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Dionysian Disarmament: Security Council WMD Coercive Disarmament Measures and Their Legal Implication

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DIONYSIAN DISARMAMENT: SECURITY COUNCIL WMD COERCIVE DISARMAMENT MEASURES AND THEIR LEGAL IMPLICATIONS

*James D. Fry**

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I. INTRODUCTION

In the Fourth Century AD, Cicero recorded the interaction between tyrannous Dionysius II of Syracuse and his courtier Damocles, who was granted the unique opportunity to live like a king after openly coveting Dionysius' position.¹ Damocles enjoyed the finest foods and service in the land while seated on the king's throne and at his table, until he noticed that Dionysius had had a sword suspended over Damocles' head by a strand of horse's hair from the ceiling throughout the feast. Known in common parlance as the "Sword of Damocles," though it actually was Dionysius' sword, this scenario invokes images of the fragility of power. It also could represent the coercive measures of the Security Council dangling over all States currently seated at the table of disarmament and arms control which are not permanent members of the United Nations Security Council, in the case of significant non-compliance with any disarmament or arms control norms. States seated there enjoy the impression of sovereign equality, having taken up the seat of their own accord at the commencement or during the course of the feast, though doom lies in store if they show any sign of retreating or wanting to retreat from that table. Such is the Security Council's prerogative in taking steps to maintain international peace and security as it deems appropriate, within certain limits.

This Article provides the first comprehensive legal analysis of the Security Council's coercive disarmament and arms control measures involving weapons of mass destruction (WMD).² In the process of

1. See CICERO, *TUSCULAN DISPUTATIONS* V:61-62 (J.E. King trans., 1960). Please note that this Dionysius is different from the Dionysus in Greek mythology; hence the reference to "Dionysian" in the title does not mean reckless or undisciplined, but rather refers to this incident between Dionysius and Damocles.

2. By "disarmament," this Article does not mean the removal of all arms, but rather the reduction of arms to a particular level. See FRANCIS O. WILCOX & CARL M. MARCY, *PROPOSALS FOR CHANGES IN THE UNITED NATIONS* 217 (1955). By "arms control," this Article means the regulation of arms in any manner that does not necessarily include the actual reduction of those arms. See Dimitris Bourantonis & Marios Evriviades, *New Directions in Disarmament*, in *THE UNITED NATIONS IN THE NEW WORLD ORDER: THE WORLD ORGANIZATION AT FIFTY* 154, 155-56 (Dimitris Bourantonis & Jarrod Wiener eds., 1995). The U.N. Charter does not mention "arms control" because that term was not coined until after the signing of the Charter. See Jost Delbrück, *Arms Control*, in *UNITED NATIONS: LAW, POLICIES AND PRACTICE* 39, 39 (Rüdiger Wolfrum ed., 1995). WMD are commonly defined as nuclear, chemical, and biologi-

providing this legal analysis, it presents a fresh perspective on a variety of widely held beliefs about disarmament and arms control law,³ as well as about U.N. law. For example, a considerable number of commentators assert that the Security Council cannot impose disarmament and arms control obligations on States without their express consent.⁴ These commentators are not without solid legitimate support, given how the International Court of Justice (ICJ) declared the following in its 1986 *Nicaragua* decision:

[I]n international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States *without exception*.⁵

Despite this opinion of the ICJ and various commentators, coercion appears to be one of the three pillars upon which the goal of nuclear

cal agents and the means to deliver them. *See, e.g.*, NEWTON R. BOWLES, *THE DIPLOMACY OF HOPE: THE UNITED NATIONS SINCE THE COLD WAR* 162 (2004). Some caution is warranted for lumping all means of delivery under this definition, as these agents need not be delivered by intercontinental ballistic missiles, but can be delivered by such simple means as shells and suitcases. *See* S. NEIL MACFARLANE & YUEN FOONG KHONG, *HUMAN SECURITY AND THE UN: A CRITICAL HISTORY* 122 (2006). The Soviet Union attempted to expand the scope of WMD in 1979 by including radiological weapons, "particle-beam weapons, infrasonic acoustic radiation weapons, and electromagnetic weapons operating at certain radio frequency radiations that could have injurious effects on human organs," although the West argued that including the prohibition of these potential weapons, which had not yet become operational, would make any treaty on this topic too vague to be effective or verifiable. JAMES S. SUTTERLIN, *THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL SECURITY: A CHALLENGE TO BE MET* 105 (2003). The definition of WMD does not appear to have evolved to incorporate the types of weapons that the Soviet Union mentioned in 1979.

3. WMD proliferation is commonly considered to be a branch of disarmament and arms control. *See* RAMESH THAKUR, *THE UNITED NATIONS, PEACE AND SECURITY: FROM COLLECTIVE SECURITY TO THE RESPONSIBILITY TO PROTECT* 176–78 (2006); Milagros Alvarez-Verdugo, *Comparing U.S. and E.U. Strategies Against Weapons of Mass Destruction: Some Legal Consequences*, 11 *ANN. SURV. OF INT'L & COMP. L.* 119, 119 (2005). Therefore, when this Article refers to "disarmament and arms control" or "disarmament and arms control law," it includes "WMD non-proliferation," unless it specifies otherwise.

4. *See, e.g.*, WILCOX & MARCY, *supra* note 2, at 182; Bourantonis & Evriviades, *supra* note 2, at 156; JORGE CASTAÑEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS* 58–60 (Alba Amoia trans., 1969); Erwin Dahinden, *The Future of Arms Control Law: Towards a New Regulatory Approach and New Regulatory Techniques*, 10 *J. CONFLICT & SECURITY L.* 263, 272 (2005); Guido den Dekker, *The Effectiveness of International Supervision in Arms Control Law*, 9 *J. CONFLICT & SECURITY L.* 315, 317 (2004); Jozef Goldblat, *The Role of the United Nations in Arms Control: An Assessment*, in *THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY* 369 (U.N. Institute for Training & Research ed., 1987).

5. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 135 (June 27) (emphasis added).

non-proliferation rests.⁶ Although there are many ways in which the regulation of arms can be seen as coercive,⁷ this Article will focus on just one: the coercive measures taken by the Security Council to remove, limit, and otherwise regulate arms through its distinct powers provided by the U.N. Charter in Articles 25 and 103 and in Chapter VII, *inter alia*. This notion goes against commentators' assertions that the *Security Council*, in particular, cannot impose disarmament and arms control obligations.⁸ These assertions inappropriately discount the tremendous discretion given to the Security Council in reaching decisions designed to maintain international peace and security. Indeed, commentators in the 1950s and 1960s, such as Hans Kelsen and Quincy Wright, noted the link between collective security and the limiting of armaments. This new perspective on disarmament and arms control law, within the U.N. legal context, touches on the very core of these bodies of law, and provides a clearer view of how they operate together.

This Article is divided into four parts. This brief introduction and a conclusion constitute Parts I and IV, respectively. Part II relies on many classical and contemporary legal philosophers to construct a theoretical framework that can be used to understand what is meant by "coercion" in the disarmament and arms control context and to determine whether it is even possible for the Security Council to adopt coercive WMD disarmament and arms control measures. With this framework in mind, Part III contains the bulk of this Article's analysis and systematically explores the various ways in which the Security Council has imposed coercive WMD disarmament and arms control measures on States. The legal implications of each imposition are addressed as they arise within each set of Security Council resolutions.

Three disclaimers are appropriate for this Article. First, the limited number of cases in which the Security Council has imposed disarmament and arms control obligations on States does not allow one to conclude definitively that the Security Council has particular patterns of behaviour in this area. Second, this Article focuses on the obligations on the target States to abide by certain WMD norms that they were not obliged to abide by before the Security Council's imposition. Third, the qualitative methodology adopted in the Article limits its ability to say

6. THAKUR, *supra* note 3, at 161 (noting that the other two pillars are norms and treaties).

7. Other coercive arms control measures can be found within treaty law and the supervisory bodies established by multilateral disarmament treaties and peace treaties inasmuch as they often impose disarmament obligations on the weaker State, and within quasi-coercive measures taken under general international law. These topics are beyond the scope of this Article.

8. See *supra* note 4.

whether there is a definitive causal link between the obligations that the Security Council imposes and any tangible results on the ground. What is more important than causality here is the notion that the Security Council's practice of imposing WMD disarmament and arms control obligations expands what constitutes "collective security" beyond the traditional definition, which ranges from responding to breaches of the peace to responding to the mere possession of certain weapons.⁹ Such an expansion is not unlike those observed with grave breaches of human rights and international humanitarian law that have broadened the scope of acts that can trigger a collective security response under Chapter VII.¹⁰

II. COERCION IN THEORY AND PRACTICE

Inasmuch as this Article looks at the *coercive* disarmament and arms control measures that the Security Council takes in maintaining international peace and security, it is important to define what coercion is and whether disarmament and arms control measures can, in fact, be coercive.

A. Defining Coercion

Coercion is one of those nebulous terms in international law that often is used but rarely defined. A know-it-when-you-see-it type approach to coercion has led to confusing standards in international legal instruments in which coercion is a component.¹¹ An aversion to defining coercion is natural, given that, as Grant Lamond asserts, "coerciveness is in fact highly complex—there are many different ways in which practices such as law may be coercive."¹² The following paragraphs provide a brief analysis of exactly which types of coercion this Article has as its focus.

9. See M.V. NAIDU, *COLLECTIVE SECURITY AND THE UNITED NATIONS* 17 (1975) (reflecting the traditional conception of collective security in terms of "actual or potential breach[es] . . . of security"). *But see id.* at 92–93 (noting that, since its early days, the ambiguity of the "collective security" concept has permitted expansive readings that have "been used to rationalize aggressive alliances, to identify regional alliances, to support bloc antagonisms of the Cold War, to describe economic and diplomatic sanctions, to define pacific settlement methods, to explain the security scheme envisaged in the UN Charter and to justify the so-called UN peacekeeping methods").

10. Vera Gowlland-Debbas, *The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance*, 11 EUR. J. INT'L L. 361, 365 (2000).

11. See generally James D. Fry, *Coercion, Causation, and the Fictional Elements of Indirect State Responsibility*, 40 VAND. J. TRANSNAT'L L. 611 (2007) (discussing the confusion caused by an unclear definition of "coercion" in the Draft Articles on State Responsibility).

12. Grant Lamond, *The Coerciveness of Law*, 20 OXFORD J. LEGAL STUD. 39, 40 (2000).

In this Article, coercion is defined as a means beyond persuasion that “agents (coercers) can use to get other agents (coercees) to do or not do something,” or is “a reason for why coercees sometimes do or refrain from doing something,” where the coercee’s freedom has been somewhat diminished.¹³ In the U.N. context generally, coercion takes the form of express or implicit threats of military action, and, of course, actual military action. In the Security Council context, however, every form of pressure can be seen as rising to the level of coercion, given the Security Council’s unique ability and broad discretion to authorize, and legitimately threaten the authorization of, collective security measures. Such a broad definition for coercion in this context seems consistent with how past commentators have defined the term as including “all forms of pressure resisted by a receiving State as well as pressure not resisted (either because of an ability to undertake resistance or a conscious decision to forego resistance).”¹⁴ Although there are numerous usages of the term, including “violence, compulsion, punishment, force, [and] interference,”¹⁵ this Article refers to coercion more in the sense of *compulsion* that St. Thomas Aquinas, Immanuel Kant, and especially John Stuart Mill envisioned, which involves involuntariness without necessarily involving the use of force, even though the ability to authorize the use of force must be present,¹⁶ as is the case with the Security Council. Although Hans Kelsen spoke of coercion primarily as a physical force,¹⁷ some of his writings indicate a definition of coercion with a lower threshold, similar to the one proposed above: “[Sanctions] are coercive in so far as they are to be taken even *against the will of the subject* to whom they are applied, *if necessary* by the employment of force.”¹⁸ The key part of that quote is “against the will of the subject” and “if necessary.” Con-

13. Scott Anderson, *Coercion*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Feb. 2006, <http://plato.stanford.edu/entries/coercion> (last visited August 29, 2007).

14. See Rex J. Zedalis, *On the Lawfulness of Forceful Remedies for Violations of Arms Control Agreements: “Star Wars” and Other Glimpses at the Future*, 18 N.Y.U. J. INT’L L. & POL. 73, 88–89 (1985); Rex J. Zedalis, *Some Thoughts on the United Nations Charter and the Use of Military Force Against Economic Coercion*, 17 TULSA L.J. 487, 491–97 (1982). *But see* Christopher C. Joyner, *The Transnational Boycott as Economic Coercion in International Law: Policy, Place, and Practice*, 17 VAND. J. TRANSNAT’L L. 205, 240–42 (1984) (adopting a more narrow definition of coercion).

15. See Anderson, *supra* note 13.

16. See *id.*

17. See, e.g., HANS KELSEN, PURE THEORY OF LAW 1–69 (Max Knight, trans., 1967); HANS KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS 48–81 (1952); HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 108 (Bonnie Litschewski Paulson & Stanley Paulson trans., 1992) (1932). See also Charles Leben, *Hans Kelsen and the Advancement of International Law*, 9 EUR. J. INT’L L. 287, 288 (1998); Clemens Japloner, *Kelsen and his Circle: The Viennese Years*, 9 EUR. J. INT’L L. 368, 372 (1998).

18. Hans Kelsen, *Sanctions in International Law Under the Charter of the United Nations*, 31 IOWA L. REV. 499, 499 (1946).

temporary philosophical discussions on coercion, starting with Robert Nozick in 1969, focus almost exclusively on one agent *compelling* another agent through conditional threats, though no use of force actually is applied.¹⁹ As Joshua Meltzer asserts, “any form of coercion reduces the normative quality of State consent.”²⁰ In sum, coercive action can be as simple as a shift from persuasion to pressure in trying to compel another State to act or refrain from acting,²¹ with the main difference between persuasion and pressure being roughly the reliance on logical reasoning in the former.

B. *Forms of Coercion*

As to the forms of coercion that exist, one ought not to just think of physical force in compelling a target to act or refrain from acting. Indeed, there are forms of coercion that are comparable to physical force in compelling behavior.²² For example, as François Rigaux points out, followers of certain religions may face the coercive sanction of excommunication if they fail to adhere to ecclesiastical law.²³ This example is useful in criticizing Kelsen’s characterization of international law as primitive on account of there being no monopoly of physical coercion in one body, because such traditional organizations as the Roman Catholic Church can be sophisticated (and effective) normative systems that apply sanctions of a non-physical nature.²⁴ Rigaux adds that the ability to rescind membership of bad actors in the United Nations or membership in association with the European Convention of Human Rights are examples of cases in which coercion does not involve physical force.²⁵ Other examples include economic measures, which some commentators assert can rise to the level of coercion,²⁶ and especially when the Security

19. See Anderson, *supra* note 13 (citing ROBERT NOZICK, COERCION, IN PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440, 441–45 (Sidney Morgenbesser et al. eds., 1969)).

20. Joshua Meltzer, *State Sovereignty and the Legitimacy of the WTO*, 26 U. PA. J. INT’L ECON. L. 693, 707 (2005).

21. See GUIDO DEN DEKKER, THE LAW OF ARMS CONTROL 130 (2001) (“Only in cases of complete failure of these attempts [to comply with warning that their acts violate the treaty that] supervision will result in coercive action, substituting persuasion by pressure.”).

22. François Rigaux, *Hans Kelsen on International Law*, 9 EUR. J. INT’L L. 325, 342 (1998) (“Even assuming that coercion forms part of the constitutive elements of a legal order, one cannot deny the existence of other forms of constraint than physical coercion.”).

23. See *id.* at 338.

24. Danilo Zolo, *Hans Kelsen: International Peace through International Law*, 9 EUR. J. INT’L L. 306, 314 (1998). Professional sports organizations are another type of organization that would fit this description. *Id.* at 314–15.

25. See Rigaux, *supra* note 22, at 338.

26. See, e.g., Comment, *The Use of Nonviolent Coercion: A Study in Legality Under Article 2(4) of the Charter of the United Nations*, 122 U. PA. L. REV. 983 (1974) (discussing a hierarchy of coercion, including military force, intermediate coercion (unfriendly measures

Council is involved because it has broad powers to authorize the use of force when such non-military measures are violated. The means of coercion are somewhat irrelevant, as Max Weber asserted,²⁷ as long as a sufficient amount of pressure is applied to the target State.

Coercion can take many forms in the context of disarmament and arms control. When both sides in negotiations have matching interests in disarmament and arms control, there is no need for so-called carrots or sticks, as the carrots are inherent in the arms control or disarmament agreement itself.²⁸ Where inherent mutual benefit is lacking, incentives and penalties, short of war, are necessary to induce compliance. These incentives can take the form of various domestic enforcement measures that can rise to the level of coercion in the aggregate. Such measures could include, among others, the suspension of benefits to another State (either military assistance or foreign aid), various fines and penalties under domestic law and export controls, deregistration of corporations (either subsidiaries or parents), extradition of key individuals to provide evidence or to imprison, the revocation of nationality when nationals fail to return for an investigation, and intelligence sharing and mutual assistance in stopping the exportation of WMD-related goods and services.²⁹ Key examples of the application of such pressure to agree to certain WMD non-proliferation norms are evident in the efforts of Western States to pressure North Korea, through the Agreed Framework and recent Six-Party Talks, and Iran into giving up their nuclear weapons programs.

Where negotiations are impossible with a target State in trying to convince them to abide by such norms, then the application of what is known as "pure coercion" might be necessary. Pure coercion is the use of military force to physically remove the threat.³⁰ This is the type of coercion that the Security Council used in disarming Iraq during the 1991 Gulf War and beyond. The Security Council has been reluctant to use

short of war), and economic and political coercion); Eiichi Fukatsu, *Coercion and the Theory of Sanctions in International Law*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY* 1187, 1193–99 (R. St.J. Macdonald & Douglas M. Johnston eds., 1983).

27. MAX WEBER, *ON LAW IN ECONOMY AND SOCIETY* 34–35 (G. Roth & C. Wittich eds., 1968) (asserting that even the statutes of voluntary associations possibly can constitute coercion).

28. Christophe Carle, *Arms Control in Reluctant Installments: Iraq and North Korea, Arms Control and Disarmament Cluster 1999–2000*, OCCASIONAL PAPER SERIES No. 9, 3 (2000).

29. See Julie Dahlitz, *Extra-Territoriality and Weapons Proliferation*, 14 *AUSTL. Y.B. INT'L L.* 179, 202 (1992); Richard L. Williamson, Jr., *Hard Law, Soft Law, and Non-Law in Multilateral Arms Control: Some Compliance Hypotheses*, 4 *CHI. J. INT'L L.* 59, 64 (2003).

30. See Steven Greffenius & Jungil Gill, *Pure Coercion vs. Carrot-and-Stick Offers in Crisis Bargaining*, 29 *J. PEACE RES.* 39 (1992).

pure coercion against North Korea and Iran, instead preferring to let carrots and the threat of sticks try to convince them to abide by international WMD non-proliferation norms. South Korea, the United States, and Japan promised billions of dollars worth of nuclear power-generating equipment and food aid in exchange for guarantees that North Korea will not develop nuclear weapons or continue production of plutonium.³¹ There are many indications that this soft approach with regard to North Korea has not been working,³² although only time will tell. Western powers seem to be trying to reach a similar arrangement with Iran.³³ Regardless of the eventual outcome, these measures give the reader a sense of the types of non-military coercive measures that States can adopt in pushing a target State to conform its behaviour in a particular way.

C. Coercion and International Organizations

The ability to take coercive measures has been a common part of international organizations for centuries. Between 1306 and 1800, starting with the earliest plans of Pierre Dubois for world peace through a strong international organization, approximately one half of such plans involved coercion by those organizations of their Member States, and nine-tenths envisioned an international organization maintaining the status quo.³⁴ In particular, Harrop Freeman identifies common structures and purposes in plans for international organizations dating back to 1600:

There is a strong family resemblance in all these plans: a league proposed by and for the victors in a war, a status quo created or to be created by force of arms, collective coercion to maintain this status quo, a non-universal league, a league dealing with “sovereigns” or “sovereign nations” rather than with people.³⁵

This is roughly the same model that the U.N. Charter framers followed. Article 53(2) makes clear that it was a league of the victors, referencing “enemy State” during the Second World War. Chapter VII establishes a collective coercion arrangement maintaining the status quo by military

31. Carle, *supra* note 28, at 6–7.

32. See, e.g., Choe Sang-Hun, *North Korea Lashes Out At South Korea's President*, N.Y. TIMES, Apr. 2, 2008, at A17 (reporting how North Korea is blaming Washington for the impasse in the nuclear talks, while at the same time threatening to turn South Korea into “ashes”).

33. See Steven Lee Myers, *Talks Stumble on Enriching Nuclear Fuel for Iranians*, N.Y. TIMES, Feb. 22, 2006, at A1.

34. See HARROP FREEMAN, COERCION OF STATES IN INTERNATIONAL ORGANIZATIONS 2 (1944) (citing JACOB TER MEULEN, DER GEDANKE DER INTERNATIONALEN ORGANIZATION IN SEINER ENTWICKLUNG 1306–1800 (1917)).

35. See *id.* at 3.

and non-military means. The entire Charter makes it clear that it is explicitly an arrangement between sovereign States, despite the fact that the preamble begins with “We the peoples”

As a general rule, the United Nations operates mainly in the realm of persuasion, not coercion.³⁶ Indeed, the United Nations was designed to foster inter-State cooperation in solving common problems.³⁷ However, the primary exception to this general rule is with certain Security Council resolutions that impose obligations on States. As one commentator notes, Security Council coercion is a case of “forced order maintained by threat of sanctions.”³⁸ The Security Council adopts coercive measures when it imposes obligations on States through its decisions, which are binding on States under Articles 25 and 103, and through Security Council authorization of non-military or military measures to enforce those obligations under Chapter VII.³⁹ Security Council decisions can also be coercive in that they send key information to bad actors that their actions are unacceptable to the international community.⁴⁰ This required communication thus provides a type of psychological and moral coercion that Eiichi Fukatsu discusses,⁴¹ and which might not be present if a State chose to impose its will through unilateral action, even if the multilateral and unilateral reasoning and results are identical. Moreover, the criticism and condemnation that comes from the Security Council through its resolutions can be a type of strong social coercion.⁴² Commentators have acknowledged that these less traditional types of coercion are applicable in the context of the Security Council trying to regulate arms.⁴³

The Security Council’s coercive powers fundamentally derive from the consent that U.N. Member States gave it when they joined the United Nations and from the principle of *pacta sunt servanda*.⁴⁴ U.N. Charter Article 25 provides, “The Members of the United Nations agree to ac-

36. QUINCY WRIGHT, *INTERNATIONAL LAW AND THE UNITED NATIONS* 77 (1960).

37. See L. GOODRICH ET AL., *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 35 (1969).

38. Shigeyoshi Ozaki, *International Law and Coercion*, 27 *JAPANESE ANN. INT’L L.* 12, 20 (1984).

39. All of these coercive measures are considered “sanctions.” See Christopher C. Joyner, *Collective Sanctions as Peaceful Coercion: Lessons from the United Nations Experience*, 16 *AUSTL. Y.B. INT’L L.* 241, 242 (1995) (“The term ‘sanctions’ under international law generally refers to coercive measures taken by one State or in concert by several States, which are intended to convince or compel another State to desist from engaging in acts violating international law.”).

40. See Alexander Thompson, *Coercion Through IOs: The Security Council and the Logic of Information Transmission*, 60 *INT’L ORG.* 1, 2 (2006).

41. Fukatsu, *supra* note 26, at 1190.

42. See *id.* at 1188.

43. See THAKUR, *supra* note 3, at 168.

44. Joyner, *supra* note 39, at 260.

cept and carry out the decisions of the Security Council in accordance with the present Charter.”⁴⁵ In cases in which Security Council decisions conflict with other State obligations, U.N. Charter Article 103 makes it clear that Security Council decisions trump: “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.”⁴⁶ The ICJ has confirmed the supremacy of Security Council resolutions over conflicting treaty obligations.⁴⁷ In particular, in the *Lockerbie* case, the ICJ declared that Security Council resolutions trump conflicting treaty obligations.⁴⁸

U.N. Charter Articles 41 and 42 also provide the Security Council with a wide array of coercive options to enforce these obligations, and give the Security Council maximum discretion to choose the appropriate measures:

Article 41. The Security Council may decide what *measures not involving the use of armed force* are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42. Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, *it may take such action by air, sea, or land forces* as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.⁴⁹

Although Article 42 makes it clear that the Security Council must at least contemplate non-military force before military force, the Security Council can authorize a wide range of measures.

45. See also Judith G. Gardam, *Legal Restraints on Security Council Military Enforcement Action*, 17 MICH. J. INT’L L. 285, 313 (1996) (seeing the ability of the Security Council to override IHL provisions as inherent in U.N. Charter Articles 103 and 25).

46. U.N. Charter art. 103.

47. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 440 (June 27); *Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libya v. U.S.)*, 1992 I.C.J. 114, 138, 140 (separate opinions of Judges Lachs and Shahabuddeen).

48. See *Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libya v. U.S.)* 1992 I.C.J. 114, 124.

49. U.N. Charter arts. 41–42 (emphasis added).

Critics could raise the issue that the Security Council does not have sufficient powers to physically coerce compliance with its pronouncements to warrant classification as coercive. Indeed, U.N. Charter Article 43, which allows for a U.N. military force, has never been implemented, thus requiring the Security Council to rely on States to enforce its pronouncements.⁵⁰ However, this arrangement does not mean that the Security Council does not have coercive powers. As Weber asserted, "This apparatus [of coercion] must also possess such power that there is in fact a significant probability that the norm will be respected because of the possibility of recourse to such legal coercion."⁵¹ Therefore, the *possibility* of recourse to coercion is sufficient for a system to be considered as coercive.

For law to be coercive, all that is needed is for an entity to have the *right to authorize* coercive measures, not that there must be legal institutions—such as an army and police—to enforce those decisions.⁵² After all, States need not have their own enforcement apparatus, but instead can use private entities to enforce their domestic laws, without this practice diminishing the State's ability to create and enforce law. Without going so far as to say that Security Council resolutions are law, the same is true with the Security Council. The Security Council's decisions can be coercive, even if it must rely on States to enforce those decisions, because of its right to create obligations through its decisions and to authorize enforcement of those decisions through U.N. Charter Article 25 and Chapter VII.

With these broad powers in mind, it seems natural to conclude that the Security Council is constitutionally well equipped to respond to the threats of WMD terrorism and WMD proliferation that continue to escalate in modern times, especially in cases in which there appear to be no chances for a negotiated settlement.⁵³ It would be unwise for the Security Council to rely simply on its coercive powers without regard to pre-existing norms or legality, which might cause a new set of issues involving legitimacy and perhaps even claims of global tyranny.⁵⁴ However, in

50. U.N. Charter art. 43.

51. WEBER, *supra* note 27, at 314.

52. See Lamond, *supra* note 12, at 39–40.

53. See, e.g., Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFFAIRS, May/June 2003, at 16 (asserting that the use of force "may, regrettably, sometimes emerge as the only and therefore the best way to deal with WMD proliferation").

