

The American and British Bombings of Iraq and International Law

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1 Introduction

On 16-19 December 1998, American and British forces bombed a number of targets in Iraq, in what became known as Operation Desert Fox. These bombings constitute the third example within a year of American use of force without an explicit authorisation by the Security Council in a matter, which is on the Council's agenda.² The Iraqi threat against its neighbours, and the Iraqi government's oppression of its own population certainly constitute important problems, and the Council's pressure on Iraq is therefore highly motivated. Still, there are legal and political reasons to ask whether the bombings are in accordance with international law.³

The background may be recapitulated as follows. On 2 August 1990, Iraq invaded Kuwait. Starting with Resolution 660 on the same day, the Security Council adopted a number of resolutions, which condemned the invasion,

¹ The article is essentially a reworked and footnoted version of a memo for the Swedish Ministry for Foreign Affairs, written and augmented during the period November 1997 to December 1998, when Sweden, as a non-permanent member of the Security Council, had to deal with the recurring crises over Iraq's obstruction of UNSCOM's work (on UNSCOM, see footnote 8). The Swedish stance in the Security Council during this period and after, including its reactions to the bombings, coincided with the thrust of the analysis in this article. Despite this history, it has to be clarified that the various views in this article do not necessarily coincide with those of the Swedish Government, and not all of them were developed and presented to the Government at the time.

² The other events were the bombings of targets in Afghanistan and Sudan on the 20 August and NATO's bombing of the Federal Republic of Yugoslavia between 24 March and 10 June 1999.

³ The legal reasons are obvious; from the legal perspective, legality is a good in itself. From the political perspective, the legality of the operation is important both for the legitimacy and for the effectiveness of the action, as well as for the authority of the Security Council.

demanded withdrawal and other measures from Iraq, and imposed sanctions of different types.⁴ In operative paragraph 2⁵ of Resolution 678 of 29 November 1990, the Council authorised the US-led coalition to use “all necessary means to uphold and implement Resolution 660 (1990) and all subsequent relevant Resolutions and to restore international peace and security in the area”. The ensuing Operation Desert Storm – which began on the night between 16 and 17 January 1991 and was finished on 28 February the same year – can be described in two different ways: as an implementation of a decision by the Security Council (Resolution 678 and preceding Resolutions) or as collective self-defence, for which a Council authorisation was not necessary (but still welcomed).⁶ Shortly thereafter, on 2 March, the Council adopted Resolution 686 on certain measures, which were a direct result of the hostilities.⁷ In Resolution 687 of 3 April 1991, the Council declared a cease-fire, while it also imposed a number of obligations on Iraq, including the famous section C, which concerns inspections and destruction of Iraq’s weapons of mass-destruction (WMD) and of its capacity to produce such weapons. Inspections were to be conducted by

⁴ The Resolutions and most other important UN documents are collected in the volume *The United Nations and the Iraq-Kuwait Conflict 1990-1996*, United Nations, New York, 1996.

⁵ Security Council Resolutions generally contain preambular paragraphs (pp) and operative paragraphs (op). Decisions appear only in the operative paragraphs, but not all operative paragraphs are of a binding character.

⁶ The legal discussion on the Gulf War was extensive. *Juridisk Tidskrift* at the Stockholm Faculty of Law published Richard Falk, *Reflections on the Gulf War Experience: Force and War in the United Nations System*, 3 *Juridisk Tidskrift* (1991) 181; Ove Bring, *Reflections on Richard Falk’s article on the Gulf War: Should a functional approach to the UN Charter be considered unconstitutional?* 3 *Juridisk Tidskrift* (1991) 375 [hereinafter: *Reflections*]; Said Mahmoudi, *Kuwait Crisis and International Law. Some Afterthoughts*, 3 *Juridisk Tidskrift* (1992) 562 and Pål Wrangé, *Reflections on Law, Schizophrenia and the Gulf Crisis*, 3 *Juridisk Tidskrift* (1991) 378. See also, i.a., Bruno Simma (ed), *The Charter of the United Nations. A Commentary*, Oxford University Press, Oxford (1995) at 120 and 416-417; Ove Bring, *FN-stadgans folkrätt*, Norstedts Juridik AB, Stockholm (1992) 332-337; Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 *American Journal of International Law* (1991) 452; Eugene Rostow, *Until What? Enforcement Action or Collective Self-Defence?* 85 *American Journal of International Law* (1991) 506; Burns Weston H., *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 *American Journal of International Law* (1991) 516; Paul Kahn, *Lessons for International Law from the Gulf War*, 45 *Stanford Law Review* (1993) 425 (containing an interesting philosophical discussion); Edwin D. Williamson, *International Law and the Role of the Legal Advisor in the Persian Gulf Crisis*, 23 *The New York University Journal of International Law and Politics* (1991) 361; Colin Warbrick, *The Invasion of Kuwait by Iraq*, 40 *International and Comparative Law Quarterly* (1991) 482; Christopher Greenwood, *New World Order or Old? The Invasion of Kuwait and the Rule of Law*, 55 *Modern Law Review* (1992) 153; Yoram Dinstein, *The Legal Lessons of the Gulf War*, 48 *Austrian Journal of Public International Law* (1995) 1; John Quigley, *The United States and the United Nations in the Persian Gulf War: New Order or Disorder?*, 25 *Cornell International Law Journal* (1992) 1; Pierre-Marie Dupuy, *Après la guerre du Golfe ...*, *Revue Générale de Droit International Public* (1991) 621.

⁷ Exchange of prisoners of war, etc.

the International Atomic Energy Agency, IAEA, and the specially created organ UNSCOM.⁸

After a number of crises during the last years, Iraq decided, on 5 August and 31 October 1998, to cut off all co-operation with UNSCOM and IAEA. In resolution 1205, the Security Council found that this constituted a "flagrant violation" of Resolution 687 and other relevant resolutions. With American bombers already in the air, on 14 November Iraq rescinded its decision. On 15 December, however, UNSCOM-chairman Richard Butler reported of Iraqi conduct which clearly constitutes breaches of Iraq's duty to co-operate,⁹ and the British and American attacks followed.

Of course, unless justified, the American and British bombings constitute a (*prima facie*) breach of the prohibition of the use of force in the UN Charter, and they have not been justified as self-defence. Therefore, the British and American arguments¹⁰ refer to decisions by the Security Council, since the Council, according to Chapter VII of the Charter, is empowered to authorise use of force which is not self-defence. In short, the American line of argument is that the authorisation to use force in Resolution 678 is still alive and comes into effect if Iraq commits a (material) breach of the provisions of the cease-fire, laid down in Resolution 687, and Iraqi conduct prior to 16 December constituted such a breach.¹¹

In order to investigate whether this justification is correct, I will enquire into whether the authorisation is still in force, though possibly in a dormant stage, and if it covers the bombings (section 2). Thereafter, I will discuss the question who has the right to decide if the conditions for the cease-fire have been breached and what the consequences are of such a breach (section 3). Lastly, I will submit a few concluding reflections (section 4).

⁸ UNSCOM is a subsidiary organ to the Security Council. Until 1996 it was led by the now Swedish ambassador in Washington, Rolf Ekéus, and subsequently by the Australian diplomat Richard Butler. On the work of UNSCOM, see i.a., Johan Molander, *The United Nations and the Elimination of Iraq's Weapons of Mass Destruction: The Implementation of a Cease-Fire Condition*, in Fred Tanner (ed), *From Versailles to Baghdad: Post-War Armament of Defeated States*, United Nations, New York (1992) and an interesting article which reached me during the editing of this article, Rex J. Zedalis, *An Analysis of Some of the Principal Legal Questions Relating to U.N. Weapons Inspections in Iraq*, 67 *Nordic Journal of International Law* (1998) 249. The future of UNSCOM seems to be very uncertain at the time of the completion of this English version of the article (September 1999).

⁹ UN Doc S/1998/1172.

¹⁰ They were presented in the debate in the Security Council on 16 December as well as in a letter on the same day to the President of the Council.; UN Doc S/PV 3955 and UN Doc S/1998/1181, respectively.

¹¹ The British view seems to have been a bit different, at least prior to the December bombings. In their opinion, a Council establishment of a material breach is necessary before action involving the use of force can be taken. See Lobel & Ratner, *infra* note 15 at 151, and literature cited therein.

