlawful military threat.<sup>18</sup> More recently, in 1994, the

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9. Albrecht Randzelhofer, *Article 2(4)*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 106, 118 (Bruno Simma ed., 1994).

10. *Id.*

11. See generally Thomas M. Franck, *Who Killed Article 2(4) or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT’L L. 809 (1970). *Contra* Louis Henkin, *Reports of the Death of Art. 2(4) are Greatly Exaggerated*, 65 AM. J. INT’L L. 544 (1971).

12. See Romana Sadurska, *Threats of Force*, 82 AM. J. INT’L L. 239, 239-40 (1988).

13. *Id.* at 250.

14. *Case Concerning Military and Paramilitary Actions in and Against Nicaragua*, (Nicar. v. U.S.) 1986 I.C.J. 14, 98 (June 27) [hereinafter *Nicaragua*].

15. See HILAIRE MCCOUBREY & NIGEL D. WHITE, *INTERNATIONAL LAW AND ARMED CONFLICT* 56-58 (1992).

16. See S.C. Res. 581, U.N. SCOR, 41st Sess., 2662d mtg. at 1, U.N. Doc. S/RES/581 (1986).

17. See MCCOUBREY & WHITE, *supra* note 15, at 58.

United Kingdom stated to the Security Council that it considered Iraqi deployment of weapons and tanks at the Kuwaiti border to be a "threat to Kuwait and a breach of the provisions of the Charter."<sup>19</sup> It would seem States, while often remiss, are not entirely averse to invoking the Charter prohibition.

It is true, however, that deficiency of condemnation is an unfortunate fact of international relations in the post-Charter era, but it is over-simplistic to equate this with a change in the law. For a new customary norm to have emerged, absence of condemnation itself is not enough. There must also be an intention for that failure to condemn to amount to an acceptance of the legality of the threat or an alteration of the pre-existing law, in other words, *opinio juris*.<sup>20</sup> This has been conspicuous by its absence. Reluctant tolerance does not evidence *opinio juris*.

There are reasons other than apathy and simple Cold War politics<sup>21</sup> leading to a lack of condemnation of many threats. First, a threat of force is frequently followed by the actual use of force, which subsumes it, leaving any appraisal to be based on that use of force rather than the preliminary threat. To compare, in municipal law, when a charge of unlawful wounding is laid against a person, an additional charge of assault is not considered necessary. There is no reason for the international system to differ here.

Second, if a threat of force is not followed up by action, "individual States may condemn the threat, but generally the collective sigh of relief that actual force has not been used, or sheer indifference if the threat is of a minor sort and relates to two States, outweighs any desire to condemn the threat."<sup>22</sup> Threats of force, if left unfulfilled, are not urgent, and States, rather than re-opening a debate not directly affecting them, maintain a discrete silence. This does not evidence any wish to change the law relating to threats, merely a wish to avoid drawing themselves into a dying controversy. Additionally, a threat of force is more inchoate than actual use of force.<sup>23</sup> This makes it more difficult for States to be certain of the perceptions of the parties, thus States tend to be prudently noncommittal, rather than be perceived as interfering or taking sides.

Removed from the politics and pragmatics of individual cases, States are happy to abstractly reaffirm the rule without caveat. For example, General Assembly Resolution 2625 includes the passage "such a threat or use of

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18. See Sadurska, *supra* note 12, at 261.

19. U.N. SCOR, 48th Sess., 3431st mtg. at 11-12, U.N. Doc. S/PV 3431 (1994).

20. "The *opinio juris*, or belief that a state activity is legally obligatory, is the factor which turns the usage into a custom and renders it part of the rules of international law. To put it slightly differently, states will behave a certain way because they are convinced it is binding upon them to do so." MALCOLM N. SHAW, *INTERNATIONAL LAW* 67 (4th ed. 1997).

21. The Cold War certainly was a very large inhibitor of States when it came to legal appraisal of other countries' actions.

22. MCCOUBREY & WHITE, *supra* note 15, at 58.

23. A threat of force need not be explicit. See *infra* Part II.C.1.

force constitutes a violation of international law and the Charter of the United Nations, and shall never be employed as a means of settling international issues.”<sup>24</sup> In addition, General Assembly Resolutions 290,<sup>25</sup> 2734,<sup>26</sup> 42/22,<sup>27</sup> and 43/51<sup>28</sup> all support the prohibition of threats of force as formulated in the Charter. Outside the UN, the Helsinki Final Act,<sup>29</sup> the Pact of Bogota,<sup>30</sup> and Article 301 of UNCLOS<sup>31</sup> all support the rule. The rule has been reaffirmed many times at the general level by States, most particularly in the General Assembly. Of course, such resolutions are not, *per se*, sources of law. However, “even if they are not binding, [they] may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.”<sup>32</sup>

The evidence of such resolutions led the ICJ in 1986 to unambiguously uphold as customary Article 2(4) in its entirety.<sup>33</sup> Indeed, it was stated that it was a rule attaining the status of *jus cogens*.<sup>34</sup> If any further evidence was required, the Court provided it in 1996 in *Nuclear Weapons*, where it decided that “a threat or use of force” that is contrary to Article 2 paragraph 4 of the United Nations Charter and that fails to meet all the requirements of Article 51 is unlawful.”<sup>35</sup> While some parts of this case were subject to great controversy and were the subject of vitriolic dissents from some judges, this aspect

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24. *Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 12, U.N. Doc. A/8028 (1970).

25. *1949 Declaration on the Essentials of Peace*, G.A. Res. 290, U.N. GAOR, 4th Sess., at 293, U.N. Doc 1251 (1949).

26. *1970 Declaration on the Strengthening of International Security*, G.A. Res. 2734, U.N. GAOR, 25th Sess., Supp. No. 28, at 22, U.N. Doc. A/8028 (1970).

27. *1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, G.A. Res. 42/22, U.N. GAOR, 42nd Sess., Supp. No. 49, at 287, U.N. Doc. A/42/49 (1987).

28. *1988 Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field*, G.A. Res. 43/51, U.N. GAOR, 43rd Sess., Supp. No. 49, at 276, U.N. Doc. A/43/49 (1988).

29. 14 I.L.M. 1292 (1975).

30. 1948 Inter-American Treaty on the Pacific Settlement of Disputes, Apr. 30, 1948, 30 U.N.T.S. 55.

31. See Third United Nations Conference on the Law of the Sea: Final Act, Dec. 10, 1982, 21 I.L.M. 1261 (1982).

32. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, July 8, 1996, 35 I.L.M. 809, 825 (1996) [hereinafter *Nuclear Weapons*].

33. See *Nicaragua*, 1986 I.C.J. at 98-101.

34. *Id.* at 100. See YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENSE* 101-06 (2d ed. 1994). *Jus cogens* is defined as a “peremptory norm of general international law. . . . [A] peremptory norm of general international law is a norm accepted and recogni[z]ed by the international community of States as a whole as a norm from which no derogation is permitted.” Article 53, Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331.

35. See *Nuclear Weapons*, *supra* note 32, at 831.

of the case was decided unanimously, and indeed, was considered by one of the dissenters to be an “anodyne asseveration of the obvious.”<sup>36</sup> If this is the case, it cannot be doubted that the prohibition of threats of force is still present and is as formulated in Article 2(4). It is important to note, also, that States have never dissented from this view.

### *B. De Lege Ferenda?*

Having determined that Article 2(4) represents the current law on the subject, it is also instructive to examine the thesis that the law should be moving away from the Article 2(4) model to allow some threats prohibited by Article 2(4). Sadurska<sup>37</sup> offers various policy arguments for the acceptance of certain threats as legitimate.

#### *1. Collective Security*

The first of these, is that due to the failure of the coercive functions of the UN system, the right to issue unilateral threats of force should be available to provide a sanction for violations of international law.<sup>38</sup> There are various problems with this view. First, the Security Council was not intended to be a coercive enforcer of all international law, it was intended to respond to threats to international peace and security. Second, the denial of a right to threaten force does not leave a State helpless against a violation of international law; there are many other methods of seeking redress, such as non-forcible reprisals or acts of retorsion.<sup>39</sup> Third, such a position lacks support either in the text of the Charter or in the interpretation States have given. In relation to the Charter, there is no mention of this linkage and the two parts of the Charter, namely the principles upon which the United Nations is based<sup>40</sup> and the collective security powers delegated to the Security Council in particular,<sup>41</sup> are clearly separate. Indeed, one of the major improvements made by the Charter over the Covenant of the League of Nations<sup>42</sup> was the severance of prohibitions on force from the collective security system. In relation to States’ adoption of this position, the only attempt

36. *Id.* at 842 (Vice President Schwebel, dissenting).

37. See Sadurska, *supra* note 12, at 246-51. It must be noted that she views them as supporting, *de lege lata*, a widened conception of the legality of threats, a position not adopted here.

38. See *id.*

39. Retorsion is “retaliation by a state against discourteous or inequitable acts of another state, such retaliation taking the form of unfriendly legitimate acts within the competence of the state whose dignity has been affronted.” I.A. SHEARER, *STARKE’S INTERNATIONAL LAW* 471 (11th ed. 1994).

40. U.N. CHARTER art. 2, para. 4.

41. U.N. CHARTER arts. 33-38, 39-51.

42. Covenant of the League of Nations, Apr. 28, 1919, *League of Nations Official Journal* 3 (1920).

to plead for a right of self-help of this nature was by the United Kingdom in the case involving the Corfu Channel.<sup>43</sup> Sadurska takes the view that this case accepts that a threat of force may be legal if it is to vindicate a right unjustly denied.<sup>44</sup> This is based on the fact that the United Kingdom threatened to return fire from ships if those ships were fired upon. The court's response to this was "ambigu[ous]:"<sup>45</sup> "the legality of this measure cannot be disputed, provided that it was carried out in a manner consistent with the requirements of international law. The 'mission' was designed to affirm a right which had been unjustly denied."<sup>46</sup>

Sadurska's interpretation sits ill with the court's condemnation of all measures of self-help involving force. Later in the same judgment, the court clearly rejected the idea that the failure of the collective security system of the UN led to any alteration in the status of Article 2(4).<sup>47</sup> It is submitted that a more convincing interpretation would reconcile the two parts of the judgment. Such an interpretation can be reached if it is realized that Article 2(4) does not prohibit threats of force in circumstances where the use of the threatened force would not violate the Charter (i.e., a threat to use force in self defense). The United Kingdom's threat was to fire back at Albanian installations firing on United Kingdom ships. This was a threat to act in self-defense, which is not prohibited by the Charter, and was thus "carried out in a manner consistent with international law."<sup>48</sup>

## 2. *An Aid to Non-Forcible Settlement?*

The second justification for certain threats advanced by Sadurska is that a threat of force may speed up a non-forcible solution to the dispute.<sup>49</sup> This is insufficient to justify a threat of force. First, as one commentator points out, the threat of force makes it a non-peaceful settlement anyway.<sup>50</sup> Second, a credible threat of force is very likely to alter the bargaining power of any target State, thus coercing it into accepting a result which may be (or is perceived to be) inequitable. As a result, the threat may fail to settle the dispute in the long run. Furthermore, suspension of a dispute by threats may sow the seeds of later escalation.<sup>51</sup> Related to this is the inherent possibility of abuse. For example, an attempt to coerce Kuwait into accepting Iraqi demands in

43. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 27 (Apr. 9) [hereinafter Corfu Channel].

44. See Sadurska, *supra* note 12, at 264.

45. *Id.*

46. Corfu Channel, 1949 I.C.J. at 30.

47. See MCCOUBREY & WHITE, *supra* note 15, at 25-26. See also Nicaragua, 1986 I.C.J. at 100.

48. Corfu Channel, 1949 I.C.J. at 30.

49. See Sadurska, *supra* note 12, at 246.

50. See CONSTANTINE ANTONOPOULOS, THE UNILATERAL USE OF FORCE BY STATES IN INTERNATIONAL LAW 100 (1997).

51. See *id.*

1990 was made during negotiations between the two States. Iraq amassed forces on the border prior to issuing Kuwait a list of demands. Actions such as this are not to be encouraged. The possibility of abuse here is one reason for the rule in the law of treaties that an agreement brought about by a threat of force is void.<sup>52</sup> This bolsters the case against such threats settling disputes as they vitiate any agreement reached. A threat of force is also likely to cause tension between the two States. That is hardly conducive to peaceful settlement; it is at least as likely to cause an entrenchment of positions.

Lastly, assuming, *arguendo*, that a threat can be used by a *bona fide* party to attempt to spur peaceful settlement, the risks involved are far more than a counterbalance to any possible benefits. A threat of force is as liable to escalate the dispute as much as it may defuse a situation. “[T]he use of threats as a form of coercion clearly runs counter to the maintenance of international peace and security since threats have a tendency to escalate into the actual use of force.”<sup>53</sup> It is possible that a threat could be misinterpreted as the direct precursor to an attack, causing a use of force by the threatened State, or causing a reciprocal threat of force, which could lead to a downward spiral towards violence.

