

# Dealing with the Weapons Inspections Crisis in Iraq

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## *I. Introduction*

This brief commentary argues two points. First, that unilateral uses of national military force, like the December 16–19, 1998, air and cruise missile strikes carried out against Iraq by British and U.S. personnel<sup>1</sup> to compel adherence to that country's U.N. commitments regarding weapons of mass destruction (WMD),<sup>2</sup> are not clearly permissible under the language and circumstances surrounding the adoption of Security Council resolution 687.<sup>3</sup> And second, that among the options being explored<sup>4</sup> to both resolve the current impasse regarding WMD inspections in Iraq,<sup>5</sup> and assure that the U.N. Special Commission (UNSCOM) does not continue to be plagued by the halting progress which has marked its eight year existence, there is at least one viable option that has not been the subject of any noticeable amount of public discussion.

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<sup>1</sup> See Francis X. Clines and Steven Lee Myers, *Biggest Attack Since '91 War – Britain Gives Support*, *N.Y. Times*, Dec. 17, 1998, at A1, col. 5. See also Philip Shenon, *Strike Aims to Cripple Weapons Centers*, *N.Y. Times*, *ibid.*, at A15, col. 3. Strike concluded after four days of bombing, see Steven Lee Myers, *U.S. and Britain End Raids on Iraq, Calling Mission a Success*, *N.Y. Times*, Dec. 20, 1998, available at <http://www.nytimes.com/library/world/mideast/122098iraq-rpd.html> (accessed Dec. 23, 1998).

<sup>2</sup> On Iraq's acceptance of the obligations under resolution 687, see Letter from the Foreign Minister of the Republic of Iraq to the Secretary-General and the President of the Security Council (Apr. 6, 1991), U.N. Doc. S/22456. On the details of the obligations of resolution 687, see Plan for the Implementation of Relevant Parts of Section C of Security Council Resolution 687 (1991): Report of the Secretary-General, U.N. Doc. S/22614, 17 May 1991; Plan for Future Ongoing Monitoring and Verification of Iraq's Compliance with Relevant Parts of Section C of Security Council Resolution 687 (1991): Report of the Secretary-General, U.N. Doc. S/22871/Rev.1, 2 Oct. 1991; Plan for Future Ongoing Monitoring and Verification of Iraq's Compliance with Paragraph 12 of Part C of Security Council Resolution 687 (1991) and with the Requirements of Paragraphs 3 and 5 of Resolution 707 (1991), U.N. Doc. S/22872/Rev.1, 20 Sept. 1991.

<sup>3</sup> See U.N. Doc. S/RES/687 (1991), adopted Apr. 3, 1991, reprinted in: 30 *Int'l Legal Mat.* 847 (1991). No attempt is made herein to determine the validity of other bases that may be advanced to justify the use of force against Iraq.

<sup>4</sup> See Barbara Crossette, *France, In Break With U.S., Urges End to Iraq Embargo*, *N.Y. Times*, Jan. 14, 1999, at A6, col. 3; Jane Perlez, *U.S. Proposes Easing U.N. Curbs on Iraq Oil*, *N.Y. Times*, Jan. 15, 1999, at A8, col. 1.

<sup>5</sup> At the time of the writing of this comment, all weapons inspection activities in Iraq had been halted, and there was concern over the fact that the joint U.S.-British bombing campaign of December 16–19 might end the possibility of future Iraqi cooperation on the inspection front. The current impasse began with Iraq blocking all but passive monitoring through equipment on August 5, 1998,

The relevancy of the matter of applications of national military force, not explicitly authorized by the U.N., to secure compliance with the objectives of Security Council resolution 687<sup>6</sup> has been intensified in recent weeks as a result of suggestions of the legality of such offered by Professor Ruth Wedgwood of the Yale Law School and appearing in one of the world's leading periodicals on international law.<sup>7</sup> From the vantage of desiring a rational and ordered society based on the rule of law, one should be extremely circumspect about suggesting the lawfulness of the use of force, and hesitate offering any such suggestion in the absence of inexorable supporting evidence. As for public discussion of options that might resolve the current inspection impasse and minimize the likelihood of a continuing on-again-off-again UNSCOM inspection process, the general nature of the threat posed by atomic, biological, and chemical weaponry is alone enough to suggest unquestioned relevancy. Biological and chemical weapons have been employed by Iraq in the past,<sup>8</sup> and there is great concern they may in the future be the weapon of choice of lesser developed nations and terrorist organizations.<sup>9</sup>

## *II. Use of Force to Secure Compliance With Security Council Resolution 687*

One of the arguments advanced in support of the thesis that it is lawful to unilaterally use national military force to compel Iraqi observance of WMD obligations turns on the fact that Security Council resolution 687, which enunciates those obligations, brought the Gulf War to an end through the mechanism of an explicitly declared cease-fire. This is thought significant because that ended what had essentially been a collaborative, yet nonetheless national, action undertaken in a coordinated way by the United States, Great Britain, France and many others. As the argument goes, since the Gulf War had not been prosecuted by U.N. standing forces acting under either article 43 of the Charter or the organization's command and control, it has been, and remains, up to the collaborating national states, and not the U.N., to decide whether the termination of hostilities is to continue, or military action of one form or another should be resumed.<sup>10</sup>

The central pillar of this argument has to do with the notion of the Gulf War as a military action conducted essentially outside the context of the United Nations.

