BAB III

PENUTUP

A. Kesimpulan

Dari uraian dalam bab hasil dan pembahasan dapat dinyatakan kesimpulan – kesimpulan sebagai berikut :

1. Peran PBB dalam memelihara perdamaian dan keamanan internasional sesuai dengan Piagam PBB tidak berjalan efektif dalam kasus Invasi Amerika Serikat ke Irak tahun 2003.
2. Dewan Keamanan PBB sebagai organ PBB yang mempunyai fungsi utama dan kunci dalam menciptakan perdamaian dan keamanan dunia terlihat jelas tidak efektif dengan ketiadaan langkah konkret dan cepat atas Invasi yang dilakukan anggota tetap Dewan Keamanan PBB yaitu Amerika Serikat dan sekutu tanpa dukungan penuh Dewan Keamanan PBB.
3. Amerika Serikat dan sekutu melakukan invasi ke Irak dengan dasar hukum sesuai Pasal 39 Piagam PBB sebagai anggota tetap Dewan Keamanan PBB dan menginterpretasikan melalui penafsiran sistematik antara Pasal 39 Piagam PBB dengan Pasal 51 Piagam PBB untuk membenarkan serangan terhadap Irak dan dasar pembelaaan diri atas adanya senjata pemusnah masal meskipun belum terbukti.
4. Upaya untuk menyelesaikan atas permasalahan yang ada melalui 3 cara yaitu Majelis Umum membuat rekomendasi untuk menghentikan agresi terhadap Irak, tindakan Amerika Serikat dalam konsep “Ultra Vires”

hubungan antar organ PBB tidak dapat dikatakan perbuatan sepihak sebab dalam konsep ini Dewan Keamanan menggunakan pengamatan dari organ lain dalam PBB dan para pakar, yang terakhir bahwa harus ada rekonstruksi dan rehabilitasi di Irak pasca invasi Amerika Serikat dan sekutu akan tetapi hal tersebut dapat terjadi apabila adanya itikad baik/ *Good Faith* dari Amerika Serikat.

B. Saran

1. Bahwa saat ini keberadaan Piagam PBB sudah harus ditinjau lagi. Reformasi/ perubahan Piagam dalam rangka memperkokoh PBB sebagai organisasi internasional yang universal.
2. Bahwa perlunya untuk memperluas keanggotaan Dewan Keamanan PBB termasuk Hak Veto meskipun hal ini sulit dilakukan.
3. Bahwa perlunya ditingkatkan lagi semangat kerja sama antar anggota Dewan Keamanan PBB dan keseimbangan di dalam pemberian suara oleh Negara – Negara.

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The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq

Michael Byers*

Abstract

Many of the authors who have written on the legal issues arising out of the United States' armed actions against Iraq in the decade following Operation Desert Storm *have disagreed on the interpretation of the relevant Security Council resolutions and the United Nations Charter, on the possible emergence of a right to unilateral humanitarian intervention, and on possible extensions to the right of self-defence. But the same authors have shied away from considering the root causes of their disagreements: i.e., their sometimes starkly divergent views on foundational aspects of international law. What are the general rules concerning the interpretation of Security Council resolutions? What are the general rules concerning the interpretation of treaties? How are rules of customary international law, in general, made and changed? How does customary international law interact with treaties? These are important questions, not only because our approach to them is likely to determine our analyses of substantive rules, but also because the considerable influence of the United States in this post-Cold War epoch might in fact be changing the answers, with profound consequences for all of international law.*

1 Introduction

Wilhelm Grewe, in his *Epochen der Viilkerrechtsgeschichte,* examined the influence of successive dominant states on the evolution of the international legal system.' In particular, he traced changes to a number of foundational aspects, as the Middle Ages

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W. Grewe, *Epochen der VOlkerrechtsgeschichte* (1984); available as W. Grewe, *The Epochs of International Law* (translated and revised by M. Byers) (2000).

gave way to the Spanish Age, the Spanish Age to the French Age, and so forth. The foundational aspects that he examined included legal personality, recognition, dispute settlement, enforcement, title to territory and the law of the sea.

Grewe devoted considerable attention to the 'sources' of international law. For example, he traced the decline of natural law conceptions and the rise of consent-based positivist approaches from the 15th century through to the early 20th century. He then described the subsequent turn towards a secular natural law and a `frenzy' of codification during the years following the First and Second World Wars. These changes, Grewe explained, could only be understood against the backdrop of shifting power relations amongst leading states.

The 1990s were the first decade of a new epoch, which Grewe characterized as 'an international community' dominated by a 'single superpower' — the United States. Grewe, writing an epilogue for the English version of his book in 1998, expressed surprise that 'the radical shift that occurred in world politics in 1989-91 did not produce new legal concepts or institutions in the field of international peace and security'. But he also expressed optimism that 'such developments may gradually occur in years to come', given the general trend of new ideas `to strengthen the authority of the international community vis-ci-vis national sovereignty and its disastrous effects on the world's natural resources, on its environment and climate, and, last but not least, on the peaceful co-existence of nations'.[2]

Much has been written on the legal issues arising out of the United States' armed actions against Iraq in the decade following the Gulf War.' Many authors have asked whether the various attacks were justified under existing international law.[4] And in many instances, they have disagreed on the interpretation of the relevant Security Council resolutions and the United Nations Charter, on the possible emergence of a right to unilateral humanitarian intervention, and on possible extensions to the right of self-defence.

But international lawyers have shied away from considering the root causes of their

[2] *Ibid,* at 720 (Eng. version).

[3] The UK has participated in some but not all of the attacks, as has France to a lesser degree. This article, however, focuses on the US as the principal actor in this policy of force.
See, e.g.: Gray, 'After the Ceasefire: Iraq, the Security Council and the Use of Force', 65 *BYbIL* (1994) 135; Reisman, The Raid on Baghdad: Some Reflections on its Lawfulness and Implications', 5 *M.* (1994)120; Kritsiotis, The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-Defence in International Law', 45 *ICLQ* (1996) 162; Wembou, 'Considerations juridiques sur les recentes attaques Americaines contre l'Iraq', 9 *African JICL* (1997) 72; Denis, 'La resolution 678 (1990) peut-elle legitimer les actions armees menees contre l'Iraq posterieurement a l'adoption de la resolution 687 (1991)?', 31 *RBDI* (1998) 485; Wedgwood, The Enforcement of Security Council Resolution 687: The Threat of Force against Iraq's Weapons of Mass Destruction', 92 *ATM* (1998) 724; Krisch, 'Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council', 3 *Max Planck UNYB* (1999) 59; Villani,

nuova crisi del Golfo e l'uso della forza contro l'Iraq', 82 *Revista di diritto internazionale* (1999) 451; White and Cryer, 'Unilateral Enforcement of Resolution 687: A Threat too Far?', 29 *California WILD* (1999) 243; Condron, 'Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox', 161 *Military* LR (1999) 115; Weller, The US, Iraq and the Use of Force in a Unipolar World', 41 *Survival* (1999-2000) 81. See also: 'Legal Authority for the Possible Use of Force Against Iraq', 92 *ASH. Proceedings* (1998) 136 (various commentators).

disagreements: i.e., their sometimes starkly divergent views on foundational aspects of international law. What are the general rules concerning the interpretation of Security Council resolutions? What are the general rules concerning the interpretation of treaties? How are rules of customary international law, in general, made and changed? How does customary international law interact with treaties? These are important questions, not only because our approach to them is likely to determine our analyses of substantive rules, but also because the considerable influence of the United States in this post-Cold War epoch might be changing the answers to these questions. As with the 'battle of the books' between Hugo Grotius and John Selden, which at one level was about the freedom of the seas and at another level about the future shape of the international legal system, debates over the rules governing the use of force raise profound questions about the shifting foundations of international law.'

2 Interpretation of Security Council Resolutions and Treaties

When it comes to interpreting Security Council resolutions, the following passage from the 1971 *Namibia* Advisory Opinion is one of the very few authoritative guides:

> The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.[6]

The passage suggests an approach similar to that codified in Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, i.e. 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.'

Two Security Council resolutions are central to any discussion of the use of force against Iraq during the decade following the Gulf War: Resolution 678, which explicitly authorized the use of force, and Resolution 687, which set out the terms of the ceasefire.' The United States, and some authors from the United States, have argued that Resolution 687 suspended but did not terminate the authorization provided by Resolution 678. Therefore, they claim that the United States is entitled to use force in response to Iraqi violations of Resolution 687 without further authorization from the Council, on the basis that the violations constituted a 'material

[5] See H. Grotius, *Mare liberum* (1609); J. Selden, *Mare clausum* (1635); Grewe, *supra* note 1, at 257-275 (Eng. version).

[6] ICJ Reports (1971) 15, at 53.

1155 LINTS 331; <http://untreaty.un.org>.

[8] See M. Weller (ed.), *Iraq and Kuwait: The Hostilities and their Aftermath* (1993); <http://www.un.org/documents/index.html>.

breach' that reactivated the earlier authorization.' This argument has been advanced, with differing degrees of explicitness, to justify the 1991 intervention in northern Iraq," the establishment and enforcement of the no-fly zones, and defensive or retaliatory actions taken in response to Iraqi efforts to shoot down warplanes enforcing those zones.'