### 3. As a Substitute for Armed Force

The final justification Sadurska offers for accepting the legality of threats of force is that the threat of force plays the role of a ritualized substitute for violence. The aggressive drive is satisfied by the adoption of deterrent postures, displays of might, and threatening communications. Thus, the threat of force, far from precipitating fighting, may be an effective mechanism for dissuading international actors from using violence.<sup>54</sup>

Sadurska further states that many such displays are often merely for the domestic, as opposed to the international, audience.<sup>55</sup> Again, this cannot provide a convincing reason for accepting threats of force as legitimate. It must not be forgotten that when force is threatened, the stakes are high. As Sadurska recognizes, “the substitution of threats for violence is only possible if the actors, first properly interpret the adversary’s communications and, second, accept the most fundamental rule of this ritual: restrain themselves from overstepping the line between verbal conflict and armed hostilities. Both requirements are difficult.”<sup>56</sup>

This understates the point as misinterpretation is easy, and States look-

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52. See Article 52, Vienna Convention on the Law of Treaties, May 23, 1969, art. 52, 1155 U.N.T.S. 331 [hereinafter Article 52]. As noted in *Fisheries Jurisdiction* (U.K. v. Ice.) 1973 I.C.J. 3, 14 (Feb. 2), this provision represents customary international law.

53. LYAL S. SUNGA, *THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW* 59 (1997).

54. See Sadurska, *supra* note 12, at 246-47.

55. See *id.* at 247.

56. *Id.*

ing for a pretext for intervention could easily “misinterpret” any such threat to their own ends. Additionally, it must not be forgotten that such threats take place when there is a dispute, and thus tension, between States. It is precisely in this situation that mutual acceptance of unwritten codes of honor relating to threats such as those described cannot be guaranteed. Most importantly, however, the possibility of threats dissipating aggressive instinct in States is hypothetical; there is a track record of threats of force snowballing into actual uses of force. One possible reason for this is pride. Once a State has threatened to use force, to fail to do so, if it remains unsatisfied, could be seen as embarrassing, thus making a climbdown from the threat impolitic (particularly at home). Far from dissipating aggression, threats may well cause it. Inter-State force is not trivial enough to leave its prevention to untested psychology.

As a result of the foregoing, the only conclusion can be that the prohibition of threats of force, as formulated in Article 2(4) is the *de lege lata*,<sup>57</sup> but also that any weakening of the prohibition cannot be considered *de lege ferenda*.<sup>58</sup> Threats of force are too disruptive, dangerous, and open to abuse for their legality to be attractive as a future development in the law.

### C. What Does Article 2(4) Prohibit?

Having determined that Article 2(4) remains the law relating to threats of force, the question naturally arises as to what types of threats it outlaws. As described above, this feature of Article 2(4) has been rather neglected in the literature, and the major decision of the ICJ on the threat of force, the *Nuclear Weapons* opinion,<sup>59</sup> “did not go very far into this question.”<sup>60</sup> However, this does not mean that there is no guidance to be gained from what literature and caselaw there is on the subject. Certain limits can be ascertained.

The classic definition of a threat of force remains that of Ian Brownlie:

A threat of force consists in an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government. If the promise to resort to force in conditions for which no justification for the use of force exists, the threat itself is illegal.<sup>61</sup>

57. The law as it is. See IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* xlvii (5th ed. 1998).

58. The “law as it should be if the rules were changed to accord with good policy.” *Id.*

59. See *Nuclear Weapons*, 35 I.L.M. 825.

60. See Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AM. J. INT’L L. 417, 431 (1997). This is true of both the majority opinion and the dissents. Judge Schwebel, for example, having taken great pains to present the facts of a United States threat in 1991, presents an entirely conclusory and unreasoned decision that the threat was lawful. See *Nuclear Weapons*, 35 I.L.M. at 840-42 (Vice President Schwebel, dissenting).

61. See BROWNIE, *supra* note 7, at 364.

To this, it is worthwhile adding that “the statement of intention to use force must be viewed against the background of the relations between both States with regard to a specific dispute and in the light of the facts surrounding the articulation of the threat.”<sup>62</sup> It is also instructive to look at the definition of a threat of aggression enumerated for the International Law Commission (ILC) Code of Crimes Against the Peace and Security of Mankind (ILC Code).<sup>63</sup> While this provision was dropped in the 1996 ILC Code, it is of some help outside that sphere, particularly as the ILC based itself on Article 2(4),<sup>64</sup> General Assembly Resolutions 2625<sup>65</sup> and 42/22,<sup>66</sup> and *Nicaragua*.<sup>67</sup> Article 16 of the ILC Code makes criminal threats of aggression, defined in Article 16(2) as “declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State.”<sup>68</sup>

### 1. *Implicit and Explicit Threats*

While the classic threat of force is the ultimatum, such as that issued by the United Kingdom and France in the Suez crisis,<sup>69</sup> it is clear that actions may speak at least as loudly as words here. For example, Iraq’s massing of forces and weaponry at the Kuwaiti border in 1994 was understood to be a threat of force by the United Kingdom. The same may be said for its massing of troops on July 31, 1990. Other actions that have been accepted as implying a threat of force include the passage of warships in strength, military aircraft violating airspace,<sup>70</sup> providing rebels or insurgents with weapons or logistical support,<sup>71</sup> and the imposition of a blockade. Though the stockpiling and deployment of mainly nuclear weapons and the policy of deterrence has been controversial, the ICJ refused to decide if it was illegal.<sup>72</sup> However, this

62. ANTONOPOULOS, *supra* note 50, at 100-01.

63. *Report of the International Law Commission on the Work of its Forty-First Session*, U.N. GAOR 44th Sess., Supp. 10, at 180, U.N. Doc. A/44/10, 180 (1989) [hereinafter ILC 1989 REPORT].

64. *Id.*

65. G.A. Res. 2625, *supra* note 24.

66. *See* Nuclear Weapons, 35 I.L.M. at 825.

67. *Nicaragua*, 1986 I.C.J. at 98.

68. ILC 1989 Report, *supra* note 63, at 180.

69. *See* D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 843, 864 (5th ed. 1998). The ultimatum issued was a threat to use force unless Israel and Egypt declared a cease-fire.

70. *See* BROWNLIE, *supra* note 7, at 148.

71. ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 248 (1995).

72. *See* Nuclear Weapons, 35 I.L.M. at 823. In the dissenting opinions, different conclusions were reached on deterrence’s legality. *See id.* at 836-37, 914 (Vice President Schwebel, dissenting; Judge Weeramantry, dissenting. Schwebel supported the legality of the policy, Weeramantry considered it illegal).

is related to the legality of the threat, not the proposition that “in that deployment inheres a threat of possible use.”<sup>73</sup>

While an express threat of force is less likely to be equivocal, a State acting in good faith or otherwise could see threats in innocuous actions, or actions which other States fail to consider as implying any threat. As a result, the test for a threat of force must not be a purely subjective one. This was recognized in the debate preceding the adoption of General Assembly Resolution 2625 by the representative of Chile who stated that a threat is “any action . . . which tends to produce in the other State a justified fear.”<sup>74</sup> This was elaborated upon by the ILC in 1989, stating that the existence of a threat “does not depend on the subjective appraisal by the State which feels threatened, but on objective elements capable of verification by an impartial third party.”<sup>75</sup> Further, support for this position may be gained from *Nicaragua*, as the court rejected a Nicaraguan contention that joint American/Honduran military maneuvers represented a threat on the facts of the case.<sup>76</sup> This demonstrates that a target States’ appraisal is not determinative.<sup>77</sup> That the threatening or threatened State’s views are not conclusive must be the case. Otherwise, responsibility could exist for almost any statement, irrespective of content, or a State could claim that it had never intended its words or actions to threaten when that was the clear effect.

Another commentator, Belatchew Asrat,<sup>78</sup> canvasses the idea that for a threat to be illegal there must be immediacy, i.e., the threat must be to use force in the near future.<sup>79</sup> Immediacy may be good evidence of a real threat. However, as this would exclude the illegality of, for example, a threat to take territory forcibly at a later, but specified point; it would be too restrictive to see immediacy as an essential component. The same may well apply to the requirement claimed by Brownlie that, for a threat of force to be illegal, there must be an attempt to coerce a State into, or out of, an action or policy.<sup>80</sup> In other words, there must be demands that must be met to prevent the threat being transformed into a use of force. This is possibly supported by *Nicaragua*, as the court declared “a ‘threat of force’ derives its wrongful and unlawful character from the element of coercion which must be established.”<sup>81</sup> It is also true that most threats of force will be contingent on certain demands, however, the requirement for this as a *sine qua non* for an unlawful threat of force has no basis in Article 2(4) itself. It would also exclude

73. *Id.* at 836.

74. U.N. GAOR 21st Sess., Annexes, U.N. Doc. A/AC 125/L23 (1966).

75. ILC 1989 Report, *supra* note 63, at 181.

76. *Nicaragua*, 1986 I.C.J. at 98.

77. See ANTONOPOULOS, *supra* note 50, at 100.

78. BELATCHEW ASRAT, PROHIBITION OF FORCE UNDER THE UN CHARTER: A STUDY OF ART. 2(4) 140 (1991).

79. See *id.* at 140.

80. See BROWNLIE, *supra* note 7, at 364.

81. *Nicaragua*, 1986 I.C.J. at 108.

the illegality of future, but non-contingent, invasion. While in some cases, threats without demands may be mere rhetorical saber-rattling, it is not impossible to imagine a situation where a State, for example, was to threaten to launch a nuclear attack as soon as it had such capacity. The legality of such threats should not be presumed *ab initio*. Again, demands are certainly very strong evidence of a threat, but they are not the only evidence from which such a threat can be determined.

## 2. Threats of Illegal Uses of Force

The final, and perhaps most important, criterion for the illegality of a threat of force is its linkage to the legality of the putative use of force threatened. The ICJ was clear (and unanimous) in *Nuclear Weapons* where it stated:

The notions of “threat” and “use” of force under Article 2 paragraph 4 of the Charter stand together in the sense that if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal. . . . [N]o State . . . suggested to the court that it would be lawful to threaten to use force if the use of force contemplated would be illegal. Whether this [deterrence] is a “threat” contrary to Article 2 paragraph 4 depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the purposes and principles of the United Nations or whether, in the event that it were intended as a means of defense, it would necessarily violate the principles of necessity and proportionality.<sup>82</sup>

There is no reason to believe that the conditions relating to justification of a threat of force differ from those of the use of force. Article 2(4) itself creates no such distinction, prohibiting the “threat or use of force”<sup>83</sup> without separating their conditions. Dino Kritsiotis, citing Sadurska, however, considers this aspect of the judgment to be “an unjustifiable, certainly an unjustified, lowering of the threshold.”<sup>84</sup> Nevertheless, the court supported itself by claiming that no State dissented from this position.<sup>85</sup> The ICJ is correct, as discussed above; Sadurska’s approach is far wider than the position adopted by States.

This criteria probably is what saves the policy of deterrence from illegality. The inherent threat of that policy is to use nuclear weapons in accordance with Article 51.<sup>86</sup> This also shows the legality of the Coalition<sup>87</sup> build-

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82. See *Nuclear Weapons*, *supra* note 32, at 823. The quote is from the (controversial) majority opinion, however, it is clear that the dissenting judges agreed. This may be inferred from the unanimous vote for para. 2C.

83. U.N. CHARTER, art. 2, para. 4.

84. Dino Kritsiotis, *The Fate of Nuclear Weapons in the Aftermath of the 1996 Advisory Opinions of the World Court*, 1 J. ARMED CONFLICT L. 95, 103-04 (1996).

85. See *Nuclear Weapons*, *supra* note 32, at 823.

86. U.N. CHARTER art. 51 preserves the rights of a state to act individually or collectively in concert with its allies in self-defense in response to an armed attack against it.

up of forces on the Iraq-Saudi Arabia border in 1990. Clearly, in this build up inhered a threat to use force. However, the inherent threat was justified as the force was clearly to be employed only in the defense of Saudi Arabia or, later, under Security Council authorization.

#### D. The Legality of the Threats Against Iraq

In order to determine the legality of the various threats, certain features of the threats themselves and their context are relevant: the context of the events; the motivation of the parties; the threats themselves; and the reaction of the international community. All this evidence must be examined before ascertaining the existence of a threat of armed force. This is to be contrasted with "mere passing verbal excesses."<sup>88</sup> As discussed above, the threat must relate to an illegal use of force, thus one which was not issued under Chapter VII<sup>89</sup> authority or in accordance with Article 51.