54. See THAKUR, *supra* note 3, at 176; Harald Müller, *Dealing with WMD Crises: The Role of the United Nations in Compliance Politics*, in ARMS CONTROL AFTER IRAQ: NORMATIVE AND OPERATIONAL CHALLENGES 114, 123 (Waheguru Pal Singh Sidhu & Ramesh Thakur eds., 2006) (asserting that the Security Council needs to take into consideration the interests of the international community generally in deciding matters involving WMD or else have its credibility and impartiality challenged); THE INTERNATIONAL LAW OF ARMS CONTROL AND DISARMAMENT: PROCEEDINGS OF THE SYMPOSIUM GENEVA, 28 FEBRUARY–2

the end, even if States do not cooperate with the obligations that the Security Council imposes, the Security Council has fulfilled its role in attempting to counter those types of threats with the tools that States have given it.⁵⁵

III. THE SECURITY COUNCIL'S COERCIVE WMD DISARMAMENT AND ARMS CONTROL MEASURES

Part II provided the theoretical basis for thinking about the notion of coercion. Part III now focuses on the Security Council's coercive measures taken through its resolutions in relation to the disarmament and control of WMD. These resolutions include:

- Resolutions 255 and 984, which provided assurances to non-nuclear weapon States that enabled their cooperation in the Treaty on the Non-Proliferation of Nuclear Weapons (NPT)⁵⁶ negotiations in 1968 and in the negotiations to extend the NPT indefinitely in 1995;⁵⁷
- Resolution 487, which called upon Israel "to place its nuclear facilities under the safeguards of the International Atomic Energy Agency" (IAEA) even though its Safeguards Agreement was extremely limited and Israel was not a party to the NPT;⁵⁸
- Resolutions 582, 598, 612, and 620, dealing with Iraq's use of chemical weapons against Iran during the Iran-Iraq War of the 1980s;⁵⁹
- Resolution 687 and related resolutions, which required Iraq to submit to an extensive WMD destruction and inspection regime;⁶⁰

MARCH 1991 224 (Julie Dahlitz & Detlev Dicke eds., 1991) (expressing the desire for Security Council involvement in enforcing compliance with arms control norms coupled with the worry that too much Security Council involvement would disenfranchise a preponderance of States).

55. See SVEN BERNHARD GAREIS & JOHANNES VARWICK, *THE UNITED NATIONS: AN INTRODUCTION* 117 (Lindsay P. Cohn trans., 2005) (2003).

56. The Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, <http://www.un.org/events/npt2005/npttreaty.html>.

57. S.C. Res. 255, U.N. Doc. S/RES/255 (June 19, 1968); S.C. Res. 984, U.N. Doc. S/RES/984 (Apr. 11, 1995).

58. S.C. Res. 487, ¶ 5, U.N. Doc. S/RES/487 (June 19, 1981).

59. S.C. Res. 582, U.N. Doc. S/RES/582 (Feb. 24, 1986); S.C. Res. 598, U.N. Doc. S/RES/598 (July 20, 1987); S.C. Res. 612, U.N. Doc. S/RES/612 (May 9, 1988); S.C. Res. 620, U.N. Doc. S/RES/620 (Aug. 26, 1988).

60. S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991).

- Resolution 825, which called upon North Korea to “honour its non-proliferation obligations under the [NTP] and comply with its safeguards agreement with the IAEA . . .”;⁶¹
- Resolution 1172, which called upon India and Pakistan to abide by the Comprehensive Test Ban Treaty (CTBT)⁶² with regard to future nuclear tests, after they both tested numerous nuclear devices in 1998;⁶³
- Resolution 1540, which imposed certain WMD obligations on all States in the context of WMD terrorism;⁶⁴
- Resolutions 1695 and 1718, which required North Korea to abide by the NPT and the IAEA Safeguards Agreement, even though it had withdrawn from these instruments;⁶⁵ and
- Resolutions 1696 and 1737, which called upon Iran to abide by its Additional Protocol with the IAEA, even though Iran had not yet ratified it.⁶⁶

An in-depth analysis of the resolutions mentioned above shows how the Security Council imposes disarmament and arms control obligations in at least five ways. Listed in descending order of coerciveness, they

- require States to join disarmament and arms control treaties;
- require States to abide by certain disarmament and arms control treaty provisions that are not already binding on those States;
- require States to abide by disarmament and arms control treaty provisions that the Security Council has modified;
- require States to abide by certain disarmament and arms control obligations not contained in treaties; and
- recall pre-existing disarmament and arms control treaty obligations on States.

61. S.C. Res. 825, ¶ 2, U.N. Doc. S/RES/825 (May 11, 1993).

62. Comprehensive Nuclear-Test-Ban Treaty, *opened for signature*, Sept. 24, 1996, S. TREATY DOC. NO. 105–28, 35 I.L.M. 1439 (not in force).

63. S.C. Res. 1172, U.N. Doc. S/RES/1172 (June 6, 1998).

64. S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

65. S.C. Res. 1695, ¶ 6, U.N. Doc. S/RES/1695 (July 15, 2006); S.C. Res. 1718, ¶ 4, U.N. Doc. S/RES/1718 (Oct. 14, 2006).

66. S.C. Res. 1696, ¶ 6, U.N. Doc. S/RES/1696 (July 31, 2006); S.C. Res. 1737, ¶ 8, U.N. Doc. S/RES/1737 (Dec. 23, 2006).

Each method of imposing obligations raises unique legal issues. These issues are explored below as they arise in the context of analyzing the Security Council resolutions.

The Security Council's activities in the field of disarmament and arms control stem from its statutory powers provided by the U.N. Charter. The Charter gives both the Security Council and the General Assembly a role in disarmament and arms control. However, it would be inaccurate to assert that the United Nations' main goal has been disarmament from its founding.⁶⁷ Indeed, neither disarmament nor arms control are mentioned in the preamble or purposes and principles of the Charter. Article 11(1) provides the first reference to the General Assembly's role in disarmament. It states,

The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.⁶⁸

Despite such references to disarmament, the secondary importance of disarmament to collective security is made abundantly clear in the U.N. Charter, which refers to "*possible* disarmament" in the future in Article 47.⁶⁹

Since the General Assembly was seen as the world's "town meeting," at least by such delegates as U.S. Senator Arthur H. Vandenberg, the U.N. Charter's framers considered it advantageous to give the General Assembly the ability to consider these broad "principles governing disarmament and the regulation of armaments."⁷⁰ Whereas the powers given to the General Assembly are permissive—the General Assembly "may"—and quite vague, the powers given to the Security Council are obligatory. Article 26 states,

In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council *shall* be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article

67. KATHERINE SAVAGE, *THE STORY OF THE UNITED NATIONS* 86 (1962).

68. U.N. Charter art. 11, para. 1.

69. U.N. Charter art. 47, para. 1 (emphasis added). See also CLARK M. EICHELBERGER, *UN: THE FIRST TEN YEARS* 45 (1955).

70. Geoffrey Goodwin, *The General Assembly of the United Nations*, in *THE EVOLUTION OF INTERNATIONAL ORGANIZATIONS* 42, 44 (Evan Luard ed., 1966) (quoting U.N. Charter, art. 11, para. 1).

47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.⁷¹

There is no mention in the U.N. Charter of how the Security Council and the General Assembly are to coordinate their activities in the realm of disarmament and arms control. While the Security Council and the General Assembly seemed to have somewhat of a symbiotic relationship in this area during a large portion of the Cold War, the U.N. Charter clearly designates that the Security Council is to have the lead. Indeed, Article 11(1) places the General Assembly's activities regarding disarmament and the regulation of armaments within its powers over the "maintenance of international peace and security," which are subordinate to the Security Council, as laid out in Article 24(1).⁷² Therefore, the U.N. Charter is designed to give the Security Council the lead on disarmament and arms control matters.

However, this language requiring the Security Council to create "plans . . . for the establishment of a system for the regulation of armaments"⁷³ is not as clear a disarmament and arms control mandate as one might have hoped for following the Second World War. Furthermore, the Security Council ostensibly has yet to act under the authorization provided by Article 26,⁷⁴ perhaps because the assistance from the Military Staff Committee never materialized. It is important to note that the Security Council is not limited, nor has it ever been limited, to using its Article 26 powers in responding to the threat to international peace and security that comes from WMD, as some commentators have asserted.⁷⁵ On the contrary, as the language of Article 26—read in combination with Article 11—indicates, such regulations fit under the Security Council's responsibility to maintain international peace and security, which provides strong powers to the Security Council.⁷⁶ Indeed, the Security Council is free to use its Chapter VI and Chapter VII powers to respond to threats to international and security, which can include the imposition of obligations relating to armaments.⁷⁷ Given the magnitude of the WMD threat, it is not surprising that the Security Council largely has skipped

71. U.N. Charter art. 26 (emphasis added).

72. U.N. Charter art. 24, para. 1.

73. U.N. Charter art. 26.

74. A.J.R. Groom & Jean-François Guilhaudis, *UNSSODS: The Quest for Structure and Norms*, in *GLOBAL ISSUES IN THE UNITED NATIONS' FRAMEWORK* 116-17 (Paul Taylor & A.J.R. Groom eds., 1989); GÖRAN LYSÉN, *THE INTERNATIONAL REGULATION OF ARMAMENTS: THE LAW OF DISARMAMENT* 29 (1990).

75. See WILCOX & MARCY, *supra* note 2, at 182.

76. Richard Butler, *The Evolving Role of the UN and Disarmament*, in *THE FUTURE OF DISARMAMENT* 176, 178 (United Nations ed., 1998).

77. See HANS Kelsen, *THE LAW OF THE UNITED NATIONS* 105 (1950).

over its Chapter VI powers in this context and has gone right for its coercive powers under Chapter VII. With these coercive powers and the Security Council's tendency to react to crises as they arise, as opposed to taking preventive measures such as formulating plans for alleviating potential tensions in the future, it also is not surprising that Article 26 has remained in its vestigial state.

As noted above, Part III studies the particular resolutions that the Security Council has adopted that impose specific disarmament and arms control obligations. Part III first focuses on Security Council resolutions adopted during the Cold War, and then focuses on resolutions adopted after the Cold War. The Security Council has picked up its pace in adopting coercive measures in the field of disarmament and arms control following the end of the Cold War. Nonetheless, the resolutions adopted during the Cold War go against the general notion that the United States and the Soviet Union were unable to cooperate within the Security Council in this realm during this time period.⁷⁸ Commentators who assert otherwise not only downplay the significance of these resolutions, but also overlook the fact that some of the greatest advances in arms control occurred at the height of U.S.-Soviet tension, thus contradicting the widely held belief that political *détente* must precede a reduction in arms.⁷⁹

Before delving into the analysis of these resolutions, it is important to note that this Part discusses resolutions in chronological order.

A. Resolutions 255 and 984: Establishing Security Assurances

Resolution 255 is the first instance of the Security Council imposing disarmament- or arms control-related obligations on an entity through one of its resolutions. Interestingly, the first entity targeted by such a Security Council imposition was the Security Council itself. States that made specific, unilateral security assurances at the time of Resolution 255 also may be bound to uphold these assurances under the principle of international estoppel. Before discussing the potential legal obligations of the Security Council and permanent members that made unilateral security assurances, the following Section provides a brief analysis of Resolution 255.

78. ANDREW BOYD, *FIFTEEN MEN ON A POWDER KEG: A HISTORY OF THE UN SECURITY COUNCIL 82-83 (1971)*; see also UNITED NATIONS, *THE UNITED NATIONS AT FORTY: A FOUNDATION TO BUILD ON 75 (1985)*.

79. See Rolf Ekéus, *The Iraqi Experience and the Future of Nuclear Nonproliferation*, WASH. Q., Autumn 1992, at 67, 67.

1. The Positive Security Assurances of Resolution 255

Resolution 255 is unique from the other resolutions discussed in this Part because the obligation does not arise from a decision that binds a State through Article 25. Indeed, Resolution 255 does not refer to Chapter VII. Its third preambular paragraph states: “*Bearing in mind* that any aggression accompanied by the use of nuclear weapons would endanger the peace and security of all States.”⁸⁰ This is far from an implication that international peace and security had been threatened by the underlying events. Nor do any of the signals within the three operative paragraphs support the notion that the Security Council had decided anything that could be binding on States under Article 25. Rather, Resolution 255 is the result of non-nuclear-weapon States seeking security assurances from the nuclear-weapon States before agreeing to the terms of the NPT.⁸¹

Even before the NPT negotiations began, non-nuclear-weapon States were pushing hard for adequate security assurances from the nuclear-weapon States.⁸² During the NPT negotiations, non-nuclear-weapon States believed that they were vulnerable to nuclear attack from States falling outside of the NPT regime—in particular, communist China—if they relinquished their ability to develop their nuclear-weapon capabilities.⁸³ Moreover, the NPT on its face reflected a considerable imbalance between the rights and obligations of the non-nuclear-weapon States, at least vis-à-vis those of the nuclear-weapon States,⁸⁴ as well as somewhat legitimized possession of nuclear weapons by nuclear-weapon States by failing to provide tangible disarmament obligations for those States.⁸⁵ Despite the best efforts of the non-nuclear-weapon States to get some security assurances during the NPT negotiations from nuclear-weapon States that would appear clearly within the NPT, the United States, the United Kingdom, and the Soviet Union were determined to address this issue in the United Nations and not within the NPT itself.⁸⁶ As a result,

80. S.C. Res. 255, *supra* note 57, pmb1. ¶ 3.

81. *Id.* ¶¶ 1–3.

82. See THOMAS GRAHAM, JR., DISARMAMENT SKETCHES: THREE DECADES OF ARMS CONTROL AND INTERNATIONAL LAW 283 (2002).

83. See BOYD, *supra* note 78, at 336.

84. See Bourantonis & Evriviades, *supra* note 2, at 161.

85. THAKUR, *supra* note 3, at 171. See *id.* (arguing that the NPT created a significant amount of fear and uncertainty concerning potential proliferation by allowing non-nuclear-weapon States to develop and use nuclear energy for peaceful purposes). Furthermore, the NPT does not prescribe a way of handling those States not party to the NPT regime). See *id.* at 171.

86. Jean du Preez, *Security Assurances Against the Use or Threat of Use of Nuclear Weapons: Is Progress Possible at the NPT Prepcom?*, JAMES MARTIN CENTER FOR NONPROLIFERATION STUDIES (Monterey Institute for International Studies, Monterey, Cal.), Apr. 24, 2003, <http://cns.mii.edu/research/npt/nptsec.htm>.

these three States made a joint request of the Security Council on June 12, 1968, to meet in order to decide whether to give security assurances to non-nuclear weapon States of the nascent NPT regime.⁸⁷ At that meeting, these States presented a draft resolution that was designed to reassure non-nuclear-weapon States that the Security Council would come to their aid if attacked or threatened with attack by nuclear weapons.⁸⁸ This draft resolution eventually became Resolution 255.

Resolution 255 provides only positive security assurances to the non-nuclear-weapon States. Positive assurances involve the promise from a nuclear-weapon State that it will come to the aid of a non-nuclear-weapon State party to the NPT that finds itself the victim of a nuclear attack.⁸⁹ Paragraph 1 of Resolution 255

[r]ecognizes that aggression with nuclear weapons or the threat of such aggression against a non-nuclear-weapon State would create a situation in which the Security Council, and above all its nuclear-weapon State permanent members, would have to act immediately in accordance with their obligations under the United Nations Charter⁹⁰

This provision essentially re-emphasizes the Security Council's —and especially its permanent members'—intentions to act immediately under the powers provided by the U.N. Charter in the case of a use or threatened use of nuclear weapons. Such immediate acts on the Security Council level could include both military and non-military sanctions under Articles 41 and 42 of the U.N. Charter. For the individual permanent members, such acts could include immediate efforts to get the Security Council involved, as well as to participate in a collective self-defense response under Article 51 during the time it takes the Security Council to take action. Paragraph two of Resolution 255

[w]elcomes the intention expressed by certain States that they will provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act or an object of a threat of aggression in which nuclear weapons are used⁹¹

This paragraph refers to more concrete measures that certain permanent members of the Security Council were prepared to take in response to

87. See BOYD, *supra* note 78, at 335–36.

88. *Id.*

89. Bourantonis & Evriviades, *supra* note 2, at 161.

90. S.C. Res. 255, *supra* note 57, ¶ 1.

91. S.C. Res. 255, *supra* note 57, ¶ 2.

the use or threatened use of nuclear weapons against a non-nuclear-weapon State.

To learn exactly what these States indicated as their intentions, one must look to the statements made by the United States, the United Kingdom, and the Soviet Union on June 17, 1968, in combination with this resolution. In fact, these three statements were the same, the most relevant parts being a *declaration* in the fifth paragraph and a *reaffirmation* in the sixth of each statement:

Aggression with nuclear weapons or the threat of such aggression against a non-nuclear-weapon State would qualitatively create a qualitatively new situation in which the nuclear-weapon States which are permanent members of the United Nations Security Council would have to act immediately through the Security Council to take the measures necessary to counter such aggression or remove the threat of aggression in accordance with the United Nations Charter, which calls for taking "effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace." Therefore, any State which commits aggression accompanied by the use of nuclear weapons or threatens such aggression must be aware that its actions will be countered effectively by measures to be taken in accordance with the United Nations Charter to suppress the aggression or remove the threat of aggression

[That particular State] reaffirms its intention, as a permanent member of the United Nations Security Council, to seek immediate Security Council action to provide assistance, in accordance with the Charter, to any non-nuclear weapon State, party to the Treaty on the Non-Proliferation of Nuclear Weapons, that is a victim of an act of aggression or an object of a threat of aggression in which nuclear weapons are used.⁹²

According to these statements, these assurances were to come into force at the same time that the Security Council resolution concerning safeguards for non-nuclear States would come into force.⁹³ Notably, these assurances are no more than the assurance provided in paragraph 1 of Resolution 255 that they will act immediately through the Security Council to counter the aggression or to remove the threat of aggression.⁹⁴

92. See generally U.N. SCOR, 23rd Sess., 1430th mtg. at 5-8, U.N. Doc. S/PV.1430 (June 17, 1968) [hereinafter U.N. Doc. S/PV.1430].

93. See generally *id.*

94. S.C. Res. 255, *supra* note 57, ¶ 1.

Essentially, the assurance is that they will *try* to get the Security Council to act, though if it is unable to act—either because of another State’s veto or because the draft resolution lacks a sufficient number of affirmative votes to pass—then their obligation will have been met. This is not a strong assurance for the non-nuclear-weapon States, though it is something, since the U.N. Charter does not otherwise oblige permanent members to *act* immediately in response to a threat or an attack.

Critics question the significance of Resolution 255. Jozef Goldblat has asserted that the security assurances under Resolution 255 were empty because they did no more than reaffirm the obligation of U.N. Member States to assist States that find themselves the victims of aggression.⁹⁵ However, there is no such obligation under the U.N. Charter. Article 51 recognizes the “inherent right of individual and collective self-defence” in responding to an armed attack, although this does not create a positive obligation on Member States to come to the aid of other States if attacked.⁹⁶ Article 48 requires Member States to carry out the Security Council’s decisions in maintaining international peace and security, although only at the Security Council’s express authorization of their involvement.⁹⁷ Therefore, Goldblat places too much significance in the language “in accordance with the U.N. Charter,” thus inappropriately robbing Resolution 255 of what little legal significance it actually provides victim States.

2. The Positive Security Assurances of Resolution 984

The same positive security assurances were reasserted in Resolution 984 as appeared in Resolution 255, although Resolution 984 was sponsored by all five permanent members of the Security Council, while Resolution 255 was jointly sponsored by the United States, the United Kingdom, and the Soviet Union.⁹⁸ NPT Article X(2) provides: “Twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods. This decision shall be taken by a majority of the Parties to the Treaty.”⁹⁹ Since the NPT entered into force on March 5, 1970, it became necessary in

95. See Jozef Goldblat, NPT and the Security of NNWS, No First Use of Nuclear Weapons, Working Paper for the Pugwash Meeting No. 279, Nov. 15–17, 2002, available at <http://www.pugwash.org/reports/nw/goldblat.htm> (last visited Sept. 10, 2007) (asserting that the positive assurances of Resolution 255 “were clearly insufficient, as they merely reaffirmed the duty of U.N. Members to provide assistance to a country which has been aggressed, irrespective of the type of weapon used in aggression”).

96. U.N. Charter art. 51.

97. U.N. Charter art. 48.

98. U.N. SCOR, 50th Sess., 3514th mtg, U.N. Doc. S/PV.3514 (Apr. 11, 1995).

99. The Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 56, art. X(2).

1995 for the nuclear-weapon States to begin canvassing non-nuclear-weapon States for their support, just as they did when the NPT was being negotiated in 1968. Resolution 984 is similar to Resolution 255 in that it attempts to soften the difficulties that non-nuclear-weapon States might have with the NPT.

Resolution 984 primarily repeats much of Resolution 255 and other arrangements provided for in the U.N. Charter. The second operative paragraph of Resolution 984 repeats the essence of the first operative paragraph of Resolution 255, which deals with the positive security assurance that the nuclear-weapon States and the Security Council will "act immediately in accordance with the relevant provisions of the Charter of the United Nations, in the event that such States are the victim of an act of, or object of a threat of, aggression in which nuclear weapons are used" ¹⁰⁰ The fifth and ninth operative paragraphs of Resolution 984 essentially repeat the third operative paragraph of Resolution 255, which reaffirms Article 51 and the ability of States to take individual or collective self-defense measures if an armed attack occurs. Resolution 984 is somewhat more detailed in specifying that the assistance from States can include "technical, medical, scientific, or humanitarian assistance," ¹⁰¹ although this addition is relatively meaningless inasmuch as States always are free to assist other States in such a dire situation as a nuclear attack. The third paragraph of Resolution 984 repeats the essence of U.N. Charter Article 35(1), and, in part

[r]ecognizes further that, in case of aggression with nuclear weapons or the threat of such aggression against a non-nuclear-weapon State Party to the [NPT], any State may bring the matter immediately to the attention of the Security Council to enable the Council to take urgent action to provide assistance, in accordance with the Charter, to the State victim of an act of, or object of a threat of, such aggression ¹⁰²

Some might see this portion of the third paragraph as creating a new right for all States to bring the use or threat of use of nuclear weapons to the attention of the Security Council, although it is unclear how this is any different from the power provided to all U.N. Member States under Article 35(1) to bring any situation that is likely to endanger the maintenance of international peace and security to the attention of the Security Council. ¹⁰³

100. S.C. Res. 984, *supra* note 57, ¶ 2.

101. *Id.* ¶¶ 5, 9.

102. *Id.* ¶ 3.

103. See U.N. Charter art. 35, para. 1.

Resolution 984 provides new obligations in the second portion of paragraph 3, which

recognizes also that the nuclear-weapon State permanent members of the Security Council will bring the matter immediately to the attention of the Council and seek Council action to provide, in accordance with the Charter, the necessary assistance to the State victim¹⁰⁴

This paragraph is a new obligation on the permanent members of the Security Council because nowhere within the U.N. Charter are permanent members required to bring any situation to the attention of the Security Council—other than when they take measures in the exercise of the right of self-defense under Article 51—or to seek Security Council action on any particular issue. Even though Article 39 *requires* the Security Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression,”¹⁰⁵ Articles 41 and 42 are permissive in saying what types of actions the Security Council “*may*” take.¹⁰⁶ Article 51 provides that States may act in self-defense “if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security,”¹⁰⁷ but nothing in the U.N. Charter requires the Security Council to take such action. Therefore, this is not an insignificant obligation on the permanent members of the Security Council to bring the situation to the attention of the Security Council and to seek Security Council action. As discussed in Section III(A)(3) below, both France and Russia are under the same obligation due to unilateral declarations that were referred to in Resolution 984.¹⁰⁸

3. Negative Security Assurances of the Unilateral Statements

Both Resolution 255 and Resolution 984 lack any explicit reference to negative security assurances. For such assurances, non-nuclear-weapon States must look to the statements of the permanent members of the Security Council that were incorporated into Resolution 984 by

104. S.C. Res. 984, *supra* note 57, ¶ 3.

105. U.N. Charter art. 39.

106. U.N. Charter arts. 41–42.

107. U.N. Charter art. 51.

108. Letter dated 6 April 1995 from the Permanent Representative of France to the United Nations addressed to the Secretary-General, U.N. SCOR, 50th Sess., U.N. Doc. S/1995/264 (Apr. 6, 1995) [hereinafter Letter from the Permanent Representative of France]; Letter dated 6 April 1995 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, U.N. SCOR, 50th Sess., U.N. Doc. S/1995/261 (Apr. 6, 1995) [hereinafter Letter from the Permanent Representative of the Russian Federation]. Such redundancy does not affect their obligations under Resolution 984.

reference.¹⁰⁹ A review of these statements makes it clear that the United States, the United Kingdom, France, and Russia all worked together in coming up with a common negative security assurance:

[The particular State] will not use nuclear weapons against non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, except in the case of an invasion or any other attack on [the particular State], its territory, its armed forces or other troops, its allies or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State.¹¹⁰

The only variations are that the United States and United Kingdom left out the comma before "except," Russia failed to capitalize "Parties" in "State Parties," the United Kingdom referred to "its dependent territories" instead of "its territory," the United States referred to "its territories," France referred to "or against its allies" instead of just "its allies," and the United States added an extra comma after "its allies." Needless to say, these variations are relatively insignificant. China's statement was much shorter in terms of providing a negative security assurance: "China undertakes not to be the first to use nuclear weapons at any time or under any circumstances," which can be seen as a no-first-use policy.¹¹¹ As is explained in greater depth in Section III(A)(4) below, none of these statements contain a statement that is sufficiently unconditional or that shows an intent to be bound. Thus, these negative security assurances are not legally binding. Although the bulk of the positive security assurances within these statements also are not legally binding, small portions of two of them are.

109. S.C. Res. 984, *supra* note 57, ¶ 1.

110. Letter from the Permanent Representative of the Russian Federation, *supra* note 108; *accord* Letter dated 6 April 1995 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General, U.N. SCOR, 50th Sess., U.N. Doc. S/1995/262 (Apr. 6, 1995) [hereinafter Letter from the Permanent Representative of the United Kingdom]; Letter dated 6 April 1995 from the Chargé d'affaires a.i. of the Permanent Mission of the United States of America to the United Nations addressed to the Secretary-General, U.N. SCOR, 50th Sess., U.N. Doc. S/1995/263 (Apr. 6, 1995) [hereinafter Letter from the Chargé d'affaires]; Letter from the Permanent Representative of France, *supra* note 108.