The argument relies on an interpretive approach that, unlike the passage from the *Namibia* Advisory Opinion, accords considerably more weight to the supposed purposes of the resolutions than to the ordinary meaning of their terms. Paragraph 34 of Resolution 687 clearly states that the Council: *'Decides* 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 region.'[12] On the basis of the ordinary meaning, individual states would be precluded from engaging in enforcement action without further authorization from the Council.'

In an even more purposively-oriented interpretation of Resolution 687 and subsequent resolutions, the United States, and some authors from the United States, have gone on to argue that explicit authorization of the use of force is in fact not required, that all one needs is a determination by the Council that a situation constitutes a threat to international peace.[14] Should the Council fail to adopt a further resolution explicitly authorizing force, the determination of a threat to the peace may be taken as an implied authorization. This argument has been relied upon, not only vis-ci-vis Iraq, but also to help justify the 1999 intervention in Kosovo.'

The implied authorization argument, it should be noted, also depends upon a

[9] In 1998, Michael Matheson of the US State Department said: 1 guess we're all agreed that there was an authorization to use force under Resolution 678. Then, at the end of the fighting, the United Nations uses Resolution 687 to declare a cease-fire. But it does so with a number of conditions and requirements upon Iraq ... I think that it is clear on the record that the Security Council understood that the requirements with respect to the destruction of these weapons and inspection of the facilities were essential conditions precedent, such that if they were violated, it would be a material breach which would lead to the possible use of force.' — 'Legal Authority for the Possible Use of Force against Iraq', 92 ***ASIL Proceedings*** (1998) 136, at 141. See similarly, Wren, TN Resolutions Allow Attack on the Likes of Iraq', ***NY Times,*** 5 February 1998, A6; Wedgwood, ***supra*** note 4; Leurdijk and Siekmann, The Legal Basis for Military Action against Iraq', 4 ***Int'l Peacekeeping*** (1998) 71; Condron, ***supra*** note 4, at 167-180.

[10] See, e.g., Greenhouse, Taker Defends Refugee Plan at European Meeting', ***NY Times,*** 18 April 1991, A18. See, e.g., Wines, T.S. and Allies Say Flight Ban in Iraq Will Start Today', ***NY Times,*** 27 August 1992, Al. In February 1999, President Clinton went so far as to say that Resolution 678 obligated the US to enforce the no-fly zones. See Myers, T.S. Jets Strike 2 Iraqi Missile Sites 30 Miles Outside Baghdad', ***NY Times,*** 25 February 1999, A5.

[12] ***Supra*** note 8 (emphasis in original).

[13] For concurring analyses of these and other relevant resolutions, and the reactions of other states to the US interpretations, see Krisch, ***supra*** note 4; Denis, ***supra*** note 4; Villani, ***supra*** note 4; White and Cryer, ***supra*** note 4.

[14] Condron, ***supra*** note 4; Leurdijk and Siekmann, ***supra*** note 9.

[19] See 'Crossette, 'Conflict in the Balkans: At the UN; Council Seeks Punishment for the Kosovo Massacre', ***NY Times,*** 2 October 1998, A6; Lewis, The Rationale: A Word Bolsters Case for Allied Intervention', ***NY Times,*** 4 April 1999; Wedgwood, NATO's Campaign in Yugoslavia', 93 ***AJIL*** (1999) 828, at 829-830. See also Independent International Commission on Kosovo, ***The Kosovo Report*** (2000), at 172 ('It is certainly legally relevant that the deteriorating situation in Kosovo in the year prior to the NATO campaign was being treated as falling within Chapter VII').

purposive interpretation of certain provisions of the UN Charter, the ordinary meanings of which would seem to preclude such authorizations. For example, Article 39 reads:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken ... to maintain or restore international peace and security.[16]

Yet the combined use of these two arguments — of material breach and implied authorization — attracted widespread support, particularly from Western governments, when used to justify the 1991 intervention in northern Iraq and the 1992 establishment of the no-fly zones.[17] The implied authorization argument also met with a degree of acceptance when deployed to help justify the Kosovo intervention.' This raises the question, at least, whether the rules concerning the interpretation of Security Council resolutions — as well as the rules concerning the interpretation of treaties — are perhaps in the process of changing.

Differing views as to the rules governing interpretation have been expressed by the United States on previous occasions. At the 1968-1969 Vienna Conference on the Law of Treaties, Myres McDougal, the head of the United States delegation, proposed a purposive approach that emphasized a comprehensive examination of the context of the treaty aimed at ascertaining the common will of the parties — as that common will has evolved over time." This proposal generated considerable opposition and was rejected in favour of the textually-oriented, hierarchical series of rules now set out in Articles 31 and 32 of the Vienna Convention.[20] And in 1971 the United States acknowledged that the Vienna Convention was an accurate codification of customary international law.[21]

Today, however, the United States, and increasing numbers of United States authors, are reasserting a preference for a broadly-gauged purposive approach. For example, in June 2000, lawyers from the State Department, the Defense Department and the National Security Council concluded that the 1972 Anti-Ballistic Missile Treaty between the United States and Russia (as the successor to the Soviet Union's

[16] For concurring analyses, see: Krisch, *supra*, note 4, at 85; Kohen, 'L'emploi de la force et la crise du Kosovo: vers un nouveau desordre juridique international', 32 *RBDI* (1999) 122, at 133; Corten and Dubuisson, 'L'hypothese d'une regle emergente fondant une intervention militaire sur une "autorisation implicite" du Conseil de Securit?', 104 RGDIP (2000) 873.

[17] See discussion *supra at* notes 10 and 11. An argument of humanitarian intervention was suggested as well. See discussion, *infra* notes 32 and 64. More recently, increasing numbers of states have protested against actions based on these claims of material breach and implied authorization. For instance, the December 1998 attacks on Baghdad attracted criticism from Germany, Russia, China, Brazil, South Africa, Costa Rica and Kenya, as well as the Non-Aligned Movement of 114 States. See Krisch, *supra* note 4, at 67-68. France responded by terminating its role in the supervision of the no-fly zones.

[18] See, e.g., Miller, 'Russia's Move to End Strikes Loses; Margin Is a Surprise', *NY Times*, 27 March 1999, A7.

[19] UN Conference on the Law of Treaties, Official Records (1st Session, 1969), at 167-168.

[20] *Ibid*, *at* 168-185. The US proposal was rejected by 66 votes to eight, with 10 abstentions.

[21] President Nixon, when submitting the Convention to the Senate for its consent to ratification, stated that it is an expertly designed formulation of contemporary treaty law and ... is already generally recognized as the authoritative guide to current treaty law and practice'. Senate Executive Document L., 92nd Congress, 1st Sess. (1971) 1.

treaty obligations) could be interpreted so as to allow construction work, including the pouring of concrete, to be carried out on a proposed anti-ballistic missile radar station in Alaska.[22] They came to this conclusion notwithstanding the terms of Articles 1(2) and 2(2)(b) of the Treaty, which read:

> 1.(2) Each Party undertakes not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense, and not to deploy ABM systems for defense of an individual region ...
>
> 2.(2) The ABM system components ... include those which are: (b) undergoing construction; ...[23]

Applying Article 31 of the Vienna Convention, the ordinary meaning of the term `under construction' includes the pouring of concrete.[24] Yet a White House spokesman felt able to assert:

> The treaty, itself, does not provide a definition of what constitutes a so-called 'breach,' but it's prudent for us to examine what the possible interpretations of the ABM Treaty would be as we continue with our development effort. There are a range of interpretations available, but we have made no decision.[25]

A similar example of purposive interpretation involves the attempt, by a few United States authors and, somewhat surprisingly, the Belgian government, to argue that unilateral humanitarian intervention does not contravene Article 2(4) of the UN Charter because it is not directed against the 'territorial integrity or political independence of any State'.[26]

Tom Farer has described the selection of interpretive approach as involving a choice between a textually-oriented 'classical view' and more malleable approach which he labelled 'legal realism'. As Farer explained, the classical view presumes that the parties to a treaty 'had an original intention which can be discovered primarily through textual analysis and which, in the absence of some unforeseen change in circumstances, must be respected until the agreement has expired according to its terms or been replaced by mutual consent'.[27] In contrast, supporters of the 'legal realist' approach regard

> explicit and implicit agreements, formal texts, and state behavior as being in a condition of effervescent interaction, unceasingly creating, modifying, and replacing norms. Texts

[22] Schmitt and Myers, 'Clinton Lawyers Give a Go-ahead to Missile Shield', *NY Times*, 15 June 2000, Al.

[23] 944 TINTS 13, <http://fletcher.tufts.edu/multi/texts/abm.txt>.

[24] See *Concise Oxford English Dictionary* (8th ed., 1990), at 246, which defines the verb 'construct' as 'make by fitting parts together; build, form (something physical or abstract)'.

[25] Press Briefing by Jake Siewert and P.J. Crowley, 15 June 2000, available at <http://www.usinfo.state.gov/topical/pol/arms/stories/00061505.htm>.

[26] See, e.g.: D'Amato, The Invasion of Panama was a Lawful Response to Tyranny', 84 *AJIL* (1990) 516, at 520; F. TesOn, *Humanitarian Intervention: An Inquiry into Law and Morality* (2nd ed., 1997), at 150-162. See also Reisman, 'Coercion and Self-Determination: Construing Charter Article 2(4)', 78 *AJIL* (1984) 642, at 645 (In the construction of Article 2(4), attention must always be given to the spirit of the Charter and not simply to the letter of a particular provision.'); Legality of use of force case (Provisional Measures) (ICJ, 1999) pleadings of Belgium, 10 May 1999, CR99/15 (uncorrected translation).