##### 1. History of Relations Inter Partes

The relations between the parties involved here, the United States, United Kingdom, and Iraq, are hostile. The United States and United Kingdom were both leading members of the Coalition that (correctly, and with full legal authority) ejected Iraq from Kuwait in 1991. Unsurprisingly, this, and the continuing sanctions, disarmament, and compensation regimes imposed by the Security Council with the United States and United Kingdom to the fore, have led to deep resentment and hostility on the part of Iraq. The United States, in particular, has remained unimpressed by Iraq, taking a lead role in international condemnation of Iraq for any of its frequent violations of Resolution 687.<sup>90</sup> Most relevant for our purposes, however, is the fact that the major actor in this instance (the United States) has, in the post-Gulf conflict era, used force against Iraq.<sup>91</sup> This has been in alleged self-defense,<sup>92</sup> in the protection of safe havens,<sup>93</sup> and very importantly, for the enforcement of

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87. The Coalition of States came together on an *ad hoc* basis to respond to the Iraqi aggression against Kuwait. The nucleus of this Coalition was formed by the United States and the United Kingdom to defend Kuwait and to oust Iraq from Kuwait in an action in collective self-defense. This later became a UN authorized operation, as will be seen *infra* Part III.B. By the time the Coalition launched its ground offensive against Iraq in February 1991, the Coalition stood at twenty-nine States. See MCCOUBREY & WHITE, *supra* note 15, at 149.

88. ILC 1989 Report, *supra* note 63, at 181.

89. Chapter VII of the U.N. Charter provides for action with respect to threats to the peace, breaches of the peace, and acts of aggression. See U.N. CHARTER arts. 39-51.

90. U.N. SCOR, 46th Sess., 2981st mtg. at 7, U.N. Doc. S/PV 2981 (1991). For a detailed discussion of the relevant provisions of Resolution 687, see *infra* Part III.

91. See *infra* Part III.A.

92. See *infra* Part III.A.1.

93. See *infra* Part III.A.2.

Security Council Resolution 687.<sup>94</sup> So it seems that the actors here have shown a penchant for the use of force against this country, for reasons very similar to those advanced in the demands in February 1998, namely that Iraq comply with Resolution 687.<sup>95</sup>

On the other hand, there have been various threats against Iraq by the United States and the United Kingdom that have not materialized into the use of force. It could be thought, therefore, that it is not reasonable to consider any such threat as serious. This cannot be. Most of the threats were not transformed into uses of force as a negotiated solution was reached.<sup>96</sup> The lack of actual force was not because there was any lack of will to carry out the threat by the countries concerned. These countries have shown they were willing to use force, unilaterally if necessary. Thus, if an unequivocal threat were to have arisen, it would be clear that the Iraqi government and the world community would be entitled to treat it seriously.

## 2. *The Threats and Their Circumstances*

### a. *The First Wave*

The first action leading up to the crisis in February 1998 was the United States' and the United Kingdom's sudden increase in firepower in the Gulf area in November 1997. In itself, a large increase in capacity for armed force in an area may carry with it an implicit threat of force. After all, sending troops and *matériel* to far-flung corners of the world costs more than bellicose rhetoric, and, to facilitate a military strike, such armaments are required to be in place. However, the movement of armaments, or even military exercises, may not reasonably be seen by a government as a threat of force against it. Here, however, additional elements transforming their actions into threats of force may have been present.

First, relations between the parties were very bad, and it was clear that this was a time of great tension. Nevertheless, the ICJ previously rejected the Nicaraguan contention that military exercises by the United States, at a time when relations between them were hardly convivial, amounted to a threat of force.<sup>97</sup> Again, perhaps more would be required. In addition to the state of their relations, at the time of the deployment, the United States began taking soundings from its Arab allies on whether they would support the United States in any airstrikes.<sup>98</sup> While support was not overly forthcoming, the fact

94. See *infra* Part III.A.3.

95. These demands were repeated in November 1998, and actual bombings took place in December 1998 after further Iraqi recalcitrance. See *infra* Part III.A.3.

96. See Ed Vulliamy, *Showdown With Iraq: Saddam Blinks First as the Bombers Take Aim. The Face-Off: US Intent on Making Him Surrender*, OBSERVER, Nov. 15, 1998, at 9.

97. See *Nicaragua*, 1986 I.C.J. at 98.

98. See *Iraq: UNSCOM Crisis*, 43 KEESING'S RECORD OF WORLD EVENTS 41 938 (Nov. 1997) [hereinafter *Iraq: UNSCOM Crisis 1997*].

that the United States was seeking such support itself could be seen to imply that the United States was seriously considering the use of force against Iraq.

Possible further evidence may be gleaned from whether the threat is accompanied by demands, and whether the threat relates to an imminent use of force or not. As discussed above, some commentators consider there to be a requirement that there are particular demands issued with the threat that must be fulfilled to prevent the use of force.<sup>99</sup> This is not necessarily the case. The correct position is that demands are excellent evidence of a real threat. In this instance, it would seem that even if demands are a *sine qua non* of a threat of force, not merely good evidence of an objective threat, this condition is satisfied. The threats involved in this crisis contained, either explicitly or otherwise, demands that Iraq comply with Resolution 687 and UNSCOM. This was their clear purpose. In November 1997, when the United States increased its naval and air warfare capacities in the Gulf, it was in the context of the row over UNSCOM. When President Clinton sent the *George Washington* to the Gulf, he did so in response to Iraq's demands that American members of UNSCOM leave Iraq, a demand Clinton described as "clearly unacceptable."<sup>100</sup> Later, on November 20, while explaining his decision to send more military aircraft, he stated that the United States was "resolute" that Iraq comply with the resolutions and allow UNSCOM unimpeded access to the "presidential palaces."<sup>101</sup> It seemed clear, the United States (and the United Kingdom) were demanding Iraq alter its behavior in response to their demands.

It is in relation to the issue of immediacy that there is a possibility of salvation for these early threats, for, although the threats seem to have been made, the possibility of them being carried out in the very near future could be questioned. As discussed above, the requirement of an imminent use of force is not dispositive, but it does provide good evidence that armed force is being seriously contemplated against a State. For example, the actions in attempting to cultivate consent could be read as relating only to very preliminary preparations for a much later date. On the other hand, evidence the other way could be implied, for having brought their forces there in advance, the United States and the United Kingdom were planning an early strike.

Further evidence of the presence of a real threat of force can be gleaned from the reaction of other States to these actions. Two States expressed their opposition in the Security Council. In a meeting on November 12, 1997, both seemed to imply that they already considered a threat of force to have taken place. The Russian delegate warned against action outside the auspices of the UN, "particularly, actions involving force or the threat of force, [which] could nullify all our achievements."<sup>102</sup> The Chinese delegate stated

99. See BROWNIE, *supra* note 7, at 364.

100. *Iraq: UNSCOM Crisis 1997*, *supra* note 98, at 938.

101. *Id.*

102. U.N. SCOR, 52d Sess., 3831st mtg. at 13-14, U.N. Doc. S/PV 3831 (1997).

his country's position very clearly: "[w]e are opposed to the use or threat of force or any actions that might further exacerbate tensions."<sup>103</sup> While neither country expressly condemned or referred to any particular threat, their comments made clear that they did not wish such things to occur. Moreover, statements of that sort are rarely made in the abstract without the prompting of previous events. Taking into account all the evidence, it would seem that even these early threats may have been of dubious legality—perhaps only saved if the use of force threatened could not be considered imminent enough to be taken as objectively wrong.

*b. December 1997–January 1998*

The second set of threats began as soon as the first ended; the only reason for dealing with them separately is that their increased intensity stands in contrast to the mostly unspoken actions preceding them. This set of events coincides roughly with the period of December 1997 to January 1998 and comprises a slow, but inexorable, crescendo of statements to Iraq about the consequences of failing to abide by the Security Council Resolutions and the breakdown of diplomacy in achieving that aim. The first of these was on December 3. United States Secretary of State Madeline Albright stated that "it looks like diplomacy isn't working" and reiterated her skepticism about any peaceful settlement.<sup>104</sup> At the same time, United States Defense Secretary William Cohen stated that if diplomacy failed, any airstrikes would be "substantial," further claiming "the United States has the power to do great damage."<sup>105</sup> However, he also suggested limits to what could be done, and perhaps to take the sting out of his comments, claimed that no decision had been reached yet about the use of force.<sup>106</sup> This could be interpreted in two ways: the first is that the use of force would not automatically follow a breakdown of diplomatic talks; the second is that while any mandate for a use of force was postponed if and until a breakdown of talks, one would automatically follow should that contingency occur. It is clear that the second of these is a stronger statement of intention to use force. The threat to possibly use force on the occurrence of a contingency is not as bellicose as a threat to definitely use that force on that contingency. It is clear that the second of these forms of working could have a greater effect and is indicative of a clear threat of force, whereas the first is more equivocal.

Iraqi compliance with UNSCOM was not forthcoming, therefore, on December 19, 1997, Richard Butler, the UNSCOM head, had to report to the Council that Iraq would not allow inspections under any circumstances.<sup>107</sup>

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103. *Id.* at 15.

104. *US Keeps up Pressure on Iraq* (visited Aug. 18, 1998) <<http://www.news.bbc.co.uk>> (search term "Iraq").

105. *Id.*

106. *See id.*

107. *See Iraq: Dispute Over UNSCOM Access to Presidential Sites*, 43 *KEESING'S*

Following this, the United States said that further action may be necessary to force Iraq to comply. As with the earlier threats, the threat of immediate force might not have been present; however, it was clearly closer than in November and the language was getting stronger.

In January 1998, things were developing in an entirely unwelcome direction. Iraqi intransigence continued, preventing UNSCOM from inspecting "presidential palaces" and forcing Butler to report to the Council that Iraq was determined not to give information or allow UNSCOM to undertake certain investigations. He also reported "specific grave instances of attempts to mislead the commission."<sup>108</sup> As in December, the deplorable actions of the Iraqis elicited a response from the United Kingdom and the United States. This time, however, it was even tougher, and it was getting clearer that they "appeared set on course of military confrontation."<sup>109</sup> On January 23, 1998, the United States confirmed that while they preferred diplomacy, no options (i.e., the use of force) had been ruled out.<sup>110</sup> The United Kingdom sent the *H.M.S. Invincible* on January 25. Prime Minister Tony Blair explained that "[s]he is there as a contingency against the possibility of the use of force."<sup>111</sup> Two days later, he told the Arab newspaper *Al-Hayat* "we do not rule out the use of force if Saddam refuses to change his stance."<sup>112</sup> The next day, President Clinton used his message to Congress to warn Saddam: "[y]ou have used weapons of mass destruction before. We are determined to deny you the capacity to use them again."<sup>113</sup>

It is clear from the reactions of several countries that these were being interpreted as threats of force. Both Russia and France spent much of the month in diplomatic maneuvers attempting to defuse the crisis and dissuade the United States from using force. Toward this end, in late January, the Russian President sent his special envoy to Iraq to find a diplomatic solution. Much of the media considered the address to Congress<sup>114</sup> to constitute a threat of force against Iraq,<sup>115</sup> and it is difficult to avoid the conclusion that their assessments were correct. What can be seen from these statements, particularly in context, is an increasing resort to less ambiguous language. The cumulative effect of this was that the threats of late January had a sufficient impact on the world community and were to be considered as clear

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RECORD OF WORLD EVENTS 41, 980 (Dec. 1997) [hereinafter *Iraq: Dispute Over UNSCOM*].

108. *Iraq: UNSCOM Crisis*, 44 KEESING'S RECORD OF WORLD EVENTS 42, 42042 (Jan. 1998) [hereinafter *Iraq: UNSCOM Crisis 1998*].

109. *Id.*

110. *See id.*

111. *Invincible Arrives in Gulf* (visited Jan. 25, 1998) <<http://www.news.bbc.co.uk>> (search term "Iraq").

112. *Clinton Threatens Saddam* (visited Jan. 28, 1998) <<http://www.news.bbc.co.uk>> (search term "Iraq").

113. *Id.*

114. *See id.*

115. *See Diplomatic Options "Exhausted"* (visited Jan. 30, 1998) <<http://www.news.bbc.co.uk>> (search term "Iraq").

threats of armed force.