111. See Letter dated 6 April 1995 from the Permanent Representative of China to the United Nations addressed to the Secretary-General, U.N. SCOR, 50th Sess. at 2, U.N. Doc. S/1995/265 (Apr. 6, 1995) [hereinafter Letter from the Permanent Representative of China].

4. International Estoppel and Security Assurances

In order for the principle of international estoppel to apply to any given situation, the entity being estopped must have voluntarily and publicly made an unambiguous statement that another entity detrimentally relies on in good faith.¹¹² The 1974 ICJ *Nuclear Tests* case is useful in understanding how this principle can work in practice. In 1973, New Zealand and Australia brought cases against France relating to its testing of nuclear devices in the South Pacific. After the claims had been brought, the French President declared that France would no longer test nuclear devices there. The ICJ said that such a declaration created international legal obligations on the State, as the following excerpt illustrates:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo, nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.¹¹³

Thus, for a unilateral statement to be legally binding under the principle of international estoppel, it must be (1) made in public, (2) with the intention of being bound and without conditions.

The remainder of this Section reviews these two elements, Resolutions 255 and 984, and the relevant unilateral statements of the permanent members of the Security Council. The public nature of these

112. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 646 (Oxford University Press 5th ed. 1998) (1966).

113. *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457, 472–73 (Dec. 20); *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253, 267 (Dec. 20).

resolutions and statements containing the security assurances of the Security Council and its permanent members easily fulfills the public element for international estoppel. The fact that the statements were incorporated by reference into the resolutions, as opposed to being made entirely outside of the United Nations context, shows the desire of the assurers to give those receiving the assurance added security that they meant what they were saying.

With regard to the intention to be bound, the Security Council's intent to be bound derives from the lack of equivocation in both Resolution 255 and 984. Whereas States are legally bound to decisions of the Security Council under Article 25, the Security Council will be bound by its pronouncements that use obligatory language such as "shall," "will," and "would," and that are sufficiently clear on their face to warrant good-faith reliance by States. Concerning the Security Council's security assurance in Resolution 255, the first operative paragraph's obligatory language, "*would create* a situation in which the Security Council . . . *would have to* act immediately," reflects such an intent to be bound and contains no conditions.¹¹⁴ This conclusion would have been different had the Security Council used such optional language as "*could* have to" or "*might* have to." The very design of these resolutions was to elicit the reliance of the non-nuclear-weapon States on these assurances so that they would agree to the NPT and to the indeterminate extension of the NPT. It would seem considerably disingenuous for the Security Council or anyone else to assert after the fact that the Security Council was not creating a binding obligation. Admittedly, the exact actions that the Security Council was to take were not spelled out, although this should not be seen as a condition for action, but rather a prudent attempt to preserve the discretion of the Security Council in deciding how to tailor its response to the hypothetical nuclear attack envisioned in the resolution.

The permanent members of the Security Council also made unilateral security assurances to the non-nuclear-weapon States in trying to convince them to agree to the NPT and to extend the NPT indefinitely, so it too would seem somewhat disingenuous for them to now claim that they were not actually giving any real assurances at all. As is common with legal matters, the devil proves to be in the details, so to speak. Indeed, one must look at the exact wording that the permanent members used in their statements to see if they showed a genuine, unconditional intent to be bound. One could try to summarize that the permanent members actually provided no such assurances by the language of paragraph

114. Operative Paragraph 2 of Resolution 984 has the obligatory "will act immediately" in place of Resolution 255's "would have to act immediately," although the legal significance of having established an intention to be bound is the same.

2 of Resolution 255 and paragraph 7 of Resolution 984, which state that the permanent members had expressed “the *intention* . . . that they will provide or support immediate assistance . . .,”¹¹⁵ with “intention” raising considerable red flags. Nonetheless, a thorough review of their statements indicates that at least Russia and France provided a sufficiently clear and unconditional intent to be bound for them to be estopped from later claiming that they had absolutely no obligations, although the bulk of their so-called assurances would not be legally binding. The positive security assurances of the Soviet Union, the United Kingdom, and the United States contain an intent to be bound to “act immediately through the Security Council” to respond to the aggression or threat of aggression, although they did not show an intention to be bound to have any particular results flow from that initial commitment to move within the Security Council.¹¹⁶

As noted above in Section III(A)(3), the United States, the United Kingdom, France, and Russia all made essentially the same negative security assurances in connection with Resolution 984. These statements, however, contain considerable conditions: the assurances apply except where there has been an invasion or other attack on the State, its allies, or a State that it had a security arrangement with, and when the attack was carried out with the aggressor having an association or alliance with a nuclear-weapon State.¹¹⁷ These conditions seem sufficiently large to absolve these States of any legally binding obligations under these statements except in the smallest of circumstances, even though each statement used obligatory language “will.” Noticeably, China’s statement was the only one that unconditionally stated the following: “China undertakes not to be the first to use nuclear weapons at any time or under any circumstances.”¹¹⁸ China somewhat redundantly asserted in the paragraph that directly followed that “China undertakes not to use or threaten to use nuclear weapons against non-nuclear-weapon States or nuclear-weapon-free zones at any time or under any circumstances.”¹¹⁹ Both of these statements by China would not appear to be legally binding due to the phrases “China *undertakes* not to . . .,” which is considerably different from China assuring that it flatly *would not* be the first to use nuclear weapons. No other part of China’s statement seems to show an intent to

115. S.C. Res. 255, *supra* note 57, ¶ 2; S.C. Res. 984, *supra* note 57, ¶ 7.

116. See generally U.N. Doc. S/SPV.1430, *supra* note 92, at 2–5.

117. Letter from the Permanent Representative of the Russian Federation, *supra* note 108, at 3; Letter from the Permanent Representative of the United Kingdom, *supra* note 110, at 3 (adding that the beneficiary of the assurance must not be “in material breach of its own non-proliferation obligations under the [NPT]”); Letter from the Chargé d’affaires, *supra* note 110, at 2; Letter from the Permanent Representative of France, *supra* note 108.

118. Letter from the Permanent Representative of China, *supra* note 111.

119. *Id.*

be bound or lacks conditions, whether as a positive or as a negative security assurance.

Concerning the positive security assurances from the other permanent members of the Security Council, only Russia and France showed an intent to be bound by unconditional assurances on a small portion of the assurances that they provided, which would indicate that they will be estopped from claiming that they do not have such legal obligations. Russia refrains from saying that it will act immediately beyond bringing the matter to the attention of the Security Council.¹²⁰ As noted already, Resolution 984 already obliged the permanent members to bring such matters to the attention of the Security Council. With regard to other actions, Russia merely says that it “will seek to ensure that they provide, in accordance with the Charter, necessary assistance to the State that is a victim of such an act of aggression or that is threatened by such aggression.”¹²¹ “Seeking to ensure” is different from “ensuring,” and would indicate an unwillingness to be legally bound to carry out that particular task. Nonetheless, as already mentioned, being bound to bring the matter to the attention of the Security Council is a new obligation, and is not an insignificant development. France makes the same assurance as Russia—although France uses the word “pledges”—that it “will immediately inform the Security Council.” However, France goes a step further than Russia by saying that it will “act within the Council to ensure that the latter takes immediate steps to provide, in accordance with the Charter, necessary assistance to any State which is the victim of such an act or threat of aggression,”¹²² as opposed to merely seeking to ensure that the Security Council provides the necessary assistance. Thus, Russia and France might be held responsible under these unilateral statements if they fail to immediately report the use or threatened use of a nuclear weapon to the Security Council, with France being obliged to take some acts within the Security Council that would constitute ensuring that it gives the necessary assistance to the victim State, whether that means proposing a draft resolution or calling for an emergency meeting of the Security Council.

The other permanent members of the Security Council seem to create no legally binding obligations through their unilateral assurances to the non-nuclear-weapon States. The United Kingdom refrains from asserting that it will bring the matter to the Security Council, as Russia and France assured, but it does assert that it will “seek immediate Security

120. Letter from the Permanent Representative of the Russian Federation, *supra* note 108, at 2 (“[T]he nuclear Powers which are permanent members of the Security Council will immediately bring the matter to the attention of the Council. . .”).

121. *Id.*

122. Letter from the Permanent Representative of France, *supra* note 108, at 3.

Council action to provide assistance . . . ,¹²³ which is roughly as vague as Russia's "seek to ensure." The United States' statement seems closest to what Resolution 984 assures the non-nuclear-weapon States, that the "nuclear-weapon-State permanent members of the United Nations Security Council would have to act immediately through the Security Council . . . to take the measures necessary to counter such aggression or to remove the threat of aggression," and that the United States has the "intention to provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State Party to the [NPT] that is a victim" of the use or threat of use of a nuclear weapon.¹²⁴ The "intention to provide or support immediate assistance" does not mean "promises to provide or support immediate assistance," which would appear to enable the United States to avoid the creation of a legally binding obligation. All of this technical analysis aside, the principle of international estoppel opens up the possibility that both the Security Council and the permanent members that make certain security assurances will be held responsible if they fail to live up to these commitments.

5. Legal Issues

Resolutions 255 and 984 raise several interesting legal issues, three of which are discussed below.

a. The Legal Nature of these Assurances

An issue arises over the legal status of these resolutions and unilateral statements. Some commentators have asserted that these security assurances have become an integral part of the commitments of the nuclear-weapon States party to the NPT.¹²⁵ It makes sense to read the NPT along with the security assurances provided to non-nuclear-weapon States provided in these Security Council resolutions and unilateral statements discussed above, because it is there—and not in the NPT—that non-nuclear-weapon States have the positive assurance that nuclear-weapon States and the Security Council will come to their aid if attacked or threatened with an attack with a nuclear weapon. However, it is inaccurate to assert that these assurances actually are legally part of the NPT as they clearly fall under different legal categories, such as the U.N. legal regime for the Security Council assurances, as opposed to the treaty regime of the NPT. Moreover, the unilateral statements of the permanent

123. Letter from the Permanent Representative of the United Kingdom, *supra* note 110, at 4.

124. Letter from the Chargé d'affaires, *supra* note 110, at 2–3.

125. Bourantonis & Evriviades, *supra* note 2, at 161.

members may be binding under international principles of equity. This is so even though all of these assurances were particularly important to the successful entry into force of the NPT and to its successful extension indefinitely in 1995.

b. Binding Permanent Members of the Security Council

Perhaps a more interesting legal issue is whether permanent members of the Security Council can be bound by Security Council resolutions. The United Nations seems to have been designed so that no actions can be taken against the interests of the permanent members of the Security Council due to their veto power over all substantive matters under U.N. Charter Article 27(3).¹²⁶ Still, this does not mean that the permanent members cannot vote for a resolution that imposes certain obligations on themselves just as it imposes obligations on other States. After all, Article 25 requires *all* States—not just non-permanent members—to “accept and carry out the decisions of the Security Council.”¹²⁷

If this is indeed the case, why then would the permanent members of the Security Council consent to have their options limited in the future in such a sensitive area as disarmament and arms control, with the possibility of legal repercussions arising for such obligations? Indeed, it is rational for these powerful States to bind themselves in order to reassure other powerful States and the rest of the international community that they will not be dominated, thus lowering the costs of maintaining international peace and security.¹²⁸ Such self-binding measures as those contained in Resolutions 255 and 984, along with their accompanying unilateral statements from the permanent members of the Security Council, are a strong example of what Eric Myjer calls the “juridification” of arms control norms, which is “the process whereby States are willing to bind themselves, either legally or politically, via arrangements of a legal nature”¹²⁹ The placing of disarmament and arms control obligations on other States, as discussed throughout the remainder of this Section, would also be an example of this type of juridification. Before moving on to discuss these examples of juridification of arms control norms, it is interesting to note that the self-binding of permanent members referred to in this Section undermines the notion that some commentators have that the permanent members lack real commitment

126. U.N. Charter art. 27, para. 3.

127. U.N. Charter art. 25.

128. See Thompson, *supra* note 40, at 4 (citing G. JOHN IKENBERRY, *AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS* (2001)).

129. Eric P.J. Myjer, *The Law of Arms-Control and International Supervision*, 3 LEIDEN J. INT'L L. (SPECIAL ISSUE) 99, 99 (1990).

to WMD non-proliferation because they have been unwilling to commit themselves to disarmament.¹³⁰ Obviously more can be done by permanent members of the Security Council promoting WMD disarmament among themselves, although any legally binding obligation is better than none at all from the perspective of trying to promote disarmament.

c. Binding the Security Council

As noted above, paragraph 1 of Resolution 255 and paragraph 2 of Resolution 984 oblige the Security Council to take immediate action if a non-nuclear-weapon State is ever attacked or threatened with attack by nuclear weapons. The question arises whether international organizations and their organs can have such obligations placed upon them. The ICJ advisory opinion concerning the Interpretation of the Agreement of 25 March 1951 between the World Health Organization (WHO) and Egypt made it clear that international organizations—in particular, the United Nations—are subjects of international law and can be bound by general rules of international law.¹³¹ Logically, if such entities have obligations, then they must also have the possibility of violating those obligations, and face the consequences—responsibility or accountability—that subsequently flow from such violations.

The International Law Commission (ILC) currently is in the process of formulating the norms of responsibility of international organizations.¹³² One noteworthy issue that has arisen from the ILC's work is the question of what law is applicable to an international organization with respect to determining its responsibility or accountability.¹³³ Here, however, this particular issue is moot, since the source of the obligation is specific—a Security Council resolution binding the Security Council itself. If the Security Council fails to take such action, it seems only right to hold the Security Council accountable, perhaps for as much as the amount of the resulting damages from that failure. This admittedly is

130. John B. Rhineland, *Limitations and Safeguards in Arms Control Agreements*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 247, 254–55 (Lori Fisler Damrosch & David J. Scheffer eds., 1991).

131. Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, 89–90 (Dec. 20).

132. See generally Special Rapporteur, *First Report on Responsibility of International Organizations, delivered to the International Law Commission*, U.N. Doc. A/CN.4/532 (Mar. 26, 2003); Special Rapporteur, *Second Report on Responsibility of International Organizations, delivered to the International Law Commission*, U.N. Doc. A/CN.4/541 (Apr. 2, 2004); Special Rapporteur, *Third Report on Responsibility of International Organizations*, at 3–9, delivered to the International Law Commission, U.N. Doc. A/CN.4/553 (May 13, 2005) [hereinafter *Third Report*]; Special Rapporteur, *Fourth Report on Responsibility of International Organizations, delivered to the International Law Commission*, U.N. Doc. A/CN.4/564 (Feb. 28, 2006).

133. See *Third Report*, supra note 132.

still quite a theoretical concept, since there currently is no effective way for a State to hold the Security Council to these obligations. Even if the United Nations expressly allows itself to be sued, as did the U.N. administration in East Timor, it would be quite difficult to determine exactly how the United Nations' acts—or failures to act—give rise to certain levels of accountability.¹³⁴ Nonetheless, these practical difficulties do not change the fact that the Security Council may incur responsibility for violations of these obligations.

B. Resolution 487 and Israel's Attack of Iraq

The second example of the Security Council's imposition of disarmament and arms control obligations is Resolution 487, which involved Israel's 1981 attack on Iraq's nuclear complex at Tuwaitha (also known as Osirak).¹³⁵ Interestingly, Iraq alleged in a Security Council meeting directly following this 1981 attack that Israel had tried to destroy that same complex on September 27, 1980, and that it warned the Security Council then that Israel was going to attack that same reactor again.¹³⁶ Israel conceded that it was responsible for this 1981 attack, although it claimed that it was an act of self-preservation due to the fear of nuclear obliteration by a nuclear-armed Iraq.¹³⁷ Israel claimed that Iraq was developing nuclear weapons in an underground laboratory under the nuclear reactor there. IAEA Director-General Sigvard Eklund asserted before the Security Council that the IAEA inspectorate had been satisfied with Iraq's accounting for all nuclear material through its safeguards inspections and that it had been aware of a vault under the reactor at that complex, but that it was for maintenance purposes and could not have been the site for producing plutonium and other weaponization efforts.¹³⁸ Eklund noted that Israel's attack on the Osirak nuclear complex could be classified as an attack on the IAEA's safeguards system, and he characterized it as a "matter of grave concern to IAEA."¹³⁹

134. See Carla Bongiorno, *A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor*, 33 COLUM. HUM. RTS. L. REV. 623 (2002) (highlighting the difficulty of determining the UN's obligations under international human rights law).

135. S.C. Res. 487, *supra* note 58.

136. U.N. SCOR, 36th Sess., 2280th mtg. at 3, 7, U.N. Doc. S/PV.2280 (June 12, 1981).

137. *Id.* at 8–12; see also CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 133 (2d ed. 2004) (discussing Israel's claim of anticipatory self-defense).

138. U.N. SCOR, 36th Sess., 2288th mtg. at 2–3, U.N. Doc. S/PV.2288 and Corr. 1 (June 19, 1981); see also GRAY, *supra* note 137, at 133 (citing the IAEA's statement that there was no evidence that Iraq planned to use the nuclear reactors for developing nuclear weapons).

139. U.N. SCOR, 36th Sess., 2288th mtg. at 3, U.N. Doc. S/PV.2288 and Corr. 1 (June 19, 1981).

On the same day as those statements by the IAEA Director-General, June 19, 1981, the Security Council unanimously adopted Resolution 487, which “[s]trongly condemn[ed] the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct”¹⁴⁰ In addition, the Security Council “[c]all[ed] upon Israel urgently to place its nuclear facilities under the safeguards of the International Atomic Energy Agency”¹⁴¹ Calling upon Israel urgently to place its nuclear facilities under IAEA supervision was seen as an essential element in managing the threat coming from Israel,¹⁴² as the Security Council had concluded that Israel’s armed attack “constituted a serious threat to the IAEA safeguards system and the nuclear non-proliferation system.”¹⁴³

1. The Significance of “Calls Upon”

Resolution 487 raises the question of the legal significance of “calls upon” in creating obligations on States. Unfortunately, there is no definitive answer as to whether the phrase signals mandatory action for States under Article 25. In fact, there are approximately equal numbers of commentators who indicate that it requires mandatory action¹⁴⁴ and who indicate that it is merely recommendatory.¹⁴⁵ Another group falls in

140. S.C. Res. 487, *supra* note 58, ¶ 1.

141. *Id.* ¶ 5. For a discussion of the significance of “calls upon,” see Section III(B)(1), *infra*. But see W. Thomas Mallison & Sally V. Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?*, 15 VAND. J. TRANSNAT’L L. 417, 440 (1982) (stating that the Security Council did not impose mandatory sanctions on Israel).

142. U.N. SCOR, 36th Sess., 2288th mtg. at 13, U.N. Doc. S/PV.2288 and Corr. 1 (June 19, 1981) (noting a statement by Uganda’s representative that this was why it supported the resolution, although it wished that the Security Council had invoked the provisions of Chapter VII).

143. See *id.* at 15. But see *id.* at 13 (reporting that the German Democratic Republic read this Resolution as not requiring Israel to stop nuclear collaboration); *id.* at 14 (noting that Tunisia seemed to interpret this resolution as not requiring Israel to stop its nuclear weapon development).

144. See, e.g., Derek Gilman, Comment, *The Gulf War and the United Nations Charter: Did the Security Council Fulfill its Original Mission?*, 24 CONN. L. REV. 1131, 1153 (1992); Jean-Philippe Lavoyer, *Jus in Bello: Occupation Law and the War in Iraq*, 98 AM. SOC’Y INT’L L. PROC. 121, 123 (2004); Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation*, 29 B.C. INT’L & COMP. L. REV. 23, 43 n.115 (confusing “calls upon all States” at the beginning of Resolution 1373 paragraph 3 with “all States shall”).

145. See, e.g., Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT’L L. 526, 532 (2004); Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT’L L. 901, 902 (2002); SYDNEY D. BAILEY, *THE PROCEDURE OF THE UN SECURITY COUNCIL* 204–05 (1975); Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT’L L. 175, 186 (2005). See also U.N. SCOR, 59th Sess., 4956th mtg. at 3, U.N. Doc. S/PV.4956 (Apr. 28, 2004) (reporting that Pakistan asserted that legally binding

between, seeing the phrase as entirely ambiguous.¹⁴⁶ Obviously, the obligation under the operative paragraph could be clearer. However, certainly when U.N. Charter Article 33(2) provides that “[t]he Security Council shall . . . *call upon* the parties to settle their dispute by [peaceful] means,”¹⁴⁷ or Article 41 allows the Security Council to “*call upon* the Members of the United Nations to apply [measures not involving the use of armed force],”¹⁴⁸ such Security Council instructions to States are not merely recommendatory, given the obligations placed on States to peacefully settle their disputes under Article 2(3) and to abide by Security Council Chapter VII decisions under Article 25.

In practice, the meaning of “calls upon” seems closer to having a mandatory meaning than recommendatory, as reflected in several of the comments of Council members during debates on particular resolutions. The United States acknowledged that provisions that start with “calls upon” create mandatory obligations when U.S. Ambassador John Bolton included the two paragraphs of Resolution 1696 that start with “calls upon” (paragraphs 1 and 5) in the list of mandatory obligations of that resolution for Iran and all U.N. Member States.¹⁴⁹ U.S. Ambassador Alejandro Wolff similarly asserted that the three provisions of Resolution 1737 that begin with “calls upon” are among that resolution’s *requirements* on Iran and Member States, and concluded as follows:

[Resolution 1737] compels all United Nations Member States to take all measures necessary to deny Iran equipment, technology, technical assistance, and financial assistance that would contribute to Iran’s enrichment, reprocessing, heavy water or nuclear-weapon delivery programmes. It is clear on this and not open to interpretation. We will insist on absolute adherence to its requirements.¹⁵⁰

The United Kingdom similarly asserted that Iran had an obligation to take the steps required by the IAEA, in accordance with the provision of the Additional Protocol, before the August 31 deadline established by

obligations arise from Security Council resolutions only when the resolution is a Chapter VII resolution and the paragraph begins with the word “decides”).

146. See, e.g., Louis Henkin, *Congress, the President and the United Nations*, 3 PACE Y.B. INT’L L. 1, 14 n.47 (1991); John P. Grant, *Beyond the Montreal Convention*, 36 CASE W. RES. J. INT’L L. 453, 470 (2004) (“‘Calls upon’ is hardly the language of obligation, but it is not that far short, particularly in a resolution expressly adopted under Chapter VII of the Charter.”).

147. U.N. Charter art. 33, para. 2 (emphasis added).

148. U.N. Charter art. 41 (emphasis added).

149. U.N. SCOR, 61st Sess., 5500th mtg. at 3, U.N. Doc. S/PV.5500 (July 31, 2006) [hereinafter U.N. Doc. S/PV.5500]; U.N. SCOR, 61st Sess., 5612th mtg. at 2, U.N. Doc. S/PV.5612 (Dec. 23, 2006) [hereinafter U.N. Doc. S/PV.5612].

150. See U.N. Doc. S/PV.5612, *supra* note 149, at 3–4.

paragraph 7 of Resolution 1696. This obligation appears to have been established by paragraph 1 of Resolution 1696, which begins with “calls upon.”¹⁵¹ Likewise, France asserted that individuals involved in Iran’s nuclear and missile programs will be prohibited from traveling due to the travel restrictions placed upon them by paragraph 10 of Resolution 1737, which starts with the signal “calls upon.”¹⁵² Finally, after the Security Council adopted Resolution 1737, Japan noted, “In defiance of resolution 1696 (2006), Iran has refused to take any steps required of it to comply with the measures set out by the [IAEA] and the Security Council”¹⁵³ This requirement to comply with the IAEA measures was imposed by paragraph 1 of Resolution 1696, which begins with the signal “calls upon.” While the Security Council members may have intended something other than mandatory action with “calls upon” in Resolution 487 here, without a clear indication in the verbatim record, the canon of legal interpretation that says interpretation of the same terms within legal instruments is the same would suggest that this phrase signals quasi-mandatory action.

This interpretation of “calls upon” is supported by a close textual analysis of the phrase. The *American Heritage Dictionary of the English Language* has two meanings for “calls upon”: “To order; require” and “To make a demand or a series of demands on.” Both definitions support the assertion that “calls upon” creates obligations. The same is true with the Spanish word “exhorta,” which the key resolutions use as the equivalent to the English “calls upon.” This word means “exhorts” in English,¹⁵⁴ which can have a strong compelling component, such as to “force or impel in an indicated direction.”¹⁵⁵ The French version uses “demande,” which can mean “to ask” but can also mean “to require.” The Arabic is the same, using “talaba,” which means “to ask” but also means “to demand, order, require, direct.”¹⁵⁶ These phrases likely fall somewhere between an invitation and an outright demand. Regardless of the ambiguity in these words that supposedly are equivalent to “calls upon,” what is clear is that it represents a decision by the Security Council, which is all that is required for States to be obliged to accept and carry out these pronouncements under Article 25. Assuming, *arguendo*, that “calls upon” constitutes recommendatory language, States would still need to

151. *Id.* at 5.

152. *See id.* at 6.

153. *Id.*

154. COLIN SMITH, *COLLINS SPANISH-ENGLISH/ENGLISH-SPANISH DICTIONARY* 315 (8th ed. 2006).

155. WordNet, <http://wordnet.princeton.edu/> (follow “Use WordNet online” hyperlink; then search “exhort”) (last visited Mar. 4, 2008).

156. ROHI BAALBAKI, *AL-MAWRID: A MODERN ARABIC-ENGLISH DICTIONARY* 728 (11th ed. 1999).

carry out such recommendations based on the principle of good faith under U.N. Charter Article 2(2) and Article 26 of the Vienna Convention on the Law of Treaties.¹⁵⁷ The analysis of “calls upon” provided in this Section is relevant for several of the resolutions discussed below.

2. Imposing Safeguards Agreements on Non-Parties to the NPT

The question arises concerning what it means to place facilities under the IAEA's safeguards in this context. According to the IAEA, “[s]afeguards are activities by which the IAEA can verify that a State is living up to its international commitments not to use nuclear programmes for nuclear-weapons purposes.”¹⁵⁸ NPT Article III(1) requires non-nuclear-weapon States “to accept safeguards, as set forth in an agreement to be negotiated” at a later date in accordance with the IAEA Statute.¹⁵⁹ The interesting aspect of Resolution 486 is that Israel has never been a party to the NPT, even though it became a member of the IAEA in 1957.¹⁶⁰ Some safeguards apply to Israel's activities because it is party to the IAEA statute and has a Safeguards Agreement with the IAEA that covers some minor facilities.¹⁶¹ However, the IAEA has no treaty-based authority to scrutinize Israel's most significant nuclear activities because Israel's Safeguards Agreement does not cover these and because it is not a party to the NPT.¹⁶² As a result, the IAEA has asserted that Israel is “under no Treaty obligations and [h]as few or no obligations to the IAEA under safeguards agreements.”¹⁶³ Although Israel could accept new agreements allowing the IAEA to implement safeguards with respect to Israel's declared facilities (based on INFCIRC/66 guidelines for the IAEA's safeguards system, for example¹⁶⁴), it would still need

157. U.N. Charter art. 2, para. 2; Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

158. IAEA *Factsheets and Frequently Asked Questions*, http://www.iaea.org/Publications/Factsheets/English/sg_overview.html (last visited Mar. 4, 2008).