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and then on October 31, 1998, refusing to cooperate in any way with UNSCOM inspectors. See Barbara Crossette, *Iraq's Sudden Rejection of Arms Scrutiny Brings U.S. Warning*, N.Y. Times, August 5, 1998, at A9, col. 1; Philip Shenon, *U.S. Asserts It Will Consider Raids Unless Iraq Backs Down*, N.Y. Times, Nov. 2, 1998, at A12, col. 5.

<sup>6</sup> In principal part, those objectives include restoring and securing stability in the region, and destroying Saddam Hussein's atomic, biological, and chemical weapons.

<sup>7</sup> See Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction*, 92 Am. J. Int'l L. 724 (1998).

<sup>8</sup> See Dilip Hiro, *The Longest War: The Iran-Iraq Military Conflict (1991)*; Human Rights Watch, *Iraq's Crime of Genocide: The Anfal Campaign Against the Kurds (1995)*.

<sup>9</sup> See U.S. Department of Defense, *Proliferation: Threat and Response (1997)*, available at: <http://www.defenselink.mil/pubs/prolif97/secii.html> (accessed Jan. 4, 1999).

<sup>10</sup> See Wedgwood (note 7), at 725-727.

There can be no doubt the action was not executed by standing U.N. armed forces, and was not under the command and control of the U.N. itself.<sup>11</sup> With over 700,000 coalition troops under arms, 2000 military aircraft, and 100 warships, it far and away exceeded any expedition the U.N. has ever mounted or attempted to command.<sup>12</sup> But just as undoubtedly, there is good reason to believe few would regard the action as simply a coordinated military attack undertaken by cooperative national forces acting independent of, and wholly divorced from, the United Nations itself.<sup>13</sup> Several pieces of evidence are supportive of this line of reasoning.

To begin with, from the very day that Iraq invaded Kuwait, the Security Council, and not just the individual members acting in consort, condemned the invasion and demanded, in resolution 660, by a vote of 14 to 0, with Yemen abstaining, that Iraq “withdraw immediately and unconditionally all its forces.”<sup>14</sup> By this action, unequivocally stated as being taken under Charter articles 39 and 40, the Security Council made plain it considered the organization itself seized of the matter. This was followed four days later by the Council giving teeth to its withdrawal demand through the imposition, under resolution 661, of a trade embargo.<sup>15</sup> The effect of this action was to supply member states with grounds for national measures of trade restriction. Additionally, when it thereafter became apparent Iraq might be circumventing the embargo, and discussion ensued regarding the possibility of using military force to prevent such,<sup>16</sup> authorization was sought from the Security Council in the form of resolution 665, adopted 13 to 0, with Yemen and Cuba abstaining. Immediate resort to unilateral military action was not had.<sup>17</sup> Paragraph 1 of resolution 665, while acknowledging the then extant U.N. member state cooperation with Kuwaiti efforts to deal with Iraq, makes clear that the use of maritime forces may be necessary, but that such is to occur “under the authority of the Security Council ...”.<sup>18</sup> Further, the coalition forces that launched Operation Desert Storm against Iraq on January 16, 1991, both sought and obtained, in the form of Security Council resolution 678, U.N. imprimatur for

<sup>11</sup> In fact, prior to the adoption of Security Council resolution 678 in November of 1990, there was much wrangling among the various states about whether the military forces poised to strike Iraq should be under U.N. command, or continue under national control. The U.S. argued for national control and prevailed. See Abram Chayes, *The Use of Force in the Persian Gulf*, in: *Law and Force in the New International Order* 3–4 (Damrosch & Scheffer, eds. 1991).

<sup>12</sup> See Barry E. Carter/Phillip R. Trimble, *International Law* 1408 (2d ed. 1995).

<sup>13</sup> For an interesting contrast, compare Eugene V. Rostow, *Until What? Enforcement Action or Collective Self-Defense?*, 85 *Am. J. Int'l L.* 506 (1991) (self-defense action) with Oscar Schachter, *United Nations Law in the Gulf Conflict*, *ibid.*, at 452 (overtones of enforcement action as well).

<sup>14</sup> See U.N. Doc. S/RES/660 (1990), para. 2, adopted Aug. 2, 1990.

<sup>15</sup> See U.N. Doc. S/RES/661 (1990), adopted Aug. 6, 1990.

<sup>16</sup> On the fact the U.S. took the position during these discussions that force could be used without a new resolution from the Council authorizing such, see Chayes (note 11), 3 (suggesting self-defense was the basis for the U.S. position). See also, Carter/Trimble (note 12), at 1402 (suggesting authority present in earlier adopted resolution 661).

<sup>17</sup> See U.N. Doc. S/RES/665 (1990), adopted Aug. 25, 1990.

<sup>18</sup> See *ibid.* at para. 1.

their efforts.<sup>19</sup> They did not presume to act outside the United Nations. It cannot be denied that paragraph 2 of that resolution speaks of “authoriz[ing]” the use of all necessary means to remove Iraq.<sup>20</sup> But such language can just as easily accommodate a reading that signifies affirmative empowerment as one that signifies permission to exercise power already in existence. Paragraph 4 of resolution 678 seems to tilt in the direction of the first reading with its request that coalition states “keep the Council regularly informed on the progress of actions taken [to secure compliance with previous resolutions on the Gulf crisis].”<sup>21</sup>

As if not enough, there are other pieces of evidence suggesting the Gulf War was far more than a purely coordinated military action by national armed forces. Specifically, at the very time the coalition forces received authorization for launching their offensive, the U.S., by the far the main player, offered observations which could be construed as indicating it viewed the effort as an inclusive, global cause extending beyond the narrow interests of the collaborating national governments. These observations came from both President George Bush and from Secretary of State James Baker.<sup>22</sup> Perhaps even more telling, however, is the background connected with the April 1991 adoption of Security Council resolution 688, by a

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<sup>19</sup> See U.N. Doc. S/RES/678 (1990), para. 2, adopted Nov. 29, 1990, reprinted in: 29 Int'l Legal Mat. 1565 (1990) (Security Council “[a]uthorizes Member States co-operating with the Government of Kuwait ... to use all necessary means to uphold and implement resolution 660 (1990) [requiring Iraqi withdrawal from Kuwait] and all subsequent relevant resolutions and to restore international peace and security in the area”).