*c. The Final Confrontations in the February 1998 Crisis*

If the actions of the previous two months were ambiguous, albeit decreasingly so, the proclamations made over the final days of January and through February 1998, until the adoption of Resolution 1154 on March 2, 1998, could barely be interpreted as anything other than threats of a serious nature. The first of these was from Secretary of State Albright on January 30. While the Russians were attempting to negotiate all parties out of the impasse, the United States Secretary of State pre-judged their efforts a failure, saying "we have all but exhausted the real diplomatic options. The moment to take a decision is rapidly approaching, all the options are open."<sup>116</sup> In distinction to the earlier threats, this gave real notice that the time-frame in which force was being considered was very short, supplying evidence of a real threat by way of imminence. On the same day, the United States revealed that it would use "smart bombs" if and when it bombed Iraq, and it had been testing weapons which could destroy chemical weapons. The implication was so clear as to be express; these were to be used on Iraq. *The Times* summed up the mood of all concerned: "military strikes against Iraq appeared inevitable."<sup>117</sup>

Threats proliferated over the next few days. During another permission-finding tour of the Middle East, Albright again claimed that diplomacy was not working and there could be the use of "significant" force.<sup>118</sup> On the United Kingdom side, Prime Minister Blair declared "he must either be persuaded by diplomacy or be made by force to yield up his long cherished ambition to develop nuclear, chemical and biological weapons. If we conclude that the only option to enforce the Security Council's will is by military action, we will not shrink from it."<sup>119</sup>

It was clear these threats were affecting Iraq, who began to remove documentation from ministries and place them in civilian targets to dissuade attacks on them.<sup>120</sup> The practice of using civilian shields is deplorable, but shows that Iraq considered itself the likely recipient of an air attack. Reactions, particularly in the Arab world, showed that most States viewed the likelihood of a resort to violence high. Egyptian Prime Minister Hosni Mubarak was only one of the Arab leaders rejecting the option of any use of force.<sup>121</sup> By this time it was clear that most Arab States considered the use of

116. *Id.*

117. Michael Theodoulou, *Albright Signals US Readiness for Air Raids on Iraq*, *TIMES* (London), Jan. 31, 1998. See also *West Set for Air Strikes on Iraq*, *DAILY TELEGRAPH*, Feb. 2, 1998. "[There are] growing signals that the West believed a military offensive may now be inevitable." *Id.*

118. See Marie Colvin, *Iraqis Braced for Airstrike*, *TIMES* (London), Feb. 1, 1998.

119. *Id.*

120. See *id.*

121. See *Egypt Says Time Not Right for Attack on Iraq* (visited Jan. 31, 1998)

force likely, but, Kuwait apart,<sup>122</sup> withheld their support for that option. The evaluation of many States was accurately summed up by Yevgeny Primakov, the Russian foreign minister: "it is taking on an ominous character, because there is more and more information to the effect that a strike against Iraq may become a reality."<sup>123</sup> The Russian Parliament showed their concern by passing a resolution stating that if there were airstrikes, Russia would breach the trade embargo on Iraq.<sup>124</sup>

On February 6, the United States and the United Kingdom gave a euphemistic, but telling, declaration, claiming that they would use "all necessary measures" to ensure compliance with UNSCOM.<sup>125</sup> "All necessary measures" is recognized as the formula used by the Security Council for force. Russia confirmed this by issuing a proclamation the same day which made clear their position that Russia would not permit violence.<sup>126</sup> While these positions were being advanced, the United States was seeking support from the ten non-permanent members of the Security Council for strikes. By this time, force was almost unavoidable. This was confirmed by Secretary of State Albright on February 8; the US was preparing "within weeks" to mount a sustained and heavy campaign of air attacks.<sup>127</sup> This was an unambiguous threat of imminent force.

Over the next few days, more States either declared their support or rejection of military action, demonstrating clearly that the use of force was a serious consideration.<sup>128</sup> While the United States and the United Kingdom were preparing for a use of force and identifying different types of targets, on February 16, Russia, France, and Turkey had sent diplomats to Iraq to defuse the situation.<sup>129</sup> On February 17, President Clinton went on national television claiming readiness to order attacks.<sup>130</sup> Two days later, when UN Secretary General Kofi Annan was in Iraq attempting to negotiate a solution, both the United Kingdom and the United States had stated their determination to use force should Annan fail to get an agreement.<sup>131</sup> Unlike the earlier

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<<http://www.news.bbc.co.uk>> (search term "Iraq").

122. See Julina Borger & Ian Black, *UN Chief Steps Up Pressure for Deal*, GUARDIAN WKLY., Feb. 15, 1998, at 1.

123. *Russian Foreign Minister Says Iraq Situation "Ominous"* (visited Feb. 2, 1998) <<http://www.news.bbc.co.uk>> (search term "Iraq").

124. See *Iraq: UNSCOM Crisis 1998*, *supra* note 108, at 42096.

125. See *id.* at 42095.

126. See *Divided Voice of the UN* (visited Feb. 6, 1998) <<http://www.news.bbc.co.uk>> (search term "Iraq").

127. See *Iraq: UNSCOM Crisis 1998*, *supra* note 108, at 42096.

128. Germany, Canada, and Australia came out in support of the airstrikes, while Russia, Turkey, Morocco, Egypt, Saudi Arabia, Tunisia, and Jordan were clear that they rejected such action. See *Battle Lines Drawn as Gulf Build Up Continues* (visited Feb. 10, 1998) <<http://www.news.bbc.co.uk>> (search term "Iraq"); *Opposition Grows Against use of Force* (visited Feb. 9, 1998) <<http://www.news.bbc.co.uk>> (search term "Iraq").

129. See *Iraq: UNSCOM Crisis 1998*, *supra* note 108, at 42096.

130. See *id.* at 42097.

131. See John Sweeney, *Saddam's Last Stand: Bent to a War of Will Saddam's Strength*

threats, these were not of the order of perhaps using force should Annan fail, but that the use of force was effectively certain should he fail to return with an agreement satisfactory to the United States and the United Kingdom. By this time, there could be no doubt. These were clear and present threats. They had immediacy, demands (the non-acceptance of which would lead to the use of force), and were considered by all to be very dangerous.<sup>132</sup> These threats received express condemnation from Iran: “[W]e consider America’s threat to Iraq as illegal.”<sup>133</sup> A similar position was advanced by Libya on February 19.<sup>134</sup> These may not be disinterested observers, but their analysis is not necessarily wrong simply because of this. While there was serious dispute about the advisability of the threats, in the Security Council on February 25 it was a common understanding that, as the Chinese delegate put it, the world had been at a “critical juncture between peace and war.”<sup>135</sup> This was the result of the threats made by the two parties, which they never denied making and intended to use, to coerce Iraq into compliance with Council Resolution 687.

Unless there was authority from the Security Council, it seems the United States and United Kingdom actions were in contravention of the Charter. The skillful diplomacy of Kofi Annan negotiating a peaceful solution in February 1998 does not alter this fact. The unraveling of the February accord on disarmament did not take long, with Iraq deciding on August 5 and again on October 31, 1998, to withdraw its cooperation with UNSCOM.<sup>136</sup> This led to both Prime Minister Blair and President Clinton again issuing explicit promises to use their continued military presence in the Gulf if Iraq did not immediately resume cooperation.<sup>137</sup> In the face of imminent airstrikes, and again in response to a diplomatic initiative by the UN Secretary General, Iraq, in a letter delivered on November 14, 1998, to Kofi Annan, expressed its desire to allow the arms inspectors “to perform their normal duties” in accordance with Security Council resolutions and the February 1998 agreement.<sup>138</sup> As with the threats of force of February 1998, the threats made in November 1998 must be viewed as illegal unless there was Security Council authority for them. It is to this issue that the analysis now turns.

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is *All-Pervading*, OBSERVER, Feb. 22, 1998, at 7.

132. The *Financial Times* declared “this is bound to be the last chance.” *Last Chance for Iraq*, FINANCIAL TIMES, Feb. 19, 1998, at 17.

133. *Iranian Leader Condemns US Policy Towards Iraq* (visited Feb. 17, 1998) <<http://www.news.bbc.co.uk>> (search term “Iraq”).

134. See *Qadhafi Says US Violating UN Charter Over Iraq* (visited Feb. 19, 1998) <<http://www.news.bbc.co.uk>> (search term “Iraq”).

135. U.N. SCOR, 53rd Sess., 3858th mtg. at 13, U.N. Doc. S/PV 3858 (1998).

136. See U.N. Doc. S/1998/1023.

137. See Ian Black, *UN Fury as Saddam Blocks Inspection*, GUARDIAN WKLY., Nov. 8, 1998, at 3.

138. See Vulliamy, *supra* note 96, at 8.

### III. WAS THERE COUNCIL AUTHORITY?

#### A. *Legal Bases of Past Airstrikes*

In helping to uncover the legal basis of the threat of force made against Iraq in February 1998 and again in November 1998, it is necessary to disentangle the various threads of law that have been used to justify airstrikes in the period after the Gulf War ended in 1991. Western States, variously combined but always with the United States to the fore, have used or threatened military force against Iraq by utilizing three different legal justifications.

##### 1. *"Self-Defense" of the United States*

On June 26, 1993, the United States, acting alone, attacked Iraq using Tomahawk missiles against a military target just outside Baghdad. Uniquely, in all the recent attacks upon Iraq, the United States did not rely on any alleged Security Council mandate, but claimed that it was exercising its right of self-defense under Article 51 of the Charter. Self-defense was claimed to be in response to a failed attempt by Iraqi agents to assassinate George Bush, the former president of the United States who was visiting Kuwait in April 1993.<sup>139</sup> This particular attack on Iraq is not of direct relevance in this article, which explores those attacks or threats of attacks which are justified, at least in part, under Security Council mandate. On balance, though, the gap between the initial attack on the United States (if the concept of attack can be stretched that far) and the retaliation reveals the June 1993 airstrike as having all the classic hallmarks of an illegal reprisal, the aim of which is not defensive but punitive.<sup>140</sup>

##### 2. *Protection of the "Safe-Havens"*

In other instances, Western States have claimed that they are using or threatening force to protect the safe-havens established after the end of the conflict between Iraq and the Coalition. The main example of this occurred on September 3-4, 1996, when the United States launched limited Cruise missile attacks against military targets in southern Iraq in response to Iraq's military operations in the Kurdish safe-haven in the north of the country.<sup>141</sup>

This operation was the continuation of a Western policy, initiated by British Prime Minister John Major on April 8, 1991, to protect the Kurds in northern Iraq and the Shias in southern Iraq who had rebelled against the regime of Saddam Hussein after the Iraqi forces had been defeated in Kuwait.

139. See Dino Kritsiotis, *The Legality of the 1993 US Missile Strikes on Iraq and the Right of Self-Defence in International Law*, 45 INT'L & COMP. L.Q. 162, 163 (1996).

140. See G.A. Res. 2625, *supra* note 24.

141. The UK provided re-fuelling facilities for the US B-52s at Diego Garcia in the Indian Ocean.

The rebellion was brutally put down by the still-strong Iraqi army in the last few days of March 1991 and the beginning of April 1991.

The fear of intervention in internal matters and the precedential nature of the Iraqi crisis led the Security Council to be much more circumspect than in its dealings with the Iraqi invasion of Kuwait—a traditional inter-State conflict. The international pressure for action became so great that the Security Council adopted Resolution 688 on April 5, 1991. This was a unique product of the various political pressures contained within the fifteen-member Council, representing an opaque compromise between the interventionists and non-interventionists. It did this by a combination of determining a “threat to the peace,” thereby recognizing that the Iraq crisis was a “Chapter VII” issue (and thus creating a precedent for future determinations), but failing to authorize any action under Chapter VII, indeed even failing to mention Chapter VII at all. Despite the tentative nature of the resolution, it was still the least-supported resolution of the Gulf Crisis, with three States voting against<sup>142</sup> and two abstaining.<sup>143</sup> Furthermore, neither the sponsor of the resolution (France), nor its close allies on the Security Council (the United Kingdom and the United States), attempted to imply a right to take military measures to enforce the resolution, at least at the time of its adoption. The resolution itself affirmed the “sovereignty, territorial integrity and political independence of Iraq,”<sup>144</sup> a fact reflected in the statement of the United States representative on the Council who said that “[i]t is not the role or intention of the Security Council to interfere in the internal affairs of any country.”<sup>145</sup> Even if the P3<sup>146</sup> had wanted a more forthright resolution, the representative of China made clear the views of several members on the Council that, despite the exception built into Article 2(7),<sup>147</sup> they viewed it as a concrete norm prohibiting intervention in the internal affairs of a country.<sup>148</sup>

Nevertheless, the momentum towards intervention proceeded apace so that, within three days of the adoption of Resolution 688, Western politicians were proposing a military operation to protect the Kurds in a “safe haven” in the north of Iraq. Prime Minister Major relied on Resolution 688 as justify-

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142. Cuba, Yemen, and Zimbabwe.