159. The Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 56, art. III(1).

160. The same is true for India and Pakistan.

161. See Louis René Beres, *Israel, Iran and Preemption: Choosing the Least Unattractive Option Under International Law*, 14 DICK. J. INT'L L. 187, 200 (1996).

162. Uranium Information Centre [UIC], *Safeguards to Prevent Nuclear Proliferation*, Briefing Paper 5 (Oct. 2007), available at www.uic.com.au/nip05.htm; Anthony D'Amato, Editorial Comment, *Israel's Air Strike upon the Iraqi Nuclear Reactor*, 77 AM. J. INT'L L. 584, 587 (1983).

163. IAEA, *Safeguards in Israel*, IAEA InfoLog, Mar. 2005, <http://www.iaea.org/blog/Infolog/?p=3>.

164. See IAEA, *The Agency's Safeguards System (1965, as Provisionally Extended in 1966 and 1968)*, IAEA Doc. INFCIRC/66/Rev.2 (Sept. 16, 1968), available at <http://www.iaea.org/Publications/Documents/Infocircs/Others/inf66r2.shtml>.

Israel's consent and would not cover special inspections normally covered by Additional Protocols.¹⁶⁵

Even if Israel placed its nuclear facilities under IAEA safeguards, as required by Resolution 487, the IAEA would have no yardstick against which to measure Israel's compliance, since the NPT creates the bulk of the international obligations on States in this realm, such as the obligations to prevent proliferation, seek nuclear disarmament, and promote peaceful nuclear energy use, while the IAEA Statute creates the basic mechanisms through which it can verify compliance with those obligations.¹⁶⁶ As Guido den Dekker points out, the IAEA inspection regime established under the IAEA Statute cannot begin until after State-parties to the NPT have made their initial declarations and the IAEA has conducted its initial inspections.¹⁶⁷ Therefore, in order for the Security Council's pronouncement to have meaning with regard to Israel, the Security Council would need to impose at least some of the NPT's obligations on Israel. For example, by requiring Israel to place its facilities under IAEA safeguards, the Security Council must classify Israel as a non-nuclear-weapon State under the NPT regime, since nuclear-weapon States do not have an obligation under the IAEA Statute to accept such safeguards. Moreover, the Security Council imposes the NPT obligations of non-nuclear-weapon States onto Israel. This interpretation of Resolution 487 is confirmed by the subsequent General Assembly resolutions in 1984 and 1985 that noted, in a negative manner, how Israel had not adhered to the NPT,¹⁶⁸ even though nothing had expressly required Israel to adhere to the NPT before then. Indeed, without such an interpretation of Resolution 487, requiring Israel to place its facilities under IAEA safeguards would have little meaning, again, due to the lack of a yardstick against which to assess Israel's compliance. Hence, this arguably is the first example of the Security Council imposing portions of a disarmament treaty on a State and is something that the Security Council seems to have been fond of doing since the end of the Cold War.

C. *Iraq's Chemical Weapons Use and Resolutions 582, 598, 612, and 620*

The third example of the Security Council getting involved in the regulation of arms occurred in the 1980s, when Iraq allegedly used

165. Barry Kellman & David S. Gualtieri, *Barricading the Nuclear Window—A Legal Regime to Curtain Nuclear Smuggling*, 1996 U. ILL. L. REV. 667, 706 n.167.

166. IAEA, *Safeguards in Israel*, *supra* note 163; DEN DEKKER, *supra* note 21, at 81.

167. See DEN DEKKER, *supra* note 21, at 82. However, it is unclear what provisions den Dekker relies upon in reaching this conclusion.

168. G.A. Res. 39/14, U.N. Doc. A/RES/39/14 (Nov. 16, 1984); G.A. Res. 40/6, U.N. Doc. A/RES/40/6 (Nov. 1, 1985).

chemical weapons against Iran during the Iran-Iraq War. Iraq had a long history of using chemical weapons against Iran—as well as against its own people—that dated back to August 1983, which was around the time that it became clear that Iraq was losing the Iran-Iraq War. The largest attack was in February 1986 and affected more than 10,000 Iranians.¹⁶⁹ Many Iraqi attacks with chemical weapons are undocumented, and even the number of attacks is unknown.¹⁷⁰ The Security Council became involved at the time of this large February 1986 attack and adopted Resolution 582 on February 24. In Resolution 582, the Security Council stated that it deplored the escalation of the conflict between Iran and Iraq and “the use of chemical weapons contrary to obligations under the 1925 Geneva Protocol”¹⁷¹ Interestingly, the resolution does not specify which State had used the chemical weapons, a point discussed further in Part IV below. On July 20, 1987, the Security Council adopted Resolution 598, in which it found there to have been a breach of the peace without saying who had breached the peace.¹⁷² In that resolution, the Security Council acted under Articles 39 and 40 of Chapter VII, rather than under all the other resolutions, which did not mention Chapter VII. The only mention of the alleged violations of the 1925 Geneva Gas Protocol¹⁷³ in that resolution was in the fourth preambular paragraph where it “*deplored*” the “use of chemical weapons contrary to obligations under the 1925 Geneva Protocol,”¹⁷⁴ although it did not expressly require compliance with the Protocol.

Nearly ten months later, the Security Council adopted Resolution 612 in response to further alleged Iraqi use of chemical weapons in March 1988. Resolution 612 “[*affirm[ed]*] the urgent necessity of strict observance of the Protocol for the [1925 Geneva Gas Protocol]” and “[*condemn[ed]*] vigorously the continued use of chemical weapons in the conflict between the Islamic Republic of Iran and Iraq contrary to the obligations under the Geneva Protocol,”¹⁷⁵ although this is different from imposing the obligations of the Protocol on these parties. Such an imposition was unnecessary at that time because both Iran and Iraq already were parties to that treaty, and these obligations already applied to

169. See Jim Garamone, *Iraq and the Use of Chemical Weapons*, AM. FORCES PRESS SERVICE, Jan. 23, 2003, <http://www.defenselink.mil/news/newsarticle.aspx?id=29540>.

170. *Id.*

171. S.C. Res. 582, *supra* note 59, ¶ 2.

172. S.C. Res. 598, *supra* note 59, pmb1. ¶ 9.

173. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925 Geneva Gas Protocol), June 17, 1925, available at <http://fletcher.tufts.edu/multi/texts/BH093.txt>.

174. S.C. Res. 598, *supra* note 59, pmb1. ¶ 4.

175. S.C. Res. 612, *supra* note 59, ¶¶ 1–2.

them.¹⁷⁶ Yet again, the Security Council failed to designate which side had been responsible for the violation of the Geneva Gas Protocol. In addition to this resolution, the Secretary-General responded by sending a group of experts there to investigate the use.¹⁷⁷ Still, Iraq continued to use chemical weapons against Iran in July 1988. Yet again, the Secretary-General responded by sending experts—this time on several missions—to the region to investigate the use, who reported that chemical weapons had been used against Iran and that such use was intensifying.¹⁷⁸ The Security Council responded by adopting Resolution 620.¹⁷⁹ Resolution 620 provided a development because it implied that Iraq was the State that used chemical weapons when it acknowledged that chemical weapons had been used against Iranians.¹⁸⁰ Moreover, the Security Council condemned the violations of the Geneva Gas Protocol in much stronger terms than before,¹⁸¹ although it noticeably stopped short of imposing new obligations on Iraq for these violations. The Security Council's actions involving the use of chemical weapons in the Iran-Iraq War appear to have ended there.

This series of resolutions does not appear to impose new obligations on Iraq, because all of the necessary obligations already applied to it through its accession to the 1925 Geneva Gas Protocol. Nonetheless, these resolutions are coercive disarmament and arms control measures from the Security Council because they reiterate those obligations. The Security Council's reference to such obligations in its Chapter VII resolutions, such as Resolution 598, brings these pre-existing obligations within the U.N. legal framework. In other words, if a State breaches a disarmament or arms control treaty obligation, there likely are a host of countermeasures under the treaty and under general international law that the other parties can take to ensure compliance. When the Security Council requires States to abide by these same obligations, it opens up another, parallel avenue through which to compel compliance with the international obligation: by the Security Council imposing sanctions for violating Article 25, which requires States to accept and carry out the Security Council's decisions.

176. Iran acceded to the Geneva Gas Protocol on Nov. 5, 1929, and Iraq acceded on Sept. 8, 1931.

177. Some commentators assert that the Security Council used its investigative role during the Iran-Iraq War. See Tsutomu Kono, *Role in Addressing WMD Issues: Assessment and Outlook, in ARMS CONTROL AFTER IRAQ: NORMATIVE AND OPERATIONAL CHALLENGES*, *supra* note 54, at 83, 103. However, if this were the case, such a role seems to have been minimal.

178. S.C. Res. 620, *supra* note 59, pmbl. ¶ 3.

179. *Id.* ¶ 2.

180. *Id.* pmbl. ¶ 3.

181. *Id.* ¶ 1.

This begs the question of whether it matters that the Security Council brings these obligations within the U.N. legal framework. Resolution 232 of 1966 suggests that there is a particular set of sanctions for violating Security Council decisions when it states that “failure or refusal by any of them to implement the present resolution shall constitute a violation of Article 25 of the United Nations Charter.”¹⁸² In reality, there is no difference between the sanctions the Security Council will apply to a violation of Article 25 and a sanction in response to a “regular” threat to international peace and security. Indeed, as Alfred Rubin notes, no provision in the U.N. Charter specifies the measures to be taken when a State violates Article 25, and so the moral-political order seems to be left to decide the appropriate sanctions on its own.¹⁸³ This point notwithstanding, incorporation into U.N. law could be significant as treaties typically allow States to withdraw from their obligations, and when treaties do not have such a provision, Article 56 of the Vienna Convention on the Law of Treaties will provide the ability to withdraw, assuming that it can be established that the treaty parties meant to admit the possibility of withdrawal and that the right to withdraw can be implied from the treaty’s nature.¹⁸⁴ However, there is no ability to withdraw from Security Council resolutions, and there is no well established way of interpreting such resolutions. Therefore, when the Security Council incorporates treaty obligations into the U.N. legal framework by reiterating them in a Security Council resolution, it becomes even clearer that these treaty obligations bind the parties.

Critics arguing against the significance of reiterating treaty obligations within Security Council resolutions could try to adopt *ad hoc* ICJ Judge Ahmed Sadek El-Kosheri’s argument in the *Lockerbie* case. There, Judge El-Kosheri asserted in his dissent that States do not have to obey Security Council decisions that have no basis in the Charter, because Article 25 requires States to obey Council decisions “in accordance with the present Charter,”¹⁸⁵ and treaty obligations do not have a basis in the Charter. However, this is a weak argument because nothing in the U.N.

182. S.C. Res. 232, ¶ 3, U.N. Doc. S/RES/232 (Dec. 16, 1966).

183. See Alfred P. Rubin, *Secession and Self-Determination: A Legal, Moral, and Political Analysis*, 36 STAN. J. INT’L L. 253, 257 n.17 (2000). Please note, however, that some commentators have argued persuasively that violators of Security Council-created sanctions should have the same measures imposed on them under Article 25. See, e.g., Jeremy P. Carver, *Making Financial Sanctions Work: Preconditions for Successful Implementation of Sanctions by the Implementing State*, (Expert Seminar on Targeting UN Financial Sanctions, Paper for Working Group 1, 1998), available at <http://www.seco.admin.ch/themen/00513/00620/00639/00641/index.html?lang=en>.

184. See Vienna Convention on the Law of Treaties, *supra* note 157, art. 56.

185. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libya v. U.S.*), 1992 I.C.J. 199, 206–07 (dissenting opinion of El-Kosheri).

Charter stops the Security Council from incorporating non-U.N. documents into its decisions. On the contrary, the Security Council regularly incorporates non-U.N. documents into its decisions by reference to these documents, just as Resolutions 255 and 984 incorporated the unilateral statements of various permanent members of the Security Council. Such decisions will be adopted in accordance with the U.N. Charter where the Security Council invokes the correct phrasing contained in Article 39 to unlock its Chapter VII powers.

D. *The 1991 Gulf War and Resolution 687*

The 1991 Gulf War was important for international relations and the United Nations for several reasons. For example, the Gulf War marked the clear end of the Cold War, in that the Soviet Union relinquished support of a key client State with the hope of saving its core union.¹⁸⁶ This newfound cooperation from the Soviet Union enabled a return to the U.N. system as it had been envisaged at its creation, with a strong emphasis on collective security coming at the direction of the Security Council. More important for this Article, the 1991 Gulf War and the subsequent activities by the United Nations Special Commission (UNSCOM) and the United Nations Monitoring, Verification, and Inspection Commission (UNMOVIC) discussed in this Section marked the beginning of a link between the violation of Article 2(4) and the requirement for the violator to disarm so that such a violation does not occur again. This link is evident in the ways in which the Security Council has imposed disarmament and arms control obligations on States that have threatened international peace and security after the Cold War and the 1991 Gulf War. Many believed that the end of the Cold War would have “profound consequences for arms control.”¹⁸⁷ These consequences are dramatically evident in the strength of the Security Council resolutions discussed in this Section, that is, the resolutions involving Iraq’s disarmament, condemnation of India and Pakistan’s nuclear tests, Iran’s persistence in enriching uranium for suspected non-peaceful purposes, North Korea’s withdrawal from the NPT, and the Security Council’s attempt to frustrate WMD terrorism through Resolution 1540.

Many commentators assert that the Security Council was not involved in imposing disarmament and arms control obligations before the

186. See MARTIN MCCAULEY, *RUSSIA, AMERICA AND THE COLD WAR, 1949–1991* 81–87 (2d ed. 2004).

187. Ekéus, *supra* note 79, at 67; Bourantonis & Evriviades, *supra* note 2, at 155 (believing that the end of the Cold War would bring a new era of cooperation in disarmament agreements within the United Nations).

1991 Gulf War.¹⁸⁸ The previous Sections somewhat challenged this very notion, although the Security Council certainly could have been more involved. Furthermore, it was not necessarily the Iraqi invasion of Kuwait that forced the Security Council to get involved with WMD proliferation issues to a greater extent in the early 1990s, as some commentators have asserted,¹⁸⁹ but rather Iraq's possession of WMD and its past use of WMD against enemy forces. Iraq's invasion of Kuwait demonstrated clearly to the world how dangerous Iraq could be to the maintenance of international peace and security, a menace that would be intolerable if it were to use WMD on a large scale or to lend its WMD to terrorists. Despite the limited international protests that resulted from such use during the Iran-Iraq War, those atrocities likely were foremost in the minds of Coalition commanders and troops before they went into Iraq in Operation Desert Storm.¹⁹⁰ Whereas the initial objective—and resolutions—prior to the actual invasion was the ouster of Iraq from Kuwait and the restoration of the Kuwaiti government, as opposed to eliminating Iraq's WMD,¹⁹¹ the overall objective quickly expanded to reducing Iraq's ability to threaten its neighbors and to destroying Iraq's WMD programs once the air campaign began to raise fears of chemical and biological weapon attacks in the near future.¹⁹² In short, a strong disarmament component would be involved in the post-war rebuilding of Iraq.¹⁹³ As the following Section shows, the Security Council lived up to this expectation through the coercive disarmament measures it adopted in various resolutions.

1. Cease-Fire Agreement on the Ground

To begin, a thumbnail sketch of the relevant facts of the 1991 Gulf War might be useful. Iraq invaded Kuwait on August 2, 1990, which led to a string of Security Council resolutions that climaxed with Resolution 678 and its authorization of Member States to “use all necessary means to uphold and implement resolution 660 (1990)¹⁹⁴ and all subsequent

188. Ekéus, *supra* note 79, at 68; see Dorinda G. Dallmeyer, *The Future Role of the United Nations in Disarmament: Learning from the Iraq Experience*, in ADAPTING THE UNITED NATIONS TO A POSTMODERN ERA: LESSONS LEARNED 129, 136 (W. Andy Knight ed., 2001).

189. EDWARD C. LUCK, UN SECURITY COUNCIL: PRACTICE AND PROMISE 99 (2006).

190. SUTTERLIN, *supra* note 2, at 105.

191. LUCK, *supra* note 189, at 99.

192. See William H. Lewis & Christopher C. Joyner, *Proliferation of Unconventional Weapons: The Case for Coercive Arms Control*, 10 COMP. STRATEGY 299, 299–301 (1991).

193. See *id.*

194. S.C. Res. 660, ¶ 2, U.N. Doc. S/RES/660 (Aug. 2, 1990) (condemning Iraq's invasion of Kuwait and demanding that “Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990 . . .”); S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).

relevant resolutions and to restore international peace and security in the area” if Iraq did not leave Kuwait by January 15, 1991. Language such as “all necessary means” within a Chapter VII decision of the Security Council is commonly interpreted as an authorization to use force.¹⁹⁵

Iraq did not comply with Resolution 678, and U.S.-led Coalition forces began Operation Desert Storm on January 17, 1991, to liberate Kuwait. This successful operation liberated Kuwait on February 27, pushed on to Baghdad, and captured some 86,000 Iraqi prisoners of war, all in approximately forty-two days, only the last one hundred hours of which consisted of actual ground combat.¹⁹⁶ This overwhelming success—for the Coalition, that is—set off a cascade of events, including the unilateral suspension of the fighting by President George H.W. Bush on February 28, 1991, and the formalization of a ceasefire agreement on March 3, 1991, between the commander of coalition forces, General Norman Schwarzkopf, and the deputy chief of staff of the Iraqi Ministry of Defense, Lieutenant General Sultan Hashim Ahmad al-Jabburi.¹⁹⁷ This agreement did not contain any provisions on disarmament, but rather expressly allowed Iraq to fly military helicopters in the cease-fire zone, and provided for a demarcation line and the repatriation of prisoners of war.¹⁹⁸ Such a concession on allowing Iraq to fly military helicopters is not only the opposite of a disarmament or arms control measure, but it was a considerable mistake in retrospect, given that Iraq had requested the use of its helicopter gunships to help move personnel and materiel but instead used them to kill 50,000 to 80,000 Kurds and Shias who were involved in an uprising against the Saddam Hussein regime.¹⁹⁹ One must look to Resolutions 686 and 687 for any express mention of disarmament or arms control obligations placed on Iraq.

195. See generally James D. Fry, *The UN Security Council and the Law of Armed Conflict: Amity or Enmity?*, 38 GEO. WASH. INT'L L. REV. 327, 336–39 (2006) (exploring the consistencies among the interpretations of varying “necessary means” provisions among resolutions, which generally imply the use of force); see also James D. Fry, *Remaining Valid: Security Council Resolutions, Textualism, and the Invasion of Iraq*, 16 TUL. J. INT'L & COMP. L. 609, 611–12 (2007).

196. David M. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT'L L. 801, 890 (1996).

197. Andru E. Wall, *The Legal Case for Invading Iraq and Toppling Hussein*, 32 ISR. Y.B. HUM. RTS. 165, 178–79 (2002); Ben Rooney, *Coalition Faces Problem in Knowing When War is Over*, DAILY TELEGRAPH, Sept. 4, 2003, available at <http://www.telegraph.co.uk/news/main/jhtml?xml=/news/2003/04/09/wirq409.xml>; Morriss, *supra* note 196, at 888–97; Christopher Greenwood, *New World Order or Old? The Invasion of Kuwait and the Rule of Law*, 55 MODERN L. REV. 153, 153 (1992).

198. Wall, *supra* note 197, at 178–79.

199. Norman G. Printer, Jr., *Establishing an International Criminal Tribunal for Iraq: The Time is Now*, 36 UWLA L. REV. 27, 38 (2005); KENNETH M. POLLACK, *THE THREATENING STORM: THE CASE FOR INVADING IRAQ* 48–51 (2002).

2. Resolution 686

Security Council Resolution 686, adopted on March 2, 1991, places eight requirements on Iraq in exchange for terminating the authorization to use force under Resolution 678. Paragraph 3(d) of Resolution 686 provided that Iraq “[p]rovide all information and assistance in identifying Iraqi mines, booby traps, and other explosives as well as any chemical and biological weapons and material in Kuwait, in areas of Iraq where forces of Member States cooperating with Kuwait pursuant to resolution 678 (1990) are present temporarily, and in the adjacent waters . . .”²⁰⁰ Some commentators assert that Iraq complied with these requirements,²⁰¹ although there is no evidence that Iraq fulfilled these requirements or even claimed to have fulfilled these requirements.²⁰² Although paragraph 3(d) obliged Iraq to provide information on the locations of WMD, mines, and explosives in Kuwait and where Coalition forces would be in Iraq, an obligation to report is not an obligation to disarm. Nevertheless, this requirement conceivably could fall under arms regulation and control, given that knowing the existence and location of particular weapons is the first step to regulating them.

3. Resolution 687

a. Disarmament Obligations

The new strength in Security Council disarmament and arms control resolutions in the post-Cold War era began with Resolution 687, which was the first resolution in which the Security Council adopted measures requiring the destruction of a State’s WMD and WMD programs, and provided for an extensive inspection and monitoring regime to prevent the reestablishment of those WMD and WMD programs.²⁰³ As illustrated below, the disarmament of Iraq envisioned in Resolution 687 is not

200. S.C. Res. 686, ¶ 3(d), U.N. Doc. S/RES/686 (Mar. 2, 1991). The other seven requirements contained in ¶¶ 2, 3 of Resolution 686 involved rescinding the annexation, accepting liability, releasing detainees, beginning the return of Kuwaiti property, stopping provocation by its forces, designating leaders to handle cease-fire negotiations, and arranging the release of prisoners of war. *Id.* ¶ 2, 3.

201. See, e.g., Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 189 (2004).

202. For more information on this matter, see generally Fry, *Remaining Valid*, *supra* note 195, at 629–33.

203. PASCAL TEIXEIRA DE SILVA, *WEAPONS OF MASS DESTRUCTION: THE IRAQI CASE, IN THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 205, 205 (2004); Dallmeyer, *supra* note 188, at 129–30.

unlike the disarmament of Germany after the First World War in terms of the magnitude and punitive nature of the disarmament measures.²⁰⁴

Part C of Resolution 687 addresses Iraq's disarmament, and requires, *inter alia*, the following from Iraq:

- the unconditional “destruction, removal, or rendering harmless, under international supervision,” of its WMD materials and facilities, including its ballistic missiles with a range greater than 150km;
- that Iraq provide detailed reports to the U.N. Secretary-General and the IAEA Director-General of Iraq's inventories of such WMD, WMD facilities, and missiles, including their locations, amounts, and types;
- that Iraq unconditionally “undertake not to use, develop, construct, or acquire” any of the items it is being required to destroy and report on; and
- that Iraq unconditionally accept urgent on-site inspections to verify the capabilities mentioned in Iraq's declarations and other locations chosen by the Special Commission created for that purpose.²⁰⁵

All of these demands were significant disarmament commitments for Iraq and were new obligations inasmuch as they did not exist before this time in any other legal instrument. Admittedly, the requirement that Iraq report its inventories of WMD and related capacities is similar to that required by paragraph 3(d) of Resolution 686, although Iraq was required to report on WMD throughout *all of Iraq* in Resolution 687, not just those in Kuwait and the parts of Iraq where Coalition forces were located, as was required by Resolution 686. In essence, Resolution 687 required that Iraq give up all of its WMD capabilities or have such capabilities removed, which is quite broad in scope. In paragraph 14, Resolution 687 goes even further than this by pulling the wider Middle East into this resolution and stating the goal of establishing a WMD-free zone for the whole of the Middle East. Resolution 687 was truly a revolutionary resolution from a disarmament and arms control perspective.

b. UNSCOM and UNMOVIC

In addition to Resolution 687 requiring Iraq to surrender its WMD and WMD programs, the resolution called for the U.N. Secretary-General to

204. See MAX HILAIRE, UNITED NATIONS LAW AND THE SECURITY COUNCIL 213 (2005).

205. See S.C. Res. 687, *supra* note 60, ¶¶ 8–10, 12.

establish a plan for the UNSCOM, in connection with the IAEA, to conduct on-site inspections of Iraq's WMD-related facilities.²⁰⁶ The U.N. Secretary-General submitted the plan for disarming Iraq of its non-nuclear WMD on April 18, 1991, pursuant to paragraph 9(b)(i) of Resolution 687, which proposed that UNSCOM be established as soon as possible in order to begin implementation of Resolution 687, and in particular the destruction or removal of biological and chemical weapons, ballistic missiles, and nuclear-weapons capabilities, as well as to provide future compliance and operations support.²⁰⁷ In addition to a staff of twenty to twenty-five people, UNSCOM would be supplemented by technical experts to assist with its responsibilities.²⁰⁸ Resolution 687 did not require the Security Council's approval before this plan was to come into effect, and no separate Security Council resolution appears to have expressly approved of this plan. The U.N. Secretary-General also submitted the IAEA's plan for disarming Iraq of its nuclear capabilities on May 17, 1991, which proposed that all nuclear-weapons-usable materials be removed from Iraq for destruction, since it could not be destroyed in Iraq, and nuclear-weapon research and production facilities be decommissioned.²⁰⁹ Unlike with the non-nuclear plan called for by paragraph 9(b)(i), paragraph 13 referred to the "plan being approved by the Council," which it did on June 17, 1991, through Resolution 699 (a Chapter VII resolution). Resolution 699 confirmed that UNSCOM and the IAEA had the authority to act under Part C of Resolution 687 to destroy, remove, and render harmless Iraq's WMD and WMD capabilities,²¹⁰ asked for bi-annual reports from the Secretary-General,²¹¹ and encouraged maximum assistance "in cash and in kind" from U.N. Member States to make sure that Part C of Resolution 687 was implemented effectively and quickly, although it also decided that Iraq was to carry the full financial burden of implementing Part C.²¹²

Although the Security Council did not approve the IAEA's plan until June 17, UNSCOM and the IAEA apparently began their work disarming Iraq of its non-nuclear WMD as well as its nuclear WMD in May 1991 (just one month after the Security Council adopted Resolution

206. *Id.* ¶¶ 9(b), 13.

207. The Secretary-General, Report of the Secretary-General, Implementation of paragraph 9(b)(i) of Security Council Resolution 687 (1991), U.N. Doc. S/2250, 1-2 (Apr. 18, 1991).

208. *Id.* at 2.

209. Note by the Secretary-General transmitting the IAEA's Plan, U.N. Doc. S/22615, 3-4 (May 17, 1991).

210. S.C. Res. 699, ¶ 2, U.N. Doc. S/RES/699 (June 17, 1991).

211. *Id.* ¶ 3.

212. *Id.* ¶ 4.