<sup>20</sup> Some have argued the feature of Security Council “authorization” signifies the self-defense character of the Gulf War. See e.g., Rostow (note 13), at 508. This has apparently been picked up by Professor Wedgwood as emphasizing the national, rather than U.N., aspects of the military action brought to a halt by resolution 687. See Wedgwood (note 7), at 726.

<sup>21</sup> See Security Council resolution 678 (note 19), at para. 4. See also Jochen Abr. Frowein, *Unilateral Interpretation of Security Council Resolutions – a Threat to Collective Security?*, in: Liber amicorum Günther Jaenicke – Zum 85. Geburtstag 97 at 102 (Volkmar Götz/Peter Selmer/Rüdiger Wolfrum eds. 1998) (arguing in favor of a restrictive interpretation of resolution 678, preventing suggestions that any claim to self-defense survived the resolution’s adoption).

<sup>22</sup> On November 29, 1990, the day the Security Council adopted resolution 678, Secretary Baker indicated, in remarks before the Council, that the thrust of the resolution was to inform Iraq it could “choose peace by respecting the will of the international community,” or suffer the consequences. See: 1 U.S. Dep’t of State Dispatch (No. 14, Nov. 29, 1990) at 297 (1990). The following day, President Bush echoed this view by observing the quarrel was not between the U.S. and Iraq, but “Iraq and the world,” and that through adoption of 678 “the Security Council has enhanced the legitimate peace-keeping function of the United Nations.” See *ibid.*, at 295 (opening statement at White House news conference). Two and one-half weeks later, in a statement at NATO Headquarters, Secretary Baker declared in the same vein that he expected Iraq might undertake, before resolution 678’s withdrawal deadline, some action to undercut the “collective will of the international community to use force.” See: 1 U.S. Dep’t of State Dispatch (No. 17, Dec. 24, 1990) at 351 (1990) (Dec. 17, 1990, remarks at NATO).

The international, U.N. aspects of the then impending military action also seem evident in a response given by Secretary Baker, at a November 29, 1990, news conference, to a reporter’s question concerning the command and control of coalition military units. The question related to coordination between coalition nations on a decision to commence Operation Desert Storm. It was asked if the U.S. would act independently, and in that context the questioner referenced the way in which the Korean operation had been carried out in 1950. Secretary Baker was careful to emphasize the

vote of 10 to 3, with two abstentions.<sup>23</sup> This resolution was aimed at ending Iraq's repression of its Kurdish population in the north, and Shi'ite population in the south, repression that commenced when the damage inflicted by Operation Desert Storm led to the surfacing of domestic hostility towards Baghdad.<sup>24</sup> Interestingly enough, had Britain, the U.S., and France, the major countries that provided protection under the resolution, perceived the Gulf War cease-fire as bringing to a halt a collaborative military campaign of a merely national character, they would have felt little need to seek independent authority from the U.N. for what ultimately became Operation Provide Comfort and Operation Southern Watch. True, there had been debate about the "domestic jurisdiction" limitation in Charter article 2, paragraph 7.<sup>25</sup> But the fact that affirmative authority was sought in order to justify intervention in territory where recently halted military action had contributed to the domestic situation suggests recognition that the military action itself had been conducted under the umbrella of the United Nations, despite retention of formal control by national military authorities.

A second argument advanced to support the thesis that it is lawful to employ national military force unilaterally to compel Iraqi observance of WMD obligations under Security Council resolution 687, concerns the coalition state air strikes against Iraq on January 13, 1993.<sup>26</sup> Of particular significance is the fact that these strikes were taken without advance approval or specific authorization by the United Nations Security Council. The strikes were designed to respond to a January 7, 1993, decision by Iraq to prevent UNSCOM from using the Habbaniyah airfield for short-notice weapons inspections.<sup>27</sup> Surely, so the argument goes, if non-U.N. authorized military force of a national character has been employed by former coalition states in the past to enforce Iraqi inspection obligations, then its use would seem equally as acceptable now or in the future.

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collective and cooperative nature of future action. Though he did not pick up on the reference to the U.N. action in Korea, one reading of his response is that future action was not envisioned as being purely national in character. See: 1 U.S. Dep't of State Dispatch (No. 14, Dec. 3, 1990) at 299, 300-01 (1990).

<sup>23</sup> See U.N. Doc. S/RES/688 (1991), adopted Apr. 5, 1991, reprinted in: 30 Int'l Legal Mat. 858 (1991). Beyond the fact that Security Council resolution 688 evidences the continuing nature of the U.N.'s involvement in decisions about how the fall-out from the Gulf War is to be handled, and a refusal to allow member states unilaterally to arrogate to themselves all decisional authority, see *Frowein* (note 21), at 106, for the view that that resolution cannot be interpreted as authorizing the use of force against Iraq.

<sup>24</sup> On the repressions, see Howard Adelman, *Humanitarian Intervention: The Case of the Kurds*, 4 Int'l J. Refugee L. 4 (1992); Middle East Watch, *The Anfal Campaign in Iraqi Kurdistan: The Destruction of Koreme* (1993).