The Resolutions are not written in a clear fashion, which may have different causes – political, technical, human, etc.¹² It has probably been an American ambition to both receive the blessing and authority of the Council and to retain an amount of freedom of action, and these contradictory ambitions naturally lead to contradictory language, particularly given the spectrum of views and interests within the Council.¹³ The official American arguments are fairly laconic, and I have therefore also used arguments from academics who have been supportive of the US position.¹⁴

Before we proceed, a few words about the analysis are in place. The analysis may appear tedious, basing itself on a very close reading of the text. I could have proceeded differently. There are policy arguments for both sides, and they could have been used to “simplify” the analysis. Among such policy arguments, which have been mentioned, is the one that authorisations cannot be implicit.¹⁵ Further, there is the argument that there is a presumption about peaceful means in the UN Charter.¹⁶ Yet another argument is that the relevant Resolutions were adopted eight to nine years ago, and even if it is possible to imagine that an authorisation is active some time after it has been issued, the reasons to be cautious most probably grow stronger as time passes. Possible arguments for the other side is that orders like the ones contained in Resolution 687 shall not be taken lightly, and the argument that there is no reason to assume that the absence of force is the predominant value when other important interests are at stake.

I do have policy considerations of this sort, too, and I will come back to them at the end of the article. However, the principled considerations which determine how I have conducted the analysis have lead me to shun away from open policy arguments, and instead turn to a scrupulous analysis of the text.

My main principled assumption is that an authorisation by the Security Council to use force has to be applied strictly, which means neither liberally, nor restricted.¹⁷ The awesome power given to the Security Council has been given to

¹² On drafting in the Security Council, see Michael C. Wood, *The Interpretation of Security Council Resolutions*, Max Planck Yearbook of United Nations Law (1997) 1, at 8-10 and 17. The article contains a useful discussion on the interpretation of the Council’s Resolutions.

¹³ Cf the then State Department legal advisor, Williamson, *supra* note 6, at 366. See also Serge Sur, *La résolution 687 (3 avril 1991) du conseil de sécurité dans l’affaire du Golfe: Problèmes de rétablissement et de garantie de la paix*, XXXVII Annuaire français de droit international (1991) 25, at 35.

¹⁴ They are mentioned in Douglas Scott, *Memorandum On The Question Whether Existing Security Council Resolutions Are Sufficient To Authorize The US To Take Military Action Against Iraq*, which is an analysis made for the Canadian NGO the Markland Group (www.hwcn.org/link/mkg/index2.html).

¹⁵ Cf Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime*, 95 American Journal of International Law (1999) 124 at 130.

¹⁶ Cf Lobel & Ratner, *supra* note 15 at 128.

¹⁷ The USA has (together with NATO and the Secretary General) interpreted Council decisions in way which is not restricted, and which I believe justified, for instance concerning Resolution 836 from 1993 on Bosnia. The forceful measures taken by NATO during the summer of 1995 on the basis of Resolution 836 were taken despite Russian protests, but these objections were less relevant from a legal point of view since they came a long time

it on the presumption that it should not be stretched beyond what the Council has agreed on, but neither should it be more restricted. The use of force is, indeed, a very serious matter, but there may be other things which are equally serious, and since the Member States of the UN gave the Council the power to authorise force, one cannot assume that force always, or in general, is the bigger evil. That is a decision, which has been left to the Council.

These decisions have to be taken seriously, studied and applied as legal texts. Of course, legal texts are never unambiguous, and the methods of interpretation are contradictory. I will apply the principles of treaty law to interpret them, with the following modification, if it is one. The decision of the Council is embodied in the text – or it is the text - and it is not located somewhere else. The members of the Council are often not in agreement about what the text means, but they, or the prevailing majority, have all voted for the text as it stands. Since the text is not a treaty, but a decision by a collegiate body, subject to certain rules of procedure, most importantly article 27 of the Charter, the text has to be interpreted with that in mind. Therefore, if the text is ambiguous, I will make a hypothetical test of whether it is likely that the one or the other restatement (interpretation) would have passed the Council.¹⁸ This means that the more restricted version will often, but not always, apply.¹⁹

after the adoption of the Resolution, since the wording of the Resolution well covered the NATO action, and since there could be no doubt that the Council members at that time (1995) judged the situation as serious as it had when the resolution was adopted in 1993. Consequently, there were good legal (and political) reasons to use Resolution 836 the way it was used.

The difference, which might be crucial, between Bosnia and Iraq is that nothing had happened in Bosnia in the summer of 1995 which had made Resolution 836 less justified than in 1993, while in Iraq there was a decision on a cease-fire.

¹⁸ I do not believe that texts ever are unambiguous, nor do I believe that hypothetical tests, or any other means can help us determine the “true” meaning of the text. All of this is self-evident to me in my former role as an academic, and I am reminded of them from time to time in my practice, as well. Nevertheless, as a professional lawyer it is my job to distinguish a good argument from a bad one, and that can be done, using the shared premises - or, perhaps, prejudices - which lawyers have (though not all lawyers share them, and probably no two lawyers have identical world-view). See also section 4.

¹⁹ This is not based on a policy consideration that the power of the Council shall be restricted, but on the rules of voting and on the fact that the veto means that the most likely alternative to any given decision is a more restricted decision or no decision at all.

For sure, there are certainly instances where a reluctant state accepts an ambiguous phrase, knowing that some states will interpret it liberally, while that state itself can hide behind a more restricted interpretation. I believe that this is an irresponsible course of action by the reluctant state, which should “come out” with its view. But it says nothing about whether the one or the other interpretation is correct.

On the one hand, one could say that one has to assume the “real” opinion of that reluctant state, and give the resolution a restrictive interpretation. On the other hand, that would mean that that state could both eat the cake and have it, since its restrictive interpretation would be determining while it would not have to take responsibility for it openly, which it would have if it had insisted on a clearer and more restricted phraseology.

2 Is the Authorisation to use Force Still in Force, Though in a “Dormant Stage”, and does it Cover the Goal of Upholding Section C in Resolution 687 on Weapons of Mass Destruction?

The first question is if the authorisation to use force is still alive, so that it can be activated after an Iraqi breach of the cease-fire conditions in section C of Resolution 687. In order to find that, one would have to come to the conclusion both that it is not extinguished through resolution 687, and that it does cover the goal of Operation Desert Fox. If not both of them are correct, the bombings are illegal. The first condition is dealt with in subsections 2.1 and 2.3 and the second one in 2.1 and 2.2.

2.1 Force to “Restore International Peace and Security in the Area”?

The first argument for the continued effect of the authorisation is that it was given in order to “restore international peace and security in the area” (op 2, Resolution 678), and that this covers the right to intervene against *any threat* to international peace and security which Iraq may pose.

However, the wide authorisation to use force was given in resolution 678 in order to implement Resolutions 660-678, including, most of all, the restoration of Kuwaiti sovereignty. Resolution 678 referred to earlier resolutions, which all concerned the Iraqi occupation of Kuwait. Further, in the open debate in the Council, no other goal was mentioned than to enforce Iraqi withdrawal and implementation of those Resolutions, which had been passed at that time.²⁰ In addition, the US decision not to go to Baghdad was explained by the restricted scope of the authorisation.²¹ Therefore, both the wording and the intention of the Council on 29 November 1990 were to remedy the breach of the peace which had occurred on 2 August that year, not to remedy any future violation or threat to peace and security in the area.²²

In addition to that, it may be said that this authorisation ended when Iraq accepted the cease-fire in Resolution 687 on 6 April 1991 in accordance with op 33, as will be developed further below (2.3).²³ But there are also a number of

²⁰ The UK Foreign Minister Douglas Hurd said that “[t]here is no ambiguity about what the Council requires in this Resolution and in previous Resolutions”, namely “that Iraq comply fully with the terms of Resolution 660 (1990) and all later Resolutions and withdraw all its forces unconditionally”. “The international community has not today added to its demands. It is not asking for anything except the reversal of the aggression – namely, full compliance with previous Resolutions.” The Soviet Foreign Minister, Edvard Shevardnadze, stated that “[t]he purpose of this Resolution is to put an end to aggression”. The US Secretary of State, James Baker, was a bit less clear: “the Security Council ... cannot tolerate this aggression”. No speaker said anything which could be interpreted to mean that it was the view that the authorisation was wider. See UN Doc S/PV. 2963.

²¹ Cf also Lobel & Ratner, *supra* note 15 at 140.

²² Otherwise, one could interpret op 2 to authorise action against, for instance, Iran, if Iran were held to be a threat to international peace and security in the area. Cf also Lobel & Ratner, *supra* note 15 at 129.