[27] Farer, An Inquiry into the Legitimacy of Humanitarian Intervention', in L. Damrosch and D. Scheffer (eds), *Law and Force in the New International Order* (1991), at 185, 186.

themselves are but one among a large number of means for ascertaining original intention. Moreover, realists postulate an accelerating contraction in the capacity and the authority of original intention to govern state behavior. Indeed, original intention does not govern at any point in time. For original intention has no intrinsic authority. The past is relevant only to the extent that it helps us to identify currently prevailing attitudes about the propriety of a government's acts and omissions.[28]

The interpretation of Security Council resolutions presents even more scope for the advancement of differing views than does the interpretation of treaties. Council resolutions are adopted by an executive organ rather than contractually agreed, the academic literature concerning their interpretation is extremely thin, and the Vienna Convention does not apply, at least not directly.'

There being no treaty on this issue, the rules concerning the interpretation of Council resolutions are rules of customary international law," as are the rules concerning the interpretation of treaties for those states, such as the United States, that have not ratified the Vienna Convention. How other states react to these efforts to advance a purposive approach therefore matters in terms of evaluating the content of these rules. And it is true that the majority of states have not evinced support for new interpretive rules. But it also matters a great deal how one evaluates these reactions —or lack of reactions — from various states; in other words, whether the accepted approach to evaluating different kinds of state practice, and the state practice of different states, is itself undergoing change. For if the rules concerning the formation of customary international law have changed, the rules concerning interpretation might also have changed — perhaps without some states even knowing.

3 Formation of Customary International Law

Some authors point to the 1991 intervention in northern Iraq and the establishment and enforcement of the no-fly zones as important precedents for a right of unilateral humanitarian intervention, i.e. a right to intervene for humanitarian purposes without the authorization of the Security Council.' The same authors also point to

[28] *Ibid, at* 186.

[29] See Wood, The Interpretation of Security Council Resolutions', 2 *Max Planck UNYB* (1998) 73; Frowein, 'Unilateral Interpretation of Security Council Resolutions — A Threat to Collective Security?', in V. Giitz (ed.), *Liber amicorum Gunther Jaenicke — zum 85. Geburtstag* (1998) 98.

[30] Wood, *supra* note 29, at 74.

[31] See, e.g., Adelman, 'Humanitarian Intervention: The Case of the Kurds', 4 II *Refugee L* (1992) 4; Kress, 'Staat und Individuum in Krieg und Biirgerkrieg', 52 *Neue Juristische Wochenschrift* (1999) 3077. Intervention for humanitarian purposes may in some instances be authorized by the Council, whereupon the legal issues concern the explicitness of the authorization and the Council's capacity to delegate such authority and characterize situations giving rise to humanitarian concerns as threats to international peace. On authorized humanitarian intervention, see S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2001), at 112-162; D. Sarooshi, *The United Nations and the Development of Collective Security: The Delegation* by *the UN Security Council of its Chapter VII Powers* (1999).

the Kosovo intervention as a further instance of supporting state practice for what, since it would exist outside the scope of the UN Charter, would be a new rule of customary international law. Suggestions by the United States that such a right exists, and explicit claims to this effect by several of its allies, are seen as evidence of an accompanying *opinio* juris.[32]

A traditional analysis of the issue, however, would focus on a broader array of state practice and *opinio juris*. One would weigh the interventions in Iraq and Kosovo, together with any accompanying claims to legality and any similar interventions and claims elsewhere, against the responses of other states to these interventions, and against the responses to humanitarian crises more generally over a considerable number of years.

The putative right of unilateral humanitarian intervention does not fare well under such an analysis. For example, the Kosovo intervention provoked an unequivocal statement from the G77 group of 133 non-industrialized states that unilateral humanitarian intervention is illegal under international law.[33] And the history of humanitarian crises more generally is predominantly a history of non-intervention, with most of the relatively few examples of humanitarian intervention having been conducted under explicit Security Council authorization.[34] As recently as 1986, the International Court was able to state, in the *Nicaragua* case, that 'while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect'.[35]

Nevertheless, the question again arises as to whether the rules concerning how customary international law is made and changed have themselves changed, or are in the process of changing. For example, are acts, as compared to statements, today accorded more weight than previously? Does the practice of the powerful now count more, as compared to the practice of the weak? Or does a lower threshold now exist with regard to the development of customary rules of a humanitarian or human rights

[32] See, e.g., President Clinton's speech of 24 March 1999 (We act to protect thousands of innocent people in Kosovo from a mounting military offensive'. — In the President's Words: "We Act to Prevent a Wider War", *NY Times*, 25 March 1999, A15); Lewis, *supra* note 15 (quoting a spokesman for the US National Security Council as well as Abram Chayes, Diane Orentlicher, Michael Reisman, Ruth Wedgwood and Thomas Franck); and the statement of the UK delegate to the UN Security Council on 24 March 1999 ('Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable.' — S/PV.3988 (1999) 12).

[33] See Declaration of the Group of 77 South Summit, Havana, Cuba, 10-14 April 2000, <http://www.g77.org/Docs/Declaration_G77Summit.htm>, para. 54 of which reads, *inter alia:* We reject the so-called "right" of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law.' The 133 states in question included 23 Asian states, 51 African states, 22 Latin American states and 13 Arab states. Individual opposition was voiced by, among others, Russia, China, Namibia, India, Belarus, Ukraine, Iran, Thailand, Indonesia and South Africa. See Krisch, *supra* note 4, at 83-84.

[34] See Chesterman, *supra* note 31; Wembou, 'Le droit d'ingerence humanitaire: un droit aux fondements incertains, au contenu imprecis et a geometrie variable', 4 *African JICL* (1992) 570.

[35] ICJ Reports (1986) 14, at 134 (para. 268).

character? The widespread acceptance among many Western governments and authors that the intervention in northern Iraq, the establishment of the no-fly zones and the Kosovo intervention were not clearly illegal suggests that, at least from the perspective of one sector of international society, changes of these kinds may indeed be underway.

Similar questions arise concerning the right of self-defence, which has been invoked by the United States in two distinct contexts to justify measures against Iraq in the decade following the Gulf War. First, it was invoked to justify attacks on Baghdad in June 1993, two months after the discovery of an assassination plot directed against former President George Bush Sr.[36] Second, self-defence has been used to justify actions to protect warplanes enforcing the no-fly zones.[37]

In both instances, the invocation of the right of self-defence raises certain issues of treaty interpretation, since Article 51 of the UN Charter limits self-defence to situations where 'an armed attack occurs against a Member of the United Nations'. Traditionally, this provision has been interpreted so as to allow self-defence only when an attack has occurred upon the territory of the state exercising the right.[38] But the United States has applied a purposive approach to the interpretation of Article 51, and has even gone so far as to rely upon that provision to justify attacks against Iraqi targets, such as communications facilities, linked to air defences but located outside the no-fly zones.'

Claims of self-defence would also seem to raise issues of customary international law, for Article 51 states: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defense ...'. For this reason, a traditional analysis of the United States' invocations of the right of self-defence also requires an examination of state practice and *opinio juris* over time.

The responses of other states to the June 1993 attacks on Baghdad hardly reflected a preponderance of support for the United States' claim.[40] Efforts to employ the right of self-defence in respect of warplanes have met with a similarly mixed reaction,

36 See Madeline Albright's statement, as reported in 'Raid on Baghdad; Excerpts from U.N. Speech: The Case for Clinton's Strike', ***NY Times,*** 28 June 1993, A7.

37 See, e.g., Wines, 'Bush Sends a Final Message to His Old Nemesis in Iraq', ***NY Times,*** 14 January 1993, A9; Myers, 'U.S. Jets Attack Iraq Missile Post', ***NY Times,*** 29 December 1998, Al; Becker, 'U.S. Pilots over Iraq Given Wider Leeway to Fight Back,' ***NY Times,*** 27 January 1999, A8. This invocation of self-defence is contingent on the right of the warplanes to be in Iraqi territory in the first place — a right that is justified on the basis of Council resolutions interpreted so as to permit the no-fly zones, and on the basis of a customary law right of unilateral humanitarian intervention. See discussion ***supra text at*** notes 8-11 and ***infra text at*** notes 63-64.

38 See I. Brownlie, ***International Law and the Use of Force by States*** (1963), at 275; B. Simma (ed.), ***The Charter of the United Nations: A Commentary*** (1994), at 676.

39 See, e.g., Dao, 'U.S. and British Jets Strike Air-Defense Centers in Iraq', ***NY Times,*** 17 February 2001, Al. For supportive commentary, see Condron, ***supra*** note 4. On purposive as compared to textually-based approaches to interpretation, see discussion ***supra text at*** notes 6-29.