<sup>25</sup> Jane E. Stromseth, *Iraq's Repression of Its Civilian Population: Collective Responses and Continuing Challenges*, in: *Enforcing Restraint 83-90* (Lori Damrosch ed., 1993).

<sup>26</sup> See *Wedgwood* (note 7), at 727-28.

<sup>27</sup> See: Statement by the President of the Security Council Concerning United Nations Flights into Iraqi Territory, U.N. Doc. S/25081 (1993) (condemnation of the Iraqi action as a "material breach" of obligations under resolution 687). See also: Note by the President of the Security Council, U.N. Doc. S/25091 (1993).

Obviously, what is especially troubling for such a contention are the circumstances surrounding Secretary-General Kofi Annan's February 23, 1998, memorandum of understanding (MOU) with Iraq on UNSCOM inspections of presidential palaces,<sup>28</sup> and its implementing Security Council resolution, 1154.<sup>29</sup> Two reasons exist for this view. First, it must be remembered that, when Iraq in late Fall, early Winter 1997 balked at permitting UNSCOM to inspect presidential palaces, the response of the international community was ultimately diplomatic rather than military.<sup>30</sup> There was no rush to use military force such as might have been expected had the January 1993 air strikes left no doubt about what the law permitted.<sup>31</sup> Second, the language chosen by the Security Council in resolution 1154 to implement the Secretary-General's MOU steered well away from authorizing individual states to resort unilaterally to the use of force in the event of an Iraqi breach of that new commitment.<sup>32</sup> While the Council opted for the ambiguous language of "severest consequences," language plainly able to accommodate the possibility of force, the formulation seems peculiar if past practice really evidenced the permissibility of unilateral, national determinations to take military action.<sup>33</sup> When to all of this is added the fact that resolution 678's basic Gulf War "authoriz[ation]" concerning the use of force speaks, in paragraph 2, only of uses to "implement Security Council Resolution 660 and ... subsequent relevant Resolutions,"<sup>34</sup> it would seem difficult to adjudge any past or future unilateral use of national force lawful. This is because each of the resolutions mentioned in paragraph 2 addresses, in one form or another, Iraqi withdrawal from Kuwait, not WMD inspections, a matter that only arose following the conclusion of the Gulf War.

Apart from the circumstances associated with the Secretary-General's MOU, resolution 1154, and paragraph 2 of resolution 678, there are several other reasons for hesitancy about accepting the January 1993 attack on Iraq as demonstrating the lawfulness of non-U.N. authorized national uses of military force to compel

<sup>28</sup> Reprinted in: *How Accord Will Work: Special Group is Set Up*, N.Y. Times, Feb. 24, 1998, at A8, col. 5.

<sup>29</sup> See U.N. Doc. S/RES/1154, adopted 2 March 1998, available at: <http://www.un.org/plweb-cgi/since.cgi?dbname=scres&foryear=1998> (accessed March 12, 1998).

<sup>30</sup> It must be acknowledged that, in spite of the eventual diplomatic solution, international political tensions were on a razors edge. The U.S., in particular, had undertaken a large scale military build up in the region and was thought to be preparing for a strike against targets in Iraq.

<sup>31</sup> To some extent, it must be acknowledged that the deterioration of relations between Security Council peers occurring from 1991 to 1997-98 may have played a role here.

<sup>32</sup> Certainly there were Security Council members who supported language that would have authorized force to be used in the event of a breach. Nonetheless, their proposals were incapable of securing approval of the Council. On the debates in the Council, see: U.N. Press Release SC/6483, 3858th mtg., 2 March 1998, available at: [http://www.un.org/plweb-cgi/idoc.pl?215+unix+\\_free\\_+www.un.org..80+un+un+pr1998+pr1998++%26](http://www.un.org/plweb-cgi/idoc.pl?215+unix+_free_+www.un.org..80+un+un+pr1998+pr1998++%26) (accessed Mar. 17, 1998).

<sup>33</sup> See Security Council resolution 1154 (note 29), at para. 3. See Frowein (note 21), at 110 (indicating "severest consequences" can include military force, but concluding that resolution 1154 requires further Security Council authorization before resort can be had to that option).

<sup>34</sup> See Security Council resolution 678 (note 19), at para. 2.

Baghdad to comply with its WMD inspection obligations. For openers, the circumstances surrounding the January 1993 attack indicate that Iraqi incursions into Kuwait to retrieve weaponry left behind on withdrawal, and deployment of Iraqi anti-aircraft missiles in and near no-fly zones, served as more of a provocation than actions connected with UNSCOM short-notice inspection activities.<sup>35</sup> Given this, it would seem difficult to draw from the mere fact of the attack the inference that it occurred in response to, and set a precedent for, breaches of Iraq's inspection commitments. Additionally, Security Council resolution 678, the resolution which authorized coalition states to use force in the first place, and resolution 687, which ended the Gulf War and established Iraq's WMD obligations, as well as a series of other U.N. instruments, including resolution 715, the presidential palaces MOU, and resolution 1154, all indicate the Security Council views itself as seized of the Iraq matter under Chapter VII of the Charter.<sup>36</sup> Given the Council's authority under Chapter VII regarding the use of force, it would seem somewhat of a stretch to ignore the Council's repeated expressions and accept unilateral, national decisions free of U.N. control. As one distinguished, senior international law scholar stated on a related point concerning the use of force against Iraq: "[even to] characterize the [Gulf War] military action as collective self-defense rather than as a United Nations action does not imply that the use of force was [or is] wholly a matter of discretion for the cooperating states; ...".<sup>37</sup> Further, there are the reactions by the members of the Security Council to the recent British-U.S. attack of December 16–19, 1998. The reactions involved a combination of muted approval and clear criticism for the use of military force.<sup>38</sup> The implication is that of a real reluctance on the Council's part to see any past national military attack on Iraq as indicative of some ongoing permission to use force to compel that nation to meet its WMD obligations.