²³ UN Doc S/22456. See also 3.1, below.

facts concerning the mandate as such which speak for the view that the authorisation had ended in April or May 1991.

Resolution 678 used the phrase *restoration*, i.e., not *maintenance* of peace and security. Consequently, the goal was to remedy the situation prevailing at the time when Resolution 678 was accepted, and when this goal had been reached, the authorisation would no longer be in force. The cease-fire, which was declared in Resolution 687 might be held to be a sign of a Council assessment that international peace and security had been restored on the 3 April 1991, and consequently the authorisation could no longer be in force.

A number of passages from *Resolution 686*, in conjunction with op 6 of Resolution 687, point in the same direction. Firstly: Resolution 686 “recognizes” in op 4 that the authorisation in Resolution 678 “remain[s] valid” for the period which it would take Iraq to comply with a number of conditions in op 2 and op 3 of Resolution 686. All of these conditions concern the direct consequences of the authorised military operations.²⁴ Hence, it can be said that it was the view of the Council that the authorisation would no longer be in force when those conditions of Resolution 686 had been fulfilled.²⁵ It is therefore logical that Resolution 687 did *not* state that the authorisation in Resolution 678 had full force and effect. Secondly: In op 6 of Resolution 687, the Council noted that as soon as the Secretary General had notified that the UN observer force UNIKOM had been deployed, the conditions would be satisfied for the coalition to “bring their military presence in Iraq to an end consistent with Resolution 686”. It was therefore the Council’s view that there was no reason to hold foreign forces in Iraq after 9 May when the Secretary General reported that UNIKOM was in place.²⁶ Thus, it must be said that the Council implicitly declared that the goal for the action, as declared in Resolution 678 had been satisfied, at least by and large.²⁷

²⁴ Iraq shall rescind all actions which aim at the annexation of Kuwait, accept liability for damages, release detained persons and prisoners of war, return seized Kuwaiti property, cease hostile and provocative actions against coalition forces, designate military commanders to arrange for the cessation of hostilities, provide information on mines, biological and chemical weapons, etc. See also Christine Gray, *After the Ceasefire: Iraq, the Security Council and the Use of Force*, *British Yearbook of International Law* (1994) 138-141.

²⁵ One could also ask the connected question of whether the authorisation in Resolution 678 still had the same content after Resolution 686 or if it had been widened to the purposes of op 2 and 3 in Resolution 686 (see Gray, *supra* note 24, at 138 *et sequat*). That question is, however, of no relevance for the main issue of this article.

²⁶ UN Doc S/22580. This decision does not concern the cease-fire but the temporary occupation by the coalition of parts of Iraq in connection with Operation Desert Storm. That is, however, of less importance for this discussion.

²⁷ It could possibly be claimed that the authorisation still stands as concerns those issues which were dealt with in op 2 and 3 of Resolution 686, but none of them is relevant for this case. (See footnote 24. As mentioned, the conditions concern the direct consequences of the hostilities. Some of these follow directly from the authorisation to drive Iraq out of Kuwait, while others follow from international humanitarian law and other international law.)

See also the strong language in op 4, Resolution 687, repeated in op 1, Resolution 806, concerning Kuwait’s borders:

It could be mentioned that Resolution 949 has also been evoked for the US side. In op 3 of that Resolution, the Council demanded that Iraq not use its military forces "in a hostile or provocative manner to threaten either its neighbours or United Nations operations in Iraq". At the same time the Council was "reaffirming" a number of earlier Resolutions, and in particular op 2 of Resolution 678. To this, it should be remarked that Resolution 678 has not been confirmed in later Resolutions, and consequently one could interpret the Council's intention to be that op 2 in Resolution 678 was relevant for those cases which are mentioned in Resolution 949 – i.e. military threats - but not for the disarmament of Iraqi capacity of mass destruction.

Therefore, it seems that the wide authorisation to use force had ceased: either Resolutions 686 and 687 can be interpreted to actually determine that the mandate had been fulfilled and that the authorisation thereby had ended when the goals set out in op 2 and 3 had been fulfilled,²⁸ or, more plausibly, Resolution 686 and op 6 in Resolution 687 are data for an interpretation which strongly suggest that it was the intention of the Council that Resolution 678 should not stretch beyond satisfying those goals which the coalition reached through Operation Desert Storm.²⁹

"Decides to guarantee the inviolability of the ... international boundary [between the State of Kuwait and the Republic of Iraq] and to take as appropriate all necessary measures to that end in accordance with the Charter of the United Nations;"

This paragraph could possibly be interpreted to mean that the coalition would have a right to act in order to defend Kuwait also in the future - cf the word "guarantee". (This follows, of course, also from the right of self-defence.) But there is another, quite effortless, interpretation, namely that this is a guarantee that the Council would decide on the necessary measures. The Council has never issued an equally far-reaching statement concerning section C on weapons of mass destruction in Resolution 687.

²⁸ The following argument could be added. In distinction to Resolution 686, Resolution 687 does not repeat the statement that the authorisation is in force, and even less does it state that it covers the purposes of Resolution 687. Since the Council found it necessary to repeat the authorisation in Resolution 686, but did not do that in Resolution 687, one could draw either of the following conclusions: either it ceased with Resolution 687, or it does not cover those purposes of Resolution 687 which are not mentioned in Resolutions 660 to 686, i.e., it does not cover the purposes of section C.

Against this argument, one could state that op 1 of Resolution 687 confirmed all earlier Resolutions, which speaks for the continuation of the authorisation. Still, this was done with the exception for everything which was expressly stated in Resolution 687, including the provisions on a formal cease-fire.

²⁹ In distinction to the analysis in section 3.1 – whether the Council decided about a cease-fire in Resolution 687 – Resolutions 686 and 687 here play the role of aiding the interpretation of Resolution 678. Hence, the purpose is not primarily to find out of whether Resolutions 686 and/or 687 extinguished the authorisation, but if these Resolutions indicate that the authorisation of Resolution 678 does not go further than to reach those goals which were obtained in Operation Desert Storm.

Article 31.3.a-b of the 1969 Vienna Convention on the Law of Treaties states that subsequent agreements and practice shall be used in order to establish the meaning of a treaty. The Convention's rules about interpretation are not directly applicable on Security Council Resolutions, but they must serve as guidance, unless there are strong reasons to deviate from them.

In addition, it should be added that during the debate when resolution 687 was adopted some states - including the Soviet Union - made statements which make it clear that they did

There is, however, one argument for the view that the authorisation also covered actions, which directly or indirectly aimed at destroying Iraq's WMD capability. In the preamble to Resolution 687, the Council says that it is "conscious of the *threat* that all weapons of mass destruction pose to peace and security in the area" and, in the last two preambular paragraphs, the Council is "bearing in mind its objective of *restoring* international peace and security in the area ... conscious of the need to take the following measures acting under Chapter VII of the Charter" (italics added).³⁰ Hence, the claim could be made that the authorisation in Resolution 678 covers also the goals in section C of Resolution 687, since they are included in the goal of restoring of peace and security.³¹ There is a strong counterargument, however: The cited preambular paragraph about WMD, implies that section C concerns not the *restoration* of but the removal of *threats against* international peace and security, which is an aim of considerably lower importance than the one for which the authorisation was given, namely to restore the peace which was breached by Iraq's invasion of Kuwait.³²

To conclude, it seems like the Council's authorisation to use force is not in force, and, in any case, it is likely that it does not cover the elimination of Iraq's WMD capacity.³³

not find that there was a remaining authority to use force. See the analysis in Lobel and Ratner, *supra* note 15 at 149, footnote 105. Cf also *infra*, footnote 43.

³⁰ One should also add that the coalition did destroy plants where weapons of mass destruction were manufactured, and thereby the coalition made the interpretation that such weapons are included in the concept "threat against international peace and security". Evidently this was done without wide-spread protests from the international community. However, the destruction of production facilities for weapons of all kinds are almost always legitimate military objectives during the course of an armed conflict.

³¹ Cf the US legal advisor during the Gulf Crisis, Edwin D. Williamson, *Comment on ASIL Flash Insight: the Legal Background On the Use of Force to Induce Iraq to Comply With Security Council Resolutions*, ASIL Flash Insight, November 1997. Williamson seems to find that restoration of peace and security is the same thing as removal of threats to peace and security.