40 The UK, Italy, Germany and Russia expressed support for the June 1993 attack; Egypt, Sudan, Jordan and the Arab League voiced opposition. See Whitney, 'Raid on Baghdad: Reaction; European Allies Are Giving Strong Backing to U.S. Raid', ***NY Times,*** 28 June 1993, A7. Only the UK and Russia expressed support for the ***legal*** justification advanced by the US. See Kritsiotis, ***supra*** note 4, at 175, note 80.

particularly when used to justify attacks outside the no-fly zones.[41] The February 2001 strikes were even condemned by a number of the United States' closest allies in the Middle East and Europe.[42]

And yet, in 1993 Dino Kritsiotis wrote of self-defence that 'it could be said that the United States is engaged in the progressive development of this area of international law'.[45] In 1994, Christine Gray identified that the different approaches to the question of an extended right of self-defence indicated a division between industrialized and non-industrialized states, with industrialized states pushing for a more extended right through their physical acts, and non-industrialized states resisting such moves through their statements in the UN General Assembly.[44] In 1998, Marc Weller observed that the justifications advanced by the United States 'either appeared to extend existing justifications for the threat or use of force, or to create a new one'.[45] These statements indicate, not only that the right of self-defence might itself be changing, but that important underlying issues of law formation are at stake.

The development of customary international law has long been a matter of some disagreement among states — and among academic international lawyers. One contested issue concerns the character of state practice. Some writers, such as Anthony D'Amato, Mark Weisburd and Karol Wollke, have insisted that only physical acts count as state practice, which means that any state wishing to support or oppose the development or change of a rule must engage in some sort of act, and that statements or claims do not suffice [46]

Numerous authors have opposed this position.[47] One reason for their opposition is that, in so far as this approach concerns the change of rules, it would seem to require violations of customary international law. In short, acts in opposition to existing rules constitute violations of those rules, whereas statements in opposition do not. Consequently, this approach is, in Michael Akehurst's words, 'hardly one to be recommended by anyone who wishes to strengthen the rule of law in international relations'." But this approach does more than reduce the space for diplomacy and

[41] See, e.g., Myers, 'U.S. Presses Air Attacks on Iraq in a Low-Level War of Attrition', *NY Times,* 3 February 1999, Al.

[42] Turkey, Egypt and France were among the more vocal critics, along with Russia, China, and the Secretary General of the Arab League. See Deutsche Press-Agentur, 18 February 2001 (Westlaw 2/18/01 DCHPA).

[43] Kritsiotis, *supra* note 4, at 176.

[44] Gray, *supra* note 4, at 171-172.

[45] Weller, The Threat or Use of Force in a Unipolar World: The Iraq Crisis of Winter 1997/98', 4 *Int'l Peacekeeping* (1998) 63.

[46] A. D'Amato, *The Concept of Custom* (1971); D'Amato, *supra* note 26; A. M. Weisburd, *Use of Force: The Practice of States since World War* II (1997); K. Woltke, *Custom in Present International Law* (2nd rev. ed., 1993).

[47] See, e.g., Akehurst, 'Custom as a Source of International Law,' 47 *BYbIL* (1974-75) 1; Brownlie, 'Remarks', in 'Comparative Approaches to the Theory of International Law', 80 *ASH. Proceedings* (1986) 154; Onuf, Took Review: Karol Wolfke, *Custom in Present International Law* (2nd rev. ed.)', 88 *AIM* (1994) 556.

[48] Akehurst, *supra* note 47, at 8.

peaceful persuasion; it also provides a substantial advantage to powerful states in developing customary international law.

The polarization between those authors who think that only acts constitute state practice and those who support a broader conception is perhaps most evident in the debate about whether, and how, resolutions of international bodies such as the General Assembly contribute to customary international law. Traditionally, most international lawyers considered that resolutions were only able to contribute as expressions of *opinio juris,* with some writers suggesting that they cannot even constitute reliable evidence of *opinio juris* because state representatives frequently do not believe what they themselves say.[49]

Yet many non-industrialized states and a significant number of writers have asserted that resolutions are important forms of practice which are potentially creative, or at least indicative, of rules of customary international law.[5°] In the 1986 *Nicaragua* case the International Court reinforced this view by accepting that a series of Assembly resolutions played a role in the development of customary rules prohibiting intervention and aggression."

These assertions have in turn been resisted, with a degree of success, by a number of powerful states and many writers, most of them from the United States.[52] Today, General Assembly resolutions play a markedly less important role in debates over customary international law than they did just 20 years ago. The recent literature on the use of force in Iraq and Kosovo contains relatively few references to the relevant resolutions, including the 1970 United Nations Declaration on Friendly Relations."

Statements by individual states or groups of states are also accorded significantly less weight. During the 1960s, 1970s and 1980s, the views of the G77 group of non-industrialized states were considered of considerable relevance to any assessment of customary international law. The same cannot be said of the statement issued by that same group following the Kosovo intervention, expressing the view that unilateral humanitarian intervention is illegal.' A review of the subsequent literature turns up scarcely a mention of that statement, especially in articles and books published in the United States.[55]

However, it is possible that we are witnessing something more than just a

See, e.g., Arangio-Ruiz, The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations', 13 *7 RdC* (1972, BI), at 455-459; Schwebel, The Effect of Resolutions of the UN General Assembly on Customary International Law', 73 *ASIL Proceedings* (1979) 301.

[50] See, e.g., R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), at 5-7; 0. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (1966), at 46-62; J. Castaneda, *Legal Effects of United Nations Resolutions* (trans. Alba Amoia) (1969), at 168-177.

[51] *Supra* note 6, at 97-100 (paras 183-90).

[52] See, e.g., D'Amato, *supra* note 26; Weisburd, *supra* note 46; Schwebel, *supra* note 49.
UNGA Res. 2625 (XXV) (unanimous) (e.g.: No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State'). *Supra* note 33.

ss Exceptions include: Krisch, *supra* note 4; Brownlie, 95 *ASIL Proceedings* (2001, forthcoming).

continued effort to degrade the influence of resolutions and the relative weight of statements as opposed to acts. The United States, and some authors from the United States, may also be seeking a degree of formal recognition for the greater influence of the actions and opinions of powerful states in the formation of customary international law. It is true that powerful states have always had a disproportionate influence on customary law-making, in large part because they have a broader range of interests and activities and consequently engage in more practice than other states. In addition, their practice is often better documented than that of relatively weaker or poorer states, and is nowadays more likely to be available electronically and in English, and thus readily accessible to a larger and more diverse group of international lawyers.[56] However, when it comes to statements such as that by the G77 on humanitarian intervention, none of these explanations pertain. The adoption of this particular document was reported in the press and the document itself is easy to find, in English, on the Internet.'

Moreover, paying less attention to some states is one thing; having a legal justification for paying less attention is another. And it is possible that the legal principle of sovereign equality is now, quietly but resolutely, under attack. Today, in the United States literature in particular, in analyses and arguments concerning customary international law, one increasingly encounters references to 'leading' and `major' states or nations — words that imply directly that some states matter more than others in a formal rather than informal way."

Ian Brownlie identified this tendency in his 1995 General Course at the Hague Academy:

> The *modus operandi* for the formation of customary law supposes an equality of States and also a principle of majoritarianism. A certain amount of contracting out is possible but the generality of States are permitted by their conduct to develop customary rules. On the same basis, more or less, new States and new regimes, like the Soviet Government of 1917, are subject to existing rules of general international law.
>
> This approach to international law creates problems for those who hold that inequalities of power between States should be reflected in the way in which the law is made and applied, and

[56] See M. Byers, *Custom, Power and the Power of Rules* (1999), at 37-38 and 153.

[57] *Supra* note 33.

[58] Richard Falk, for example, refers to leading states' ('The Complexities of Humanitarian Intervention: A New World Order Challenge', 17 *MTh (1996)* 491; *Idem*, 'Re-framing the Legal Agenda of World Order in the Course of a Turbulent Century', 9 *Transnat'l L & Cont. Probs.* (1999) 451). According a special role to 'powerful states' is also increasingly common; see, e.g., Yoo, 'UN Wars, US War Powers', 1 *Chicago III.* (2000) 355 ('Achieving the progressive goals of international law — ending human rights violations, restoring stability and peace based on democratic self-determination — often requires powerful nations to violate international law norms about national sovereignty and the use of force.'). These efforts to differentiate between states are, it should be noted, not the same thing as assigning particular importance to the practice of 'specially affected States', an approach deemed proper by the International Court in the 1969 *North Sea Continental Shelf* cases ICJ Reports (1969) 3, at 42 (para. 73). Although the broader range and greater frequency of activities of powerful states are more likely to make them 'specially affected' by any particular legal development, up to now there has been, in Gennady Danilenko's words, no indication that their special status in customary law-making is recognized as a matter of law'. G. Danilenko, *Law-Making in the International Community* (1993), at 96.

> this involves what may be called the hegemonial approach to law-making. The hegemonial approach to international relations may be defined as an approach to the sources which facilitates the translation of the difference in power between States into specific advantages for the more powerful actor. The hegemonial approach to the sources involves maximizing the occasions when the powerful actor will obtain 'legal approval' for *its* actions and minimizing the occasions when such approach may be conspicuously withheld.[59]

And it is clear that, as the number of less powerful states increases and the economic and military gap between the weak and the strong grows, powerful states, and authors from powerful states, do have an interest in altering the principle of sovereign equality — a principle which operates, in a multitude of contexts, to constrain the law-making influence of the powerful.'