143. China and India.

144. S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg. at 1, U.N. Doc. S/RES/688 (1991).

145. U.N. SCOR, 46th Sess., 2982d mtg. at 57, U.N. Doc. S/PV 2982 (1992). *See also* France, *id.* at 53; U.K., *id.* at 63.

146. The Western permanent members on the Council, that is, the United States, the United Kingdom, and France.

147. U.N. CHARTER, art. 2, para. 7. This prohibits the UN from intervening “in matters which are essentially within the domestic jurisdiction of any State.” However, this principle of non-intervention “shall not prejudice the application of enforcement measures under Chapter VII.” U.N. CHARTER art. 2, para. 7.

148. U.N. SCOR, 46th Sess., 2982d mtg. at 54-55 U.N. Doc. S/PV 2982 (1992). *See also* India, *id.* at 62; USSR, *id.* at 59-60; Zimbabwe, *id.* at 31; Cuba, *id.* at 42.

ing such an operation, stating that the United Kingdom's view was that no new resolution was needed.<sup>149</sup> This was supported by President Bush.<sup>150</sup> Despite Iraq's objections that a military operation was a violation of international law,<sup>151</sup> in "Operation Provide Comfort" 15,000 Western troops<sup>152</sup> were sent into northern Iraq to create a Kurdish safe area supported by the imposition of a no-fly zone north of the 36th parallel.<sup>153</sup> The troops stayed for a relatively short period of time in April and May 1991, to be replaced by UN guards under an agreement between Iraq and the UN Secretary General.<sup>154</sup> However, the no-fly zone was maintained by France, the United States, and the United Kingdom. An additional no-fly zone was added south of the 32nd parallel in southern Iraq in August 1992 following continued atrocities against minorities there, particularly the Marsh Arabs.<sup>155</sup> It was in defending this new no-fly zone that United Kingdom Foreign Secretary Douglas Hurd, when questioned about the legal basis of these operations in the absence of an express Security Council mandate, stated that "[n]ot every action that a British Government or an American Government or a French Government takes has to be underwritten by a specific provision in a UN resolution provided we comply with international law. International law recogni[z]es extreme humanitarian need,"<sup>156</sup> while still emphasizing that the military actions undertaken were "in support" of Resolution 688.<sup>157</sup>

The introduction of reliance on "extreme humanitarian need" brought to the fore the dormant,<sup>158</sup> many would argue discredited,<sup>159</sup> doctrine of hu-

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149. Statement by the UK Prime Minister: A Safe Haven for the Kurds, UK FCO Press Office, Apr. 8, 1991, in *IRAQ AND KUWAIT: THE HOSTILITIES AND THEIR AFTERMATH* 774 (Marc Weller ed., 1993) [hereinafter *IRAQ AND KUWAIT*].

150. The United States President's News Conference, April 16, 1991, Weekly Compilation of Presidential Documents, Vol. 27, No. 16, in *IRAQ AND KUWAIT*, *supra* note 149, at 717.

151. See U.N. Doc. S/22531 (1991).

152. These included American, French, British, Dutch, and Italian troops.

153. See *IRAQ AND KUWAIT*, *supra* note 149, at 714-16.

154. See U.N. Doc. S/22531, *supra* note 151.

155. See *IRAQ AND KUWAIT*, *supra* note 149, at 723-25.

156. *Id.* at 723-24.

157. *Today* (NBC television broadcast, August 19, 1992). See also UK FCO spokesman, Aug. 20, 1992, both in *IRAQ AND KUWAIT*, *supra* note 149, at 723-24.

158. See Dino Kritsiotis, *Developing Approaches Towards Legitimising Intervention on Humanitarian Grounds*, 2 J. ARMED CONFLICT L. 91 (1997); FERNANDO R. TÉSON, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (2d ed. 1997); Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 229 (John N. Moore ed., 1974); W. Michael Reisman, *Humanitarian Intervention to Protect the Ibos*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 167 (Richard B. Lillich ed., 1973).

159. See BROWNLIE, *supra* note 7, at 338-42. See also Michael Akehurst, *The Use of Force for the Protection of Nationals Abroad*, 5 INT'L REL. 3, 10-16 (1977); Derek W. Bowett, *The Use of Force for the Protection of Nationals Abroad*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 39, 49-51 (A. Cassese ed., 1986); Rosalyn Higgins, *Intervention and International Law*, in *INTERVENTION IN WORLD POLITICS* 38 (Hedley Bull ed., 1984); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L.R. 1620, 1629 (1984).

manitarian intervention as a customary right of States acting outside the umbrella of the UN. In September 1996, with Iraqi forces entering into the Kurdish zone, the United States responded by missile attacks from bombers and warships. In justifying these attacks, both the United States and the United Kingdom tended to echo reliance on humanitarian intervention as well as the "threat" represented by Iraq, rather than on any Security Council mandate. President Clinton stated that the aim of the action was to make "Saddam pay a price for the latest act of brutality, reducing his ability to threaten his neighbors and American interests."<sup>160</sup> Prime Minister John Major said "[w]hat we are concerned about is any external threats he produces and repression of his own people—and its against that the United States acted,"<sup>161</sup> in expressing his full support for Operation Desert Strike.<sup>162</sup>

Thus, the legal basis for the initial military intervention in northern Iraq and subsequent actions which continue the policy of protection of the Kurds, and to a lesser extent, the Shias, is either Resolution 688 or the alleged customary right of humanitarian intervention. The purpose of this article is not to provide a definitive analysis of the latter justification, though it is worth stating that the Western reliance of an alleged customary right was weak, reflecting the lack of *opinio juris* in State practice since 1945 for such a right. The limited intervention which took place in northern Iraq may be a precedent which will be built on in the future, possibly leading to a much more limited form of humanitarian intervention. However, it is the aim here to assess the uses and threats of force that have been undertaken against Iraq on the basis of Security Council resolutions. Clearly, Resolution 688 does not provide an express mandate to take military action. The question whether it can be interpreted to imply such a right will be returned to later.

### 3. Enforcement of Disarmament

The airstrikes proposed in February 1998 and again in November 1998 by the United States and the United Kingdom were solely directed at the enforcement of the disarmament provisions of Security Council Resolution 687, adopted on April 3, 1991.<sup>163</sup> This resolution, "the mother of all resolutions,"<sup>164</sup> not only continued economic sanctions against Iraq, it established mechanisms to ensure Iraq made reparation to the victims of its aggression, to ensure that the boundary dispute between Iraq and Kuwait was settled,

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160. Nigel D. White, *Commentary on the Protection of the Kurdish Safe-Haven: Operation Desert Strike*, 1 J. ARMED CONFLICT L. 197 (1996).

161. *Id.*

162. As well as the missile strike, the United States extended the no-fly zone in the south to the 33rd parallel. This action was again supported by the United Kingdom, but not by France, whose aircraft share the policing of the no-fly zones. *See id.*

163. *See* S.C. Res. 687, *supra* note 2. Twelve votes in favor with one against (Cuba), Yemen and Ecuador abstaining.

164. Frederick Kirgis, *The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 525 (1995).

and to ensure a significant level of Iraqi disarmament. Prior to the threats of force in February and November 1998, there had been previous military strikes to attempt to enforce Resolution 687. The main example occurred in January 1993 by the United Kingdom, the United States, and French warplanes. The January 1993 strikes were also aimed at Iraqi threats to the no-fly zones, as were later limited strikes in April, July, and August 1993.<sup>165</sup> More recently, despite Iraqi assurances of cooperation which narrowly averted airstrikes in November 1998, its refusal to allow certain UNSCOM inspections finally resulted in a seventy hour bombing and missile campaign, codenamed "Operation Desert Fox" by the United States and the United Kingdom, commencing on December 16, 1998.<sup>166</sup>

Security Council Resolution 687 was adopted at the end of the hostilities under Chapter VII and imposed, among other things, disarmament conditions on Iraq. In particular, it included a decision that "Iraq shall unconditionally accept the destruction, removal or rendering harmless its chemical and biological weapons,"<sup>167</sup> development, and support systems under the international supervision of UNSCOM. The resolution also provided for a similar intrusive investigation into nuclear weapons by the International Atomic Energy Agency (IAEA). Security Council Resolution 715<sup>168</sup> of October 11, 1991, also adopted under Chapter VII, provided for ongoing monitoring and verification by inspections, overflight, and submission of reports by Iraq of its continuing compliance with Resolution 687. The intention behind Resolution 715 was that once Iraq's weaponry of mass destruction was destroyed, Iraq would not be permitted to acquire fresh weaponry and technology.

The extent of Iraq's non-compliance with Resolution 687 is staggering. Resolution 687 provided for Iraq to report on its weaponry within fifteen days. Within forty-five days, UNSCOM/IAEA should have been planning the destruction of these weapons, such destruction occurring within another forty-five days of Security Council approval of such plans. Within 120 days of the resolution, a plan for future monitoring of Iraq's non-acquisition of chemical, biological, and nuclear weaponry and technology should have been approved by the Security Council. Despite this over-optimistic timetable, it is clear that Iraq has not even complied with the preliminary obligation to reveal all its weaponry and, although UNSCOM has supervised the destruction of a great deal of hardware, there remains a hardcore of weaponry and technology to be accounted for and destroyed.<sup>169</sup> Even when this is achieved, Resolution 715 provides for ongoing monitoring of Iraq by

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165. See Christine Gray, *After the Cease-Fire: Iraq, the Security Council and the Use of Force*, 68 BRIT. Y.B. INT'L L. 135, 169 (1994).

166. See Michael Evans, *US and Britain Strike at Iraq*, TIMES (London), Dec. 17, 1998, at 1.

167. S.C. Res. 687, *supra* note 2.

168. S.C. Res. 715, *supra* note 3.

169. See U.N. Doc. S/22531, *supra* note 151.

UNSCOM. In light of this, the frustration which led to the airstrikes in 1993 and December 1998, and the threats of February and November 1998, are understandable, but this does not necessarily mean that such uses or threats of force are lawful.

It is clear, legally speaking, that airstrikes to enforce the disarmament provisions of Security Council Resolution 687 can only be justified as an action under the collective security umbrella of Chapter VII of the UN Charter. There is no claimed residual customary right to threaten or use force against Iraq—this includes claimed rights to self-defense, or the more controversial doctrine of humanitarian intervention put forward by the United States in June 1993 and by the United States and the United Kingdom in September 1996. This is reflected in the fact that the United States' and the United Kingdom's legal justifications for the threats of force made in February 1998 and again in November 1998 are solely based upon Security Council resolutions. The only other argument, one of national self-interest, stated by Secretary of State Albright<sup>170</sup> is clearly a non-legal justification and, in many ways, a recognition that if the arguments based on Security Council resolutions are unsustainable, then there was no real legal basis for the proposed military operations.

However, while there was no additional legal basis put forward for the February and November 1998 threats of force, in January 1993, when airstrikes were undertaken, the United Kingdom Secretary of State for Defense argued self-defense of allied aircraft enforcing the no-fly zones imposed by the West to protect the Kurds and the Shias.<sup>171</sup> This must be seen as a very weak attempt to base military action on self-defense and reflects the fact that the purposes of the January 1993 strikes were uncertain in that they seemed to be both the enforcement of Resolution 688, by enforcing the no-fly zones purportedly established under the auspices of that resolution, and the enforcement of Iraqi compliance with the disarmament provisions of Resolution 687.<sup>172</sup> Self-defense of warplanes flying over Iraq can only be accepted as a legal justification if those planes had the legal right to be there in the first place. "This depends on the legality of the no-fly zones,"<sup>173</sup> which, as has been shown above, were imposed outside the rubric of Security Council resolutions.<sup>174</sup> There was no repeat of the self-defense argument in the disarmament crises of February 1998 or in November and December 1998. As will be seen, the United States and the United Kingdom argued that their right to threaten force and use force if necessary was based on Security Council resolutions.

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170. See Vulliamy, *supra* note 4.

171. Statement by the UK Secretary of State for Defense, Jan. 13, 1993, in IRAQ AND KUWAIT, *supra* note 149, at 738.

172. See Gray, *supra* note 165, at 169.

173. *Id.* at 168.