687).²¹³ UNSCOM's and the IAEA's desire to get to work before getting the Security Council's approval was not surprising, given that it was to carry out the disarmament plan provided by the Secretary-General and the IAEA Director-General "within forty-five days following approval by the Council . . ."²¹⁴ This short timeframe reflects the unrealistic expectations of the Security Council when it adopted Resolution 687. Despite these unrealistic expectations, it is still somewhat troubling from a legal perspective that UNSCOM and the IAEA began removing Iraq's nuclear capabilities before receiving express authorization from the Security Council. When it became clear that Iraq's declarations had been incomplete and that Iraq was not complying with its obligations to disclose its WMD and WMD capabilities,²¹⁵ it became clear that UNSCOM would not be able to carry out this plan in the given amount of time, and so UNSCOM and the IAEA began to focus on identifying the gaps and finding the undeclared items. Iraq began to be completely uncooperative in June 1991, when it refused access to two sites suspected of being part of its nuclear weapons program and even attacked UNSCOM inspectors to stop them from inspecting and, later, to retrieve confiscated documents.²¹⁶ Despite Iraq's lack of cooperation, UNSCOM pressed forward in unearthing Iraq's WMD activities through its reliance on clever tactics to avoid tipping Iraq off to where it would be headed.²¹⁷ With the tremendous personnel support from all over the world and technological capabilities given it by willing Western governments,²¹⁸ it took UNSCOM approximately six months of operations to conclude to the Security Council that "[t]he elements of misinformation, concealment, lack of cooperation, and violation of the privileges and immunities of the

213. Note by the Secretary-General transmitting the IAEA's Plan, U.N. Doc. S/22615, at 3 (May 17, 1991). See also Trevor Findlay, *Lessons of UNSCOM and UNMOVIC for WMD Non-Proliferation, Arms Control and Disarmament*, in *ARMS CONTROL AFTER IRAQ: NORMATIVE AND OPERATIONAL CHALLENGES*, *supra* note 54, at 140, 141–42.

214. S.C. Res. 687, *supra* note 60, ¶ 13.

215. The Secretary-General, Letter Dated 26 June 1991 from the Secretary-General Addressed to the President of the Security Council, at 2–3, U.N. Doc. S/22739 (June 26, 1991); The Secretary-General, Letter Dated 28 June 1991 from the Secretary-General Addressed to the President of the Security Council, at 2, U.N. Doc. S/22743 (June 28, 1991); The Secretary-General, Letter Dated 12 July 1991 from the Director-General of the International Atomic Energy Agency Addressed to the Secretary-General, at 9–14, U.N. Doc. S/22788 (July 15, 1991); The Secretary-General, Letter Dated 25 July 1991 from the Director-General of the International Atomic Energy Agency Addressed to the Secretary-General, at 5–11, U.N. Doc. S/22837 (July 25, 1991).

216. Findlay, *supra* note 213, at 142.

217. Kono, *supra* note 177, at 103; Findlay, *supra* note 213, at 142–43.

218. Findlay, *supra* note 213, at 141–42; Dallmeyer, *supra* note 188, at 131 (discussing how "the nuclear inspection team which was detained in 1991 in the car park was composed of thirty-seven people from twenty-two countries including Morocco, Egypt, and Syria, notions previously not at the forefront of arms control verification").

Special Commission and IAEA have not created any trust in Iraq's intentions.²¹⁹ The Security Council acknowledged the fact that Iraq was non-compliant with Part C of Resolution 687 and non-compliant with its safeguards agreement with the IAEA in violation of the NPT in its Resolution 707 of August 15, 1991,²²⁰ and again demanded Iraq's compliance with Resolution 687, including allowing UNSCOM and the IAEA teams "immediate, unconditional, and unrestricted access to any and all areas, facilities, equipment, records, and means of transportation which they wish to inspect"²²¹ These efforts to apply considerable pressure on Iraq to get it to comply had no discernable impact on Iraq. In an effort to improve the inspection regime and to apply greater pressure on Iraq, the Security Council updated the inspection plan with Resolution 715, enabling UNSCOM to inspect all types of facilities and to remove anything of interest during these inspections, among other powers provided for in a plan developed by the U.N. Secretary-General.²²²

Security Council resolutions were relatively silent on UNSCOM's inspections of Iraq after Resolution 715 until June 1996, when Iraq refused access to UNSCOM yet again, which led the Security Council to declare in Resolution 1060 that Iraq had violated its disarmament obligations under Resolution 687 and that it must grant "immediate, unconditional, and unrestricted access" to the inspectors of all sites.²²³ A similar situation occurred a year later, and the Security Council responded in the same manner in Resolution 1115, but threatened an escalation of sanctions,²²⁴ although without a significant impact. Without these inspections, the Security Council was unable to know how much of a threat Iraq posed with its chemical and biological weapons, although it was known that Iraq still had such capabilities.²²⁵ The Security Council repeated these threats four months later in Resolution 1134,²²⁶ and actually imposed greater sanctions in the form of travel bans on Iraqi officials.²²⁷

Without Iraq's cooperation, the burden of proving that Iraq did not have WMD seems to have inappropriately shifted from Iraq to the Security Council.²²⁸ In an effort to shift the burden back to Iraq, the Security

219. The Secretary-General, *Report of the Sixth IAEA Inspection Team, delivered to the Security Council*, U.N. Doc. S/23122 (Oct. 8, 1991).

220. S.C. Res. 707, ¶¶ 1–2, U.N. Doc. S/RES/707 (Aug. 15, 1991).

221. *Id.* ¶ 3(a)–(b).

222. S.C. Res. 715, ¶ 1, U.N. Doc. S/RES/715 (Oct. 11, 1991).

223. S.C. Res. 1060, ¶¶ 1–2, U.N. Doc. S/RES/1060 (June 12, 1996).

224. S.C. Res. 1115, ¶¶ 2–6, U.N. Doc. S/RES/1115 (June 21, 1997).

225. SUTTERLIN, *supra* note 2, at 106.

226. S.C. Res. 1134, ¶¶ 1–6, U.N. Doc. S/RES/1134 (Oct. 23, 1997).

227. S.C. Res. 1137, ¶ 4, U.N. Doc. S/RES/1137 (Nov. 12, 1997).

228. Kono, *supra* note 177, at 92–93.

Council threatened further military action if Iraq refused to comply with inspectors. Resolution 1154 required Iraq to give “immediate, unconditional, and unrestricted access to the Special Commission and the IAEA”²²⁹ Resolution 1205 strongly condemned “the decision by Iraq of 31 October 1998 to cease cooperation with the Special Commission as a flagrant violation of resolution 687 (1991) and other relevant resolutions[,]” and required it to

rescind immediately and unconditionally the decision of 31 October 1998, as well as the decision of 5 August 1998, to suspend cooperation with the Special Commission and to maintain restrictions on the work of the IAEA and that Iraq provide immediate, complete and unconditional cooperation with the Special Commission and the IAEA²³⁰

This led to the joint U.S.-U.K. action Operation Desert Fox from December 16 to 19, 1998, which involved a four-day air campaign that included as many Cruise missiles as were used during the entire 1991 Gulf War.²³¹ Operation Desert Fox was not expressly authorized by the Security Council, although it arguably was in response to Iraq’s violation of an earlier Security Council resolution.²³² As one commentator asserts, Operation Desert Fox was designed to harm Iraq’s WMD capabilities, not to bring Iraq into compliance with Security Council resolutions,²³³ although the latter likely was a desired result as well.

After nearly two years of inspectors not having access to Iraq, the Security Council dissolved UNSCOM and replaced it with the UNMOVIC in Resolution 1284.²³⁴ Unlike Resolution 687, which had been adopted quickly under somewhat unrealistic expectations, the Security Council had the time to craft UNMOVIC in such a way as to incorporate the lessons it had learned with UNSCOM. Like UNSCOM, UNMOVIC was a subsidiary organ of the Security Council (accountable solely to the Security Council) with responsibility in verifying Iraq’s compliance with Resolution 687, although it also had the task of addressing the unresolved disarmament issues and to identify other sites in Iraq to include within the monitoring and verification regime, among other things.²³⁵ UNMOVIC was given a stronger ability to avoid the

229. S.C. Res. 1154, ¶ 3, U.N. Doc. S/RES/1154 (Mar. 2, 1998).

230. S.C. Res. 1205, ¶¶ 1–2, U.N. Doc. S/RES/1205 (Nov. 5, 1998).

231. GRAY, *supra* note 137, at 266.

232. Sean M. Condrón, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox*, 161 MIL. L. REV. 115, 178 (1999).

233. Kono, *supra* note 177, at 94.

234. S.C. Res. 1284, U.N. Doc. S/RES/1284 (Dec. 17, 1999).

235. *Id.* ¶ 2.

barriers that Iraq put in its way in that Resolution 1284 required Iraq to give UNMOVIC teams “immediate, unconditional, and unrestricted access to any and all areas, facilities, equipment, records, and means of transport which they wish to inspect,”²³⁶ without such limitations as presidential sites and a requirement of advance notice that had plagued UNSCOM. In terms of practice, UNMOVIC was an improvement from UNSCOM in that it learned from UNSCOM’s mistakes.²³⁷ Whereas UNSCOM and UNMOVIC relied heavily on intelligence from certain States to learn about Iraq’s WMD, Hans Blix, the head of UNMOVIC, made sure that this was one-way intelligence sharing with UNMOVIC by requiring UNMOVIC staff to be U.N. civil servants subject to the requirements of U.N. Charter Article 100, which addresses staff independence and which greatly improved UNMOVIC’s perceived impartiality and, hence, legitimacy.²³⁸ Blix even made sure that his staff members received the appropriate training to make them sensitive to Iraqi culture, history, and religion, among other things.²³⁹ Nevertheless, Iraq refused to cooperate with UNMOVIC until 2002, when the United States and the United Kingdom again began to increase their military presence in the Gulf region. During this military build-up, the Security Council adopted Resolution 1441, which not only deplored Iraq’s failure to comply with its past disarmament obligations and requirements to report its WMD programs,²⁴⁰ it required, among other things, renewed commitment to comply with these obligations as well as a renewed obligation on Iraq to allow UNMOVIC to inspect all sites including Presidential palaces and to suspend Iraq’s ground and aerial movement.²⁴¹

Despite the strengthened mandate of UNMOVIC, several Western States—in particular, the United States, the United Kingdom, and Spain (the Coalition States)—believed that Iraq still was successfully concealing its WMD capabilities from inspectors,²⁴² and believed that Saddam

236. *Id.* ¶ 4.

237. Findlay, *supra* note 213, at 156 (noting UNSCOM’s early practice of dynamiting chemical weapons in open pits and other practices that led to the exposure of inspectors to harmful chemical agents).

238. HANS BLIX, *DISARMING IRAQ* 49 (2004); Kono, *supra* note 177, at 92–93; BOWLES, *supra* note 2, at 162; Lewis & Joyner, *supra* note 192, at 299–301.

239. BLIX, *supra* note 238, at 51–52.

240. S.C. Res. 1441, pmbl. ¶¶ 1, 6–9, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

241. *Id.* ¶¶ 2–7.

242. Interestingly, the belief that Iraq had been able to conceal its biological weapons program from inspectors for so long had a significant impact on the negotiations for a protocol to strengthen the Biological Weapons Convention, although Iraq was later found to have no biological weapons program. See Patricia Lewis, *Why We Got it Wrong: Attempting to Unravel the Truth of Bioweapons in Iraq*, in *ARMS CONTROL AFTER IRAQ: NORMATIVE AND OPERATIONAL CHALLENGES*, *supra* note 54, at 160, 160–66.

Hussein showed no intention of complying with UNMOVIC or the IAEA, as initial reports had indicated.²⁴³ However, later reports from UNMOVIC and the IAEA stated that their monitoring operations were being implemented smoothly and with the full cooperation of the Iraqi government, though the inspections still were difficult.²⁴⁴ Indeed, before the invasion, Saddam Hussein opened Iraq's doors to inspectors without any conditions, and asserted that it had made a complete declaration of its WMD programs.²⁴⁵ However, it appeared to be too little too late. Indeed, the list of unresolved disarmament issues reported to the Security Council under Resolution 1284 suggested that UNMOVIC was having considerable problems in Iraq.²⁴⁶ Moreover, inspections did not uncover WMD, the existence of which largely was taken as a given by the Coalition States. Therefore, the Coalition States decided that there was sufficient justification for a military invasion to forcefully remove Iraq's WMD permanently, which these States carried out in March 2003.²⁴⁷ After the invasion, the Security Council unanimously adopted Resolution 1483, which called for international verification that Iraq had ceased its WMD programs.²⁴⁸ As time has told, Iraq had ceased its WMD programs before the invasion, thus making the main rationale for the invasion meritless, assuming, *arguendo*, that it had any merit to begin with.

UNMOVIC suspended inspections with the invasion in 2003. The Security Council recently terminated UNMOVIC's mandate.²⁴⁹ Termination of the most intrusive disarmament regime to date was relatively unceremonious. Although Iraq tried to frustrate UNSCOM's and UNMOVIC's activities at nearly every step save the very end, these entities were quite successful in removing Iraq's WMD and WMD capabilities.²⁵⁰ This success can be credited to the Security Council's control of these entities, which, along with the help of strong leadership of UNSCOM and UNMOVIC, enabled them to largely avoid the meddling

243. See SUTTERLIN, *supra* note 2, at 106; GRAY, *supra* note 137, at 272.

244. Kono, *supra* note 177, at 104–05; THAKUR, *supra* note 3, at 168 (claiming that the UNSCOM and UNMOVIC inspections were a success); BOWLES, *supra* note 2, at 162 (asserting, among other things, that Hans Blix told the Security Council that UNMOVIC could finish inspections of Iraq within a few months); GRAY, *supra* note 137, at 272 (arguing that, after some initial delays, Iraq began to cooperate more fully in February 2003).

245. BOWLES, *supra* note 2, at 162; Findlay, *supra* note 213, at 147–48.

246. Kono, *supra* note 177, at 94.

247. See generally BOWLES, *supra* note 2, at 11–12; SUTTERLIN, *supra* note 2, at 106. But see GRAY, *supra* note 137, at 192 (asserting that the United Kingdom's purpose in invading Iraq in 2003 was to disarm Iraq of its WMD, although the United States' purpose was regime change).

248. S.C. Res. 1483, ¶ 11, U.N. Doc. S/RES/1483 (May 22, 2003).

249. S.C. Res. 1762, ¶ 1, U.N. Doc. S/RES/1762 (June 29, 2007).

250. See SUTTERLIN, *supra* note 2, at 99 (asserting that Iraq's disarmament was a notable achievement by the United Nations); Findlay, *supra* note 213, at 150–51.

of outside entities such as other States, the IAEA Board of Governors, and the U.N. Secretariat.²⁵¹ It remains to be seen whether UNSCOM and UNMOVIC will be useful models for coercive disarmament activities in the future. Some commentators believe that they will,²⁵² while others do not.²⁵³ Those in the latter group formed this opinion before the Security Council adopted strong disarmament resolutions against Iran and North Korea, as can be seen simply by comparing the dates of publication for those resolutions and those opinions. In reality, these resolutions have gone beyond those regarding Iraq in many ways, such as the clear imposition of *treaty* obligations on these States. Before delving into those later resolutions, the following Section examines several of the pressing legal issues that arose from the coercive disarmament and arms control measures that the Security Council took against Iraq.

4. Legal Issues

The resolutions involved with the WMD disarmament of Iraq raise the most pressing legal issues of any other resolution discussed in this Article. The five main legal issues discussed here are: Iraq's acceptance of Resolution 687, UNSCOM's strength, Security Council delegation of coercive powers to the U.N. Secretary-General, due process concerns with Security Council proceedings, and Security Council imposition of treaty obligations on States.

a. Iraq's Acceptance of Resolution 687

A major question that arises when discussing the coercive disarmament measures under Security Council Resolution 687 is whether Iraq's acceptance of Resolution 687 constitutes consent, and so renders the case not one of coercive disarmament. Indeed, Iraq accepted, though quite begrudgingly, the cease-fire terms of Resolution 687 on April 6, 1991,²⁵⁴ as required by paragraph 33 of that resolution, which stated that the cease-fire would become effective "upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance"²⁵⁵

It is important to note that Iraq technically was obliged to accept Resolution 687 as a member of the United Nations, in accordance with Article 25, which states that States are bound to "accept and carry out

251. Findlay, *supra* note 213, at 150-52; Ekéus, *supra* note 79, at 71.

252. See, e.g., Kono, *supra* note 177, at 91.

253. See, e.g., SUTTERLIN, *supra* note 2, at 107.

254. See Identical Letters dated 6 April 1991 from the Permanent Representative of Iraq to the United Nations addressed respectively to the Secretary-General and the President of the Security Council, at 7, U.N. Doc. S/22456 (Apr. 6, 1991).

255. S.C. Res. 687, *supra* note 60, ¶ 33.

the decisions of the Security Council,"²⁵⁶ thus suggesting that Iraq's acceptance under paragraph 33 was unnecessary for Resolution 687 to come into effect. Nonetheless, Iraq's acceptance of the demands of the coercer (here, the Security Council) does not diminish the coercive nature of those demands, just as an unruly bar patron's decision to leave the bar under the threat of the bouncer's violence makes the patron's decision to leave no more voluntary than had the bouncer actually used force to come to the same result.²⁵⁷ Indeed, coercion requires only that an implicit or explicit threat was made.²⁵⁸ In the context of Iraq and Resolution 687, the subtext was that the pummelling of Iraq by Coalition forces would continue if Iraq did not accept these terms unconditionally.

b. UNSCOM's Strength

What stands out in Iraq's WMD disarmament saga is the broad authority the Security Council gave UNSCOM and UNMOVIC to inspect and disarm Iraq. The Security Council initially had considerable assurances that Iraq would cooperate in this endeavor, including Iraq's express acceptance of the terms of Resolution 687. Once it became clear that Iraq would not cooperate, however, the Security Council and UNSCOM were forced to decide how far they were willing to go to compel Iraq to comply with Resolution 687. What resulted was a gradual ratchetting up of coercive measures against Iraq based on the coercive imposition of obligations under Resolution 687. Resolution 1441, of course, represents the outer limit of what the Security Council was willing to do to disarm Iraq. In Resolution 1441, the Security Council refrained from expressly authorizing the use of force against Iraq for a second time. All of these resolutions and efforts to disarm Iraq seem rather devoid of Iraqi consent. However, Iraq gave its consent to future Security Council actions when it joined the United Nations, and gave up an expectation of freedom from interference when it chose to develop WMD in violation of WMD norms and to invade its neighbor.²⁵⁹ The

256. U.N. Charter art. 25; *see generally* RENATA SONNENFELD, RESOLUTIONS OF THE UNITED NATIONS SECURITY COUNCIL 120-44 (1988) (discussing the legal effects of Security Council resolutions under U.N. Charter article 25); *see also* U.N. Charter art. 48, para. 1 ("The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.").

257. *See* Anderson, *supra* note 13.

258. *See id.*

259. *See* Müller, *supra* note 54, at 128 (asserting that Iraq was in trouble with the Security Council not for violations of a WMD treaty obligation but for breaching disarmament and arms control obligations under Resolution 687). However, the Security Council's imposition of obligations through Resolution 687 stemmed from Iraq's suspected covert development of nuclear weapons in violation of its NPT obligations prior to Resolution 687, which the Security Council confirmed was a violation of the NPT in Resolution 707.

Security Council was perfectly within its administrative powers, provided under U.N. Charter Article 29, to establish a subsidiary body tasked to disarm a target under a Chapter VII mandate.²⁶⁰

The Security Council's choice to use this power within the disarmament and arms control context marked a shift away from nuclear *regulation* to a stronger focus on *enforcement* in the post-Cold War era.²⁶¹ These enforcement decisions are made without consulting—at least openly—the U.N. Secretary-General or the ICJ as to the existence of an actual violation,²⁶² and are adopted as powerful Chapter VII resolutions that signal to the target State that military force backs up these decisions. As explained in Sections III(F) and III(G) below, the Security Council's imposition of stiff disarmament and arms control obligations against Iran and North Korea in this same manner signals that the Security Council's emphasis on disarmament and arms control *enforcement* is a trend that will stay.

c. Security Council Delegation of Coercive Powers to the U.N. Secretary-General

Even though the Security Council does not consult the U.N. Secretary-General or the ICJ when determining the existence of a violation of a WMD norm, the Security Council has seen fit to involve the U.N. Secretary-General in developing plans for the implementation of the Security Council's coercive disarmament measures. As noted above in Section III(D)(3)(b), paragraph 9(b)(i) of Resolution 687 required the U.N. Secretary-General to submit a plan for disarming Iraq of its non-nuclear WMD, which he submitted on April 18, 1991. This plan proposed a number of items, including the size of the U.N. Secretary-General's staff and his intensive plan for destroying or removing all of Iraq's non-nuclear WMD.²⁶³ As already noted, Resolution 687 did not require the Security Council's approval before this plan was to come into effect, and so the plan came into effect at the moment it was formulated. This raises an interesting legal issue regarding the Security Council's ability to delegate to other entities the power to define the contours of its coercive mandates, while still being binding on U.N. Member States un-

260. See THAKUR, *supra* note 3, at 168.

261. See Dallmeyer, *supra* note 188, at 136.

262. See Lewis & Joyner, *supra* note 192, at 309 (calling for the Security Council and the U.N. Secretary-General to work in concert to impose coercive arms control measures on alleged violators of WMD non-proliferation norms); ALLAN GOTLIEB, *DISARMAMENT AND INTERNATIONAL LAW: A STUDY OF THE ROLE OF LAW IN THE DISARMAMENT PROCESS* 39 (1965) (discussing a U.S. proposal that the ICJ should have jurisdiction over all disputes concerning the interpretation and application of the disarmament treaty).

263. See Implementation Report, *supra* note 207.

der Article 25. The Security Council obviously has the power to create subsidiary organs under U.N. Charter Articles 7(2) and 29,²⁶⁴ and to provide them with broad powers to complete their tasks, which conceivably include the ability to bind States. For example, the Security Council gave the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) the power to bind States.²⁶⁵ However, here the Security Council gave binding powers to an entity not its subsidiary, namely, the U.N. Secretary-General. Nowhere does the U.N. Charter provide the U.N. Secretary-General with binding powers, so the question arises whether this is an *ultra vires* act by the U.N. Secretary-General.

Resolution 687 is not the first instance in which the Security Council has delegated considerable powers to the U.N. Secretary-General to determine the contours of Security Council decisions that bind all Member States. For example, in 1992, three months after the Security Council established the arms embargo on Somalia, the Security Council established the first United Nations Operation in Somalia (UNOSOM) with Resolution 751, along with a sanctions committee.²⁶⁶ Resolution 775 increased the size of UNOSOM by 3,500 troops.²⁶⁷ While this force started as a traditional, neutral peacekeeping operation, it eventually shifted to a peace enforcement operation that could use force in fulfilling its mandate and imposing its will on the Somalis.²⁶⁸ Interestingly, in Resolution 794, the Security Council decided that UNOSOM would “proceed at the discretion of the Secretary-General in the light of his assessment of conditions on the ground”²⁶⁹ Thus, the Security Council essentially gave the Secretary-General *carte blanche* to modify the mandate of UNOSOM. Moreover, Resolution 794 authorized the “Secretary-General and Member States cooperating to implement [an offer of a Member State to help create a secure environment there] to use all necessary means to establish as soon as possible a secure environment for

264. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 482 (Bruno Simma ed., 1994).

265. See Statute of the International Criminal Tribunal for the Former Yugoslavia art. 29(2), 32 I.L.M. 1192, available at <http://www.un.org.icty/legaldoc-e/basic/statut/statute-feb08-e.pdf>, adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (May 27, 1993), 32 I.L.M. 1203; Statute of the International Criminal Tribunal for Rwanda, art. 28(2), 33 I.L.M. 1602, available at <http://69.94.11.53/ENGLISH/basicdocs/statute/2007.pdf>, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg. at 3, U.N. Doc. S/RES/955 (Nov. 8, 1994), 33 I.L.M. 1600.

266. S.C. Res. 751, ¶¶ 2, 11, U.N. Doc. S/RES/751 (Apr. 24, 1992).

267. See S.C. Res. 775, ¶¶ 3, 5, U.N. Doc. S/RES/775 (Aug. 28, 1992).

268. Winston A. Tubman, *The Role of the United Nations with Respect to the Means for Accomplishing the Maintenance and Restoration of Peace*, 26 GA. J. INT'L & COMP. L. 101 (1996).

269. S.C. Res. 794, ¶ 6, U.N. Doc. S/RES/794 (Dec. 3, 1992).

humanitarian relief operations in Somalia²⁷⁰ Ultimately, this operation expressly involved the forcible disarmament of combatants. Shortly after Resolution 794's adoption, the Secretary-General stated that UNOSOM and the Unified Task Force (UNITAF) would be allowed to use force to disarm combatants. From the beginning of his discussion of UNOSOM's "new mandate," the Secretary-General expressed his "firm view . . . [that] the mandate of UNOSOM II must cover the whole territory of Somalia and include disarmament."²⁷¹ The Secretary-General not only gave UNOSOM the mandate to "seize the small arms of all unauthorized armed elements and to assist in the registration and security of such arms."²⁷² In case someone questioned whether this allowed coercive disarmament, the Secretary-General made it clear later in the same report:

To be effective the disarmament process should be enforceable. Those factions or personnel who fail to comply with timetables or other modalities of the process would have their weapons and equipment confiscated and/or destroyed.²⁷³

The Security Council expressly incorporated this report of the Secretary-General into UNOSOM II's mandate with Resolution 814. The Security Council "[d]ecide[d] to expand the size of the UNOSOM force and its mandate in accordance with the recommendations contained in paragraphs 56-88 of the report of the Secretary-General of 3 March 1993, and the provisions of this resolution"²⁷⁴ Despite this incorporation of the Secretary-General's report, the Secretary-General retained his power to modify the Security Council mandate that UNOSOM II enjoyed, which was made clear in paragraph 5 of Resolution 837, which "[r]eaffirm[ed] that the Secretary-General is authorized under resolution 814 (1993) to take all necessary measures"²⁷⁵

These two examples show some practice of the Security Council in delegating binding powers to the U.N. Secretary-General as if deputizing the Secretary-General in its enforcement activities. The Security Council also often delegates its coercive powers to States to implement its resolutions, and the delegation to the U.N. Secretary-General is comparable. While no provision in the U.N. Charter grants the Secretary-General

270. *Id.* ¶¶ 8, 10.

271. The Secretary-General, Further Report of the Secretary-General Submitted in Pursuance of Paragraphs 18 and 19 of Resolution 794 (1992), ¶ 57, U.N. Doc. S/25354 (Mar. 3, 1993).

272. *Id.* ¶ 57(d).

273. *Id.* ¶ 63.