The objective in recounting each of the preceding reasons for questioning whether the Gulf War cease-fire and the January 13, 1993, air strikes on Iraq support the application of national military force to secure observance of that nation's WMD obligations, has not been to suggest some fundamental opposition to the

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<sup>35</sup> See Michael R. Gordon, *Bush Said to Plan Air Strike on Iraq Over Its Actions*, N.Y. Times, Jan. 13, 1993, at A1, col. 5 (listing a variety of provocations). It should also be noted that, unlike the Gulf War itself, several nations, including China, were less than enthusiastic supporters, thus reflecting on the clarity of the strikes as permissible under international law. See: (Op-Ed) *Just Punishment for Iraq's Offenses*, N.Y. Times, Jan. 14, 1993, at A24, col. 1 (China not supportive); Youssef M. Ibrahim, *Many Arabs See 'Double Standard' ...*, N.Y. Times, Jan. 15, 1993, at A8, col. 4 (several Gulf states critical).

<sup>36</sup> On resolution 678, see (note 19) at third paragraph of the preamble; on resolution 687, see (note 3) at para. 34; on resolution 715, see U.N. Doc. S/RES/715, adopted 11 Oct. 1991, available at: <http://www.fas.org/news/un/iraq/sres/sres0715.htm> (accessed Jan. 10, 1999); on the MOU, see (note 28) at para. 1; on resolution 1154, see (note 29) at para. 5.

<sup>37</sup> See Schachter (note 13), at 460 (emphasis added).

<sup>38</sup> See: *International Reaction: Critics From Paris to Kuwait, but a Friend in London*, N.Y. Times, at Dec. 18, 1998, at A21, col. 1; Barbara Crossette, *At the U.N., Alliances of Cold War Are Renewed*, *ibid.*, at A19, col. 6; Michael R. Gordon, *Moscow Orders U.S. Envoy Home to Protest Air Strikes*, *ibid.*, at A21, col. 5.

military option. It is beyond dispute that instances occasionally arise which leave little choice. The WMD situation with Iraq might well be just such a case. Nonetheless, in light of the fact armed force is perhaps the single greatest power in the possession of the various members of the world community, resort to it should never be explained as based on prevailing legal rules unless it is absolutely clear those rules provide complete justification. It is the prohibition on the use of force, not the permissions concerning such, that the U.N. Charter articulates in its opening provisions. Self-defense, individual or collective, as well as U.N. applied or authorized military force, are all tucked back in Chapter VII, seemingly creating a presumption of sorts. In the event the use of military force is felt essential in a situation where the law suggests impermissibility, the preference should be for an explanation grounded in the non-legal. Arguments of lawfulness are likely to be perceived as disingenuous dissembling, undermining the sanctity of law needed for increasing its role in affecting the actual conduct of states.

### *III. An Undiscussed Option for Future WMD Inspections in Iraq*

The issue of non-U.N. authorized nationally applied military force to secure observance by Iraq of its WMD inspection obligations is an extremely important one. However, from the standpoint of a peaceful resolution of the very matter that generates that issue, finding an option capable of both restarting the inspection process and keeping it moving forward is far more important. Such would serve two clear purposes. First, it would insure that there would be only a minimal chance of military force being used against Iraq, thus saving untold suffering and precious tax dollars, and perhaps accelerating Iraq's reintegration into the community of nations. And second, it would contribute to resumption and maintenance of a regime aimed at regulating Iraqi activity in the field of WMD, an area currently of great concern to defense analysts.

In the immediate aftermath of the December 16–19, 1998, British and U.S. cruise missile attacks and air strikes against military targets in Iraq, the level of public discussion by key national policymakers and United Nations officials and representatives about Baghdad's reticence regarding WMD inspections has accelerated substantially. To a certain extent, this acceleration reflects the growing splits within the Security Council that have gradually surfaced since the Gulf War.<sup>39</sup> It is also evidence of increasing frustration on the part of the Council, frustration born of eight long, arduous years filled with constant Iraqi footdragging and prevarication. Additionally, the acceleration may represent a testimonial to the skill and adroitness of Saddam Hussein in playing one state against another, tweaking the U.S. and UNSCOM at what he considers precisely the right moment. Irrespective of the factors that have contributed to the acceleration in

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<sup>39</sup> See text accompanying note 31. The splits, at least in part, are the result of the inclination of states like France, Russia, and China to be autonomous in the matters of international relations. In the case of Russia, national political pressures may also play a contributory role.



public discussion about what to do on Iraq and its WMD inspections, a variety of proposals have been voiced. Perhaps the one subject to the greatest attention has been the suggestion that Saddam Hussein be removed from power.<sup>40</sup> While removal may result in a government committed to fulfilling its inspection obligations and restoring friendly relations with its neighbors, it might also produce a civil war, resulting in Iraq being totally or partially dismembered, thereby contributing to further friction and instability in the region.<sup>41</sup> However, on the assumption that Iraq's political leadership will remain unchanged, other options affecting the WMD inspection process have also been put forward. Two of these options in particular, the French option and the U.S. option, warrant brief description.