174. See *id.* at 168.

### B. *The Extent of the Decentralized Collective Security System*

In all the airstrikes, missile attacks, and threats of such outlined above, there has been no attempt by the main progenitors, the United States and the United Kingdom, or by any other State, to resurrect the argument made by various jurists<sup>175</sup> during the original conflict in 1991 that the operation against Iraq was an action taken in collective self-defense of Kuwait, and not under the collective security umbrella of the UN.<sup>176</sup>

States viewed the Gulf operation as coming under the collective security system and not under collective self-defense.<sup>177</sup> The United Kingdom and the United States had originally placed their troops in Saudi Arabia after the Iraqi invasion of Kuwait in preparation for action in collective self-defense at the request of the governments of Saudi Arabia and Kuwait.<sup>178</sup> They maintained that this right was unaffected by Resolution 661<sup>179</sup> of August 6, 1990, which had imposed comprehensive sanctions against Iraq,<sup>180</sup> despite the wording of Article 51 which states, in relevant part, that the right of self-defense persists "until the Security Council has taken measures necessary to maintain international peace and security."<sup>181</sup> What the United States and the United Kingdom were concerned about was preserving their right of collective self-defense in the event of the Security Council *only* being able to impose economic sanctions. If the Security Council had stopped there, with the United States and the United Kingdom unable to persuade it to authorize military enforcement action, then according to these two States they still had the right of collective self-defense. Of course, if Security Council authority for the use of force was forthcoming, then these arguments were simply on record for the future. With the adoption of a resolution authorizing the use of force to remove Iraq from Kuwait,<sup>182</sup> the legal basis of the UN operation

175. See PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 392, 397 (7th ed., 1997); Eugene V. Rostow, *Agora: The Gulf Crisis in International and Foreign Relations Law, Continued*, 85 AM. J. INT'L L. 506, 506-10 (1991); Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 459-60 (1991); R. Laval, *The Law of the United Nations and the Use of Force Under the Relevant Security Council Resolutions of 1990 and 1991 to Resolve the Persian Gulf Crisis*, XXIII NETH. Y.B. INT'L L. 3, 62 (1992).

176. Authority for the "Collective Security System" is found under Chapter VII of the U.N. Charter.

177. Just as States had viewed the Korean operation in 1950, which in many ways was a precedent for the Gulf operation, as a collective security operation. DEREK W. BOWETT, *UNITED NATIONS FORCES* 45-47 (1964).

178. See U.N. Doc. S/21492 (1990); U.N. Doc. S/21501 (1990).

179. S.C. Res. 661, U.N. SCOR, 46th Sess., 2933d mtg. at 2, U.N. Doc. S/RES/661 (1990).

180. See, e.g., Prime Minister Thatcher's Statement in the House of Commons, *Hansard*, H.C., 6th ser., vol. 7, 737. For the US position, see U.N. SCOR, 46th Sess., 2937th mtg. at 22, U.N. Doc. S/PV 2937 (1992).

181. U.N. CHARTER, art. 51.

182. See S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 1, U.N. Doc. S/RES/678 (1990) [hereinafter S.C. Res. 678].

against Iraq was Article 42.<sup>183</sup> In other words, it was a UN collective security operation, not an operation in collective self-defense. Once Resolution 678 was secured authorizing the use of force against Iraq, the United States and the United Kingdom, and other members of the Security Council, indeed even those opposing the force, referred to it as a UN operation. As with the UN mandated Korean military operation in 1950, there was overwhelming *opinio juris* that the military operations were *United Nations* military operations.<sup>184</sup> This is further shown by the fact that the war against Iraq was formally brought to a close by Security Council resolutions, principally Resolution 687, which contained elaborate and intrusive provisions for disarmament.<sup>185</sup>

The legality of the decentralized system has been discussed more fully elsewhere.<sup>186</sup> Although not matching the original Charter scheme, the decentralized military option,<sup>187</sup> which has been developed by the Security Council to deal both with acts of aggression<sup>188</sup> and threats to the peace,<sup>189</sup> is a lawful development of its powers to maintain or restore international peace and security.<sup>190</sup> Although the system has several deficiencies, not the least of which is the voluntary nature of States' involvement, it must not be forgotten that the original Charter scheme was by no means ideal,<sup>191</sup> based as it was on

183. U.N. Charter article 42 permits the Security Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." U.N. CHARTER art. 42.

184. See Nigel D. White & Özlem Ülgen, *The Security Council and the Decentralised Military Option: Constitutionality and Function*, XLIV NETH. INT'L L.R. 378, 392-96 (1997).

185. See S.C. Res. 687, *supra* note 2 See also S.C. Res. 686, U.N. SCOR, 46th Sess., 2987th mtg. at 2, U.N. Doc. S/RES/686 (1991).

186. See White & Ülgen, *supra* note 184.

187. See Torsten Stein, *Decentralized International Law Enforcement: The Changing Role of the State as Law Enforcement Agent*, in ALLOCATION OF LAW ENFORCEMENT AUTHORITY IN THE INTERNATIONAL SYSTEM 107 (Jorst Delbrüch ed., 1995).

188. See S.C. Res. 83, U.N. SCOR, 5th Sess., 474th mtg. at 1, U.N. Doc. S/RES/83 (1950) (Korea).

189. See S.C. Res. 794, U.N. SCOR, 47th Sess., 3415th mtg. at 2, U.N. Doc. S/RES/794 (1992) (Somalia); S.C. Res. 816, U.N. SCOR, 48th Sess., 3191st mtg. at 31, U.N. Doc. S/RES/816 (1993); S.C. Res. 836, U.N. SCOR, 48th Sess., 3228th mtg. at 2, U.N. Doc. S/RES/836 (1993); S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg. at 2, U.N. Doc. S/RES/1031 (1995) (Bosnia); S.C. Res. 929, 49th Sess., 3329th mtg. at 2, U.N. Doc. S/RES/929 (1994) (Rwanda); S.C. Res. 940, U.N. SCOR, 49th Sess., 3413d mtg. at 2, U.N. Doc. S/RES/940 (1994) (Haiti); S.C. Res. 1080, U.N. SCOR, 51st Sess., 3713d mtg. at 2, U.N. Doc. S/RES/1080 (1996) (Zaire); S.C. Res. 1101, U.N. SCOR, 52nd Sess., 3758th mtg. at 2, U.N. Doc. S/RES 1101 (1997) (Albania).

190. See 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 NETH. Y.B. INT'L L. 33, 58 (1995). But see John Quigley, *The United States and the United Nations in the Persian Gulf War: New Order or Disorder?*, 25 CORNELL INT'L L.J. 1, 20-28 (1992). In particular, in the current system, as developed by the Security Council, there are no agreements for the provision of armed forces as provided for in Article 43 of the Charter, nor is there any control of the operation by the Military Staff Committee as provided for by Article 47.

191. What constitutes an ideal collective security system is the subject of debate. See,

an unrealistic assumption about great power unity both in the Security Council and the Military Staff Committee. Furthermore, there is evidence that the Council is tightening up its control of its military enforcement operations culminating in its precise, renewable mandate given to the multinational force in Albania in March 1997.<sup>192</sup>

The decentralized military option outlined above, though not complying with the strict wording of the UN Charter, is lawful though still weak. However, although the use of force in 1991 by the Coalition was lawful, it does not signify that all subsequent threats and uses of force against Iraq are lawful. The system is loose and decentralized but there are clear limits to it. In terms of the crises in February and November 1998, it is arguable that those limits have been passed by those States wishing to threaten or use force simply because they do not have a mandate from the Security Council to do so. The collective security system developed by the Security Council under pressure from powerful States does already benefit those States greatly. To attempt to stretch the system further to give more latitude to those States wishing to use force, as seems to be the desire of the United States and the United Kingdom in the confrontations after the end of the Gulf Conflict of 1991, will result in a shattering of that system and an end to a Security Council with the power to authorize military action. The collective security system is still dependent on Council authorization to threaten or use force; where there is no authorization, there is no legal basis. That this principle applies to both threats and uses of force is clear since as it has been shown above both are equally unlawful in the absence of a saving justification, in this case, Council authorization. It then boils down to a question of whether the panoply of resolutions adopted against Iraq contain such an authorization.

The following sections examine the various levels of possible justification derived from Security Council resolutions in order to assess the legality of each level. Each level involves a greater degree of decentralization than the last in that each one involves a further move away from the requirement that there is an express UN resolution authorizing the threat or use of force. Each level will be assessed in relation to the most recent crisis in Iraq which led to the threats of force against it in February and November 1998, as well as the use of force in December 1998 and some of the previous uses of force against Iraq that have occurred since 1991.

### *1. An Express Authorization?*

The requirements of the collective security system are clearly satisfied if there is an express authorization by the Security Council to threaten or use

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*e.g.*, INIS L. CLAUDE, *POWER AND INTERNATIONAL RELATIONS* 110-68 (1962); Charles A. Kupchan, *The Case for Collective Security*, in *COLLECTIVE SECURITY: BEYOND THE COLD WAR* 41, 42-44 (George W. Downs ed., 1997).

192. See White & Unger, *supra* note 184, at 409.

force in that the constitutional link between the Charter and military operation is made. In the case of Iraq, the only express authorization is to be found in Resolution 678 of November 29, 1990. This authorized the Coalition to "use all necessary means to uphold and implement Security Council Resolution 660 and all subsequent resolutions and to restore international peace and security in the area."<sup>193</sup>

Does this give States an open-ended mandate to threaten or use force against Iraq? Resolution 678 was cited as the legal basis for the airstrikes of January 1993 on the grounds that the violation of Resolution 687, containing *inter alia*, provisions on disarmament, re-triggered the original mandate given to Coalition States. The Secretary General stated in a Press Release that "the raid . . . and the force that carried out the raid, have received a mandate from the Security Council according to Resolution 678 and the cause of the raid was the violation by Iraq of Resolution 687."<sup>194</sup> This argument was repeated in justifying the threatened enforcement of Resolution 687 in February 1998. The United Kingdom is reported to have stated that "Iraq's refusal to allow the inspectors free access constituted a breach of [Resolution 687]. The cease-fire, therefore, no longer applied and the UN fell back on Resolution 678."<sup>195</sup>

Resolution 678 of November 1990 related to the initial use of force against Iraq.<sup>196</sup> Any subsequent threats or uses of force needed to be mandated afresh, otherwise the mandate is simply too open-ended to be practical. To allow such a system would be to sanction the permanent delegation of authority for the purpose of dealing with a threat to or breach of the peace. If the United Kingdom's position is correct, then would there ever be a time when Resolution 678 was not operative in the absence of the United States and the United Kingdom renouncing their status as contractors for the Security Council? Even then, could other States take up the sword? Resolution 678 cannot realistically be used as the legal basis for threats or uses of force subsequent to the formal cease-fire in Resolution 687. Furthermore, when Resolution 678 authorized the enforcement of Resolution 660 and all subsequent resolutions, it was clearly referring to resolutions adopted between Resolutions 660 and 678, the aim of which was to force Iraq out of Kuwait. In addition, member states of the Council voting for Resolution 678 did not interpret the phrase "and to restore international peace and security to the area" as permitting any wider use of force than pushing Iraq out of Kuwait.<sup>197</sup> Having said that, Resolution 687 itself does confirm all previous Se-

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193. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 1, U.N. Doc. S/RES/678 (1990).

194. IRAQ AND KUWAIT, *supra* note 149, at 741-42.

195. Michael Binyon, *Britain Says New Resolution Required*, TIMES (London), Feb. 19, 1998.

196. See Marc Weller, *US Takes Perilous Path in Show of Military Might*, TIMES (London), Feb. 3, 1998, at 14.

197. See Statements made by Council members at the adoption of S.C. Res. 678, U.N.

curity Council resolutions on Iraq, including Resolution 678. However, it is unlikely that this was intended to keep Resolution 678 alive as a resolution which continues to authorize the use of force,<sup>198</sup> particularly in light of the other provisions of Resolution 687 which will be considered below, and also by the fact that Resolution 687 affirmed previous resolutions "except as expressly changed . . . to achieve the goals of this resolution, including a formal cease-fire."<sup>199</sup> When Resolution 687 was adopted on April 3, 1991, members of the Council emphasized that those States acting under Resolution 678 should withdraw their forces as soon as possible after the establishment of UNIKOM<sup>200</sup> on the disputed frontier and after Iraq had accepted Resolution 687, thereby creating a formal cease-fire.<sup>201</sup> Resolution 678 simply continued until Iraqi acceptance of the resolution and an unhindered withdrawal by Coalition forces took place.<sup>202</sup> Iraq accepted Resolution 687 on April 6, 1991,<sup>203</sup> and the Coalition ground forces withdrew in July 1991.<sup>204</sup> There was no mention made at the adoption of Resolution 687 by the Coalition States of a continuing right to use force.<sup>205</sup> Furthermore, both China and the Union of Soviet Socialist Republic made it clear at the time Resolution 687 was adopted that it was the task of the Security Council to ensure implementation of its provisions.<sup>206</sup>

Moving forward to the February 1998 crisis when the United States, with United Kingdom support, threatened to use force against Iraq to ensure

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SCOR, 45th Sess., 2963d mtg. at 70-85, U.N. Doc. S/PV 2963 (1990). See, in particular, the Statement by UK Foreign Secretary Douglas Hurd at 78: "There is no ambiguity about what the Council requires in this resolution and in previous resolutions. We require that Iraq comply fully with the terms of resolution 660 (1990) and all later resolutions and withdraw all its forces unconditionally to the positions on which they stood on 1 August. This means that withdrawal must be complete. If not, the Member States, acting with the Government of Kuwait, are authorized to use such force as may be necessary to compel compliance." *Id.* See also *id.* at 101 (statement by US Secretary of State James Baker).