274. S.C. Res. 814, ¶ 5, U.N. Doc. S/RES/814 (Mar. 26, 1993).

275. S.C. Res. 837, ¶ 5, U.N. Doc. S/RES/837 (June 6, 1993).

binding powers, and no provision allows the Security Council to give the Secretary-General binding powers, at the same time, no provision restrains the Security Council from deputizing the U.N. Secretary-General in this manner. Thus, delegation arguably is allowable as long as it is necessary for the Security Council to fulfill its role under the U.N. Charter.

d. Due Process Concerns with Security Council Proceedings

Given the lack of WMD that have been discovered in Iraq after the 2003 invasion, serious questions arise as to what types of due process safeguards can be put in place in order for the international community to avoid making such important decisions based on weak evidence. In general, Security Council decision-making procedures are not known for their due process safeguards. While the Security Council is to meet in public, informal consultations generally are held in private, which would appear to be where most of the actual decision-making occurs.²⁷⁶ Concerning the Security Council meetings, U.N. Charter Article 31 provides non-members of the Security Council the possibility of “participat[ing], without vote, in the discussion of any question brought before the Security Council . . . ,”²⁷⁷ and Article 32 similarly provides such States the possibility of “participat[ing], without vote, in the discussion relating to the dispute”²⁷⁸ Despite this language, States that will be particularly affected by a resolution have no right to be invited to participate in the debates.²⁷⁹ Even if a State is invited into the proceedings, there is no guarantee that it will be allowed an opportunity to be heard before the Security Council votes on the resolution that creates significant obligations on that State.²⁸⁰ Indeed, there are two barriers to these provisions

276. See BAILEY, *supra* note 145, at 53–54, 60–75.

277. U.N. Charter art. 31.

278. U.N. Charter art. 32.

279. The Permanent Representative of India to the United Nations, Letter dated 4 June 1998 from the Permanent Representative of India to the United Nations Addressed to the President of the Security Council, at 1, U.N. Doc. S/1998/464 (June 4, 1998) (reporting that India complained, during the debates leading up to the adoption of Resolution 1172, that the Security Council “disregarded [Article 31] by not giving India an opportunity to participate in the discussions on this draft,” thus showing how the Security Council “is neither open nor transparent”). *But see* U.N. SCOR, 2666th mtg. at 2–5, U.N. Doc. S/PV.2666 (Feb. 24, 1986) (noting that the President of the Security Council made it clear that some States that were not necessarily welcome during the debates over Iraq’s use of chemical weapons against Iran were nonetheless allowed to participate).

280. U.N. Doc. S/PV.5500, *supra* note 149, at 2 (reporting that Iran complained that the President of the Security Council did not allow it to address the Council before the vote for Resolution 1696, even though it had requested such an opportunity on several occasions, thus reflecting “the degree of the Council’s transparency and fairness that it has adopted a presidential statement and a resolution without even allowing the views of the concerned party to be heard”).

providing a considerable degree of protection for target States: first, such States must be *invited* by the Security Council, and second, the Security Council is free to refer to the questions and disputes under its consideration under Articles 31 and 32 as “issues,” “concerns,” “matters,” or any other euphemism that would relieve the Security Council of having to decide whether to extend an invitation, or instead assert that the *party* to the dispute is not a State at all.²⁸¹ Assuming that such States are liberally granted the ability to actively participate in Security Council debates, they neither have the right to a reasoned decision from the Security Council that can stand up to scrutiny nor the possibility of appeal,²⁸² among other standard due process safeguards.

Nevertheless, critics reasonably could argue that the Security Council is becoming more conscious of due process considerations. For example, the Security Council demonstrated its understanding of the significance of due process when it established the ICTY and ICTR as subsidiary bodies and gave accused individuals such rights as the right to be present for the trial,²⁸³ in accordance with Article 14(3)(d) of the International Covenant on Civil and Political Rights.²⁸⁴ Although Security Council Resolutions 1267 and 1373 showed serious deficiencies in terms of due process, in that they required States to adopt sanctions “without delay” against suspected terrorists,²⁸⁵ these deficiencies gradually have

281. *But see* THE CHARTER OF THE UNITED NATIONS, *supra* note 264, at 497, 500–01 (asserting that a State-party to a dispute has the *right* to participate under Article 31, although it shows signs of confusing the role of permissive and obligatory language when relying on Rule 37 of the Provisional Rules of Procedure for support of that right and that Rule merely states that non-members *may* be invited to participate by the Security Council, thus putting the State on a “weak legal foundation”).

282. *See* Request for Indication of Provisional Measures, Concerning Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libya v. U.S.), Provisional Measures, 1992 I.C.J. 114, 124; *see also* Frederic L. Kirgis, Jr., *The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 527 (1995) (claiming that no judicial review is available, and thus the Security Council is left alone to decide how far to stretch the United Nation's purposes and principles). Please note that this was written before the *Lockerbie* case. *But see* Thomas M. Franck, *The “Powers of Appreciation”: Who is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT'L L. 519, 521–22 (1992) (comparing the *Lockerbie* case with the U.S. Supreme Court case, *Marbury v. Madison*, and suggesting that *Lockerbie* might also establish judicial review on the international level); John Dugard, *Judicial Review of Sanctions*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 83, 87 (Vera Gowlland-Debbas ed., 2001) (citing ICJ and ICTY review as examples).

283. *See* Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 21(4), U.N. Doc. S/RES/827 (May 27, 1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955/Annex art. 20(4)(d) (Nov. 8, 1994).

284. International Covenant on Civil and Political Rights, art. 14(3)(d), Dec. 16, 1966, 999 U.N.T.S. 171.

285. *See* S.C. Res. 1373, ¶ 1(c), U.N. Doc. S/RES/1373 (Sept. 28, 2001) (“Freeze without delay funds” (emphasis added)); S.C. Res. 1267, ¶ 2, U.N. Doc. S/RES/1267 (Oct. 15, 1999) (“Demands that the Taliban turn over Usama bin Laden without further delay” (empha-

been improved. Such an improvement is likely due to the pressure that European Union Member States and Switzerland placed on the Security Council to establish a delisting process for those who found themselves on the lists of terrorists maintained by the 1267 Committee;²⁸⁶ a delisting procedure was not included in Resolution 1526 but eventually was included in Resolution 1730.²⁸⁷ Despite this evidence of consciousness of due process safeguards, alleged violations of WMD obligations by such States as Iran and North Korea are not likely to inspire the Security Council to protect their due process rights in the same way as *individuals* before the international criminal tribunals or on Security Council committee terrorist lists.

As with Iraq's alleged WMD in 2002, there was no meaningful examination of the evidence that U.S. Secretary of State Colin Powell presented to the Security Council during a special meeting on February 5, 2003. Secretary Powell presented the U.S. case for invading Iraq to other foreign ministers for over an hour, and the other foreign ministers merely read their prepared speeches after Secretary Powell had finished his presentation.²⁸⁸ Where such sensitive topics as WMD and the possibility of invading another State that allegedly possesses such weapons is involved, one would hope that the standard of proof would be sufficiently high in order to avoid reliance on questionable evidence to make such a key determination. Perhaps clear and convincing evidence would be the most appropriate standard in cases in which military action is threatened, while non-military sanctions might be authorized on a lesser standard, such as a preponderance of the evidence.²⁸⁹ Possible reliance on

sis added)); see also S.C. Res. 1526, ¶ 1(a), U.N. Doc. S/RES/1526 (Jan. 30, 2004) ("Freeze without delay funds" (emphasis added)).

286. Richard Ryan, Permanent Representative of Ireland to the United Nations, Statement on Behalf of European Union, U.N. SCOR, 59th Sess., 4892nd mtg. at 23–24, U.N. Doc. S/PV.4892 (Jan. 14, 2004); Pierre Helg, Deputy Permanent Representative of Switzerland to the United Nations, *id.* at 28.

287. See S.C. Res. 1526, *supra* note 285; S.C. Res. 1730, U.N. Doc. S/RES/1730/Annex (Dec. 19, 2006). These procedures appear to have been modelled after the delisting procedures established by the Resolution 1267 Committee in November 2006, in which the entity on the list can petition its government of residence or citizenship to review the case. That government then approaches the government that initially put the entity on the list in order to consider the justifications for removal. Either government can request that the Committee remove the entity from the list, which can occur by consensus of the Committee members or by a decision of the Security Council. See Security Council 1267 Committee, Guidelines of the Security Council Committee Established Pursuant to Resolution 1267 (1999) for the Conduct of its Work, Nov. 7, 2002, as amended Nov. 29, 2006, at 7, available at http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf (last visited July 28, 2007). However, Resolution 1730 also provides listed entities the possibility of submitting delisting requests through the U.N. Secretariat. See S.C. Res. 1730, U.N. Doc. S/RES/1730/Annex (Dec. 19, 2006).

288. Müller, *supra* note 54, at 128.

289. Karel Wellens, *The UN Security Council and New Threats to the Peace: Back to the Future*, 8 J. CONFLICT & SECURITY L. 15, 23 (2004).

classified information provided by national intelligence services further exacerbates the hypothetical problem of the Security Council meeting evidentiary standards.²⁹⁰ Perhaps the Security Council might want to establish some procedural rules for admitting evidence under its powers provided by Article 30. For example, the Security Council might allow evidence from treaty bodies, but require certain corroboration of evidence provided by national intelligence networks,²⁹¹ at least where military actions are proposed. In addition, a procedure of advocacy might also be useful where one State would act as impartial prosecutor and the other as defense counsel, which is largely what already happens informally, and with the target State having a *right* to participate in the deliberations.²⁹² The Security Council might also place considerable weight on determining a target State's intent, much like a criminal judge or jury would be asked to do, which could be done by calling in an expert group to assess the evidence and by calling neighboring States as witnesses.²⁹³ With all of this information, the Security Council would be in the best position to craft its response specifically to the intents of the target State and the magnitude of the threat.

While the Security Council is a political body and not a court of law, and could conceivably act without any significant evidence as support,²⁹⁴ such a baseless action would forfeit whatever legitimacy the Security Council has if such arbitrariness were to be made public. As Inger Österdahl notes,

It is not illegal on the part of the Security Council to be arbitrary, but if it becomes apparent that its choice of situations in which to intervene is arbitrary, both in the sense that some situations are intervened in but not others presenting the same characteristics, and that the situations in which the Council does intervene are very different from one another and the Council does not convincingly or consistently show in its resolutions why it intervenes in these situations, or precisely what makes these situations worthy of Security Council consideration, then the de-

290. SIMON CHESTERMAN, *SHARED SECRETS: INTELLIGENCE AND COLLECTIVE SECURITY* 47–54 (2006).

291. Müller, *supra* note 54, at 133.

292. *Id.*

293. *Id.* at 121, 133–34.

294. See Gowlland-Debbas, *supra* note 10, at 364 (asserting that “the violation [of international law] becom[es] therefore a constituent element of the threat to, or breach of, the peace”). However, a violation of international law is not necessarily needed for the Security Council to find a threat to the peace.

cisions and the possible follow-up action of the Security Council risk losing a large measure of legitimacy.²⁹⁵

By adding these types of due process safeguards, the Security Council would run less of a risk of relying on incorrect evidence and losing its legitimacy, as could have occurred had it authorized the use of force in Resolution 1441 based on Secretary Powell's presentation of U.S. evidence for going to war with Iraq.

e. Imposing Treaty Obligations

Finally, there is the legal question of whether Resolution 687 imposed *treaty* obligations on Iraq. Paragraph 7 of Resolution 687 invited Iraq to ratify the Biological Weapons Convention (BWC),²⁹⁶ as well as to reaffirm its obligations under the 1925 Geneva Gas Protocol and the NPT.²⁹⁷ The reaffirmation of Iraq's obligations under the 1925 Geneva Gas Protocol and the NPT could rise to the level of coercive disarmament measures, though this question already has been addressed in Section III(c)(1) above. This Section focuses on the invitation to Iraq to ratify the BWC, and whether this creates any legal obligations.

The problematic part of this provision is the word "invites," which does not constitute the imposition of a legally binding obligation. Some commentators disagree. Max Hilaire sees this particular provision of Resolution 687 as "forc[ing] Iraq to comply with its international treaty obligations, some of which the Iraqi parliament had not ratified,"²⁹⁸ namely, those international treaty obligations in the BWC. Thomas Franck likewise concludes that Resolution 687 "oblig[es] Iraq, even as a non-party, to comply with the [Biological Weapon] Convention's norms, arguably because they have become customary international law, and because the intent to comply in future [sic] can best be attested by ratification."²⁹⁹ To interpret "invites" as "requires" seems a stretch, at least from a textual perspective. If this was the case, and Resolution 687 required Iraq to join the BWC, Iraq might try to argue that its ratification is void on account of Security Council coercion. Iraq never has claimed this, even though the Saddam Hussein regime proved to be non-compliant with virtually every other disarmament obligation it had.

295. INGER ÖSTERDAHL, *THREAT TO THE PEACE: THE INTERPRETATION BY THE SECURITY COUNCIL OF ARTICLE 39 OF THE UN CHARTER* 103–10 (1998).

296. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (BWC), Apr. 10, 1972, 26.1 U.S.T. 583, 1015 U.N.T.S. 163.

297. S.C. Res. 687, *supra* note 60, ¶¶ 7, 11.

298. See HILAIRE, *supra* note 204, at 216.

299. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 233 (1995).

Alternatively, perhaps Saddam Hussein had good legal advice that such an argument would not be successful, since Article 52 of the Vienna Convention, which states that coercion of a State by the threat or use of force releases the coerced State from its obligation, has an exception for the threat or use of force that is not prohibited by the U.N. Charter, namely, the threat or use of force flowing from the Security Council.

Some commentators assert that Resolution 687 altered Iraq's treaty rights under the NPT. NPT Article IV(1) acknowledges the "inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with articles I and II of this Treaty."³⁰⁰ NPT Article IV(2) allows States parties "to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy."³⁰¹ Dorinda Dallmeyer asserts that the Security Council did not allow such civilian use when it adopted Resolution 687 due to the distrust Iraq created by developing a nuclear weapons program while party to the NPT.³⁰² However, paragraph 12 of Resolution 687 only requires Iraq "not to acquire or develop nuclear weapons or nuclear-weapon-usable material or any subsystems or components or any research, development, support or manufacturing facilities related to the above"³⁰³ In support of the idea that Iraq was still free to develop nuclear energy for peaceful purposes, paragraph 13 of Resolution 687 calls for the IAEA Director-General, through the U.N. Secretary-General and UNSCOM, to come up with a plan to monitor and verify Iraq's compliance with the nuclear aspects of this resolution "including an inventory of all nuclear material in Iraq subject to the Agency's verification and inspections to confirm that Agency safeguards cover all relevant nuclear activities in Iraq"³⁰⁴ That same paragraph referred to Iraq's "rights and obligations" under the NPT.³⁰⁵ The Security Council likely would not have used this language if it were simultaneously stripping Iraq of its ability to develop its peaceful use of nuclear energy, even though there admittedly is a fine line between developing nuclear energy for peaceful and for aggressive purposes.³⁰⁶ Instead of Resolution 687, paragraph 3(f) of Resolution 707 interfered with Iraq's NPT rights to develop nuclear energy for peaceful

300. The Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 56, art. IV(1).

301. *Id.* art. IV(2).

302. Dallmeyer, *supra* note 188, at 136.

303. S.C. Res. 687, *supra* note 60, ¶ 12.

304. *Id.* ¶ 13.

305. *Id.*

306. See THAKUR, *supra* note 3, at 172 ("For nuclear energy for peaceful purposes can be pursued legitimately to the point of being a screwdriver away from a weapons capability.").

purposes, because it required Iraq to “[h]alt all nuclear activities of any kind, except for use of isotopes for medical, agricultural or industrial purposes, until the Council determines that Iraq is in full compliance with the present resolution and with paragraphs 12 and 13 of Resolution 687 (1991) and the Agency determines that Iraq is in full compliance with its safeguards agreement with the Agency”³⁰⁷ Therefore, it is true that the Security Council coercively removed Iraq’s NPT right to develop nuclear energy for peaceful purposes. Not only this, but paragraph 4 of Resolution 707 also divested Iraq of its ownership rights in the WMD and WMD-related materials that UNSCOM “destroyed, removed, or rendered harmless,” which property conceivably had a value of many millions of dollars.³⁰⁸ Under U.N. Charter Article 103, the Security Council has the power to divest States of such treaty-based and contract-based rights, in addition to overriding all other conflicting obligations.

E. India, Pakistan, and Resolution 1172

India and Pakistan have had nuclear ambitions since the 1960s, when China was developing its nuclear weapons. India appears to have tested a nuclear device in 1974 in what some refer to as the “Smiling Buddha” tests in the Rajasthan Desert,³⁰⁹ which led Pakistan to begin its nuclear development program. Pakistan tested an intermediate-range nuclear missile in April 1998 that it had named after a twelfth-century Muslim warrior responsible for having conquered a part of India, which prompted India to conduct five underground nuclear tests the following month.³¹⁰ Pakistan responded with five nuclear tests of its own just two weeks later.³¹¹ Pakistan’s provocation in 1998 is somewhat surprising, given that Pakistan prided itself on being a leader in WMD non-proliferation issues in South Asia before it tested its nuclear device in 1998,³¹² and even asserted that it offered a bilateral test ban with India that India rejected,³¹³ only to change its approach when it appeared that

307. S.C. Res. 707, *supra* note 220, ¶ 3(f).

308. *Id.* ¶ 4.

309. *India and Pakistan: Tense neighbours*, BBC NEWS, Dec. 16, 2001, http://news.bbc.co.uk/1/hi/world/south_asia/102201.stm.

310. *Id.*

311. *Id.*

312. See Letter from Ahmad Kamal, Permanent Representative of Pakistan to the United Nations, to the Secretary-General, United Nations (May 29, 1998), at 2, U.N. Doc. A/52/920 (June 1, 1998), <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/150/83/pdf/N9815083.pdf?OpenElement>.

313. Letter from Ahmad Kamal, Permanent Representative of Pakistan to the United Nations, to the Secretary-General, United Nations (July 2, 1998), at 8, U.N. Doc.

the testing of its own nuclear devices was needed in order to defend itself and to deter aggression.³¹⁴

India and Pakistan's nuclear tests in 1998 took most of the world by surprise. Prophetically, before India's nuclear tests in 1996, Thakur pointed out that "[f]aced with U.S.-led United Nations coercion, an isolated, sullen, and resentful India is more likely to respond with an open nuclear programme, including a . . . series of nuclear tests."³¹⁵ The initial response from the Security Council was a statement by its President, reiterating the special statement that had been made by all Security Council member heads of State on January 31, 1992, that the "proliferation of all weapons of mass destruction constitutes a threat to international peace and security."³¹⁶ Resolution 1172 was adopted three weeks later, on June 6, 1998, and not only "[c]ondemn[ed] the nuclear tests,"³¹⁷ but also "[d]emand[ed] that India and Pakistan refrain from further nuclear tests. . . ."³¹⁸ Interestingly, the Foreign Ministers of the permanent members of the Security Council apparently "called on both countries to refrain from carrying out new nuclear tests" and "appealed to [them] to adhere to the Nuclear-Test-Ban Treaty and to the Treaty on the Non-Proliferation of Nuclear Weapons" on June 4, 1998.³¹⁹ Therefore, in the intervening two days before the resolution was adopted on June 6, somehow the statement rose to the level of a *demand*, which reflects a clear imposition of obligations on India and Pakistan.

Particularly relevant is that neither India nor Pakistan had committed to the CTBT, so the Security Council imposed one element of that treaty on these States. One element is in CTBT Article I, which requires State parties "not to carry out any nuclear weapon test explosion or any other nuclear explosion, and to prohibit and prevent any such nuclear explo-

S/1998/605 (July 6, 1998), <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/194/01/img/N9819401.pdf?OpenElement>.

314. See Letter from Ahmad Kamal, Permanent Representative of Pakistan to the United Nations, to the Secretary-General, United Nations (May 29, 1998), *supra* note 312, at 2.

315. Ramesh Thakur, *Nuclear India Needs Coaxing, Not Coercion*, AUSTL., Sept. 6, 1996, *quoted in* THAKUR, *supra* note 3, at 163.

316. Provisional Verbatim Record of the Three Thousand and Forty-Sixth Meeting, U.N. SCOR 47th Sess., 3046th mtg. at 145, U.N. Doc. S/PV.3046 (Jan. 31 1992).

317. S.C. Res. 1172, *supra* note 63, ¶ 1.

318. *Id.* ¶ 3.

319. U.N. SCOR, 53d Sess., 3890th mtg. at 5, U.N. Doc. S/PV.3890 (June 6, 1998) [hereinafter U.N. Doc. S/PV.3890]; Letter dated 5 June 1998 from the Permanent Representatives of China, France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations to the President of the Security Council, U.N. Doc. S/1998/473 (June 5, 1998) ("India and Pakistan should therefore stop all further such tests. . . . To reinforce security and stability in the region and more widely, the Five strongly believe that India and Pakistan should adhere to the [CTBT] immediately and unconditionally, thereby facilitating its early entry into force.").

sion at any place under its jurisdiction or control.”³²⁰ Slovenia—one of the four sponsors of the draft resolution that became Resolution 1172—acknowledged that India and Pakistan “legitimately argue[d] that they ha[d] not violated any of their treaty obligations,” which made it necessary for the Security Council to create an obligation that India and Pakistan refrain from future nuclear testing, so that they legally could be held responsible if they were to continue their testing.³²¹ In light of this statement, at least one sponsor of the Resolution 1172 saw this resolution as expressly creating treaty-type obligations for India and Pakistan. Notably, the Security Council did not impose the entirety of the CTBT on India and Pakistan, as was done by Resolution 1737 in requiring North Korea to abide by the NPT. Nevertheless, Resolution 1172 clearly imposed a portion of the CTBT on both India and Pakistan. The ultimate result was not that India and Pakistan joined the CTBT or NPT, as some States had hoped.³²² Instead, India and Pakistan both declared a moratorium on nuclear tests,³²³ which essentially gave effect to the requirement imposed by paragraph 3. India apparently expressed its willingness to convert this so-called unilateral moratorium into a formal obligation,³²⁴ although India was too late for that, since Resolution 1172 already had done so.

Paragraph 7 of Resolution 1172 imposes an obligation less formally on India and Pakistan. The Security Council

[c]all[ed] upon India and Pakistan immediately to stop their nuclear weapon development programmes, to refrain from weaponization or from the deployment of nuclear weapons, to cease development of ballistic missiles capable of delivering nuclear weapons and any further production of fissile material for nuclear weapons, to confirm their policies not to export equipment, materials or technology that could contribute to weapons of mass destruction or missiles capable of delivering them and to undertake appropriate commitments in that regard. . . .³²⁵

This provision imposes more than just some of the CTBT and NPT commitments on States not party to these treaties, and also limits their ability to develop certain ballistic missiles and to engage in certain types

320. Comprehensive Nuclear-Test-Ban Treaty, *supra* note 62, art. I, ¶ 1.

321. U.N. Doc. S/PV.3890, *supra* note 319, at 6.

322. *See id.* at 3, 9, 13.

323. The Secretary-General, Letter dated 8 July 1998 from the Secretary-General addressed to the President of the Security Council, ¶ 7, U.N. Doc. S/1998/619 (July 9, 1998).

324. *Id.*; The Permanent Representative of India to the United Nations, Letter dated 9 June 1998 from the Permanent Representative of India to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1998/489 (June 10, 1998).

325. S.C. Res. 1172, *supra* note 63, ¶ 7.

of trade. Neither India nor Pakistan had entered treaties that impose these obligations on them, so this resolution imposes new disarmament and arms control limitations on these two States.

To come to the conclusion that paragraph 7 imposes obligations on India and Pakistan, it is necessary to recall the analysis of “calls upon” provided in Section III(B) above. Despite the theoretical generalizations there, States ascribed varying levels of significance to this signal during the debates on Resolution 1172. On one end of the spectrum, China saw Resolution 1172 as demanding “in explicit terms” that India and Pakistan adhere to the CTBT and the NPT,³²⁶ not just to the provision of the CTBT that prohibits nuclear testing, thus indicating that China sees the language “calls upon” in paragraph 7 as imposing a binding obligation. At the other end of that spectrum, Costa Rica saw Resolution 1172 as “a *vehement and vigorous appeal* to India and Pakistan to cease immediately the development of nuclear weapons and, as soon as possible, to accede unconditionally to the Treaty on the Non-Proliferation of Nuclear Weapons and the Comprehensive Nuclear-Test-Ban Treaty.”³²⁷ Use of the word “appeal” indicates that the “calls upon” language of Resolution 1172 does not contain coercive measures. Just like Japan, Brazil, and the European Union,³²⁸ Costa Rica’s statement reflects the idea that Resolution 1172 was designed to push India and Pakistan into joining the CTBT and the NPT.³²⁹ Others that fall between these two ends show signs of confusion. France, for example, asserts that India and Pakistan “*must* also display restraint and demonstrate, by acting in accordance with the Security Council’s *requests*, their willingness to commit themselves to this path [of peace by giving up their nuclear weapon development programmes],”³³⁰ thus reflecting a slight paradox that India and Pakistan are *bound* to exercise their *choice* in a particular manner, which makes little sense. One could interpret the U.S. statement as reflecting a belief that these provisions were merely recommendatory. It stated that the intent was to “convince them it is in their own national security interests to do what the international community is *urging* them to do,” which was to sign and ratify the CTBT immediately and without conditions.³³¹ However, Resolution 1172 is not being construed here to imply an obligation

326. U.N. Doc. S/PV.3890, *supra* note 319, at 12.

327. *Id.* at 7 (emphasis added).

328. *Id.* at 3 (reporting that Japan hoped that the imposition of this obligation on India and Pakistan under the Security Council resolution would “urge them to become parties to the NPT and the CTBT without delay and without conditions”); *see also id.* at 9 (reporting that Brazil called for India and Pakistan to join the CTBT); *id.* at 13 (noting that the European Union, through the United Kingdom, urged India and Pakistan to join the CTBT).

329. *Id.* at 7.

330. *Id.* at 11 (emphasis added).

331. *Id.* at 8.

to join the CTBT, but rather as to impose certain CTBT and NPT provisions on India and Pakistan without them being members of the CTBT or the NPT, but with the ultimate, implicit hope that they would join the CTBT and the NPT.