³² For sure, the Council makes a reference in the preamble of Resolution 687 to "its objective of restoring international peace and security in the area". However, this could be taken to mean that "restoring" refers to the whole Resolution, and not to every single part; in Resolution 687 the Council decided, about the observation mission UNIKOM (op 5 and 6) and demanded that Iraq respect that Kuwaiti borders are inviolable (op 2). One could also make the interpretation that the reference to the goal to "restore" shall be understood to mean that since the goal to "restore" peace and security was fulfilled, it was possible to decide about a cease-fire.

Further the Council had to show that weapons of mass destruction constitute a threat to international peace and security in the area; otherwise it would not have had the capacity to take a binding decision. According to article 39 – which opens Chapter VII – the Council can take enforcement measures only if there is a breach of the peace, an act of aggression or a threat to (international) peace (and security).

³³ Zedalis, *supra* note 5, at 258, comes to a similar conclusion.

2.2 *Force to Implement Resolutions Subsequent to Resolution 678?*

Yet another argument for the US position is that operative paragraph 2 of Resolution 678 authorises force to implement *all future* Resolutions, i.e., also resolutions subsequent to 29 November 1990.³⁴ A close reading of Resolution 678, however, yields that “subsequent Resolutions” refers to the eleven Resolutions on the Gulf crisis existing at the time, which all were enumerated in the first preambular paragraph of Resolution 678.³⁵ The debate in the Council when Resolution 678 was accepted does not suggest a different interpretation.³⁶ And, in accordance with the arguments made previously in this section, any other conclusion would have been unreasonable.

2.3 *The Implications of the Cease-fire*

Wars seldom end in formal peace treaties, and instead a war de facto ends with an armistice, at least if the armistice is general, in distinction to local.³⁷ Resolution 687, however, speaks of “cease-fire”.³⁸ A cease-fire is, broadly speaking, a temporary and local condition, and therefore the use of the word “cease-fire” might be an argument for the continuing force of the authorisation.

The term “cease-fire”, which mainly is used in Security Council Resolutions and other UN contexts, covers, however, also more permanent arrangements. As an example, Security Council Resolutions 54 and 73 from 1948 and 1949 ordered a cease-fire between Israel and the Arab States under article 40 of the Charter, the latter resolution also noting the four armistice agreements.³⁹ Resolutions 233-236 and 338 during the Six Days War in 1967 and the Yom Kippur war in 1973, respectively, called for a “cease-fire”. There is still no peace treaty between Israel and Syria, but nevertheless, the prevailing view is that there is not an armed conflict between the two states,⁴⁰ and the Security

³⁴ This argument is also made by John Carey, in a “Letter to the Editor” in *American Journal of International Law*.

³⁵ In op 1, it was stated that Iraq should comply with Resolution 660 and “all subsequent Resolutions”. One would have to assume that “all subsequent resolutions” denotes the same things in op 2 as in op 1. In op 1, it could not refer to anything but the then existing 11 Resolutions enumerated in pp 1, for the simple reason that Iraq could not possibly comply with future, and in that moment hypothetical Resolutions. See also Scott, *supra* note 14, at 23-25.

³⁶ One could remind of Douglas Hurd’s words: “The international community has not today added to its demands. It is not asking for anything except the reversal of the aggression – namely, full compliance with *previous* Resolutions” (my emphasis). See footnote 20.

³⁷ Yoram Dinstein, *War, Aggression and Self-Defence*, Cambridge (1988) 50 *et sequat*.

³⁸ Ove Bring does the same thing in *supra* note 6, at 341.

³⁹ Israel-Syria, Israel-Transjordan, Israel-Lebanon and Israel Egypt. See also Jules Lobel & Michael Ratner, *supra* note 15 at 146.

⁴⁰ The situation between Israel and Lebanon is more complex. This does not, however, change the conclusion concerning the meaning of the word “cease-fire” in this context.

Bilateral cease-fires, agreed under the auspices of the U.N., are no longer considered to be at the disposal of the parties (Gray, *supra* note 6, at 143). The U.N. participation in Resolution 687 goes even further, since the Council stated the conditions for the cease-fire.

Council explicitly stated in resolution 248 that reprisals are "grave violations" of the cease-fires.⁴¹ This entails that "cease-fire" can also mean a general cessation of hostilities, which cannot be abrogated unilaterally because of a mere breach of its conditions (unless, of course, there is an armed attack). Further, the arrangements and obligations in Resolution 687 are very far-reaching – the comparison to the peace treaty of Versailles is common⁴² – and the fact that the conditions for the cease-fire were decided and accepted at the highest political level both at the UN and in Iraq point in the same direction.⁴³

According to the old law, a serious violation of an armistice meant that the other side could denounce the armistice and resume fighting.⁴⁴ The prohibition of use of force changed the basis for that; there is now a new situation of peace, where the prohibition of force reigns,⁴⁵ and the practice of the Security Council confirms that a state may no longer be free to suspend a cease-fire on violation by the other party.⁴⁶

Therefore, the conclusion is that what we have is akin to a general armistice, that is, *de facto* peace.⁴⁷ At a minimum, the analysis shows that the use of the term "cease-fire" does not prove that there is a right to decide unilaterally on the use of force.

⁴¹ This means that a countermeasure against a breach is illegal, and this, in its turn, suggest that it is not possible to suspend a cease-fire.

⁴² E.g. Ove Bring, *supra* note 6, at 338; Oscar Schachter, *supra* note 6, at 456. Cf also Grey, *supra* note 6, at 144 and Sur, *supra* note 13, at 625, as well as the title *From Versailles to Baghdad: Post-War Armament of Defeated States, United Nations*, referred to in footnote 8.

⁴³ Both the US and the Soviet Union talked about "*permanent* cease-fire" during the open debate of 3 April 1991, even if they did so in different terms; it seems to have been the view of the Soviet Union that the cease-fire should be permanent, at least from the Iraqi acceptance and the deployment of UNIKOM, while the US statement left that issue open. The US ambassador Pickering said that the Resolution laid "the groundwork for the permanent cease-fire", and he did so in terms which leave open the view that the cease-fire would not be permanent already through the Iraqi acceptance. The Soviet ambassador Vorontsov claimed that the "crux" of the Resolution was that it transformed the temporary cessation of hostilities into a "permanent cease-fire". Thereafter, he spoke of the clauses concerning demarcation of the border, etc. When he later touched upon section C, that was under the assumption that it "paves the way to forming a post-crisis settlement". This indicates that it was the view of the Soviet Union that a permanent cease-fire would be at hand as soon as the issues directly related to the Iraqi-Kuwaiti conflict were resolved, but that the questions related to section C did not have the same link. UN Doc S/PV. 2981. Cf also *supra*, footnote 29.

⁴⁴ See article 40, the Regulations Respecting the Laws and Customs of War on Land, annexed to the Fourth Hague Convention of 1907.

⁴⁵ See Jules Lobel & Michael Ratner, *supra* note 15 at 144-145.

⁴⁶ See footnote 39.

⁴⁷ Dinstein is of a different view; see Dinstein, *supra* note 6, at 3.

2.4 Conclusion

There are good, but not wholly decisive, arguments for the view that the authorisation to use force has ceased completely; there are very good arguments for the view that the authorisation does not cover the purposes which section C of Resolution 687 are meant to fulfil, i.e., the elimination of Iraq's weapons of mass destruction.⁴⁸

3 How can the Cease-fire be Suspended or Terminated?

If it is a correct assumption that the authorisation to use force has ceased to be in force, or if it is correct that it does not cover questions related to section C of Resolution 687 and Iraq's weapons of mass destruction, in any of those cases a suspension of the cease-fire can not entail a right to use force for any purpose related to the activities of UNSCOM and IAEA without a new explicit decision by the Security Council.⁴⁹ However, since it is not completely clear that the authorisation is dead or that it excludes such purposes, it still remains to be determined if, and under what circumstances, the authorisation to use force may again become active after an Iraqi breach of the cease-fire conditions.

In this section, I will first determine the substantive requirements for a suspension or a termination of the cease-fire, namely, a material breach of the cease-fire stipulations (3.1). Thereafter, the analysis will continue to the procedural questions of who has the right to determine that a material breach has occurred (3.3) and to suspend or terminate the cease-fire (3.4). As a preliminary question to those two, I will deal with the legal basis of the cease-fire (3.2). Lastly, the consequences of a suspension or termination will be covered (3.5).