We may also be witnessing efforts to reduce the time necessary for the development of customary international law. Much of the literature concerning unilateral humanitarian intervention focuses on the decade following the end of the Cold War. There is an assumption, implicit in this literature, that the geopolitical shifts of 1989-1991 rendered previous practice of little relevance to determining the contemporary balance of influence and interests — and thus the current state of customary law. This assumption is made notwithstanding the fact that the interests of most states have not changed on many issues, including the use of force in international relations. As the G77 made clear after the Kosovo intervention, weak states still attach considerable importance to the existence of legal protections against the use of force.' Since the capacity of the United States to influence law-making is much greater today than it was just 10 years ago, a reduction in the time involved in the formation of customary international law, by discounting long-established practice, disfavours weak states and favours the single superpower.

It is true that technology has accelerated the process of information gathering, and thus one aspect of the formation and dissemination of state positions on international legal issues. But governmental policy-making, and especially inter-governmental policy-making on fundamental issues, still takes considerable time. For example, it has taken nearly a decade for France, Germany and a number of Arab States to decide to oppose publicly the United States' continuing policy of force against Iraq.[62] A reduction in the time involved in customary international law would constrain or obviate these sorts of deliberative processes, especially those involving coordination among groups of states.

The United States' actions in Iraq raises a host of additional issues concerning customary international law and, more particularly, possible changes to the manner

" Brownlie, International Law at the Fiftieth Anniversary of the United Nations,' 255 *RdC* (1995-I) 9, at 49.

[60] The principle of sovereign equality ensures that all states are entitled to participate in law-making in bodies such as the UN General Assembly which operate on the basis of one State–one vote, in the negotiation and conclusion of treaties, and in the formation of customary international law. But though the participation of the weak imposes some limits on the law-making influence of the powerful, differences in influence can still remain substantial. See generally: Byers, *supra* note 56.

[61] *Supra* note 33.

[62] *Supra, text at* note 42.

in which customary rules are made and changed. To begin with, what weight should be accorded to arguments in the alternative as potential contributions to the development of customary rules? For example, a right of unilateral humanitarian intervention was hardly the principal justification advanced by the United States when it intervened in northern Iraq, imposed the no-fly zones and then intervened in Kosovo; in fact, such a claim was advanced by the United States in only ambiguous terms.' In contrast, the United Kingdom did clearly articulate such a claim — which raises the additional question of whether one state, in this case a partner in the relevant act, can express the *opinio juris* for another state's practice.[64]

A related issue concerns the weight to be accorded to academic writing that advances legal arguments to justify governmental actions that the governments themselves have not articulated clearly, if at all. Most of the support for a right of unilateral humanitarian intervention has been generated by authors who have attached legal arguments to policy decisions that may in fact have been made in disregard — if not conscious violation — of international law. Similarly, what weight, if any, should be accorded to expressions of opinion by the media and non-governmental organizations on this and other legal issues?

Another question concerns the degree of significance, if any, that should be accorded to inconsistencies in the application of measures justified by the putative rule. For example, with regard to the right of unilateral humanitarian intervention, what weight should be accorded to the 1996 decision to strike at targets in southern rather than northern Iraq in response to renewed persecution of the Kurds,[65] or the refusal to take risks with pilots' lives in the Kosovo campaign?[66] Do these decisions demonstrate a lack of focus on the humanitarian justification claimed, and thus provide evidence that *opinio juris* did not in fact exist, or was at best limited? Or does the making of the claim together with a demonstrated willingness to act, in whatever manner, provide both the *opinio juris* and state practice necessary to contribute to the new rule?

Is it the case, also, that a lower threshold now exists with regard to the development of customary rules of a humanitarian or human rights character? Suggestions to this

[63] See, e.g., 'Excerpts From Bush's News Conference: Relief Camps for Kurds in Iraq', *NY Times,* 17 April 1991, Al2; President Clinton's speech on 24 March 1999, *supra* note 32.

[64] See, e.g., UK Foreign Secretary Douglas Hurd, BBC Radio interview, 19 August 1992, reprinted in *BYbIL* (1992) 824 ('[i]nternational law recognizes extreme humanitarian need'); Anthony Aust, Legal Counselor, Foreign & Commonwealth Office, statement before the House of Commons Foreign Affairs Committee, 2 December 1992, reprinted in 63 BYbIL (1992) 827; statement by the UK delegate to the Security Council on 24 March 1999, *supra* note 32.

[65] See Schmitt, 'Targets Were Chosen to Punish and Weaken Hussein', *NY Times,* 4 September 1996, A9; Schmitt, 'Clinton, Claiming Success, Asserts Most Iraqi Troops Have Left Kurds' Enclave', *NY Times,* 5 September 1996, Al.

[66] See O'Hanlon, 'Should Serbia Be Scared?', *NY Times,* 23 March 1999, A23; Schmitt, Out of NATO's Reach: Yugoslavia's Treetop War', *NY Times,* 24 April 1999, A7.

effect have certainly appeared in the literature,[67] and may be bolstered by recent debates concerning possible differences between human rights and other rules with regard to their effects on reservations to treaties,' and on the law of state succession.'

And finally, if the law concerning force is changing, are we seeing the end of the *jus cogens* character of the prohibition on the use of force, given the higher threshold that would traditionally have been accorded that rule with regard to any such change?'

All of these potential changes to the underlying process of customary international law matter greatly because their effect would be to favour disproportionately one particularly powerful international actor. Although law is necessarily the result and reflection of politics, law nevertheless retains a specificity and resistance to short-term change that enables it to constrain sudden changes in relative power, and sudden changes in policy motivated by consequentially shifting perceptions of opportunity and self-interest.[71] As Grewe recognized, the geopolitical changes that occurred in 1989-1991 will, eventually, result in substantial changes to the international legal system. But the question of the moment concerns whether those changes will occur slowly and deliberately enough to reflect accurately the complexity of relationships and interests, amongst states as well as non-state actors, that constitutes the international community of the early 21st century; or whether those changes will be implemented so quickly and forcefully that they instead reflect little else but the particular interests of the newly dominant state.

A few authors have responded to these developments by advancing new approaches that would work in favour of the less powerful states. For example, Nigel White and Robert Cryer have taken issue with those who ascribe legal significance to the refusal of many states publicly to object to the armed actions of the United States:

> It is true ... that deficiency of condemnation is an unfortunate fact of international relations in the post-Charter era, but it is over-simplistic to equate this with a change in the law. For a new customary norm to have emerged, absence of condemnation itself is not enough. There must also be an intention for that failure to condemn to amount to an acceptance of the legality of

[67] See, e.g., T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), at 113; Schachter, New Custom: Power, *Opinio furls* and Contrary Practice', in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996) 531, at 538-540. For further discussion, see Byers, *supra* note 56, at 162-165.

[68] See General Comment 24 of the United Nations Human Rights Committee, CCPR/C/21/Rev. 1 /Add.6, 11 November 1994, 7 (para. 18), <http://wwwl.umn.edu/humanrts/gencomm/hrcom24.htm>.

[69] See 1999 ILC Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, <http://www.un.org/law/ilc/>; *Genocide Case (Preliminary Objections),* 11 July 1996, <http:// www.icj–cij.org/icjwww/idecisions.htm>, paras 21, 23 and 34.

[70] In the *Nicaragua case* the ICJ quoted with approval the following statement by the ILC: '[T]he law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens.'* ICJ Reports (1986) 14, at 100 (para. 190). On the concept of *jus cogens,* see generally Vienna Convention on the Law of Treaties, Articles 53 and 64, *supra* note 7; L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (1988); S. Kadelbach, *Zwingendes VOlkerrecht* (1992).

[71] See, e.g., Corbett, The Consent of States and the Sources of the Law of Nations', 6 BYbII. (1925) 20; Schachter, 'Towards a Theory of International Obligation', 8 *Virginia JIL* (1968) 300; Byers, 'Taking the Law Out of International Law: A Critique of the "Iterative Perspective¨, 38 *Harvard ILJ* (1997) 201.

> the threat or an alteration of the pre-existing law, in other words, opinio juris. This has been conspicuous by its absence. Reluctant tolerance does not evidence opinio juris.[72]

Identifying evidence of *opinio juris* when a state does not respond is a notoriously difficult problem that has led international lawyers traditionally to presume its existence when a state does nothing in the face of another state's clear and concerted effort to change customary international law." In 1981, Brigitte Stern identified that acquiescence on the part of relatively weak states is often a result of the dynamics of power rather than a freely given consent, and that *opinio juris* thus means different things for weak and powerful states." Nevertheless, this insight did not lead Stern to suggest changes in the relevance accorded to acquiescence, nor is there any evidence of such a change having occurred. But the argument advanced by White and Cryer represents two authors' effort to engineer precisely such a change, altering the process of customary international law so as to better protect — in one small but significant way — the weak against the powerful."

Current evidence suggests that the customary process is in fact changing in the opposite direction, weakening those aspects of the law that disfavour the powerful while maintaining and strengthening those aspects, such as the rules concerning acquiescence, that operate in their favour. The early results of these developments are reflected in the following passage from the report of the Independent International Commission on Kosovo:

> One way to analyze the international law status of the NATO campaign is to consider legality a matter of degree. This approach acknowledges the current fluidity of international law on humanitarian intervention, caught between strict Charter prohibitions of non-defensive uses of force and more permissive patterns of state practice with respect to humanitarian interventions and counter-terrorist use of force. [76]

This passage bears more than a passing resemblance to the following lines from an article written by Michael Reisman on the June 1993 attacks on Baghdad:

> If one believes, as I do, that law is not to be found exclusively in formal rules but in the shared expectations of politically relevant actors about what is substantially and procedurally right—which may diverge sharply from the written rules — then a prerequisite for appraisal of the

[72] White and Cryer, *supra* note 4, at 246.