Perhaps even more interesting than the imposition of the obligations in paragraph 7, the second half of paragraph 3 of Resolution 1172 imposed obligations on all States that were of the same nature as those imposed on India and Pakistan in the first half of that paragraph.³³² Indeed, the second half of paragraph 3 “in this context *calls upon* all States not to carry out any nuclear weapon test explosion or any other nuclear explosion in accordance with the provisions of the Comprehensive Nuclear Test Ban Treaty.”³³³ This provision arguably imposes obligations on all States to abide by Article I of the CTBT, which requires State parties “not to carry out any nuclear weapon test explosion or any other nuclear explosion”³³⁴ Just as some States had hoped that the imposition of the CTBT obligations on India and Pakistan would lead them to join the CTBT, there is some evidence in the verbatim record that at least France hoped that the imposition of an obligation on all States to refrain from testing their nuclear weapons would lead to them joining the CTBT “without delay and without conditions.”³³⁵ Gambia was another State that supported this resolution because it “reiterate[ed] its firm conviction that nuclear disarmament is an obligation of all States without exception.”³³⁶ The same was true for Slovenia, which emphasized the “importance of universal adherence to the NPT and the CTBT, which are essential foundations for the pursuit of nuclear disarmament.”³³⁷ Such language in the resolution likely was a concession that the permanent members of the Security Council had to give during their canvassing efforts to secure the support needed to adopt this resolution.

Before discussing the particular language in Resolution 1172, however, it is important to note one general Security Council policy that Resolution 1172 seemed to establish. During the debates on Resolution 1172, Costa Rica asserted that, with this resolution condemning India’s and Pakistan’s tests, the Security Council established a “substantive policy of condemning test explosions of nuclear weapons as well as any other type of nuclear explosion, in accordance with the provisions of the

332. S.C. Res. 1172, *supra* note 63, ¶ 3.

333. *Id.*

334. Comprehensive Nuclear-Test-Ban Treaty, *supra* note 62, art. I.

335. U.N. Doc. S/PV.3890, *supra* note 319, at 10. Interestingly, France has signed but not yet ratified the CTBT.

336. *Id.*

337. *Id.* at 6.

Comprehensive Nuclear-Test-Ban Treaty.”³³⁸ Such a policy would complement the policy that all WMD proliferation issues create a threat to international peace and security, as was first established by the 1992 statement of the President of the Security Council³³⁹ and reaffirmed by the first preambular paragraph of Resolution 1540.³⁴⁰ The response of the Security Council to Iran and North Korea in 2006 emphasizes the veracity of Costa Rica’s assertion. This policy does not absolve the need for the Security Council to weigh the facts on a case-by-case basis before condemning such tests, or otherwise establish a default rule that Security Council members can rely on in condemning future actions. Nevertheless, States that plan on testing nuclear weapons can expect a strong condemnation from the Security Council, unless the State is a permanent member of the Security Council, in which case the condemnation will have to come in the form of international public opinion. This is exactly what France experienced in 1973, when it tested its nuclear weapons in the South Pacific, until it agreed to move its testing underground, and again when French President Jacques Chirac announced in 1995 that France would yet again test its nuclear weapons in the South Pacific. Although there have not been overt nuclear tests since 1998, the Security Council’s strength in condemning the recent activities of Iran and North Korea indicate that this policy likely still remains, and perhaps even in an intensified form.

The main legal issue arising from this resolution—apart from the legal significance of “calls upon”—deals with the ability of the Security Council to impose treaty-based obligations on all States. The CTBT has not even entered into force for those States that have signed and ratified it, yet the Security Council is imposing the substance of its provisions on States nonetheless. The principal question is whether this resolution actually imposes obligations on all States, assuming that “calls upon” reflects a decision of the Security Council, as asserted in Section III(B) above. In particular, does “in this context” in paragraph 3 qualify this Security Council decision to the point that it has little meaning outside of India’s and Pakistan’s tests? If this were the case, it essentially would read all meaning out of the requirement that all States refrain from carrying out nuclear tests, since only India and Pakistan had independently tested nuclear devices in 1998. Therefore, this interpretation would not seem appropriate.

338. *Id.* at 7.

339. The President of the Security Council, Note by the President of the Security Council, U.N. Doc. S/23500 (Jan. 31, 2002).

340. S.C. Res. 1540, *supra* note 64, pmb. ¶ 1.

To summarize, Resolution 1172 requires all States to comply with Article I of the CTBT. This language marks the beginning of a universalism movement for disarmament and arms control law, where all States—even non-parties to disarmament and arms control treaties—have had disarmament and arms control obligations placed on them by the Security Council. The resolutions dealing with North Korea and Iran strengthen this general trend as well.

F. North Korea and Resolutions 1695 and 1718

This Section, addressing North Korea, is important for several reasons, including providing further evidence of the Security Council's pattern of imposing treaty obligations on States that violate WMD norms and of the pattern of emphasizing enforcement of these norms as opposed to mere regulation.³⁴¹ In addition, this Section demonstrates a new willingness of the Security Council to impose obligations on States that have—or are believed to have—nuclear weapons. This is significant because some commentators saw the Security Council as being rarely involved in disarmament and arms control issues, and, when it did get involved, as too weak on cases of alleged non-compliance, such as in 1993 when the Security Council left resolution of North Korea's attempt to leave the NPT to bilateral negotiations led by the United States.³⁴² Moreover, before the resolutions against North Korea that are discussed in this Section were adopted, commentators thought that the different priorities of the permanent members of the Security Council concerning disarmament and non-proliferation would make it difficult for the Security Council to take action against States protected by a so-called veto umbrella of a permanent member.³⁴³ However, as with the measures taken against North Korea that are discussed in this Section, the permanent members of the Security Council—especially China—have shown a surprising willingness to reassess alliances and take coercive measures against former client-States when WMD issues are involved.

341. See *supra* text accompanying note 261.

342. Müller, *supra* note 54, at 127, 129; Berhanykun Andemicael, *Nuclear Verification in North Korea and Iran*, in *SWORDS INTO PLOWSHARES: BUILDING PEACE THROUGH THE UNITED NATIONS* 123, 131 (Roy S. Lee ed., 2006).

343. Kono, *supra* note 177, at 106; see also Müller, *supra* note 54, at 129 (“Politics and national idiosyncrasies repeatedly got in the way of fair and appropriate decision-making on WMD non-compliance.”); THAKUR, *supra* note 3, at 168 (“Pyongyang has yet to face any consequences for its serial brinkmanship, hiding safely behind P5 disagreement on any appropriate policy response.”).

North Korea has had a long and shaky relationship with the rest of the international community when it comes to its WMD activities.³⁴⁴ The primary legal issue that the international community struggles with is whether North Korea can leave the NPT regime. NPT Article X(1) provides States with the ability to withdraw from the NPT:

Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.³⁴⁵

North Korea agreed to a Safeguards Agreement with the IAEA in 1992, apparently in response to the U.S. removal of its tactical nuclear weapons from South Korea.³⁴⁶ Article 26 of that Safeguards Agreement states the following: "This Agreement shall remain in force as long as the Democratic People's Republic of Korea is party to [the NPT]."³⁴⁷ In light of these two provisions, North Korea's obligations would cease if it ever withdrew from the NPT. The following paragraphs discuss the difficulties that have arisen over North Korea's efforts to withdraw.

North Korea began its efforts to develop peaceful nuclear energy in the 1980s with Soviet assistance, which led North Korea to join the NPT in 1985.³⁴⁸ North Korea allowed six inspections of its nuclear facilities before denying access to two facilities based on the assertion that they were conventional military facilities.³⁴⁹ Suspicions quickly arose over North Korea's production of plutonium due to the fact that the IAEA found an inconsistency between what it reported and what the IAEA found in an analysis of North Korea's nuclear waste.³⁵⁰ Resenting the

344. Most recently, newspapers have alleged that North Korea has shared its nuclear knowledge with Iran. *See N. Korea denies sharing nuke secrets with Iran*, CNN.com, Jan. 27, 2007, <http://www.cnn.com/2007/WORLD/asiapcf/01/27/koreas.nuclear/index.html>.

345. The Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 56, art. X(1).

346. Andemicael, *supra* note 342, at 127.

347. Agreement of 30 January 1992 between the Government of the Democratic People's Republic of Korea and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons art. 26, INF/CIRC/403 (May 1992).

348. Andemicael, *supra* note 342, at 127.

349. *See, e.g.*, U.N. SCOR, 48th Sess., 3212 mtg. at 53, U.N. Doc. S/PV.3212 (May 11, 1993) (noting that the United Kingdom mentioned these inspections) [hereinafter U.N. Doc. S/PV.3212]; John F. Murphy, *Force and Arms*, in 1 UNITED NATIONS LEGAL ORDER 247, 314-15 (Oscar Schachter & Christopher Joyner eds., 1995).

350. Andemicael, *supra* note 342, at 127.

allegations of wrong-doing, North Korea announced its withdrawal from the NPT on March 12, 1993.³⁵¹ The IAEA Board of Governors referred North Korea to the Security Council on April 1, 1993, according to IAEA Statute Article XII(c), after the Board had determined that North Korea was in violation of its safeguards agreement with the IAEA.³⁵² Meanwhile, the depositories of the NPT—Russia, the United States, and the United Kingdom—challenged North Korea’s reasons for withdrawal,³⁵³ while the Security Council refrained from challenging these reasons.³⁵⁴ Instead, the Security Council “call[ed] upon [North Korea] to honour its non-proliferation obligations under the Treaty and comply with its safeguards agreement with the IAEA as specified by the IAEA Board of Governors’ resolution of 25 February 1993.”³⁵⁵ Given the analysis of “calls upon” provided in Section III(B) above, this is not an insignificant measure that the Security Council took in imposing the obligations of the NPT and the safeguards agreement on North Korea.³⁵⁶ In fact, the United Kingdom even asserted that North Korea remains bound by its safeguards agreement despite its attempts to withdraw from the NPT.³⁵⁷ Although North Korea claimed in the Security Council debates that it had acted legally by withdrawing from the NPT,³⁵⁸ the members of the Security Council were clearly of a different opinion.³⁵⁹

On the day before the ninety-day notification period was to expire under NPT Article X(1),³⁶⁰ North Korea suspended its withdrawal after the United States and North Korea agreed on the points that would later become the U.S.-North Korea Agreed Framework, in which North Korea committed to freeze its nuclear reactors and reprocessing plants in exchange for needed economic assistance, including two nuclear reactors that did not pose a threat to WMD proliferation and fuel oil pending the construction of those reactors.³⁶¹ In the years following this agreement,

351. See generally DEN DEKKER, *supra* note 21, at 298.

352. Murphy, *supra* note 349, at 315.

353. See, e.g., U.N. Doc. S/PV.3212, *supra* note 349, at 54.

354. S.C. Res. 825, *supra* note 61, pmb. ¶ 7 (noting, however, that the depositories challenged North Korea’s stated reasons for withdrawing from the NPT); see also Müller, *supra* note 54, at 127 (noting that certain permanent members likely were reluctant to challenge North Korea’s reasons for withdrawing because they did not want to establish a precedent and later be challenged when they themselves decide to withdraw from a treaty).

355. S.C. Res. 825, *supra* note 61, ¶ 2.

356. But see SUTTERLIN, *supra* note 2, at 107 (asserting that Resolution 825 contained only “admonitory” language).

357. Provisional Verbatim Record, *supra* note 349, at 54.

358. See, e.g., *id.* at 7, 36.

359. See generally *id.*

360. Douglas Jehl, *North Korea Says It Won’t Pull Out of Arms Pact Now*, N.Y. TIMES, June 12, 1993, at A11.

361. See, e.g., Carle, *supra* note 28.

the United States failed to provide all of the promised assistance and continued to criticize North Korea. North Korea announced its withdrawal from the NPT again in 2003, though this time it declared “an automatic and immediate effectuation of its withdrawal from the NPT.”³⁶² Quite a debate has arisen over whether this withdrawal was valid because North Korea failed to wait the requisite ninety days after notification.³⁶³ However, all of these commentators fail to remember that North Korea simply had suspended its withdrawal from the NPT in 1993, thus suggesting that North Korea had waited more than the required time before officially withdrawing.³⁶⁴

Regardless, there has been confusion in the Security Council over whether North Korea had withdrawn from the NPT. In preambular paragraph 10 of Resolution 1695, adopted in response to its test of ballistic missiles capable of delivering its WMD and North Korea’s withdrawal from the NPT, the Security Council expressly “[d]eplor[ed] [North Korea’s] announcement of withdrawal from the [NPT] and its stated pursuit of nuclear weapons in spite of its treaty on Non-Proliferation of Nuclear Weapons and [IAEA] safeguards obligations”³⁶⁵ Use of the word “announcement” in “announcement of withdrawal” is interesting, as it suggests a distinction from an actual withdrawal. Operative paragraph 6 of Resolution 1695 also strongly urged North Korea to “return at an early date to the Treaty on Non-Proliferation of Nuclear Weapons and International Atomic Energy Agency safeguards”³⁶⁶ Operative paragraphs trump preambular paragraphs, although one need not establish the existence of hierarchy between these paragraphs, since Resolution 1718 clarified this issue just three months later, when it “[d]emand[ed]

362. *North Korea: Statement On Pullout*, N.Y. TIMES, Jan. 11, 2003, at A7 (“Systematically violating the D.P.R.K.-U.S. Agreed Framework, the U.S. brought up another ‘nuclear suspicion’ and stopped the supply of heavy oil, reducing the Agreed Framework to a dead document.”).

363. See, e.g., Christopher Le Mon, *Did North Korea’s Nuclear Test Violate International Law?*, OPINIO JURIS, Oct. 9, 2006, <http://www.opiniojuris.org/posts/1160382356.shtml>; Frederic L. Kirgis, *North Korea’s Withdrawal from the Nuclear Nonproliferation Treaty*, ASIL INSIGHTS, January 2003, available at <http://www.asil.org/insights/insigh96.htm>.

364. The purpose of this Section is not to assess the legality of North Korea’s actions. Although it is inappropriate to separate these two incidents, quite a few commentators see North Korea’s withdrawal efforts in 2003 in isolation from the 1993 withdrawal efforts. Thus they would take issue with North Korea’s allegedly faulty withdrawal in 2003 without the requisite notification. See, e.g., PASCAL TEIXEIRA, *THE SECURITY COUNCIL AT THE DAWN OF THE TWENTY-FIRST CENTURY: TO WHAT EXTENT IS IT WILLING AND ABLE TO MAINTAIN INTERNATIONAL PEACE AND SECURITY?* 84 (United Nations Publication 2003); THAKUR, *supra* note 3, at 171; SUTTERLIN, *supra* note 2, at 107.

365. S.C. Res. 1695, *supra* note 65, ¶ 10.

366. *Id.* ¶ 6.

further that [North Korea] return to the [NPT] and [IAEA] safeguards[.]”³⁶⁷

Despite the question of whether North Korea validly left the NPT, Resolution 1718 makes it clear that North Korea still has obligations under the NPT. Resolution 1718 was adopted just five days after North Korea detonated a one-kiloton nuclear device underground that registered a 4.2 on the Richter scale.³⁶⁸ Therefore, one gets a sense of greater urgency when reading Resolution 1718 *vis-a-vis* Resolution 1695. In particular, operative paragraph 6 of Resolution 1718 obliges North Korea to abide by the NPT and its Safeguards Agreement:

*[The Security Council d]ecides that [North Korea] shall abandon all nuclear weapons and existing nuclear programmes in a complete, verifiable, and irreversible manner, shall act strictly in accordance with the obligations applicable to parties under the Treaty on the Non-Proliferation of Nuclear Weapons and the terms and conditions of its [IAEA] Safeguards Agreement.*³⁶⁹

Not only did this resolution force North Korea back to the NPT and the Safeguards Agreement, which, in theory, it previously had been allowed to withdraw from, but the resolution extended North Korea’s obligations beyond the obligations it had under the NPT and the Safeguards Agreement.

1. Imposing Treaty Obligations on North Korea

The main legal issue that arises here is the Security Council’s ability to impose treaty obligations on North Korea. The Security Council seems to concede that North Korea successfully withdrew from the NPT. Yet Resolution 1718 requires North Korea to return to the NPT, thus imposing an entire international treaty on a non-party (or former party) to that treaty. Resolution 1718 also extends North Korea’s obligations beyond the obligations it had had under the NPT and the Safeguards Agreement in at least two ways. First, whereas States can withdraw from treaties either according to specific treaty provisions, such as NPT Article X, or according to VCLT Article 56,³⁷⁰ no mechanism currently exists for allowing withdrawal from Security Council resolutions, some of which make North Korea’s NPT obligations differ from the obligations of other State parties to the NPT. Second, Resolution 1718 strips North Korea of one of its so-called inalienable rights. Under NPT Article

367. S.C. Res. 1718, *supra* note 65, ¶ 4.

368. David E. Sanger, *North Korea Says It Tested a Nuclear Device Underground*, N.Y. TIMES, Oct. 9, 2006, at A1.

369. S.C. Res. 1718, *supra* note 65, ¶ 6.

370. Vienna Convention on the Law of Treaties, *supra* note 157, art. 56.

IV(1), States have the “inalienable right” to “develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty.”³⁷¹ At least three Security Council Chapter VII resolutions reaffirm this inalienable right.³⁷² The Security Council’s references to these so-called inalienable rights conceivably might even estop the Security Council from changing its tune in the face of overwhelming pressure from key Western States to essentially re-write NPT Article IV(1). However, paragraph 6 of Resolution 1718, with its reference to “existing nuclear programmes” as opposed to “existing nuclear-weapons programmes” or its equivalent,³⁷³ makes it seem as though North Korea was required to give up even its nuclear programs to develop nuclear energy for peaceful purposes. Admittedly, this is not the first time that the Security Council has stripped a State of its inalienable right to nuclear energy for peaceful purposes, as it had done this with Iraq through Resolution 707.³⁷⁴ Admittedly, there is a fine line between development for peaceful purposes and development for aggressive purposes,³⁷⁵ and the Security Council has the power to override conflicting treaty obligations under Article 103. Nonetheless, this stripping of Iraq’s ability to develop its nuclear energy for peaceful purposes goes against what the Security Council has said on at least three other occasions and as provided for in NPT Article IV.

2. Imposing Treaty Obligations on All States

The other aspect to notice about Resolution 1718 is that the Security Council “*underlines* the need for all States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to continue to comply with their Treaty obligations”³⁷⁶ Although “underlines” is softer than “decides” or “demands,” it can nonetheless be read as constituting a Security Council decision to be followed in accordance with Article 25. The Security Council’s intent in that resolution is clear: to interfere with the

371. The Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 56, art. IV(1).

372. S.C. Res. 487, *supra* note 58, ¶ 4 (“[The Security Council *fully recognizes* the inalienable sovereign right of Iraq and all other States, especially the developing countries, to establish programmes of technological and nuclear development to develop their economy and industry for peaceful purposes in accordance with their present and future needs and consistent with the internationally accepted objectives of preventing nuclear-weapons proliferation[.]”); S.C. Res. 1696, *supra* note 66, pmb. ¶ 2 (“*Reaffirming* its commitment to the Treaty on the Non-Proliferation of Nuclear Weapons, and recalling the right of States Party, in conformity with Articles I and II of that Treaty, to develop research, production and use of nuclear energy for peaceful purposes without discrimination[.]”); S.C. Res. 1737, *supra* note 66, pmb. ¶ 2.

373. S.C. Res. 1718, *supra* note 65, ¶ 6.

374. S.C. Res. 707, *supra* note 220, ¶ 3(f).

375. See THAKUR, *supra* note 3, at 172.

376. S.C. Res. 1718, *supra* note 65, ¶ 4 (emphasis added).

ability of States to withdraw from the NPT in the future, thus modifying the obligations of all parties to the treaty. While the U.N. Charter's broad discretion to the Security Council in deciding what constitutes a threat to the peace means that it can stop North Korea from leaving the NPT,³⁷⁷ it is an entirely separate matter to interfere in the ability of all States to withdraw from the NPT.

G. Iran and Resolutions 1696 and 1737

Unlike North Korea, Iran seems to have been in compliance with the legal obligations created by the NPT and its Safeguards Agreement for many years before acting in violation of them.³⁷⁸ Problems began to arise in 2003 with what the IAEA called a general policy of concealment by Iran.³⁷⁹ Iran's sudden change in 2003 could have flowed from its sense of strategic vulnerability with significant U.S. forces surrounding it in Iraq and Afghanistan and with India and Pakistan as nuclear neighbors, coupled with U.S. support of Israel and the U.S. 2002 classification of Iran as a member of the Axis of Evil along with North Korea and Iraq.³⁸⁰ Regardless of Iran's reasoning, the Security Council imposed sanctions and obligations on Iran as a result of its concerns over Iran's nuclear program, which concerns arose from IAEA reports and resolutions that raised these issues, including the fear of militarization of its nuclear program.³⁸¹ Despite these fears, the IAEA has not alleged that Iran has diverted nuclear material for a military purpose, that Iran has broken an agreement concerning an IAEA project or that its acts constitute safety or health violations, thus suggesting that the fears concerning Iran's activities might be exaggerated.³⁸² Any one of these three factors can lead to a referral by the IAEA Board of Governors to the Security Council under IAEA Statute Article XII(c).³⁸³

Nonetheless, in Resolution 1696, the Security Council demanded that Iran "suspend all enrichment-related and reprocessing activities,

377. Kirgis, *supra* note 363.

378. Andemicael, *supra* note 342, at 128–29.

379. See generally Steven E. Miller, *Proliferation Gamesmanship: Iran and the Politics of Nuclear Confrontation*, 57 SYRACUSE L. REV. 551, 551–60 (2007) (discussing Iran's poor behaviour since 2003).

380. Andemicael, *supra* note 342, at 128–29.

381. See S.C. Res. 1696, *supra* note 66. Some commentators complain that it took too long for the Security Council to take action against Iran after the IAEA determined that Iran had violated its Safeguards Agreement. See Müller, *supra* note 54, at 129. However, the Security Council moves deliberately and carefully before imposing such disarmament and arms control measures.

382. See generally Michael Spies, *Iran and the Limits of the Nuclear Non-Proliferation Regime*, 22 AM. U. INT'L L. REV. 401, 424–35 (2007).

383. Statute of the International Atomic Energy Agency art. XII(c), Oct. 26, 1956, http://www.iaea.org/About/statute_text.html.

including research and development, to be verified by the IAEA . . .”³⁸⁴ There was general consensus among the permanent members of the Security Council that this provision created mandatory obligations for Iran.³⁸⁵ This imposition is a clear modification of Iran’s rights and obligations under the Iran-IAEA Safeguards agreement, in particular Article 37, which allows Iran a certain amount of natural and depleted uranium with a certain level of enrichment.³⁸⁶ In addition, NPT Article IV provides Iran with an inalienable right to develop its nuclear energy capabilities for peaceful purposes, a right that Iran often has emphasized but one that others have questioned due to the fact that Iran’s large oil reserves remove the credible civilian need for such development.³⁸⁷ Although IAEA Statute Article III(B)(4) requires the IAEA to notify the Security Council of activities that raise questions “within the competence of the Security Council,”³⁸⁸ it does not authorize the Security Council to do anything more than this. Moreover, the IAEA’s responses to alleged violations are limited by Article XII, which do not include the suspension of rights under Safeguard Agreements. Therefore, this would appear to be an example of the Security Council modifying disarmament obligations, which can be seen as equivalent to an imposition of new disarmament treaty obligations, since it is done within the IAEA context.

Even more crucial language in Resolution 1696 is in paragraph 6, in which the Security Council “*call[ed] upon* Iran to act in accordance with the provisions of the Additional Protocol and to implement without delay all transparency measures as the IAEA may request in support of its ongoing investigations.”³⁸⁹ Again, the legal significance of “calls upon” discussed in Section III(B)(1) is relevant here. The conclusion that “calls upon” creates binding obligations for the target State is even more persuasive here, where permanent members—most notably, Ambassador Bolton of the United States and Ambassador Emyr Jones Parry of the United Kingdom—asserted during debate on the resolution that these

384. S.C. Res. 1696, *supra* note 66, ¶ 2.

385. U.N. Doc. S/PV.5500, *supra* note 149, at 4–7; *see also* Letter dated 25 July 2006 from the Permanent Representative of France to the United Nations addressed to the President of the Security Council, at 1–2, U.N. Doc. S/2006/572 (July 26, 2006) (noting that it was the permanent members’ purpose to impose such a mandatory obligation on Iran when it sought to adopt a resolution in this case).

386. Agreement Between Iran and the Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, art. 37, Dec. 13, 1974, INF/CIRC/214, *available at* <http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc214.pdf>.

387. Andemicael, *supra* note 342, at 126; *see also* U.N. Doc. S/PV.5612, *supra* note 149, at 6 (providing France’s Permanent Representative Jean-Marc De La Sablière’s assertions on this matter).

388. Statute of the International Atomic Energy Agency, *supra* note 383, art. III(B)(4).

389. S.C. Res. 1696, *supra* note 66, ¶ 6.

provisions of Resolution 1696 that have the signal “calls upon” create part of the mandatory obligations of that resolution.³⁹⁰ The United States implied this same point with respect to the “calls upon” provisions of Resolution 1737.³⁹¹ This particular provision of Resolution 1696 is interesting because, while Iran joined the NPT in 1970 and agreed to a Safeguards Agreement that entered into force on May 15, 1974, it signed on December 18, 2003 but did not ratify an Additional Protocol with the IAEA.³⁹² Iran apparently signed it in response to U.S. allegations that it was developing nuclear weapons, and it wanted to show that its “activities are peaceful.”³⁹³ This Additional Protocol would have allowed unscheduled inspections of Iranian facilities, although the Protocol never entered into force. While Iran followed the Additional Protocol starting in 2003 and apparently allowed the IAEA considerable access under this Additional Protocol in order to conduct robust inspections,³⁹⁴ over 2,000 inspector-days of scrutiny between then and 2006, it changed its mind when the IAEA took up the issue of whether Iran had violated certain of its international obligations at the beginning of 2006.³⁹⁵

Iran appears to have been allowed to reject the Additional Protocol because it had not consented to the creation of any obligations under the Additional Protocol by ratifying that legally binding instrument. Certain obligations do arise after signing, as indicated in Article 18(a) of the VCLT, including “refrain[ing] from acts which would defeat the object

390. U.N. Doc. S/PV.5500, *supra* note 149, at 3–4; *id.* at 4 (recording that the United Kingdom asserts that Iran had an obligation to take the steps required by the IAEA, in accordance with the provision of the Additional Protocol, before the August 31, 2006, deadline established by Resolution 1696, ¶ 7, the obligation of which appears to have been established by Resolution 1696, ¶ 1, which began with “calls upon”).

391. U.N. Doc. S/PV.5612, *supra* note 149, at 2 (recording the United States’ implication that the provisions that start with the signal “calls upon” are among the requirements of this draft resolution).

392. See International Atomic Energy Agency, Safeguards and Verification, http://www.iaea.org/OurWork/SV/Safeguards/sg_protocol.html (last visited Jan. 27, 2007) (listing the dates that certain States have signed and ratified Additional Protocols to their IAEA Safeguards Agreements).

393. *Iran Agrees to Nuclear Checks*, CHINA DAILY, Dec. 19, 2003, at 1, available at http://www.chinadaily.com.cn/en/doc/2003-12/19/content_291677.htm; *Iran To Agree To Nuclear Inspection Protocol*, WHITE HOUSE BULL., Dec. 17, 2003, at 1.