The French option was circulated to the members of the Security Council within four weeks of the commencement of the December 1998 British and U.S. air strikes.<sup>42</sup> It attempts to deal with the twin issues of economic sanctions and weapons inspections by proposing a phased lifting of sanctions, beginning first with oil, removing sanctions on other items in accordance with Iraqi cooperation on future weapons inspections.<sup>43</sup> The proposal put forward by France would also replace UNSCOM with a "renewed control commission" responsible for monitoring prohibited Iraqi WMD activities, rather than for conducting intrusive inspections designed to get a handle on Iraq's past weapons programs.<sup>44</sup> Another important feature of the French option would be the substitution of a financial surveillance system for the existing oil-for-food escrow account. The idea would be to insure Iraq avoided utilizing its oil revenues for objectionable weapons activities, but this would be accomplished without requiring advance U.N. permission for disbursements from an earmarked account.<sup>45</sup>

The U.S. option was offered immediately on the heels of the proposal coming from Paris. It differs radically from the French option in that it suggests little beyond removing the current cap of \$5.2 billion every six months on the amount of revenues Iraq is permitted to generate by export sales of oil.<sup>46</sup> The U.S. proposal would leave UNSCOM in place, and also the rules that body administers.<sup>47</sup> Moreover, it would continue to insist upon full compliance by Iraq with its WMD inspection obligations prior to any lifting of the economic embargo against that

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<sup>40</sup> See: (Editorial) *Unseating Saddam Hussein*, N.Y. Times, Nov. 19, 1998, at A30. col. 1; James Risen, *U.S. Calling for New Iraq Government, But Has No Plan to Oust Current One*, N.Y. Times, Dec. 23, 1998, available at: <http://www.nytimes.com/library/world/mideast/122398iraq-opposition.html> (accessed Dec. 23, 1998).

<sup>41</sup> See Tom Raum, *U.S.-Iraq Policy Criticized by General*, Tulsa World, Jan. 29, 1999, at A5, col. 2 (Marine General Anthony Zinni fears efforts to overthrow Saddam Hussein will result in instability).

<sup>42</sup> See Barbara Crossette, *France, in Break With U.S., Urges End to Iraq Embargo*, N.Y. Times, Jan. 14, 1999, at A6, col. 3.

<sup>43</sup> See *ibid.*

<sup>44</sup> See *ibid.*

<sup>45</sup> See *ibid.*

<sup>46</sup> See Jane Perlez, *U.S. Proposes Easing U.N. Curbs on Iraq Oil*, N.Y. Times, Jan. 15, 1999, A8, col. 1.

<sup>47</sup> See *ibid.*

country.<sup>48</sup> At the same time, the proposal retains the existing escrow account approach to assuring that revenues generated by permitted Iraqi oil exports are not diverted from food, medicine, and humanitarian purchases, and the payment of Gulf War compensation claims.<sup>49</sup> In that regard, it is interesting to note that recent reports indicate the poor condition of Iraq's oil production facilities have effectively limited sales to around \$3.5 billion every six months.<sup>50</sup> Given this, it seems questionable that, in the absence of modifications of some other sort, the mere removal of the oil revenues cap is likely to induce renewed and continued cooperation by Baghdad with U.N. weapons inspectors.

Indications suggest that it is Iraq's chemical weapons file that remains the principal WMD file of concern.<sup>51</sup> This suggestion derives from a number of factors, with two being particularly prominent: evidence from June 1998 that the deadly nerve agent VX had been loaded on the warheads of Iraqi projectiles;<sup>52</sup> and discovery by inspectors, in July of that same year, of a document suggesting Iraq, in its earlier declarations to the U.N., vastly underestimated the number of weapons armed with chemical devices during its Eight Year War (1980–88) with Iran.<sup>53</sup> Together, these two factors can be seen as representing a continuing effort by Iraq to refuse to provide full and complete disclosure on its chemical weapons programs.<sup>54</sup>

It cannot be said with certainty what really viable options exist for restarting the WMD inspections process and keeping it moving forward. Only time will tell whether the French or the U.S. proposals actually fall into that category. Apart from those two, there is one option in particular that specifically addresses Iraq's chemical weapons file, and has escaped any noticeable degree of public discussion by officials of interested nation-states. Prior to turning attention to that option, there is another option that bears at least brief mention. Specifically, that other option would involve conditionally lifting the entire U.N. imposed trade embargo for a limited time, say 90 days, with extensions dependent upon the resumption of complete, unconditional cooperation by Iraq within a time certain. The broad

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<sup>48</sup> See *ibid.*

<sup>49</sup> See *ibid.*

<sup>50</sup> See *ibid.*

<sup>51</sup> See Barbara Crossette and Steven Erlanger, *Allies See Bombing of Iraq as Inevitable: Hussein Likely to Break Vow, U.S. Says*, N.Y. Times, Nov. 17, 1998, at A1, col. 6, at A8, col. 1 (Chief UNSCOM inspector sees fewer problems on ballistic missiles than on chemical weapons, with not enough known on biological weapons activities).

<sup>52</sup> See Christopher S. Wren, *Iraq Insists It's Being Candid with U.N. Arms Inspectors*, N.Y. Times, June 23, 1998, at A6, col. 5; Christopher S. Wren, *Lab Reports of Iraq Poison Bolster Case for Sanctions*, N.Y. Times, June 24, 1998, at A9, col. 1; Christopher S. Wren, *U.N. Arms Inspector Firm on Iraq Nerve Gas but Accepts New Tests*, N.Y. Times, June 25, 1998, at A10, col. 1.