3.1 Under Which Conditions may the Cease-fire be Suspended or Terminated?

The first question concerns the conditions under which the cease-fire may be suspended or terminated.⁵⁰ In contract law terms it could be said that the cease-fire may end or be suspended if Iraq breaches the conditions in Resolution 687

⁴⁸ It should be mentioned that it is probably uncontroversial that there is a limited, remaining authorisation to use force according to Resolution 665 in order to implement the UN trade embargo against Iraq through a blockade in the Persian Gulf. I have kept that issue outside of this discussion.

⁴⁹ It might be possible, though, in order to defend Kuwait against an Iraqi attack. See *infra*, note 70 and note 80.

⁵⁰ Resolution 687 does not state that the cease-fire is conditioned on Iraqi *compliance* but only on *acceptance*. Resolution 687 does *not* state that the cease-fire shall be suspended or terminated if Iraq does not comply with resolution 687 or if it no longer accepts the conditions in this Resolution. Therefore, it has been claimed that the continuance of the cease-fire is not conditioned by Iraqi compliance in any way. See Scott, *supra* note 14, at 19-20.

substantially.⁵¹ In particular, this would be true if the cease-fire were the result of an agreement between the US-led coalition and Iraq and hence is an inter-governmental agreement (contrary to the findings below).⁵²

However, such a breach must be “material” (cf Article 60, the Law of Treaties Convention⁵³). This is, in principle, an objective standard but in practice it is, of course, a matter of judgement whether a breach is “material”. It seems to be beyond doubt that the Iraqi decisions on 5 August and 31 October to discontinue all co-operation with UNSCOM and IAEA constitute material breaches.⁵⁴ (These decisions were rescinded on 14 November.) Nevertheless, in Resolution 1205, the Council used the expression “flagrant violation” to label these acts. Legally speaking, these words probably have the same meaning as “material breach”.⁵⁵ Several Council members, however, wanted to avoid the term “material breach” - most certainly because they were conscious that it is an existing view among some members that “material breach” entails a green light for the use of force. If a suspension of the cease-fire is self-executing⁵⁶ the Council’s determination is of no relevance (see below). However, if a suspension is not self-execution, the Council’s finding is important, as will be further discussed below. Hence, the use of words indicates that the Council thought that a material breach had occurred, but the avoidance of that particular term, shows that it did not find that to be a green light for the use of force.⁵⁷

Not any breach is “material”. For sure, the Council warned in op 3 of Resolution 1154 that “any violation” will have “severest consequences”, but the most reasonable interpretation of this statement is that op 3 contains a warning

⁵¹ These conditions probably cover later relevant resolutions about UNSCOM, as well as that Memorandum of Understanding which Iraqi vice Prime Minister Tariq Aziz and the UN Secretary General signed on 23 February (UN Doc S/1998/166), since they elaborate UNSCOM’s mandate and Iraqi obligations, but, in general, do not add any new obligations which can not be said to be covered by section C of Resolution 687 (cf, e.g., op 3, SC Res 1154).

⁵² To be sure, it is open to debate whether it is an agreed cease-fire with the Council, and it is likewise debatable whether the Security Council is bound by any condition or agreement, since the Council has the right to decide discretionary whatever it wishes, as long as it serves to maintain peace and security. Nevertheless, for the political credibility of the Council - and perhaps for the legality of its decisions - the Council would have to motivate a decision to again authorise force.

⁵³ Note 29.

⁵⁴ Cf also the presidential statement of 28 February 1992 (UN Doc S/23663). A presidential statement is a statement made on behalf of the Council. The statement is accepted and made public in a formal meeting. The presidency rotates on a monthly basis between the members of the Council.

⁵⁵ It is true that “flagrant” means that the breach is evident - i.e., easy to establish - while “material” means that it is considerable, i.e., a judgement of quantity. This subtle difference of meaning is, however, less important in my judgement, and there are no signs in the records of the discussion that this difference of meaning was clear or mattered to the members of the Council.

⁵⁶ This is the view of Ruth Wedgwood; see Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force against Iraq’s Weapons of Mass Destruction*, 92 *American Journal of International Law* (1998) 724, at 726.

⁵⁷ See also Lobel & Ratner, *supra* note 15 at 154.

to Iraq about measures which may be decided by the Council – not by individual states (see 3.4).⁵⁸ Those breaches which were reported by UNSCOM Chairman Richard Butler on 15 December may possibly, taken together, constitute a “material breach” or a “flagrant violation”, but this is a question which requires intimate knowledge of the working methods of UNSCOM and of Iraq’s weapons of mass destruction.

3.2 *What is the Legal Basis of the Cease-fire?*

After the discussion on which facts may justify a suspension of the cease-fire, it is time to deal with the question who may decide on such a suspension. As a preliminary issue to that, we have to ask who instituted the cease-fire, because, as will be explained further, the answer to that question is likely to be material to the question who may make decisions, relevant to renewed use of force against Iraq.

In Resolution 687, the Council decided about the conditions for the cease-fire. In op 33 it was declared that “a formal cease-fire is effective” as soon as Iraq accepts the conditions of the preceding 32 paragraphs, and this acceptance came in a letter to the Secretary-General and the President of the Security Council on the 6 April the same year.⁵⁹

The Council used the verb “declares” and not “decides”. Therefore, it could be claimed that the Council decided on the conditions for the cease-fire (“decides”) but not on the institution of the cease-fire (“declares”). According to this interpretation, it seems like the Council only decided on the conditions which would be in force *if* there were a cease-fire, but that both the coalition and Iraq had a choice of accepting or not accepting those conditions, in a bilateral agreement. However, that is not expressly stated in the Resolution,⁶⁰ and there is no cease-fire agreement between the US-led coalition and Iraq, nor is there any letter from the coalition to the Council with an acceptance or any other statement which may be taken to form a basis for any sort of agreement.⁶¹ Iraq wrote that she had “*decided ... to agree to United Nations Security Council Resolution 687*”(italics added).⁶²

⁵⁸ See also Zedalis, *supra* note 6, at 259, which also contains an interesting line of reasoning about the conjunctions “but” and “and”.

⁵⁹ UN Doc S/22456.

⁶⁰ The Resolution does not refer to any letter or other document from the Coalition or from those states who were a part thereof, neither does any such document appear from the debate in the Council.

⁶¹ There is no letter from the Coalition accepting the conditions, and the Iraqi acceptance of the conditions were not directed towards Kuwait or the USA but to the UN Secretary General and to the President of the Security Council. See also Gray, *supra* note 6, at 141.

⁶² Iraq stated in the preceding letter of the 6 April 1991 that it had “no choice but to *accept* this *Resolution*” (UN Doc S/22456). The responding letter from the President of the Council of 11 April stated that he had been informed that the letter of 6 April meant Iraqi “acceptance” of Resolution 687, and that the Council’s members had asked him to “note that the conditions established in paragraph 33 of Resolution 687 (1991) have been met and that the formal cease-fire referred to in paragraph 33 of that Resolution is therefore effective” (UN

Further, though the Council does not use the word “decides” in op 33, neither does it use “notes”, “welcomes” or the like. The intermediate “declares” must be taken to mean that the Council states itself on the state of legal obligations in a binding fashion.⁶³ Even most of those students of international law who claim that there was a right for the US to bomb are of the view that it was Resolution 687 which instituted the cease-fire.⁶⁴

It may be concluded that the Security Council not only decided on the conditions for the cease-fire but that the Resolution, together with the Iraqi acceptance, constitutes the legal basis of the cease-fire.⁶⁵ Further, it is reasonable to hold that the consequences are that the Council now disposes of the cease-fire.⁶⁶

3.3 Who has the Right to Decide that a Material Breach has Occurred?

We are now ready to discuss the question who shall decide whether a material breach has occurred. In order to analyse this problem, a short discussion of the character of Operation Desert Storm is necessary. It may be viewed in either of two ways: implementation of a decision by the Security Council or collective self-defence.⁶⁷

Doc S/22485). Concerning the question why the Council demanded an acceptance from Iraq instead of just deciding on the cease-fire, see Sur, *supra* note 13, at 42-43.

⁶³ It is unclear whether this is a performative expression, which means that it is unclear whether the legal situation came into being through the Council statement – which is the case if the word “decides” is used – or if it is a statement which merely notes a fact (in the terminology of the philosopher J.L. Austin). On the meaning of the word “decide”, see Wood, *supra* note 12, at 10.