[73] See MacGibbon, 'Customary International Law and Acquiescence', 33 *BYb11,* (1957) 115; Akehurst, *supra* note 47, at 38-42; Byers, *supra,* note 56, at 142-146.

Stern, coutume au coeur du droit international', in *Mélanges offerts* a *Paul Reuter* (Pedone, 1981) 479 (approved English translation in 11 *Duke JCIL* (2001) 89).

[75] White and Cryer may well have been following Luigi Condorelli's advice to international lawyers: to resist the acceptance of 'regressive' changes wrought by changing patterns of state practice, by portraying the law as unchanged and, thus, making their own, albeit minimal contributions to the development of a more progressive international order. See Condorelli, 'A propos de l'attaque americaine contre l'iraq du 26 juin 1993: Lettre d'un professeur desempare aux lecteurs du JEDI', 5 *EJIL* (1994) 134, at 143-44.

[76] *Supra* note 15, at 172.

lawfulness and implications of an incident such as the Baghdad raid is an identification of the yardstick of lawfulness *actually* being used by relevant actors.[77]

Reisman's use of the term 'politically relevant' is noteworthy, as is the fact that his writings are cited with expressed approval in the Commission's report.' Here too, in the field of customary international law, Myres McDougal and the 'New Haven School' are staging a comeback.

4 Customary International Law and Treaties

It was explained above that a number of the claims advanced by the United States to justify its policy of force towards Iraq contradict traditional interpretations of the UN Charter." This raises at least three different kinds of questions. At one level, questions arise as to whether the interpretations of these and other Charter provisions have changed as a result of the subsequent acts and claims of the United States, and the responses of other states.' At another level, questions arise as to whether the rules concerning treaty interpretation have themselves changed or are in the process of changing.[81] And at a third level, the question arises as to whether the influence of subsequent practice has extended beyond interpretation into the actual modification of treaty obligations, or the desuetude of those obligations and their replacement by rules of customary international law. This is certainly a plausible, if unlikely scenario with regard to the putative right of unilateral humanitarian intervention.

The desuetude of treaties is a recognized process.[82] However, it usually takes a lengthy period of time and is unlikely to occur in areas, such as the use of force, where considerable practice occurs under the umbrella of the relevant treaty. The modification of treaties by way of subsequent practice would also seem to occur from time to time." However, the mechanisms by which such modifications occur are

[77] Reisman, *supra*, note 4, 122. See similarly, Falk, The Beirut Raid and the International Law of Retaliation', 63 *AfIL* (1969) 415, at 438-439 ('[R]ules of international law, as traditionally conceived, are too rigidly formulated to give appropriate insight into the factors that shape a decisional process of government and thus do not, in a realistic way, help officials or observers identify when a use of force is "excessive".').

[78] *Supra* note 15, Ch. 6, note 14.

[28] See discussion, *supra*, *text at* notes 16, 32, 38-39.

[80] Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties, *supra* note 7, states: 'There shall be taken into account together with the context ... any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.'

[81] See discussion, *supra*, *text at* notes 7, 16-28.

[82] See Commentary (para. 5) to Article 39 of the ILC Draft Articles on the Law of Treaties, in *Report of the ILC on the Work of its 18th Session*, 2 *Yearbook of the International Law Commission* (1966) 172, at 237; A. McNair, *The Law of Treaties* (1961), at 516-518; A. Vamvoukos, *Termination of Treaties in International Law: The Doctrines of Rebus Sic Stantibus and Desuetude* (1985), at 219-303; I. Brownlie, *Principles of Public International Law* (5th ed., 1998), at 621-622.

[83] See Danilenko, *supra* note 58, at 162-172; N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (1994); Byers, *supra*, note 56, at 172-175.

unclear and, at the least, a considerable amount of state practice of a relatively uniform character would seem to be required, over a lengthy period of time.

The question therefore arises whether the processes by which treaties may be modified through subsequent practice are themselves undergoing change. The question takes on a particular sharpness in respect of the use of force, where violations of the Charter are not uncommon, and where the Charter has traditionally been accorded, not only primacy in this area, but also a quasi-constitutional status vis-ci-vis other treaties." At what point, if ever, does a pattern of non-compliance alter or render inapplicable the treaty rule? Does the quasi-constitutional status of the Charter create a higher threshold for the replacement or supplementation of its provisions by new rules of customary international law?' Does the Charter apply in situations where the decision-making processes that it created have become inoperative due to political differences between states, and urgent action is needed to prevent gross violations of fundamental rules of customary international law?"

The response to certain claims advanced by the United States would suggest that change is indeed underway with regard to at least some of these issues. The intervention in northern Iraq, the creation of the no-fly zones and the Kosovo intervention were all supported, at least initially, by most Western states notwithstanding the apparent constraints of the Charter." And this support becomes all the more relevant if one accepts the related suggestion that powerful states count more than weak states in the development of customary rules, for the rules governing the interaction of customary international law and treaties are themselves customary in character."

5 A *sui generis* Set of Rules for the United States?

It is widely accepted that a state may choose persistently to object to a change in a rule of customary international law, and that the United States has successfully — though never indefinitely — persistently objected to a few rules on previous occasions." However, it is difficult to see how the United States could now become a persistent

[84] Article 103 of the Charter reads: In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

85 The latter question, it should be noted, is similar to that of whether the *jus cogens* character, usually accorded the parallel customary law prohibition on the use of force, creates a higher threshold for change there. See: discussion, *supra* note 70.

[86] For an affirmative response to the latter question, see Reisman, *supra* note 26.

[87] See discussion, *supra* notes 10 and 11.

[88] See discussion, *supra text at* notes 56-60.

[89] On persistent objection, see: Akehurst, *supra* note 47, at 23-27; Stein, The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law', 26 *Harvard ILI* (1985) 457. One example of persistent objection by the US was its resistance to the development of the 12-mile territorial sea. See generally M. Whiteman, *Digest of International Law* (1965) 14-207, esp. at 61-63, 91, 115-19. The US abandoned its position in 1983 and adopted a 12-mile limit of its own in 1988. See Presidential Proclamation 5030, 22 ILM (1983) 461, at 462; Presidential Proclamation 5928, 28 ILM (1989) 284.

objector to the customary rules governing the use of force, given the long existence of those rules — unless the rules concerning persistent objection have themselves changed, or are in the process of changing.

But maybe what we are seeing is not so much an effort by the United States to resist change as an attempt to create new, exceptional rules for itself alone. Similar exceptional rules have been created by other states in the past, albeit on a more limited basis. In 1984, the Federal Republic of Germany abandoned its claim to a three-mile territorial sea within the specific confines of the German Bight and claimed a new limit on the basis of a 16-mile box defined by geographical coordinates.' The new claim, which was explicitly designed for the limited purpose of preventing oil spills in those busy waters, met with no public protests from other states. This was perhaps because the balance of interests in that situation was different from that which existed more generally — different enough that other states were prepared to allow for the development of a prescriptive right as an exception to the general rule.

The same might be said of the position and interests of the single superpower in the post-Cold War period, in which case the development of exceptional rules would depend on the responses of other states to the exceptional claims. And given the potentially substantial political, military and economic costs of opposing the United States in any particular law-making situation, acquiescence might well occur — at least with regard to those claims that are not substantially contrary to the most important interests of other states. Most importantly, acquiescence may also be likely with regard to the United States' preferred approaches to the interpretation of at least some Security Council resolutions and treaties, the identification and assessment of at least some forms and instances of state practice, and the relationship between customary international law and at least some treaties. And it is this pattern of assertion and acquiescence in exceptional claims that might, in turn, eventually lead to changes in the underlying rules concerning interpretation and law-formation, if not generally, then at least in so far as they concern the United States. The end result could be that one set of legal processes pertain to the single superpower, and another set to all other states.'

In short, although international law is what states choose it to be, the power dynamic behind the law may, in fact, leave relatively less powerful states believing that they have little choice but to allow the United States to reshape international law into such an exceptional regime.

Conclusion

This article has used the United States' policy of force against Iraq as an opportunity to consider the potential for change in three foundational areas: the rules concerning the

[90] See: Decree of 12 November 1984, reproduced in 7 *Law of the Sea Bulletin* (1986) 9; Byers, *supra,* note 56, at 95.

[91] For a similar view, see Symes, 'Force without Law: Seeking a Legal Justification for the September 1996 U.S. Military Intervention in Iraq', 19 *Michigan III.* (1998) 581, at esp. 616.

interpretation of Security Council resolutions and treaties; the rules concerning how customary international law is made and changed; and the rules concerning the interaction of customary international law and treaties. It concludes that change may already be occurring in each and every one of these areas.