198. See Gray, *supra* note 165, at 155.

199. S.C. Res. 678, *supra* note 182.

200. The Iraq-Kuwait Observer Mission.

201. See U.N. SCOR, 46th Sess., 2981st mtg. at 85, 111 U.N. Doc. S/PV 2981 (1991).

202. This is in accordance with S.C. Res. 686, U.N. SCOR, 46th Sess., 2978th mtg. at 2, U.N. Doc. S/RES/686 (1991), which continued the authorization in Resolution 678 (1990) "for the period required for Iraq to comply with the . . . obligations" contained in Resolution 686, which related to the abandonment of the use of force in the conflict by Iraq, to rescind its annexation of Kuwait, release detainees and prisoners of war, and identify minefields. Resolution 686 was superseded by Resolution 687 on April 3, 1991. See Gray, *supra* note 165, at 139.

203. See U.N. Doc. S/22456 (1991).

204. See Gray, *supra* note 165, at 144.

205. Only Yemen, who has persistently objected to the open-ended nature of Resolution 678 (1990) and had voted against its adoption and had abstained on Resolution 687 (1991), stated that it saw Resolution 678 as still giving an open mandate to the Coalition: "These are the forces that decided to wage battle, using the authority of the Council, and these are the forces that will decide upon the cessation of the operation." U.N. SCOR, 46th Sess., 2981st mtg. at 36, U.N. Doc. S/PV 2981 (1991).

206. See *id.* at 95 (China), 98 (USSR).

compliance with the disarmament provisions of Resolution 687, Prime Minister Tony Blair was quoted as saying that not only did existing UN resolutions give ample authority for military strikes, this authority has been strengthened by the adoption of Resolution 1154 on March 2, 1998.<sup>207</sup> This Resolution was adopted, in part, to endorse the Memorandum of Understanding between Iraq and the UN of February 23, 1998.<sup>208</sup> Although adopted under Chapter VII, there is no use of the accepted UN terminology for authorizing the use of force. Consistently, there has been use of the phrase “necessary means” or “necessary measures.”<sup>209</sup> Stating that Iraqi non-compliance would have “severest consequences” is not clear enough. In addition, there is no “authorization” to threaten or use force. If this is thought to be too precious an argument then the last paragraph states clearly that the Council (not individual members) will “ensure the implementation of this resolution.”<sup>210</sup> Certainly, at the meeting at which Resolution 1154 was adopted, not only did Russia and China make it clear that the resolution did not automatically authorize any State to use force against Iraq in the event of non-compliance,<sup>211</sup> so also did the vast majority of the members of the Council, although with varying degrees of clarity.<sup>212</sup> The United Kingdom attempted to keep the possibility of further unilateral threats and uses of force alive by referring to the success of “diplomacy backed by the willingness to use force,”<sup>213</sup> which led to the Memorandum of Understanding, a phrase echoing that used by the UN Secretary General. On Resolution 1154, the United Kingdom simply repeated the wording of the resolution that any violation would result in the “severest consequences” for Iraq.<sup>214</sup> The United States representative was similarly oblique as to the nature and source of these “consequences,” stating that Iraq would face “certain punishment and continued isolation” if Iraq chose not to “abide by the rules of civilized behavior.”<sup>215</sup> On balance, it is clear that Resolution 1154 does not authorize the

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207. See S.C. Res. 1154, U.N. SCOR, 53d Sess., 3858th mtg. at 1, U.N. Doc. S/RES/1154 (1998).

208. See *supra* note 1.

209. See, e.g., S.C. Res. 678, *supra* note 182.

210. Sec. Res. 1154, *supra* note 207.

211. See U.N. SCOR, 53rd Sess., 3858th mtg. at 14, 17, U.N. Doc. S/PV 3858 (1998). “The resolution clearly states that it is precisely the Security Council which will directly ensure its implementation, including the adoption of appropriate decisions. Therefore, any hint of automaticity with regard to the application of force has been excluded; that would not be acceptable for the majority of the Council’s members.” (Russia).

212. See *id.* Costa Rica at 4-5; Brazil at 7; Sweden at 9; Gabon at 9; Kenya at 10; Japan (one of the sponsors along with the UK) at 11; Slovenia at 12-13; France at 15; Gambia at 18.

213. *Id.* at 4.

214. See *id.* See also Secretary General at 3. United Kingdom Foreign Secretary Robin Cook seemed to support the idea of automatic airstrikes saying that “there was already existing legal authority for military action to enforce existing undertakings from Iraq, and that has not changed by . . . resolution [1154].” Interview with Radio 4 (UK) (Mar. 3, 1998).

215. See U.N. SCOR, 53rd Sess., 3858th mtg., *supra* note 211, at 16. However, the United States Assistant Secretary of State James P. Rubin said on March 3, 1998, of Resolu-

automatic threat or use of force. First, the text is not clear enough; second, the vast majority of Security Council members, including three permanent members, do not regard it as such; and third, when the dialogue between Iraq and UNSCOM again broke down in early August 1998, the issue was dealt with by the Security Council. The Security Council rejected Baghdad's announcement that it would no longer cooperate with UNSCOM.<sup>216</sup>

## 2. A Liberal Interpretation?

Is Resolution 687 by itself sufficient to establish the legality of the 1998 threats of force? Several arguments against this have been examined in the above section. Furthermore, Resolution 687, which was adopted under Chapter VII, provides in its last paragraph that the Security Council "decides to remain seized of the matter and to take such further steps as may be required for the implementation of this resolution and to secure peace and security in the area."<sup>217</sup> "Further steps" is not an authorization to use or threaten force. Furthermore, the paragraph provides for the *Council* to decide what further steps are necessary, not individual members. This also seems to contradict the argument that Resolution 678 is the legal basis for any military strikes. Resolution 687 seems to replace both Resolution 678 and Resolution 686<sup>218</sup> of March 2, 1991, which contained the temporary ceasefire. Resolution 687 appears to be the governing resolution, which has within it a paragraph which provides for further steps to be taken by the *Security Council* if there is not compliance with the resolution.<sup>219</sup> Simply put, Resolution 687, like Resolution 1154, cannot be interpreted as allowing for air-strikes without further Council authority.<sup>220</sup>

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tion 1154 that "severest consequences" was the "diplomatic code for military action" and "that military force will ensue if Iraq violates this agreement." Barton Gelman, *U.S. Avoids Military Threat After Iraqi Defiance: Stress is Placed on Economic Sanctions*, WASH. POST, Aug. 7, 1998, at 1.

216. See *U.N. Daily Highlights* (visited Aug. 6, 1998) <<http://www.unoteorg/cgi-bin/dh.pl>>. Council members took different positions on how the Security Council should respond. China emphasized dialogue, while the United States demanded "strong" action, but both seemed to be in accord that it was the Security Council's decision.

217. S.C. Res. 687, *supra* note 2.

218. S.C. Res. 686, U.N. SCOR, 46th Sess., 2978th mtg. at 2, U.N. Doc. S/RES/686 (1991).

219. This is made clear by Brazil at the meeting at which S.C. Res. 1154, U.N. SCOR, 53rd Sess., 3858th mtg. at 1, U.N. Doc. S/RES/1154 (1998) was adopted when it stated "that the question of the implementation of the conditions for the ceasefire with Iraq remains firmly under the wing, so to speak, of the United Nations and the Security Council. Only the Security Council has the authority to determine if, when and under what conditions the formal ceasefire it declared on 3 April 1991 holds or not." U.N. SCOR, 53rd Sess., 3858th mtg. at 7, U.N. Doc. S/PV 3858 (1998).

220. See Gray, *supra* note 165, at 155.

### 3. *The Tacit Consent of the Security Council?*

It is arguable that the basis of the January 1993 airstrikes was not simply Resolution 687 alone, which cannot by itself be authority for airstrikes, but also the tacit support of the Security Council. Two days before the airstrikes, the Security Council condemned Iraqi defiance of Resolution 687 and warned Iraq of the "serious consequences that will flow from continued defiance."<sup>221</sup> Although not a formal resolution, this could be construed as an authorization by the Security Council for the use of force by willing States. However, again the language is too ambiguous to give the airstrikes a firm legal basis. It is better viewed as a case where the Council, as with Resolution 1154, was prepared to threaten Iraq with unspecified consequences but not expressly authorize the threat or use of force. Furthermore, "Security Council statements do not have the legal status of a resolution,"<sup>222</sup> and clearly, if the Western States wanted express authority, they should have sought a formal resolution. Although there was no suggestion of any informal "go-ahead" in the February 1998 crisis,<sup>223</sup> there was reportedly a lack of vociferous opposition to airstrikes in November 1998 from France, Russia, and China in informal Security Council discussions immediately prior to Iraq's agreement to resume cooperation with UNSCOM and the IAEA on November 14, 1998.<sup>224</sup> However, in the face of Iraqi decisions of August 5 and October 31, 1998, to withdraw cooperation, the Security Council as a whole, had adopted condemnatory resolutions under Chapter VII of the Charter.<sup>225</sup> The only coercive elements of these resolutions were in the form of provisions making it clear to Iraq that without its cooperation on disarmament, there would be no comprehensive review of the sanctions regime. The lack of Security Council approval for the actual bombings and airstrikes that took place between December 16 and December 19, 1998, was revealed when the Council met formally on December 16 after the United States and the United Kingdom had carried out their threats and had launched their attacks on Iraq. Six members of the Council, including Russia and China, spoke out unambiguously against the attacks on the basis of lack of Security Council authority.<sup>226</sup> Only Japan, alongside the United States and the United Kingdom, openly argued in terms of a mandate under existing Council

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221. SC/5536 (1993), in *IRAQ AND KUWAIT*, *supra* note 149, at 736-37. *See also* SC/5534 (1993), *id.* at 736.

222. Gray, *supra* note 165, at 155.

223. *See* White, *supra* note 160, at 202-03. Nor for the September 1996 military actions. *See id.*

224. *See* Vulliamy, *supra* note 96, at 8.

225. *See* S.C. Res. 1194, U.N. SCOR, 53d Sess., 3924th mtg. at 2, U.N. Doc. S/RES/1194 (1998); S.C. Res. 1205, U.N. SCOR, 53d Sess., 3939th mtg. at 2, U.N. Doc. S/Res/1205 (1998).

226. *See* U.N. SCOR, 53d Sess., 3955th mtg. at 3-4, U.N. Doc. S/PV 3955 (1998). Russia, China, Costa Rica, Sweden, Brazil and Kenya.

resolutions.<sup>227</sup>

Of course, the United States and the United Kingdom may point to the difficulty, if not the impossibility, of securing a Security Council resolution which allows them to threaten or use force, given the potential vetoes of China and Russia in particular. Indeed, their attempts to secure a more forceful resolution in June 1996<sup>228</sup> and November 1997<sup>229</sup> failed, frustrating facts which may well have led to the United States and the United Kingdom acting without Security Council authority in February 1998, and again in November and December 1998. Unfortunately for those States, the system of collective security, which they have helped to shape, requires, at a bare minimum, such an enabling resolution. As Rosalyn Higgins states, “[t]here is no entitlement in the hands of individual Members of the United Nations to enforce prior Security Council resolutions by the use of force.”<sup>230</sup>

#### 4. *Simply a Chapter VII Resolution?*

If the resolution, as with Resolutions 687 and 1154, contains no reference to the threat or use of force as regards enforcement of its provisions on disarmament,<sup>231</sup> and none is supported by the Security Council as a whole,

227. See *id.* France and the remaining members condemned Iraq while not clearly approving or disapproving of the airstrikes.

228. At the meeting at which S.C. Res. 1060, U.N. SCOR, 51st Sess., 3672d mtg. at 1, U.N. Doc. S/RES/1060 (1996) was unanimously adopted, (3672) the original draft proposed by the US and the UK, U.N. Doc. S/1996/426, was amended with the slightest suggestion that a breach of the cease-fire may re-ignite the Coalition’s mandate of 1990 being deleted. See original draft of resolution 1060 U.N. Doc. S/1996/426, the penultimate preambular paragraph, which was deleted, recalled “that resolution 687 (1991) established a cease-fire and provided for the conditions essential for the restoration of peace and security to the area.” The Russian representative expressed his relief “that the members of the Security Council have been able to resist the temptation to use threatening language and an approach based on force,” U.N. SCOR, 51st Sess., 3672d mtg. at 2, U.N. Doc. S/PV 3672 (1996).