<sup>53</sup> See Barbara Crossette, *Iraq Backtracks In New Defiance Over Inspections*, N.Y. Times, Nov. 23, 1998, at A1, col. 6, at A10, col. 2; UNSCOM Chairman Butler's Report to UN Secretary-General, 15 Dec. 1998, available at: <http://www.fas.org/news/un/iraq/s/butla216.htm> (accessed Jan. 27, 1999).

<sup>54</sup> For the official report on the VX matter, see: Report of the Group of International Experts on VX, U.N. Doc. S/1998/995, Annex, 26 Oct. 1998.

scope of any such move may be sufficiently attractive that Iraq might be interested in accepting the option, while viewing the more limited French proposal as unappealing. Of course, one of the major hurdles presented by this option, a hurdle not inherent in France's proposal, is the fact Iraq would be expected to allow UNSCOM itself to renew its inspection activities.<sup>55</sup> That has been an especially sensitive matter for Baghdad. In various public fora it has painted the U.N. Special Commission as biased and partial. On the positive side, however, to the extent the British and the U.S. remain insistent the present inspection regime be left intact,<sup>56</sup> a conditional lifting of the entire trade embargo may restart an inspection process that will produce a thorough investigation of Iraq's WMD programs.

Attention is now turned to the option alluded to in the preceding paragraph as specifically addressing Iraq's chemical weapons file. This option differs radically from anything yet proposed to date and, again, has not been the subject of any real public discussion. The primary feature of the option would be to shift responsibility on the chemical weapons front to The Hague based Organization for the Prohibition of Chemical Weapons (OPCW), established to oversee compliance with the obligations of the newly effective Chemical Weapons Convention of 1993.<sup>57</sup> The attraction of the OPCW option is that it walks a middle path between, on the one hand, completely lifting the embargo or eliminating the UNSCOM inspection regime and, on the other, insisting that the embargo remain and Iraq continue to show the requisite obeisance to UNSCOM and its weapons inspectors. The proposal put forward by France also vests some entity other than the U.N. Special Commission with responsibility for assuring that Iraq does not mount a WMD redevelopment effort. Clearly, given Iraq's perception of UNSCOM as prejudiced, this attribute provides either option with a certain appeal.

Distinct from the French proposal, however, the OPCW option would leave intrusive inspections in place, thereby appealing as well to those concerned about Iraq having to come clean on its chemical weapons activities. Such inspections could result from having the Organization continue to apply the extant UNSCOM inspection rules to Iraq, or simply having the familiar terms of the CWC

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<sup>55</sup> Attention should also be drawn to the fact the Arab League has recently indicated its support for maintenance of the economic embargo until Iraq fully complies with its WMD obligations, while criticizing the British-U.S. air strikes of December 16-19. See Douglas Jehl, *As Arab League Urges Iraqis to Obey the U.N., They Walk Out of the Meeting*, N.Y. Times, Jan. 25, 1999, at A10, col. 1.

<sup>56</sup> On the fact Britain may be prepared to back away from the present UNSCOM regime, see Barbara Crossette, *U.S. More Isolated In U.N. on Keeping the Iraq Sanctions*, N.Y. Times, Jan. 12, 1999, at A1, col. 5, at A8, col. 1.

<sup>57</sup> See: Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, done at Paris, 13 Jan. 1993, reprinted in: 32 Int'l Legal Mat. 800 (1993). For a review of the Convention's history, see Walter Krutzsch/Ralf Trapp, *A Commentary on the Chemical Weapons Convention* (1994). On the export control aspects of the Convention, see Rex J. Zedalis, *New Export Controls for Chemicals on the Horizon?*, 30 Int'l Lawyer 141 (1996); Rex J. Zedalis, *The Chemical Weapons Convention Implementation Act: United States Control Over Exports*, 90 Am. J. Int'l L. 138 (1996) (reviewing an earlier proposed version of the U.S. domestic implementing legislation).

applied instead. As with the UNSCOM rules, those provided in the CWC would require Iraq to subject its past chemical weapons activities, including activities connected with potential weapons precursor chemicals, to declaration and on-site verification inspections.<sup>58</sup> Relative to inspections, though, there are numerous differences between the two sets of rules that must be considered in the context of any decision about which should be applied to Iraq. For example, the CWC provides for “routine” and “challenge” inspections.<sup>59</sup> In many cases, routine inspections require forty-eight hour advance notice,<sup>60</sup> and even challenge inspections at least twelve hours,<sup>61</sup> with the possibility of challenge inspectors not being transported by the nation to be inspected to the specific site any earlier than twenty-four hours after arrival at the so-called point of entry.<sup>62</sup> UNSCOM rules permit unannounced, surprise inspections.<sup>63</sup> Another example is that a CWC challenge inspection may only seek facts related to the particular limited and identified concern that caused a certain CWC state-party to exercise its authority to request that the OPCW carry out the inspection.<sup>64</sup> UNSCOM has not been so shackled.<sup>65</sup> Clearly, such differences are important. Nonetheless, the full significance of the differences has to be considered against the background of the CWC inspection regime being thought of as sufficient to prevent many nations much more powerful and scientifically sophisticated than Iraq from constituting a chemical weapons arsenal.

In the event a shift to the OPCW is deemed of interest, there can be no doubt that it has support in the documents that created the existing UNSCOM inspection regime. Paragraph 25 of S/22614,<sup>66</sup> the Security Council’s plan for the information gathering and weapons destruction phases of the Iraqi WMD regime, envisions the establishment of an ongoing monitoring and verification phase.<sup>67</sup> With reference

<sup>58</sup> See: Chemical Weapons Convention, arts. I-V, *ibid.* at 804–09, and especially art. III(1)(c), *ibid.* at 806, indicating that required declarations concerning production facilities cover any facility that “has had” chemical weapons production. Given that art. II(1), *ibid.* at 804, contains an extremely broad definition of chemical weapons, a wide range of production facilities will be involved.