On the question to what extent the Security Council’s Resolutions are binding, see Jean-Pierre Cot & Alain Pellet (ed), *La Charte des Nations Unies*, Economica, Paris, 2 ed (1991) at 475 and 478.

“Declare” is usually used in the UN to denote the assertion of a state of facts or law. If it is used about legal relations, it is done so with binding force, but from the assumption that the declaration as such does not entail a change. See Henry G. Schermers, & Niels M Blokkers, *International Institutional Law. Unity Within Diversity*, Martinus Nijhoff Publishers, The Hague, 3 ed (1995) at 769-771.

⁶⁴ Professor John Carey, New York University, *supra* note 34, writes that “Resolution 687 ... brought about a cease-fire upon Iraq’s notification...” See also the critical Gray, *supra* note 24, at 141. Wedgewood does not expressly deny that, but still remarks that “the original cease-fire on the ground” was decided by the coalition. Wedgewood, *supra* note 56, at 726.

⁶⁵ For a similar conclusion, see Zedalis, *supra* note 6, at 257-258, and Sur, *supra* note 13, at 38-42. It is another matter whether Iraqi acceptance was necessary for the cease-fire to enter into force. The answer is, most likely, no. Legally speaking, the Council could have decided to institute the cease-fire even without an Iraqi acceptance, even if it is very unlikely that the Council would have done so.

⁶⁶ Sur comes to the same conclusion, *supra* note 13, at 37.

⁶⁷ It is also possible to combine the two, and such a perspective seems necessary for the US argument: The Council confirmed Kuwait’s right to collective self-defence (the view of the US and the UK), at the same time as the coalition was authorised to take measures which went beyond what was necessary to remove the occupation but which nevertheless were necessary to re-establish peace and security. This, however does not change the following discussion, since the US still has to base every attack on one of these two grounds, and

The first interpretation is that the action of the coalition aimed to implement a Security Council decision (too). In the armed conflict with Iraq, the UN was not a party, even if the coalition acted on a UN mandate. The cease-fire, on the other hand, was decided by the Security Council and not through an agreement between Iraq and the coalition, as already indicated. This is logical since the Council gave the initial approval. Therefore, it seems like it is the Council, which disposes of the cease-fire, and shall decide when a “material breach” has occurred (and if this justifies recommencement of hostilities; see 3.4).⁶⁸ One should also remember that the Council, in op 34 of Resolution 687, decided to “remain seized of the matter and to take such further steps as may be required for the implementation of the present Resolution and to secure peace and security in the area”. Even though the prerogative of the Council does not trump the right of self-defence in case of an armed attack, the measures taken in December to implement section C of Resolution 687 do not constitute self-defence proper.

The other interpretation of the events of 1990-1991 – the American and British one during the Gulf crises – that the action constituted collective self-defence – entails that the Coalition then was justified to take all necessary measures to defend Kuwait, but only in so far as Kuwait itself claimed.⁶⁹ However, the US has not invoked the argument that the measures taken in December, 1998, were taken in collective self-defence of Kuwait, and such a claim would not have been reasonable from a legal point of view.⁷⁰

according to the US, that is what she is doing, namely the authorisation. See generally, Martti Koskenniemi, *Kollektiv säkerhet, internationell rätt och grunden för den internationella ordningen*, in Per Ahlin & Pål Wrange (ed), *Den eviga freden? Perspektiv på den nya världsordningen* (1992) 67.

⁶⁸ The situation would possible have been different if it had been a cease-fire between the coalition and Iraq which was only endorsed by the Council, See, though, 2.3.

⁶⁹ Hence, Zedalis’ argument is misdirected. He claims that the P3 (US, UK, France) thought that the Gulf War’ was fought under a U.N. umbrella, since they sought U.N. authority for Operation Provide Comfort and Operation Southern Watch. However, the defence of Kuwait would have been legitimate under article 51. It would be much harder to make the same case for the latter two operations. See Rex J. Zedalis, *Dealing with the Weapons Inspection Crisis in Iraq*, 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1999) 37, at 41.

⁷⁰ Kuwaiti air force bases were used during Operation Desert Fox, but the Kuwaiti Government underlined that it was not a co-actor and, consequently, it was not acting in self-defence. A Kuwaiti demand would be relevant only as regards collective self-defence, but not to enforce section C of Resolution 687. Such an action could possibly be labelled preventive self-defence, but when Israel in 1981 made a similar action against Osiraq in Iraq, this was condemned by a unanimous Council (SC Res 487).

One can also remind that the right to self-defence according to article 51 is only effective until the Council has taken “measures necessary to maintain international peace and security” What “measures necessary” means was one of the most interesting questions during the Gulf war. See i.a. Bring, *FN-stadgans folkrätt*, *supra* note 6, at 326; Bring, *Reflections*, *supra* note 6, at 376; Mahmoudi, *supra* note 6, at 568-570; Schachter *supra* note 6, at 457-461, Rostow *supra* note 6, at 510-514, Warbrick, *supra* note 6, at 487; Greenwood, *supra* note 6, at 164; Weston, *supra* note 6, at 520-521; Sur, *supra* note 13, at 31-32.

Another fact hints in the same direction. The Council has, on a couple of other occasions, determined a "material breach".⁷¹ On the 13, 17 and January 1993, the US, the UK and France bombed Iraq, after a presidential statement of the 11 January,⁷² in which it was declared that Iraq had committed a "material breach". Even though this does not constitute final evidence that only the Council may determine "material breach", it may still be noted that the three states took action only after the breach was determined by the Council. In Resolution 1205, the Council determined that there had been a "flagrant violation",⁷³ but no similar finding occurred prior to the December bombings.

A conclusion in this part is that it is for the Council to determine "material breach", and that the Council has not done so for the situation prevailing on December, 15th.

3.4 Who has the Right to Decide that the Cease-fire Shall be Suspended or Terminated?

As mentioned and according to principles of treaty law, in order for the cease-fire to be suspended or terminated, it does not suffice that a material breach has been committed or determined; it is also necessary that someone actually suspends or terminates it.⁷⁴ The question is if any state of the coalition may take that decision, or if that is for the Council only to decide.⁷⁵

Since the above analysis concluded that it is the Council which so to say owns the situation, this indicates that it is also the Council, only, which is entitled to suspend or terminate the cease-fire. In distinction to what is the case for self-defence, there is no room in general international law for actions against weapons of mass destruction. Therefore, the right to take such action has to come from the Council.

It has been claimed that the American, British and French bombings of 13, 17 and 18 January 1993 constitute evidence that the cease-fire is suspended or terminated if the Council finds a "material breach",⁷⁶ and that these events make

⁷¹ Resolution 707 was the first one. Here in op 1 the Council condemned "Iraq's serious violation of a number of its obligations under section C of Resolution 687 (1991) ... which constitutes a *material breach* of the relevant provisions of Resolution 687 which established a cease-fire and provided the conditions essential to the restoration of peace and security in the region".

⁷² UN Doc S/25091. See also section 3.4.

⁷³ As mentioned, it was essential for many of those members of the Council who were sceptical to the use of force that another term than "material breach" was used. See subsection 3.1.

⁷⁴ This conclusion follows from general principles of treaty law. An agreement is not terminated or suspended only for the reason that one party breaches the agreement; it is also necessary that the wronged party actually terminates or suspends the agreement. See article 65, the Convention on the Law of Treaties (note 29), and note 87.

⁷⁵ Hypothetically, one could imagine the alternative any state whatsoever. It has not been necessary to discuss that alternative for the purpose of this article.

⁷⁶ See footnote 72.

it clear that the US can decide the consequences of such a breach.⁷⁷ However, the events of January 1993 support that hypothesis only if it can be shown that it was the Council's view that the US was justified in acting as it did.⁷⁸ That has not been shown; on the contrary, the Council, including the permanent members, was split over this issue.⁷⁹ In addition, other circumstances were different, too, which gave the 1993 actions an element of collective self-defence of Kuwait.⁸⁰ The presidential statement found that Iraq had failed in its co-operation with UNSCOM and UNIKOM, and had also at some occasions intruded on the Kuwaiti side of the demilitarised zone, i.a., through a trespass of 200 Iraqis which removed weapons and other materiel "by force". Even though the Council does not use those words, the Iraqi action violated that guarantee of the Kuwaiti border which the Council had enacted.⁸¹ In fact, resolution 1205 shows that many members did not accept the interpretation of the events of 1993 given by some commentators. If it had been their view that a finding of a material breach is sufficient for use of force, then they would have accepted the use of that term in Resolution 1205. However, their knowledge of the incident of 1993 made them wary that these words were interpreted as a green light to use force, and they did not condone of that.