229. In S.C. Res. 1137, U.N. SCOR, 52d Sess., 3831st mtg. at 14, U.N. Doc. S/RES/1137 (1997), Iraqi intransigence led the Council to tighten sanctions by imposing travel restrictions on Iraqi officials. Although Resolution 1137, sponsored by various States including the US and the UK, warned Iraq of “serious consequences” in the event of non-compliance, it made the Council’s control of the situation clear by stating its “firm intention to take further measures as may be required for the implementation of this resolution.” The Russian Representative stated of Resolution 1137 that it “rules out the possibility of abusing the authority of the Security Council and the United Nations to justify any attempts to use force.” *Id.* See also *id.* at 10 (France). “The Council’s authority is maintained. The Council is still master of its judgements and future actions”. The UK, *id.* at 12, obliquely referred to “further measures” in the event of non-compliance, the US, *id.* at 11, to “consequences.” The attempt, in this resolution and in S.C. Res. 1154, U.N. SCOR, 53d Sess., 3858th mtg. at 1, U.N. Doc. S/RES/1154 (1998), to stretch the diplomatic code so that “serious consequences” can now be read as authorizing the use of force seems to have failed.

230. Rosalyn Higgins, *General Course*, 230 HAGUE RECUEIL, 330-31 (1991).

231. S.C. Res. 687, *supra* note 2, does use the phrase “necessary measures” in paragraph 4 in relation to the inviolability of the international boundary between Iraq and Kuwait, but makes it clear that the *Security Council* will “take as appropriate all necessary measures to that end in accordance with the Charter.” *Id.* See also S.C. Res. 773, U.N. SCOR, 47th Sess.,

then surely this was an insufficient legal basis for the threat of force against Iraq in February 1998. This is also true of all the Security Council resolutions adopted in between Resolutions 687 and 1154 which have condemned Iraqi intransigence on the disarmament provisions of 687, but have not authorized the use or threat of force. This includes Resolutions 707,<sup>232</sup> 715,<sup>233</sup> 1060,<sup>234</sup> 1115,<sup>235</sup> 1134,<sup>236</sup> and 1137.<sup>237</sup> Furthermore, no resolution adopted after resolution 1154 has mandated such coercive measures.<sup>238</sup>

### 5. Any Security Council Resolution?

Security Council Resolution 688 seems to be the main basis of the West's imposition of the no-fly zones over northern and southern Iraq in 1991 and 1992, and the enforcement of the northern safe-haven in 1991 by ground troops and again in September 1996 by airstrikes. Resolution 688 does not provide for enforcement and, although there is a finding of a threat to the peace, there is no explicit Chapter VII reference. This resolution clearly does not entitle States to use force or threaten it for there is no express authorization for such measures. To accept the contrary would mean any State could take upon itself the right to use force to enforce a Security Council resolution whenever it perceived that the resolution required enforcement. This is not mere delegation, but would constitute unilateral or multilateral action outside the UN system.

It is thus clear that the threats of force against Iraq in February and November 1998 had no legal basis in Security Council resolutions. For the United States and the United Kingdom to successfully make that claim would require an express mandate from the Security Council. In all other situations analyzed above, the constitutional link between the Security

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3108th mtg. at 2, U.N. Doc. S/RES/773 (1992). See Gray, *supra* note 165, at 149, who States that paragraph 4 of Resolution 687 would not "justify unilateral resort to force by members of the coalition," but at footnote 75 raises the possibility that a further attack against Kuwait may justify a response in collective self-defense despite the fact that the Security Council is dealing with the matter under Resolution 687. This would certainly accord with the UK and US's view, Stated earlier in the crisis in relation to Resolution 661 (1990), that the continuation of sanctions (in this case by Resolution 687) would not prevent the right of self-defense in the event of an armed attack.

232. S.C. Res. 707, U.N. SCOR, 46th Sess., 2978th mtg. at 3, U.N. Doc. S/Res/707 (1991).

233. S.C. Res. 715, *supra* note 3.

234. S.C. Res. 1060, U.N. SCOR, 51st Sess., 3672d mtg. at 1, U.N. Doc. S/RES/1060 (1996).

235. S.C. Res. 1115, U.N. SCOR, 52d Sess., 3792d mtg. at 1, U.N. Doc. S/RES/1115 (1997).

236. S.C. Res. 1134, U.N. SCOR, 52d Sess., 3826th mtg. at 2, U.N. Doc. S/RES/1134 (1997).

237. S.C. Res. 1137, U.N. SCOR, 52d Sess., 3831st mtg. at 3, U.N. Doc. S/RES/1137 (1997).

238. See U.N. 3955th mtg., *supra* note 226.

Council and the military operation is simply not made and the *de minimis* conditions necessary for a basic UN collective security action have not been fulfilled.

Only Resolution 678 of 1990 clearly authorizes the use of force, but as seen, this is no longer operative; it only applied to the initial military action against Iraq in 1991. The delegation of authority to the Coalition ended with the formal cease-fire in Resolution 687 of 1991, and there has been no revival of it since. Security Council Resolutions 687 to 1205 have kept the Security Council as a whole in charge of the situation, there being no further delegation to States. These resolutions are simply Chapter VII resolutions, which are not to be enforced by military measures except under the further authority of the Council. The British and the Americans may argue that Resolution 687 needs enforcing and that this is the only way to make Iraq comply, however, this ignores the fact that first the Council decided in Resolution 687 not to expressly authorize military force for the enforcement of its resolution and, second, Resolution 687 continues sanctions against Iraq which will only be lifted when Iraq has complied with the resolution. In other words, there is provision for enforcement. As Christine Gray states, the cease-fire in 687 was not put under the control of one State or a group of States, it was put under the control of the Security Council as a whole.<sup>239</sup> It is therefore up to the Security Council to enforce it, whether by sanctions alone or by authorizing the threat or use of airstrikes.

### C. After-Effects

This does not absolve Iraq of its responsibilities to the Council, nor indeed does it alter the fact that Iraq has behaved in a highly inappropriate manner towards UNSCOM. What it does mean is that the United States and the United Kingdom reacted unsuitably to Iraq's actions. It only remains to decide what effects this illegality had on the Memorandum of Understanding signed by Iraq and the Secretary General on February 23, 1998.

As discussed above, Article 52 of the Vienna Convention on the Law of Treaties<sup>240</sup> renders void all treaties brought about by threats or uses of force. However, it would seem that the Memorandum would not fall foul of this. There are various reasons for this. The first of these is that the threat of force was not by the UN, indeed conspicuously outside of it. Kofi Annan did not threaten force, the United States and the United Kingdom did. For Article 52 to bite, the coercion must be from the State negotiating the treaty, and this did not happen here. Against this, it could be implied that Kofi Annan adopted the threats of force in relation to Iraq and thus, as a signatory, he was tainted by them. This would have to be implied from his statement that "you can do a lot with diplomacy, but of course you can do a lot more with

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239. See Gray, *supra* note 165, at 173.

240. See Article 52, *supra* note 52.

diplomacy backed up by firmness and force.”<sup>241</sup> It is very difficult to say if this amounts to an adoption, or if he adopted them in negotiations with Iraq, or only later. Either way, whether they were adopted or not could make no difference in this case. This is because the threat must have been the reason for the acceptance of the treaty, but in this case, it is unlikely that this was so given that there were carrots offered as well as sticks shown. Iraq secured “UNSCOM plus suits” and its objective of raising the issue of the ending of sanctions. In addition, Tariq Aziz, the Iraqi Deputy Prime Minister, expressly stated that the threats of force were not determinative in the conclusion of the treaty; the diplomacy of Kofi Annan was the reason for the agreement.<sup>242</sup> This would preclude any reliance on Article 52 by Iraq at a later stage.

The most important issue must be, however, that in accepting the Memorandum, Iraq has imposed no new burdens on itself which were not already imposed by Resolution 687. As a result, even if the agreement was vitiated by the threats of force, the primary source of the obligation, the Security Council resolution, is still in force. Thus, the agreement makes no practical difference to Iraq’s obligations. Indeed, Iraq probably obtained a better deal than it was entitled to by the addition of “suits” to UNSCOM and the publicity for its campaign to remove UN sanctions. Indeed, Iraq feted the agreement as a victory so it is highly unlikely that it could later be nullified by the Iraqis on the grounds of Article 52.

#### IV. CONCLUSION

It only remains to decide what lessons and implications for international law can be drawn from this combustible period. The reactions of States in the affair and after, and in the Security Council meeting preceding the adoption of Resolution 1154, are instructive in relation to the views of those States on threats of force. While it is clear that in the February 1998 crisis the United States and the United Kingdom, with the support of some other States, notably Germany, Canada, Australia, Slovenia and Kuwait,<sup>243</sup> considered it acceptable to threaten force, their views were not accepted by a sizeable proportion of States. In addition to the statements of various States in the Council mentioned above, China, Russia, Mexico, Pakistan, Malaysia and, albeit obliquely, France and Egypt, all expressed their opposition to threats and uses of force, reiterating the traditional rule in this very public forum.<sup>244</sup> After such a situation, it is refreshing to see States rally around the prohibition.

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241. *A Turning Point for the UN?* (visited Feb. 25, 1998) <<http://www.news.bbc.co.uk>> (search term “Iraq”).

242. See *Iraq: UNSCOM Crisis 1998*, *supra* note 108, at 42097.

243. The latter two expressing their support in the Security Council, U.N. SCOR, 53d, Sess., 3858th mtg. at 16, 23, U.N. Doc. S/PV 3858 (1998).

244. See *id.* at 14-20.

The events described also brought into focus the dangers of threatening force. From a situation between Iraq, the United States, the United Kingdom, and UNSCOM, which had occurred before, events quickly spiraled out of control towards a major conflict. By threatening force, the United States and the United Kingdom raised the stakes and backed both themselves and Iraq into corners from which force became increasingly likely. It caused an entrenchment of position on both sides, and this could well have prevented earlier diplomatic settlement as both parties would see it as a climb down. It is testament to the diplomatic skills of Kofi Annan that he managed to provide a way out for both sides in February 1998. Despite the Secretary General's placatory words directed at the United States and the United Kingdom about the efficacy of diplomacy backed by force, the February 1998 crisis reveals that, miraculously, diplomacy worked despite the threat of force. Furthermore, diplomacy conducted looking down the barrel of a gun, even if successful in producing an agreement, is likely to produce one that unravels almost instantly. This is graphically illustrated by the repetition of the threats in November 1998 and the final descent into violence in December 1998, as the United States and the United Kingdom sought to maintain the credibility of their threats of force. This clearly shows the snowballing effect of threats of force and is a strong argument against accepting them *de lege ferenda*.

What is also worrying is how the United States and the United Kingdom, despite a conspicuous lack of support from many nations, decided to proceed unilaterally to enforce the will of the international community in ways which were expressly rejected by that community. It is no longer sufficient to point to Cold War politics to explain a lack of action from the Security Council. It may be that, as in this case, there simply is no agreement on the necessity to use force and, as such, the lack of a mandate from the Council is actually reflective of the balance of international opinion. To proceed unilaterally, irrespective of this, is to act only on behalf of self-interest, even if it is cloaked in a fictive claim of international approval. That the United States and the United Kingdom have done this, particularly in relation to pariah States, is shown again by their recent actions and statements made to Yugoslavia over Kosovo.<sup>245</sup> This unilateralism should not be encouraged; it is dangerous.

Unfortunately, it seems that this unilateralism is also creeping into the interpretation of Security Council language. This is evidenced by the interpretations of the phrase "severest consequences," as discussed above. The debate on Resolution 1154 made it clear that phrase was not to be considered analogous to "all necessary measures" and, as such, is not a mandate for the threat or use of force. This has not prevented the United States and the United Kingdom from later claiming, in direct contradiction to the under-

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245. See Michael Evans, *NATO to Train in Albania and Macedonia for Raids on Serb Targets*, *TIMES* (London), June 11, 1998, at 20; Michael Evans, *NATO to Draw up Kosovo Military Options*, *TIMES* (London), June 25, 1998, at 17; Chris Bird & Ian Black, *Serbs Dare West to Raise Stakes*, *GUARDIAN WKLY.*, Jan. 24, 1999, at 1.

standing upon which Resolution 1154 was adopted, that Resolution 1154, and in particular the phrase "severest consequences," is enough to mandate them to take unilateral military action if they deem it expedient.<sup>246</sup> This is duplicitous and can only be intended to gain support at home, as on the international plane it is clear that this was not the intent of the resolution. If the United States and the United Kingdom insist on providing their own interpretations of phrases contradicting those already agreed to, this could have very serious effects on cooperation and trust in the Security Council, which would not be a positive development.

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246. See, e.g., 3858 mtg., *supra* note 211, at 16.