If such changes are indeed occurring, this could have a number of important consequences. For example, states could become significantly more cautious about supporting any Security Council resolution that might subsequently be interpreted so as to justify the use of force, and permanent members of the Council would probably exercise their vetoes more often.[92] This in turn could result in an increasingly diminished role for the Council, and more frequent unilateral applications of force." The trend towards greater unilateralism could be accelerated further by the increasingly flexible character of customary international law, and all of these changes could together contribute to a weakening of the entire international legal system, as the development of rules favouring the powerful strengthens the sense of disenfranchisement that is already felt by many states, particularly in the non-industrialized world.[94]

Grewe, however, recognized that the logical conclusion of his thesis — an international legal system shaped by and for the dominant state — is not a necessary conclusion in the unique environment that has emerged in the years following the Cold War." Grewe accepted that the United States would dominate law-making in the new epoch, but he also expressed hope that the 'international community' would play a substantial role in shaping the new international law, thus constraining the single superpower substantially more than would otherwise have been the case. Grewe understood that, although the United States is the most powerful single state, it is not more powerful than groups of other states — if those groups are large enough, act in concert, and speak with one voice. Nor, in a world in which non-state actors occupy an increasingly influential role, is the influence of any state necessarily as great as it would otherwise have been.

After a decade-long period of adjustment and learning, during which time the United States has on numerous occasions successfully exploited its law-making power to its own ends, other states, and non-state actors, seem to be responding to the efforts of the single superpower in ways that, at times, serve broader community interests. Developments such as the 1997 Land Mines Convention and the 1998 Statute for an International Criminal Court suggest that a greater coherence in approaches to law-making may be emerging outside the United States, as other international actors

[92] See Weller, *supra* note 4.

[93] See Quigley, The United Nations Security Council: Promethean Protector or Helpless Hostage?', 35 *Texas ILI* (2000) 129.

[94] See Wembou, *supra*, notes 4 and 34; Kohen, *supra* note 16; Kwakwa, 'Regulating the International Economy: What Role for the State?' in M. Byers (ed.), *The Role of Law in International Politics* (2000) 227.

[95] See discussion *supra text at* note 2.

recognize the possibility of a new balance of power in the making of international law.[96]

And yet, although these developments are promising, the critical differences remain unresolved — and largely unaddressed. The future shape of the international legal system will depend, above all, on *how* we interpret Security Council resolutions and treaties, on *how* we create and change rules of customary international law, and on *how* we understand the relationship between customary international law and treaties. These are contested issues, and likely to become more so. It is here that the strengthened authority of the international community will be most severely tested by the considerable power and law-making influence of the United States.

[96] See: <http://www.un.org/law/icc/statute/romefra.htm>; <http://domino.un.org/MineBan.nsf>.

United Nations S/RES/1441 (2002)

Security Council

Distr.: General
8 November 2002

Resolution 1441 (2002)

Adopted by the Security Council at its 4644th meeting, on 8 November 2002

The Security Council,

Recalling all its previous relevant resolutions, in particular its resolutions 661 (1990) of 6 August 1990, 678 (1990) of 29 November 1990, 686 (1991) of 2 March 1991, 687 (1991) of 3 April 1991, 688 (1991) of 5 April 1991, 707 (1991) of 15 August 1991, 715 (1991) of 11 October 1991, 986 (1995) of 14 April 1995, and 1284 (1999) of 17 December 1999, and all the relevant statements of its President,

Recalling also its resolution 1382 (2001) of 29 November 2001 and its intention to implement it fully,

Recognizing the threat Iraq's non-compliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles poses to international peace and security,

Recalling that its resolution 678 (1990) authorized Member States to use all necessary means to uphold and implement its resolution 660 (1990) of 2 August 1990 and all relevant resolutions subsequent to resolution 660 (1990) and to restore international peace and security in the area,

Further recalling that its resolution 687 (1991) imposed obligations on Iraq as a necessary step for achievement of its stated objective of restoring international peace and security in the area,

Deploring the fact that Iraq has not provided an accurate, full, final, and complete disclosure, as required by resolution 687 (1991), of all aspects of its programmes to develop weapons of mass destruction and ballistic missiles with a range greater than one hundred and fifty kilometres, and of all holdings of such weapons, their components and production facilities and locations, as well as all other nuclear programmes, including any which it claims are for purposes not related to nuclear-weapons-usable material,

Deploring further that Iraq repeatedly obstructed immediate, unconditional, and unrestricted access to sites designated by the United Nations Special Commission (UNSCOM) and the International Atomic Energy Agency (IAEA), failed to cooperate fully and unconditionally with UNSCOM and IAEA weapons

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inspectors, as required by resolution 687 (1991), and ultimately ceased all cooperation with UNSCOM and the IAEA in 1998,

Deploring the absence, since December 1998, in Iraq of international monitoring, inspection, and verification, as required by relevant resolutions, of weapons of mass destruction and ballistic missiles, in spite of the Council's repeated demands that Iraq provide immediate, unconditional, and unrestricted access to the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC), established in resolution 1284 (1999) as the successor organization to UNSCOM, and the IAEA, and regretting the consequent prolonging of the crisis in the region and the suffering of the Iraqi people,

Deploring also that the Government of Iraq has failed to comply with its commitments pursuant to resolution 687 (1991) with regard to terrorism, pursuant to resolution 688 (1991) to end repression of its civilian population and to provide access by international humanitarian organizations to all those in need of assistance in Iraq, and pursuant to resolutions 686 (1991), 687 (1991), and 1284 (1999) to return or cooperate in accounting for Kuwaiti and third country nationals wrongfully detained by Iraq, or to return Kuwaiti property wrongfully seized by Iraq,

Recalling that in its resolution 687 (1991) the Council declared that a ceasefire would be based on acceptance by Iraq of the provisions of that resolution, including the obligations on Iraq contained therein,

Determined to ensure full and immediate compliance by Iraq without conditions or restrictions with its obligations under resolution 687 (1991) and other relevant resolutions and recalling that the resolutions of the Council constitute the governing standard of Iraqi compliance,

Recalling that the effective operation of UNMOVIC, as the successor organization to the Special Commission, and the IAEA is essential for the implementation of resolution 687 (1991) and other relevant resolutions,

Noting that the letter dated 16 September 2002 from the Minister for Foreign Affairs of Iraq addressed to the Secretary-General is a necessary first step toward rectifying Iraq's continued failure to comply with relevant Council resolutions,

Noting further the letter dated 8 October 2002 from the Executive Chairman of UNMOVIC and the Director-General of the IAEA to General Al-Saadi of the Government of Iraq laying out the practical arrangements, as a follow-up to their meeting in Vienna, that are prerequisites for the resumption of inspections in Iraq by UNMOVIC and the IAEA, and expressing the gravest concern at the continued failure by the Government of Iraq to provide confirmation of the arrangements as laid out in that letter,

Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of Iraq, Kuwait, and the neighbouring States,

Commending the Secretary-General and members of the League of Arab States and its Secretary-General for their efforts in this regard,

Determined to secure full compliance with its decisions,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* that Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq's failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 687 (1991);

2. *Decides*, while acknowledging paragraph 1 above, to afford Iraq, by this resolution, a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council; and accordingly decides to set up an enhanced inspection regime with the aim of bringing to full and verified completion the disarmament process established by resolution 687 (1991) and subsequent resolutions of the Council;

3. *Decides* that, in order to begin to comply with its disarmament obligations, in addition to submitting the required biannual declarations, the Government of Iraq shall provide to UNMOVIC, the IAEA, and the Council, not later than 30 days from the date of this resolution, a currently accurate, full, and complete declaration of all aspects of its programmes to develop chemical, biological, and nuclear weapons, ballistic missiles, and other delivery systems such as unmanned aerial vehicles and dispersal systems designed for use on aircraft, including any holdings and precise locations of such weapons, components, sub-components, stocks of agents, and related material and equipment, the locations and work of its research, development and production facilities, as well as all other chemical, biological, and nuclear programmes, including any which it claims are for purposes not related to weapon production or material;

4. *Decides* that false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below;

5. *Decides* that Iraq shall provide UNMOVIC and the IAEA immediate, unimpeded, unconditional, and unrestricted access to any and all, including underground, areas, facilities, buildings, equipment, records, and means of transport which they wish to inspect, as well as immediate, unimpeded, unrestricted, and private access to all officials and other persons whom UNMOVIC or the IAEA wish to interview in the mode or location of UNMOVIC's or the IAEA's choice pursuant to any aspect of their mandates; further decides that UNMOVIC and the IAEA may at their discretion conduct interviews inside or outside of Iraq, may facilitate the travel of those interviewed and family members outside of Iraq, and that, at the sole discretion of UNMOVIC and the IAEA, such interviews may occur without the presence of observers from the Iraqi Government; and instructs UNMOVIC and requests the IAEA to resume inspections no later than 45 days following adoption of this resolution and to update the Council 60 days thereafter;

6. *Endorses* the 8 October 2002 letter from the Executive Chairman of UNMOVIC and the Director-General of the IAEA to General Al-Saadi of the Government of Iraq, which is annexed hereto, and decides that the contents of the letter shall be binding upon Iraq;

7. *Decides* further that, in view of the prolonged interruption by Iraq of the presence of UNMOVIC and the IAEA and in order for them to accomplish the tasks

set forth in this resolution and all previous relevant resolutions and notwithstanding prior understandings, the Council hereby establishes the following revised or additional authorities, which shall be binding upon Iraq, to facilitate their work in Iraq:

– UNMOVIC and the IAEA shall determine the composition of their inspection teams and ensure that these teams are composed of the most qualified and experienced experts available;