There is an argument turning on a later resolution than Resolution 687. In op 3 of Resolution 1154, the Council said that "any violation"⁸² would bring the "severest consequences", and Resolution 1205 determined that there was a "flagrant violation". Hence, following a liberal interpretation, it could possibly be held that Resolution 1154 constituted a conditional suspension, which was put into effect through Resolution 1205.⁸³

⁷⁷ Ruth Wedgewood, *supra* note 56, at 728, makes the claim that these events show that no new resolution authorising force is necessary. She does not deal with whether a Security Council finding of a material breach is necessary.

⁷⁸ Arguably, it could constitute an important piece of subsequent practice: either a customary development of earlier Resolutions, or a datum of interpretation for these same resolutions. See article 31, the Convention on the Law of Treaties (note 29).

⁷⁹ Judging from press reports, Russia was critical of the bombings of 17 and 18 January. Further, France had some doubts (Gray, *supra* note 24, at 154-155); France participated in the bombing of 13 and 19 January, but then for other purposes, and, as far as can be ascertained, only against targets which aimed to attack air planes which maintained the "no fly" zone in Southern and Northern Iraq (Gray, *supra* note 24, at 167-168).

⁸⁰ See also footnote 27. The obstruction of UNSCOM only covered about 1/8 of the presidential statement, and therefore one may reasonably claim that the purpose of the actions of 1993 were not the same as the present action. The actions of 1993 could be justified as collective self-defence, but the Security Council does not seem to have treated the Iraqi actions as an armed attack but rather as "border incidents" (Gray, *supra* note 24, at 151). Cf Zedalis, *supra* note 69, at 43.

⁸¹ See footnote 27. This characterisation is only implied in the second paragraph, where the President says that the Council guaranteed the inviolability of the boundary in Resolution 687.

⁸² I.e., not only a "material breach".

⁸³ Therefore, there were stronger reasons to accept force against Iraq after Resolution 1205 than there were when force was actually used on 16 December; further the conditions were

Nevertheless, the prevailing view among several states in the Council – including some permanent members – was that Resolution 1154 did not contain a conditional authorisation to use force,⁸⁴ and neither does the text of that paragraph give strong support for that notion.⁸⁵ Further, op 5 of Resolution 1154 confirms that it is the Council which bears the responsibility to “ensure implementation of this Resolution, and to secure peace and security in the area.” Therefore, it seems natural to interpret op 3 as a warning of measures which the *Council* may take.⁸⁶ In addition, no determination of a violation occurred before the bombings in December.

Lastly, if the US were of the view that it had the right to suspend or terminate the cease-fire, it would have had to declare such a suspension or termination, which has not happened; if the cease-fire is an agreement or some other status which the US disposes over - contrary to the analysis above – then the US is bound by that agreement until it is legally suspended or terminated.⁸⁷

3.5 *What is Entailed by a Termination of the Cease-fire?*

The next question concerns the consequences of the suspension or termination of the cease-fire. Either a specific authorisation to use force is necessary, or the right to use force reverts to the coalition, because the cease-fire is no longer in force.

If the authorisation in Resolution 678 still is in force, at least in a dormant form - contrary to some of the findings in section 2 - then it seems logical that that authorisation again takes effect when the cease-fire is suspended or terminated. However, Resolution 678 does not give ground for unlimited force for any and all purposes. Firstly, force may only be used for certain purposes, namely to implement Resolutions 660, 661, 662 ... 677 “and to restore international peace and security in the area”. As has been stated above (section 2.1), it is very doubtful whether this includes measures to induce Iraqi compliance with the provisions of section C of Resolution 687. Therefore, the

different then also in some other respects. Resolution 1205 did not concern only the decision to terminate the co-operation with IAEA and UNSCOM.

⁸⁴ See also Zedalis, *supra* note 6, at 259.

⁸⁵ See *supra*, subsection 3.1.

⁸⁶ To be more exact, there were four different opinions among the members the Council: 1) op 3 authorises unilateral force if Iraq breaches its obligations; 2) op 3 warns that one state may invoke the authorisation to use force, which is “dormant” in Resolution 678; 3) op 3 warns that the Council may later authorise force; 4) op 3 means nothing at all because there are different views between the members of the Council, and the Council will never be able to agree on an authorisation to use force.

The main point is, though, that there is no majority view (including unanimity among the permanent members) for the first interpretation. Even though the Law of Treaties Convention may not be directly applicable for an instrument of this sort, it still provides guidance, and its principles may be applicable. One should also note that the legal language used by supporters of the US and UK action is law of treaties language, such as “material breach” and “suspension”.

⁸⁷ Article 65 in the Convention on the Law of Treaties supplies the procedure for the suspension of treaties (note 29).

conclusion is that a new specific authorisation for the use of force for these purposes would be necessary. Nevertheless for the sake of argument, we will examine this and the other conditions, as well. Secondly, according to op 2, force may only be used in accordance with the formula “all necessary means”. This contains a limitation to that which is necessary, and this includes that the measures shall be useful in order to attain this accepted purpose. Thirdly. The action has to be proportional to the purpose.⁸⁸

As for the first requirement, the American and British bombings had two purposes: to decrease the ability of Saddam Hussein’s regime to produce and use weapons of mass destruction and to decrease Iraq’s threat to its neighbours.⁸⁹ Assuming – contrary to above - that force to ensure compliance with section C is covered by the purpose of Resolution 678, then actions necessary to induce Iraqi co-operation with UNSCOM and IAEA are definitely within that framework. Attacks on Iraq’s capacity of weapons of mass destruction – which is the US’ and the UK’s first goal – may also fulfil those conditions. However, it is doubtful whether measures which aim to militarily weaken Saddam Hussein or Iraq in general are in line with this, even though those purposes may be desired for other reasons.⁹⁰

The second requirement is harder to evaluate. “Necessary” means first of all that there has to be a prognosis that it would not be possible to establish or maintain a satisfactory regime to overview Iraqi WMD without these measures. Secondly, it means that the bombing would be more successful for that purpose than any alternative measure. We know in hindsight, that the latter condition has not been satisfied. There is currently no inspection regime at all. Nevertheless, that has to be evaluated in the light of the information which was available at the time, i.e., on December 16th. Thirdly, given the great risk that Iraq had B- and C-weapons, and given the regime’s well established propensity, the measures were perhaps proportional. I should add that I have made no evaluation here of how the action compared with the demands of international humanitarian law.

Another question is if a suspension of the cease-fire also means that the rest of the conditions of Resolution 687 are suspended, including section C. If the US unilaterally can claim that the cease-fire with its conditions have been suspended or annulled, then Iraq may claim the same. There are, however, legal arguments against that view.⁹¹

⁸⁸ The requirements of proportionality and necessity are general demands on the use of force (see Schachter, *supra* note 6, at 460). These demands are recognised by the USA (see the documents referred to in footnote 10).

⁸⁹ Tony Blair’s opening statement at the press conference in London, 20 December (<http://www.fco.gov.uk/news>).

⁹⁰ If the purpose was only to weaken the Iraqi regime, they are not covered, since the alleged breach of Resolution 687 pertained to WMD, and not to any obligations concerning Iraq’s military capacity in general. The answer would be different if it were held that these actions were also aimed at inducing compliance with Resolution 687, which seems to follow from the statement by the President Clinton on 16 December (<http://www.pub.whitehouse.gov/urires/I2R?urn:pdi://oma.eop.gov.us/1998/12/16/12.text.1>).