<sup>59</sup> See Barry Kellman, David S. Gualtieri and Edward A. Tanzman, *Disarmament and Disclosure: How Arms Control Verification Can Proceed Without Threatening Confidential Business Information*, 36 *Harv. Int’l L.J.* 71 at 87 (1995).

<sup>60</sup> See CWC (note 57), at 824, 859, Verification Annex, Pt. VII (30).

<sup>61</sup> See *ibid.* at 817, art. IX(15).

<sup>62</sup> See *ibid.* at 865, Verification Annex, Pt. X(14).

<sup>63</sup> See: Plan for Future Ongoing Monitoring and Verification of Iraq’s Compliance with Relevant Parts of Section C of Security Council Resolution 687 (1991), U.N. Doc. S/22871/Rev.1, 2 October 1991 at 5, paras. 17(c) and 18(c).

<sup>64</sup> See (note 60), Pt. X(44)-(45).

<sup>65</sup> See (note 63), at 13, Annex I, para. 2(e), and at 14, para. 5.

<sup>66</sup> See: Plan for the Implementation of Relevant Parts of Section C of Security Council Resolution 687 (1991) at 6, para. 25, U.N. Doc. S/22614, 17 May 1991.

<sup>67</sup> The details of that phase are further spelled out in two other Security Council documents: S/22871/Rev.1 (note 63); and Plan for Future Ongoing Monitoring and Verification of Iraq’s Compliance with Paragraph 12 of Part of Section C of Security Council Resolution 687 (1991) and with the Requirements of Paragraphs 3 and 5 of Resolution 707 (1991), U.N. Doc. S/22872/Rev. 1, 20 September 1991.

to such, the fourth sentence of the paragraph mentions what was at that time the proposed Convention on the Prohibition of Chemical Weapons. The immediately following sentence then provides that “[w]ith the eventual entry into force of such a Convention, the inspectorate envisaged in it should at an appropriate time take over the function of monitoring and verification of compliance in the area of chemical weapons.”<sup>68</sup> Arguably, the Security Council was thinking about a time following the completion of the tasks of the U.N. Special Commission. But even if one were to view the on-again-off-again nature of the inspections in Iraq over the past couple of years as suggesting the time is now “appropriate” for turning in the OPCW’s direction, two matters would still remain.

The first would involve the fact that, since Iraq is not a party to the CWC, any shift to the OPCW that looks toward that body applying the rules of the CWC would require some device for legally obligating Baghdad to adhere to prescriptions and duties therein spelled out. Presumably, such a device would not prove troublesome. After all, if Iraq found it attractive to move the responsibility for the chemical weapons file out of UNSCOM, it could accept the condition precedent that it become a state-party to the CWC, or at least commit to the application of the Convention’s rules. The second matter would involve the whole issue of supervision of Iraq’s files on biological weapons and ballistic missile systems. The OPCW is charged with supervising chemical weapons. And while there may be a certain degree of overlap with biological weapons, there would unquestionably be resistance to having such placed under the authority of the new Hague-based Organization. However, international negotiations are now underway to create verification mechanisms for the 1972 Biological Weapons Convention, and once concluded might provide a device comparable to the OPCW.<sup>69</sup> As for ballistic missile systems, satellite surveillance is currently capable of detecting tests violative of prohibitions aimed at preventing development of a missile capability. Thus, removing UNSCOM from the mix should not prove especially problematic in stemming further Iraqi work on such systems.

#### *IV. Conclusion*

Hopefully, the international community will be able to work its way through the WMD problem with Iraq. In retrospect, though, there can be little question that this has been an immensely complicated and draining experience. Nonetheless, we should keep in the bright forefront of our minds that we have it within our power to shape the future destiny of our world. The choices we make regarding how international law is to be understood and applied in this and other com-

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<sup>68</sup> See note 66.

<sup>69</sup> See: (Associated Press), *Germ Warfare Treaty Advances*, *Tulsa World*, Jan. 23, 1999, at A8, col. 1 (present Treaty commits states-parties not to develop or stockpile bioweapons, and negotiations seek to establish an inspection regime).

parably difficult situations,<sup>70</sup> and the time and attention we accord to making every effort to explore all available avenues for solving intractable problems, will determine whether future generations are able to marvel at the patience and discipline that made them inheritors of a more ordered society, or remark with regret at how unfortunate it was that we missed important opportunities.

Since the collapse of the Iron Curtain, we have been the beneficiaries of many chances, not perhaps to cure, but certainly to palliate, some of the insidious social and political maladies that afflict relations between the members of the international community. Time is running out. Every day we face immense pressures to return to the old ways, or replace ideologies that truly have been discarded with new progenitors of suspicion and division. Unless each and every nation-state, up and down the board, commits now to making a genuine and indefatigable effort at speaking frankly about the law, and seeking novel ways to solve old problems, we may assure that generations to come will labor under the exact same compulsions that have shadowed humanity since the dawn of time. Fear, frustration, and force will be the only rule that really prevails. Understanding, compassion, and justice will remain as elusive as they are today.

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<sup>70</sup> See *Frowein* (note 21), at 97–112 (arguing that the Security Council resolutions dealing with the Iraqi situation seem not to permit unilateral use of military force, and, because of the sanctity of state sovereignty and the Council's retention of oversight on the matter, should be construed as requiring specific U.N. authorization prior to the employment of such).