– All UNMOVIC and IAEA personnel shall enjoy the privileges and immunities, corresponding to those of experts on mission, provided in the Convention on Privileges and Immunities of the United Nations and the Agreement on the Privileges and Immunities of the IAEA;

– UNMOVIC and the IAEA shall have unrestricted rights of entry into and out of Iraq, the right to free, unrestricted, and immediate movement to and from inspection sites, and the right to inspect any sites and buildings, including immediate, unimpeded, unconditional, and unrestricted access to Presidential Sites equal to that at other sites, notwithstanding the provisions of resolution 1154 (1998) of 2 March 1998;

– UNMOVIC and the IAEA shall have the right to be provided by Iraq the names of all personnel currently and formerly associated with Iraq's chemical, biological, nuclear, and ballistic missile programmes and the associated research, development, and production facilities;

– Security of UNMOVIC and IAEA facilities shall be ensured by sufficient United Nations security guards;

– UNMOVIC and the IAEA shall have the right to declare, for the purposes of freezing a site to be inspected, exclusion zones, including surrounding areas and transit corridors, in which Iraq will suspend ground and aerial movement so that nothing is changed in or taken out of a site being inspected;

– UNMOVIC and the IAEA shall have the free and unrestricted use and landing of fixed- and rotary-winged aircraft, including manned and unmanned reconnaissance vehicles;

– UNMOVIC and the IAEA shall have the right at their sole discretion verifiably to remove, destroy, or render harmless all prohibited weapons, subsystems, components, records, materials, and other related items, and the right to impound or close any facilities or equipment for the production thereof; and

– UNMOVIC and the IAEA shall have the right to free import and use of equipment or materials for inspections and to seize and export any equipment, materials, or documents taken during inspections, without search of UNMOVIC or IAEA personnel or official or personal baggage;

8. *Decides* further that Iraq shall not take or threaten hostile acts directed against any representative or personnel of the United Nations or the IAEA or of any Member State taking action to uphold any Council resolution;

9. *Requests* the Secretary-General immediately to notify Iraq of this resolution, which is binding on Iraq; demands that Iraq confirm within seven days of that notification its intention to comply fully with this resolution; and demands

further that Iraq cooperate immediately, unconditionally, and actively with UNMOVIC and the IAEA;

10. *Requests* all Member States to give full support to UNMOVIC and the IAEA in the discharge of their mandates, including by providing any information related to prohibited programmes or other aspects of their mandates, including on Iraqi attempts since 1998 to acquire prohibited items, and by recommending sites to be inspected, persons to be interviewed, conditions of such interviews, and data to be collected, the results of which shall be reported to the Council by UNMOVIC and the IAEA;

11. *Directs* the Executive Chairman of UNMOVIC and the Director-General of the IAEA to report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including its obligations regarding inspections under this resolution;

12. *Decides* to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security;

13. *Recalls*, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations;

14. *Decides* to remain seized of the matter.

Annex

Text of Blix/El-Baradei letter

United Nations Monitoring, Verification and Inspection Commission

The Executive Chairman

International Atomic Energy Agency

The Director General

8 October 2002

Dear General Al-Saadi,

During our recent meeting in Vienna, we discussed practical arrangements that are prerequisites for the resumption of inspections in Iraq by UNMOVIC and the IAEA. As you recall, at the end of our meeting in Vienna we agreed on a statement which listed some of the principal results achieved, particularly Iraq's acceptance of all the rights of inspection provided for in all of the relevant Security Council resolutions. This acceptance was stated to be without any conditions attached.

During our 3 October 2002 briefing to the Security Council, members of the Council suggested that we prepare a written document on all of the conclusions we reached in Vienna. This letter lists those conclusions and seeks your confirmation thereof. We shall report accordingly to the Security Council.

In the statement at the end of the meeting, it was clarified that UNMOVIC and the IAEA will be granted immediate, unconditional and unrestricted access to sites, including what was termed "sensitive sites" in the past. As we noted, however, eight presidential sites have been the subject of special procedures under a Memorandum of Understanding of 1998. Should these sites be subject, as all other sites, to immediate, unconditional and unrestricted access, UNMOVIC and the IAEA would conduct inspections there with the same professionalism.

H.E. General Amir H. Al-Saadi
Advisor
Presidential Office
Baghdad
Iraq

We confirm our understanding that UNMOVIC and the IAEA have the right to determine the number of inspectors required for access to any particular site. This determination will be made on the basis of the size and complexity of the site being inspected. We also confirm that Iraq will be informed of the designation of additional sites, i.e. sites not declared by Iraq or previously inspected by either UNSCOM or the IAEA, through a Notification of Inspection (NIS) provided upon arrival of the inspectors at such sites.

Iraq will ensure that no proscribed material, equipment, records or other relevant items will be destroyed except in the presence of UNMOVIC and/or IAEA inspectors, as appropriate, and at their request.

UNMOVIC and the IAEA may conduct interviews with any person in Iraq whom they believe may have information relevant to their mandate. Iraq will facilitate such interviews. It is for UNMOVIC and the IAEA to choose the mode and location for interviews.

The National Monitoring Directorate (NMD) will, as in the past, serve as the Iraqi counterpart for the inspectors. The Baghdad Ongoing Monitoring and Verification Centre (BOMVIC) will be maintained on the same premises and under the same conditions as was the former Baghdad Monitoring and Verification Centre. The NMD will make available services as before, cost free, for the refurbishment of the premises.

The NMD will provide free of cost: (a) escorts to facilitate access to sites to be inspected and communication with personnel to be interviewed; (b) a hotline for BOMVIC which will be staffed by an English speaking person on a 24 hour a day/seven days a week basis; (c) support in terms of personnel and ground transportation within the country, as requested; and (d) assistance in the movement of materials and equipment at inspectors' request (construction, excavation equipment, etc.). NMD will also ensure that escorts are available in the event of inspections outside normal working hours, including at night and on holidays.

Regional UNMOVIC/IAEA offices may be established, for example, in Basra and Mosul, for the use of their inspectors. For this purpose, Iraq will provide, without cost, adequate office buildings, staff accommodation, and appropriate escort personnel.

UNMOVIC and the IAEA may use any type of voice or data transmission, including satellite and/or inland networks, with or without encryption capability. UNMOVIC and the IAEA may also install equipment in the field with the capability for transmission of data directly to the BOMVIC, New York and Vienna (e.g. sensors, surveillance cameras). This will be facilitated by Iraq and there will be no interference by Iraq with UNMOVIC or IAEA communications.

Iraq will provide, without cost, physical protection of all surveillance equipment, and construct antennae for remote transmission of data, at the request of UNMOVIC and the IAEA. Upon request by UNMOVIC through the NMD, Iraq will allocate frequencies for communications equipment.

Iraq will provide security for all UNMOVIC and IAEA personnel. Secure and suitable accommodations will be designated at normal rates by Iraq for these personnel. For their part, UNMOVIC and the IAEA will require that their staff not stay at any accommodation other than those identified in consultation with Iraq.

On the use of fixed-wing aircraft for transport of personnel and equipment and for inspection purposes, it was clarified that aircraft used by UNMOVIC and IAEA staff arriving in Baghdad may land at Saddam International Airport. The points of departure of incoming aircraft will be decided by UNMOVIC. The Rasheed airbase will continue to be used for UNMOVIC and IAEA helicopter operations. UNMOVIC and Iraq will establish air liaison offices at the airbase. At both Saddam International Airport and Rasheed airbase, Iraq will provide the necessary support premises and facilities. Aircraft fuel will be provided by Iraq, as before, free of charge.

On the wider issue of air operations in Iraq, both fixed-wing and rotary, Iraq will guarantee the safety of air operations in its air space outside the no-fly zones. With regard to air operations in the no-fly zones, Iraq will take all steps within its control to ensure the safety of such operations.

Helicopter flights may be used, as needed, during inspections and for technical activities, such as gamma detection, without limitation in all parts of Iraq and without any area excluded. Helicopters may also be used for medical evacuation.

On the question of aerial imagery, UNMOVIC may wish to resume the use of U-2 or Mirage overflights. The relevant practical arrangements would be similar to those implemented in the past.

As before, visas for all arriving staff will be issued at the point of entry on the basis of the UN Laissez-Passer or UN Certificate; no other entry or exit formalities will be required. The aircraft passenger manifest will be provided one hour in advance of the arrival of the aircraft in Baghdad. There will be no searching of UNMOVIC or IAEA personnel or of official or personal baggage. UNMOVIC and the IAEA will ensure that their personnel respect the laws of Iraq restricting the export of certain items, for example, those related to Iraq's national cultural heritage. UNMOVIC and the IAEA may bring into, and remove from, Iraq all of the items and materials they require, including satellite phones and other equipment. With respect to samples, UNMOVIC and IAEA will, where feasible, split samples so that Iraq may receive a portion while another portion is kept for reference purposes. Where appropriate, the organizations will send the samples to more than one laboratory for analysis.

We would appreciate your confirmation of the above as a correct reflection of our talks in Vienna.

Naturally, we may need other practical arrangements when proceeding with inspections. We would expect in such matters, as with the above, Iraq's co-operation in all respect.

Yours sincerely,

(*Signed*)
Hans **Blix**
Executive Chairman
United Nations Monitoring,
Verification and Inspection Commission

(*Signed*)
Mohamed **ElBaradei**
Director General
International Atomic Energy Agency