⁹¹ The first argument – a hypothetical US argument - is that the American action was a justified countermeasure against the Iraqi breach of the cease-fire, and that these measures cannot

4 Conclusion and Reflections

No single state has the right to use force solely according to its own judgement against Iraq. Most likely, the authorisation was limited to the goal of liberating Kuwait, and therefore it does not cover the purpose of eliminating Iraq's weapons of mass destruction. Further, it could not have been the Council's intention that Resolution 678 of 29 November 1990 were to give every member of the coalition the right to react with force against every future breach or threat to peace and security in the area. The conflict concerning Iraq's weapons of mass destruction is a conflict between the UN and Iraq, and not between single states and Iraq. It was the UN which laid down the conditions for the cease-fire and decided when it would enter into force. Therefore, it is the Council which "owns" the situation. A number of states, including permanent members of the Council, have explicitly stated that force without a specific authorisation is not allowed, and even if these statements post Resolutions 678 and 687 are not directly decisive concerning the interpretation of the Resolutions, they still ought to be taken into account as subsequent practice, in particular since the Resolutions do not give clear contrary evidence.⁹² As a consequence, in order to justify force, a Resolution must contain a finding of a "material breach"⁹³ of the conditions for the cease-fire in Resolution 678,⁹⁴ and it ought to contain a decision to suspend or terminate the cease-fire. In addition, there are very strong reasons to require that it contains an explicit authorisation of force.⁹⁵

On the other hand, the Council should assume its responsibility to uphold international peace and security, including to see to it that Iraq abides by its obligations to dispose of all weapons of mass destruction, an obligation which is clearly spelt out in op 3 of Resolution 1154. Arguably, the prerogative of the Council is valid only for as long as the Council functions as intended. There is, however, no ground for claiming that there is such a situation today. On the contrary, the UN Charter was written to allow the great powers to exercise their veto powers, in particular for events which they feel are of special importance. In this case, the Security Council has followed the situation very closely from

justify continued Iraqi breaches. The other argument is that the Council still disposes of the conditions of the cease-fire and that neither the USA nor Iraq has a right to suspend or terminate them.

⁹² In the Council's debate on 16 December, the US and the UK received support from Japan, while France, Gambia, Portugal and Slovenia were neutral, Kenya, Sweden, Costa Rica, Brazil and Gabon (implicitly) were critical and Russia and China condemned. One can not exclude the possibility that at least some of those states which were neutral or positive had made legal analyses similar to that of Sweden, but refrained from criticism for political reasons. See also the analysis in Lobel & Ratner, *supra* note 15 at 154. There is a number of public and secret statements from members of the Council which point in that direction. In any event, it is clear that a great number of members were not of the opinion that the Resolutions gave a mandate for the type of action which was taken in December 1998.

⁹³ Or possibly "flagrant violation".

⁹⁴ As in op 1 in Resolution 707 or possibly as in op 1 of Resolution 1205.

⁹⁵ A finding of a "material breach" could possibly be made in a presidential statement. A decision to suspend or terminate the cease-fire would have to be made in a resolution.

day one, 2 August 1990. Further, it is not a bilateral issue between the US and Iraq, and the Council's hesitance to accept the use of force was not determined only by particular interests of the reluctant states but also because several states had bona fide doubts about the feasibility of the action.⁹⁶

As has become evident, the material is not unambiguous, even though the analysis pointed in one particular direction. Purely legal lines of reasoning are typically speaking digital, i.e., they lead either to A or to non-A. In politics, on the other hand (and also in legal practice) reasoning is often analogous, i.e., different quantities are weighed.

The analysis above aimed to be strictly legal. That is, however, impossible, and if I had conducted an auto-analysis of my own text, I would most likely have found that the choices which had to be made at each juncture in the line of arguments were more arbitrary than I might have admitted in the text. On earlier occasion, I have (like many others), scrutinised texts by other authors to unravel the seems of their texts, and their philosophical, ideological and political underpinnings.

There are of course a number of assumptions of different sorts which have influenced this text. Some of the policy-oriented arguments have come out clearly in the first paragraphs of this concluding section 4. Some I have kept to myself, not because they are uninteresting, but because my sense of professionalism says – perhaps wrongly – that they should be left out. And some, yet, I have forgotten or they were not, or barely, available even to my own conscious mind.

Nevertheless, the analysis presented above is written by me in my role as a professional legal advisor, and not as a detached academic, and, as such, I believe that it is the best professional evaluation of the problem which I can make, given all the weaknesses of international law. And there is no necessary contradiction between claiming that and still admitting that it is arbitrary.

As mentioned, during the Gulf War there were two different views about which aspect of international law which dominated - the sovereign right of (collective) self-defence or collective security.⁹⁷ The choice between the two was conditioned on whether one emphasised the freedom of action of states or the

⁹⁶ Some of this scepticism was based on the fear that Saddam Hussein would be strengthened by a military action and that such an action also would make inspections more difficult or even impossible. In particular the last prediction seems to have materialised.

⁹⁷ These events can also be discussed from other perspectives. We can see them as yet more examples of instances where different standards apply to different situations. We can think of them as a confirmation of Samuel P. Huntington's thesis of a struggle between civilisations. One could discuss which historical analogue is most appropriate - Munich 1938 or Vietnam 1968. And one could speculate over why the USA did not use the self-defence argument, and if that - despite all - is a sign of a sort of collectivisation. (See my essay on Thomas Franck och Louis Henkin, 68 *Nordic Journal of International Law*, 1999, 53.)

prerogative of international organisations.⁹⁸ After Resolution 678, where collective security took the upper hand, the discussion turned to the issue whether the Security Council is, or should be, a notary public which notes and attests decisions already made by the super powers,⁹⁹ or the international community's absolute and more or less impartial policeman. Even though the Council acted for motives which were very well compatible with the UN Charter, there were political motives in the background, which were noted by many critics.¹⁰⁰

Through the latest development, with the Council's inability or refusal to authorise force against Iraq, as well as in Yugoslavia/Kosovo,¹⁰¹ it is the old question whether the Council can function at all which has returned to the top of the agenda.

It is the Security Council's explicit duty to make decisions in the name of the whole membership of the UN. However, this UN collective security system is driven by a great power concert of five permanent members, and it presupposes something quite unlikely, namely that the conductors of the Concert either have common interests, or no special interests at all (or at least no special interests which are more important than the global interest to maintain order).¹⁰² If the first alternative were true, i.e., that the great powers really had common interests, that would mean that they wanted to maintain status quo because there are new competitors on the scene. But in that case the arrangement is more of an alliance against the competitors than a collective security arrangement, and/or it means that the great powers are enforcing their views on other members. If, however, the second alternative were true, they would not be great powers, because a power is a great power only if it always has interests. And, if they had no interests, how could they be persuaded to contribute troops to enforce the decisions they take; after all, it was precisely their capacity to put power behind words which motivated their position on the Council. Consequently, great

⁹⁸ See works cited in footnote 70.

⁹⁹ Many people have expressed the concern that the UN Security Council is governed by the USA (see Bring, FN-stadgans folkrätt, *supra* note 6, at 363, and David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 *American Journal of International Law* (1993) 552, at 562-565). Other examples to corroborate this assertion are the actions against the de facto regime on Haiti 1993-94 (SC Res 841, 940 and others) and against Libya (SC Res. 713 and 748). In general concerning the Council's activism, see Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, 6 *European Journal of International Law* (1995) 325.

¹⁰⁰ On the negotiations in the Council before Resolution 678, see i. a Lawrence Freedman & Efraim Karsh, *The Gulf Conflict 1990-1991*, Faber and Faber, 1993, 228-234; Ramsey Clark, *The fire this time: US war crimes in the Gulf*, Thunder's Mouth Press, New York, 1992, s 153-156; Weston, *supra* note 6, at 520-521.

¹⁰¹ And, one could add, its inability to send peacekeepers to Kongo-Brazzaville (summer of 1997) and a number of other places, these inhibitions being caused by the "sixth veto" of the US Congress.

¹⁰² It is not necessary that this is in their interest in every single situation, but it should be more important in general to maintain order than to expand or protect spheres of influence, and this is what makes consensus on principles and/or their implementations possible.

powers cannot *both* act as great powers and make decisions without interests in the name of the international community.¹⁰³

To a surprisingly great extent, though, the Council discusses its business in language which suggests a common, global perspective, and it does take decisions, and some of them wise. Still, in the last instance, it seems to be caught between these two logics – unable to act or a tool for (some) great power(s). Either way, as political animals we will curse the Council for what it does, or does not, and as professional lawyers we will read the texts they produce, and curse them for their ambiguities, created by precisely this logic, and try to cruise between their extremes to make them workable.

¹⁰³ As is known, there is plenty of empirical evidence for the assertion that decisions really have been made in the Council, and that some of them have been right and good. But, I will revise my thesis only if it can be shown that there have been instances where such decisions have entailed substantially forceful measures without the interest of at least one great power. (Somalia is not a good example. International goodwill in the camera lights of CNN is hard currency these days, and President Bush probably assumed that Operation Restore Hope would not entail any great problems, at least not during the few weeks remaining of his term in office in late 1992 and early 1993.)