394. U.N. Doc. S/PV.5500, *supra* note 149, at 9 (showing a statement by Iran that it allowed “2,000 inspector-days of scrutiny over the past three years; the signing of the Additional Protocol on 18 December 2003 and its immediate implementation until 6 February 2006; the submission of more than 1,000 pages of declaration [sic] under the Additional Protocol; allowing over 53 instances of complementary access to different sites across the country; and permitting inspectors to investigate baseless allegations by taking the unprecedented step of providing repeated access to military sites”).

395. See Steven R. Weisman, *Iran Hints at Compromise on Nuclear Inspections*, N.Y. TIMES, Feb. 18, 2006, at A3.

and purpose of a treaty”³⁹⁶ However, this obligation continues “until it shall have made its intention clear not to become a party to the treaty”³⁹⁷ The infamous U.S. “unsigned” of the Rome Statute demonstrates that States can release themselves from this obligation once they express that they have no intention of ratifying the instrument.³⁹⁸ Iran’s Parliament declared that it would not ratify the Additional Protocol in 2004.³⁹⁹ Despite this unwillingness, the United States has pushed for universal adherence to the principles reflected in the Additional Protocols, regardless of ratification and the general need for consent under VCLT Article 14.⁴⁰⁰ Ironically, the United States has signed but not yet ratified its own Additional Protocol with the IAEA.⁴⁰¹ In addition, the IAEA Board of Governors has been calling on Iran to follow the spirit of the Additional Protocol since well before the adoption of these resolutions in September 2003.⁴⁰²

The Security Council called upon Iran to abide by the Additional Protocol in paragraph 6 of Resolution 1696.⁴⁰³ While actual Additional Protocols between the IAEA and NPT members are confidential and vary between States, the IAEA adopted a model Additional Protocol on May 15, 1997, which requires the State to provide certain nuclear-related information under Articles 2 and 3, and to give access to certain sites under conditions specified under Articles 4 and 5, *inter alia*.⁴⁰⁴ This analysis assumes that the IAEA-Iran Additional Protocol resembles the Model Additional Protocol. The Security Council required Iran to carry out all transparency measures the IAEA requested, which obligation is contained in Article 2(c) of the Model Additional Protocol, which states, “Upon request by the Agency, [the State] shall provide amplifications or clarifications of any information it has provided under this Article, in so

396. Vienna Convention on the Law of Treaties, *supra* note 157, art. 18.

397. *Id.* art. 18(a).

398. See generally Edward T. Swaine, *Unsigned*, 55 STAN. L. REV. 2061 (2003).

399. Nazila Fathi, *Iran Rebuffs U.N. Agency On Atom Issue*, N.Y. TIMES, Sept. 20, 2004, at A15.

400. Vienna Convention on the Law of Treaties, *supra* note 157, art. 14. *But see, e.g.*, MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 270–91 (1989) (arguing against the need for consent for international obligations to be established).

401. IAEA, *Strengthened Safeguards System: Status of Additional Protocols*, http://www.iaea.org/OurWork/SV/Safeguards/sg_protocol.html (listing that the United States signed its Additional Protocol on June 12, 1998, but that it has not yet entered into force, which means that it has not yet been ratified).

402. Andemicael, *supra* note 342, at 132.

403. S.C. Res. 1696, *supra* note 66, ¶ 6.

404. Model Protocol Additional to the Agreement(s) Between State(s) and the International Atomic Energy Agency for the Application of Safeguards (Additional Protocol), arts. 2–5, <http://www.iaea.org/Publications/Documents/Infcircs/1997/infcirc540c.pdf> (last visited May 16, 2008).

far as relevant for the purpose of safeguards.”⁴⁰⁵ Again, Iran did not have this obligation before, since it did not ratify its Additional Protocol and the IAEA Statute does not provide the IAEA with such broad powers to request this type of information. Indeed, the IAEA’s safeguard powers under Article XII of the IAEA Statute include the ability “to examine the design of specialized equipment and facilities . . . to require the observance of any health and safety measures . . . to call for and receive progress reports,” and to obtain and verify the accounting a State provides of its fissionable materials.⁴⁰⁶ None of the IAEA’s enumerated powers involves the ability to demand whatever transparency measures it chooses. Granted, Article XII(c) allows the Board of Governors to “call upon the recipient State or States to remedy forthwith any non-compliance which it finds to have occurred,”⁴⁰⁷ though this falls short of having to provide all information the IAEA demands.

About five months later, the Security Council adopted Resolution 1737, this time under U.N. Charter Article 41 instead of under Article 40, under which Resolution 1696 had been adopted.⁴⁰⁸ Paragraph 2 of Resolution 1737 repeated paragraph 2 of Resolution 1696, suspending “all enrichment-related and reprocessing activities, including research and development,” and added that Iran also must suspend “work on all heavy water-related projects, including the construction of a research reactor moderated by heavy water, also to be verified by the IAEA”⁴⁰⁹ These provisions clearly imposed binding disarmament and arms control obligations on Iran, although these resolutions imposed other obligations as well.⁴¹⁰ In particular, Resolution 1737 went beyond Resolution 1696’s requirement for Iran to abide by the Additional Protocol, and instead “*call[ed] upon* Iran to ratify promptly the Additional Protocol.”⁴¹¹ As noted above, some permanent members of the Security Council implied during the debate over this resolution that “calls upon” provisions of Resolution 1737 make up part of the mandatory obligations that Resolution 1737 imposed on Iran.⁴¹²

405. *Id.* art. 2(c).

406. Statute of the International Atomic Energy Agency, *supra* note 383, arts. XII(1)–(4).

407. *Id.* art. XII(c).

408. S.C. Res. 1737, *supra* note 66.

409. *Id.* ¶ 2.

410. *Id.* Sixteen of Resolution 1737’s twenty-five paragraphs begin with the signal “[d]ecides,” which is considerable in light of other Chapter VII resolutions. However, all except paragraph 2 deal with obligations on all States to ensure that Iran lacks the materials and other support needed to develop nuclear weapons.

411. *Id.* ¶ 8.

412. U.N. Doc. S/PV.5612, *supra* note 149, at 2 (reporting that the United States implied that the provisions that start with the signal “calls upon” are among the requirements of this draft resolution).

The legal issues raised in Resolutions 1696 and 1737 are similar to many of those raised in the other resolutions, especially the significance of “calls upon” and the ability of the Security Council to impose treaty obligations on States. In particular, that these resolutions require Iran to abide by its Additional Protocol is similar to those resolutions requiring North Korea to return to the NPT and its Safeguards Agreement obligations. Just as with those resolutions on North Korea, the permanent members of the Security Council acted in this coercive manner not only to maintain international peace and security but also to support the IAEA’s activities in this area.⁴¹³ This stands as another example of the extent to which the Security Council is willing to create new disarmament- and arms-control-related obligations that somewhat resemble treaty obligations, and not just an example of the Security Council trying to get a State to comply with its already existing obligations, as some commentators assert.⁴¹⁴ In addition, it shows the Security Council’s willingness to act coercively in removing nuclear-weapon capabilities from States, despite commentary to the contrary.⁴¹⁵

H. WMD Terrorism and Resolution 1540

The last resolution to be discussed in this Part is Resolution 1540 and its impact on the Security Council’s WMD counter-terrorism efforts. The September 11, 2001, terrorist attacks intensified the international community’s attitude towards combatting international terrorism, and marked the shift of international terrorism from an “issue of ongoing concern” for the General Assembly to one that threatened international peace and security sufficiently to engage the Security Council in a meaningful way.⁴¹⁶ The international community’s intensity towards curbing terrorism has overflowed into the international community’s WMD counter-proliferation efforts. The fear of the destruction that could result if terrorists were to use such devastating weapons as WMD drives much of the recent activity in multilateral WMD disarmament and arms control measures. The link between WMD and terrorism was strengthened by President George W. Bush’s 2002 State of the Union address, in which he combined the war against terrorism with a war against the members of the “Axis of Evil,” which he asserted might pass WMD on to terrorist

413. See, e.g., *id.* (reporting that Russia noted this as its “main thrust” in supporting Resolution 1737).

414. Andemicael, *supra* note 342, at 123–24.

415. SUTTERLIN, *supra* note 2, at 101.

416. Young, *supra* note 144, at 34; Eric Rosand, *Security Council Resolution 1373, The Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT’L L. 333, 333 (2003) (calling the Security Council’s “deep involvement in the United Nation’s counter-terrorism effort” following September 11 a “new development”).

groups if they were allowed to develop their WMD capabilities. This link was further strengthened in the 2002 National Security Strategy of the United States.⁴¹⁷ Not surprisingly, in 2004, the United Nations High-Level Panel on Threats, Challenges, and Change (the High-Level Panel) saw WMD terrorism as a major threat to the international community.⁴¹⁸

For some commentators, the only solution in responding to the heightened threat is for the Security Council to get involved in imposing obligations on States to take certain measures to stop WMD from getting into the hands of terrorists.⁴¹⁹ These commentators assert that the terrorism-related conventions adopted before September 11 provide the legal basis for action, although they do not state exactly what action should occur in case of violation, which would be left up to the Security Council to decide.⁴²⁰ While it is true that these conventions are largely silent on what measures are to be taken in case of violation, they are clear about some of the preventive measures that states are to take prior to such a violation. Indeed, nine—and arguably ten—of the twelve conventions that deal with certain acts of terrorism before September 11 require some form of criminalization by the State parties. This seems to be the same approach that the Security Council has taken with Resolution 1540 in preventing WMD terrorism.

The threats coming from WMD terrorism are perceived to be so tremendous that the Security Council had to impose obligations on States to try to deal with that threat in Resolution 1540. The question becomes whether these obligations constitute new obligations that are not covered by the NPT, Chemical Weapons Convention (CWC),⁴²¹ or BWC.⁴²² The literature indicates that the main purpose of Resolution 1540 is to apply these treaties to non-parties in their entirety. In particular, some commentators assert that Resolution 1540 extends the CWC and the BWC to cover all States that were not already party to these conventions.⁴²³ However, this interpretation of Resolution 1540 runs contrary to the plain meaning of paragraph 5 of that resolution, which makes it clear that

417. See GRAY, *supra* note 137, at 176.

418. See *Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, at 19–21, 38–49, U.N. Doc. A/59/565 (Dec. 2, 2004).

419. SUTTERLIN, *supra* note 2, at 108.

420. *Id.* at 110.

421. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (CWC), Jan. 13, 1993, 1974 U.N.T.S. 45 (1997).

422. Even if the latter, this would not be insignificant in itself, in that it would add Article 25 sanctions to the sanctions envisioned under the respective multilateral treaties. See *supra* Section III(C).

423. Lisa Tabassi, *A Note on UN Security Council Resolution 1540* (2004), 64 CBW CONVENTIONS BULL. 12, 12–13 (June 2004).

“none of the obligations set forth in this resolution shall be interpreted so as to conflict with or alter the rights and obligations of State Parties to the [NPT, CWC, and BWC].”⁴²⁴ In other words, Resolution 1540 does not touch the NPT, CWC, or BWC either by modifying them or changing their membership, but rather *adds to* the obligations that States already have—or do not have, in the case of non-parties to these treaties—without these new obligations being *treaty obligations per se*. This interpretation of paragraph 5 is emphasized by the reference in paragraph 8(b), in which the Security Council “[c]alls upon all States . . . [t]o adopt national rules and regulations, where it has not yet been done, to ensure compliance with *their* commitments under the [NPT, CWC, and BWC].”⁴²⁵ Had Resolution 1540 extended the NPT, CWC and BWC themselves to non-parties, then paragraph 8(b) more likely would have replaced “their commitments” with “the commitments,” because “their” emphasizes that the particular commitments might be different for different States.

In terms of new obligations that Resolution 1540 imposes on States, Resolution 1540 potentially creates at least three new obligations with its emphasis on non-State actors, on States adopting legislation, and on preventing trafficking and brokering. Paragraph 1 of Resolution 1540 requires all States to “refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery”⁴²⁶ Paragraph 2 requires all States to “adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them”⁴²⁷ Paragraph 3 states that the Security Council

[d]ecide[d] also that all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials and to this end shall:

- a. Develop and maintain appropriate effective measures to account for and secure such items in production, use, storage or transport;

424. S.C. Res. 1540, *supra* note 64, ¶ 5.

425. *Id.* ¶ 8(b) (emphasis added).

426. *Id.* ¶ 1.

427. *Id.* ¶ 2.

- b. Develop and maintain appropriate effective physical protection measures;
- c. Develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law;
- d. Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations⁴²⁸

The following three Sections compare these three paragraphs with the provisions of the NPT, BWC, and CWC, with an eye towards determining whether Resolution 1540 creates any new obligations. In short, there are three types of obligations that Resolution 1540 imposes on all States: an emphasis on non-State actors, an obligation to adopt legislation, and the requirement that all States incorporate supply-side measures against WMD proliferation into their legislation.

1. New Obligations Concerning Non-State Actors

The NPT, CWC, and BWC lack any reference to non-State actors. NPT Article III(1) does provide that safeguards “shall be applied on all source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere.”⁴²⁹ However, this seems more like an obligation on the IAEA in implementing the safeguards agreements than an obligation on States to control the activities of non-State actors.

The BWC is more specific in implying that States have an obligation to take measures that reach non-State actors. BWC Article III prohibits States from assisting “any State, group of States or international organizations to manufacture or otherwise acquire” biological and toxin

428. *Id.* ¶ 3.

429. The Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 56, art. III(1).

weapons and their related equipment,⁴³⁰ which clearly does not deal with non-State actors. BWC Article II requires that each State party must “undertake[] to destroy, or to divert to peaceful purposes, as soon as possible but not later than nine months after the entry into force of the Convention, all agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, which are in its possession or *under its jurisdiction or control*.”⁴³¹ Article IV requires States to “take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition, or retention of the agents, toxins, weapons, equipment and means of delivery specified in article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere.”⁴³² Both Articles II and IV conceivably would include biological and toxin weapons and related equipment that non-State actors possess within the Member State’s jurisdiction. However, Article II requires States not only to know what biological and toxin agents and equipment are within its jurisdiction and to destroy them, but also to target non-State actors who possess these agents and equipment. Moreover, Article IV requires States to “prohibit and prevent” the acquisition and possession of biological and toxin weapons and their related equipment, which conceivably could reach its non-State actors, although this is not explicit, as it is in Resolution 1540. Therefore, Resolution 1540 appears to impose new obligations on States to deal specifically with non-State actors located within their jurisdiction and control.

The CWC is by far the most advanced of the three treaties when it comes to creating obligations on States to take measures that reach non-State actors. CWC Article I provides the general obligations for States under the CWC, three of which are particularly relevant here:

1. Each State Party to this Convention undertakes never under any circumstances: . . . (d) To assist, encourage, or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention
2. Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in *any place under its jurisdiction or control*, in accordance with the provisions of this Convention
4. Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, or that are located

430. BWC, *supra* note 296, art. III.

431. *Id.* art. II (emphasis added).

432. *Id.* art. IV.

in any place under its jurisdiction or control, in accordance with the provisions of this Convention.⁴³³

Article III requires States to declare the existence and location of chemical weapons, chemical weapons production facilities, and other related facilities under its jurisdiction or control, and its plan to destroy these items.⁴³⁴ Articles IV and V require States to subject all of these to the verification regime provided by the CWC, and Article VI(2) requires the same of their toxic chemicals and their precursors listed in the schedules located in the CWC's Annex on Chemicals.⁴³⁵ Article IX(8) provides States the right to request onsite challenge inspections of any of these locations or facilities when issues of non-compliance are raised. Finally, and most importantly in this context, Article VII(1) imposes extensive obligations on States to adopt national implementation measures, which include "the necessary measures" to:

- a. Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;
- b. Not permit in any place under its control any activity prohibited to a State Party under this Convention; and
- c. Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.⁴³⁶

Although this provision is particularly relevant to the next Section concerning the requirement on States to adopt criminal legislation, this provision also is relevant here inasmuch as it makes explicit an obligation on States to take measures against non-State actors.

In concluding this Section, it is important to note that the first two operative paragraphs of Resolution 1540 are somewhat unique in their focus on non-State actors *per se*.⁴³⁷ This focus was adopted for the obvious reason that the Security Council was trying to target terrorist entities in particular. Paragraph 1 creates a new obligation for all States to refrain from providing support to non-State actors in making or possessing

433. CWC, *supra* note 421, art. I(2) & (4); *see also id.* art. II(8)(a)(i)(2) (discussing the definition of chemical weapons production facilities).

434. *Id.* art. III(1)(a)(i), (ii), (v); *Id.* art. III(1)(c)(i), (ii), (v), (vi), (vii); *Id.* art. III(1)(d).

435. *Id.* arts. IV and V.

436. *Id.* art. VII(1).

437. S.C. Res. 1540, *supra* note 64, ¶¶ 1–2.

nuclear and biological weapons.⁴³⁸ State parties to the CWC already have such an obligation under Article I(1)(d), but the obligation is new for States not party to the CWC.⁴³⁹ The following Section analyzes whether paragraphs 2 and 3 of Resolution 1540 create new obligations for States.

2. New Obligations Concerning Legislation

The second type of obligation that Resolution 1540 contains involves the requirement for States to adopt legislation against persons who engage in particular activities. It is interesting to note how such an obligation is not unlike what a majority of the terrorism-related conventions have required of their Member States. This requirement to adopt legislation under Resolution 1540, as well as these terrorism-related conventions, targets terrorist organizations that operate within domestic settings. Domestic legislation is essential to prosecuting and deterring such entities because there is no widely recognized international crime of terrorism yet.

It is important to first assess whether the CWC, NPT, and BWC require States to adopt legislation, and if so, what types of legislation they must adopt. As noted in Section III(H)(1) above, CWC Article VII(1), under the article heading “National Implementation Measures,” requires States to adopt criminal legislation against citizens and persons within their jurisdiction who commit acts that States are prohibited from doing under the CWC.⁴⁴⁰ In addition, CWC Article VI(2), under the article heading “Activities Not Prohibited Under This Convention,” states the following: “Each State Party shall adopt the *necessary measures* to ensure that toxic chemicals and their precursors are only developed, produced, otherwise acquired, retained, transferred, or used within its territory or in any other place under its jurisdiction or control for purposes not prohibited under this Convention”⁴⁴¹ Given the broad nature of the obligation to legislate in CWC Article VII(1), this reference to “necessary measures” is more likely to involve a legislative component, though the requirement is not limited to States taking legislative action.

The NPT contains no requirement—and no semblance of a requirement—that Member States adopt legislation against persons who violate any of its provisions. Nonetheless, NPT Article III(4) requires non-nuclear-weapon State parties to “conclude agreements with the Interna-

438. *Id.* ¶ 1.

439. In theory, the obligation contained in paragraph 1 might not be a repeat of the obligation in Article I(1)(d) for members that added a “condition” relating to this provision when they ratified the CWC, though no such conditions appear to apply to Article I(1)(d).

440. CWC, *supra* note 421, art. VII(1)(a) & (c).

441. *Id.* art. VI(2) (emphasis added).

tional Atomic Energy Agency to meet the requirements of this Article either individually or together with other States in accordance with the Statute of the International Atomic Energy Agency.”⁴⁴² Out of the 162 States that the IAEA reports as having a safeguards agreement in force, seventy-seven of those States have publicized their safeguards agreement on the IAEA’s website, and the Former Yugoslav Republic of Macedonia accepted the conditions of a Model Safeguards Agreement.⁴⁴³ A review of these agreements for seventy-eight States shows that not one contains a requirement that the State adopt legislation against persons who violate the provisions of the NPT or the IAEA Safeguards Agreement. Nor does the IAEA Model Safeguards Agreement contain such a requirement. Thus, it is relatively safe to conclude that nothing in the NPT regime requires States to adopt legislation against particular acts that are in violation of the NPT or the IAEA Safeguards Agreements.

As for the BWC, its Article IV is the closest provision in the BWC to requiring States to adopt legislation against WMD-proliferation activities within their jurisdiction and control.⁴⁴⁴ BWC Article IV does not refer to a requirement that States “enact[] penal legislation with respect to such activity” involving biological or toxin weapons, as CWC Article VII(1) provides.⁴⁴⁵ Instead, it requires States to “take any necessary measures to prohibit and prevent”⁴⁴⁶ Such provisions are not unlike paragraph 3 of Resolution 1540, which requires States to “take and enforce effective measures to establish domestic controls”⁴⁴⁷ These so-called effective measures need not be legislative measures, either of a criminal or civil nature.

In contrast, Resolution 1540 requires States to adopt legislation against certain types of activities in paragraphs 2 and 3(d). Paragraph 2 of Resolution 1540 establishes the need for States to “adopt and enforce appropriate effective *laws*” against non-State actors who make or possess WMD and try to engage in such activities, or who act as accomplices, assistants, or financiers of such activities.⁴⁴⁸ In addition, Paragraph 3(d) of Resolution 1540 requires States to

442. The Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 56, art. III(4).

443. See Agreement For the Application of Safeguards in Connection With The Treaty on The Non-Proliferation of Nuclear Weapons: An Agreement by Exchange of Letters with the Former Yugoslav Republic of Macedonia in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, Maced.-IAEA, Oct. 4–Oct. 10, 2000, INFCIRC/610 (May 22, 2002).

444. BWC, *supra* note 296, art. IV.

445. CWC, *supra* note 421, art. VII(1)(a).

446. BWC, *supra* note 296, art. IV.

447. S.C. Res. 1540, *supra* note 64, ¶ 3.

448. *Id.* ¶ 2 (emphasis added).

[e]stablish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations⁴⁴⁹

The obligation to adopt laws is clear. What is interesting is that the legislation need not involve a *prohibition* of trade in WMD, but rather simply specific controls on that trade that are set by domestic laws and regulations. This indicates that Resolution 1540 was designed to create a minimum standard for all States, regardless of their WMD obligations under the NPT, CWC, or BWC, among other multilateral treaties. In sum, Resolution 1540 requires all States to adopt legislation criminalizing the manufacturing, acquisition, possession, development, transportation, transferring or using of WMD, attempts to do any of these, and any participation in these activities as an accomplice, assistant, or financier.⁴⁵⁰ The one exception is that Resolution 1540 does not create a new obligation for CWC members in relation to chemical weapons, as States already have this obligation under CWC Article VII(1). However, this new obligation would apply to these States in the context of nuclear and biological weapons.

3. New Obligations in Preventing Trade in WMD

The third type of relevant obligation that Resolution 1540 contains is the obligation on States to legislate against persons who act as illicit traffickers or brokers of WMD, or who in any way assist in the acquisition or manufacturing of WMD. Paragraphs 3(c) and (d) of Resolution 1540 address trade in WMD, although it is paragraph 2 that has the broadest scope in this context. As already noted above, paragraph 2 requires States to adopt laws against non-State actors who make or possess WMD, who try to engage in such activities, or who are accomplices, assistants, or financiers of such activities.⁴⁵¹ Such accomplices, assistants, and financiers conceivably would be involved in the trade and transfer of

449. *Id.* ¶ 3(d).

450. At the time of writing, 124 States had reported to the 1540 Committee legislation that they were in compliance with the requirements of Resolution 1540. *See* 1540 Committee Legislative Database, <http://disarmament2.un.org/Committee1540/list-legdb.html> (last visited Sept. 18, 2007).

451. S.C. Res. 1540, *supra* note 64, ¶ 2.

such WMD. Paragraph 3(d), quoted above, clarifies that States are required to adopt “national export and trans-shipment controls” over WMD trade.⁴⁵² Paragraph 3(c) further requires that all States combat the “illicit trafficking and brokering” of WMD, whatever that might mean.⁴⁵³ Use of the qualifier “illicit” suggests that States do not need to take and enforce effective measures to combat *non-illicit* trafficking and brokering of WMD. Similar to the analysis of Resolution 3(d) provided above, this language supports the notion that trade in WMD is not entirely prohibited by Resolution 1540 but instead is subject to a minimum standard for all States.

What is particularly interesting about paragraph 3(c) of Resolution 1540 in the context of WMD non-proliferation is that it shifts focus from the demand-side of nuclear non-proliferation to the supply-side. Supply-side measures are defined as those “intended to restrict the military capabilities of Third World countries [and other States] by denying them access to technologies and materials likely to produce weapons of mass destruction,” and demand-side restraints are defined as those “intended to eliminate or temper political and economic disputes that might serve as catalysts for armed conflict.”⁴⁵⁴ The CWC and the BWC contain both types of obligations. CWC Article I(1)(a) requires States “never under any circumstances . . . [t]o develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone,”⁴⁵⁵ and Article I(1)(d) requires States “never under any circumstances . . . [t]o assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.”⁴⁵⁶ Likewise, BWC Article I requires States “never in any circumstances to develop, produce, stockpile or otherwise acquire or retain [biological and toxin weapons,]” with Article III requiring States “not to transfer to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States or international organizations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in article I of the Convention.” The NPT, however, involves demand-side non-proliferation obligations for all but the five nuclear-weapon States. Article II states,

Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of

452. *Id.* ¶ 3(d).

453. *Id.* ¶ 3(c).

454. Lewis & Joyner, *supra* note 192, at 301.

455. CWC, *supra* note 421, art. I(1)(a).

456. *Id.* art. I(1)(d).

nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.⁴⁵⁷

This provision says that they cannot receive, make, or have assistance in making nuclear weapons or other nuclear explosive devices, which are clearly demand-side measures. At the same time, the NPT says absolutely nothing about these States giving or helping others to get or make nuclear weapons or other nuclear explosive devices, which would be supply-side measures. The assumption is that non-nuclear-weapon States are unable to provide such assistance because it is the nuclear-weapon States that have a monopoly on these materials and information, and who have their own supply-side non-proliferation obligations provided by NPT Article I. Admittedly, the IAEA maintains an Illicit Trafficking Database with the assistance of approximately eighty States,⁴⁵⁸ although this involvement is voluntary and does not constitute a treaty obligation.

In sum, paragraph 3(c) of Resolution 1540 introduces new supply-side measures to the nuclear non-proliferation regime. Resolution 1540 imposes such supply-side nuclear non-proliferation measures on all States, regardless of their prior nuclear non-proliferation commitments. Resolution 1540 also imposes such supply-side measures for States not party to the CWC and BWC.

4. Shifting to Supply-Side Arms Control Through Imposition

Resolution 1540 raises many of the same issues that the earlier resolutions have raised, such as the ability of the Security Council to impose treaty-type disarmament and arms control obligations on States. In addition to these common points, it is interesting to note how the Security Council occasionally has replaced the cumbersome treaty negotiating process with the quick establishment of rules through its legislating those rules for all States.⁴⁵⁹ This appears to be what happened in Resolution 1540. Indeed, it would have taken years for States to shift to an emphasis on supply-side measures through perhaps renegotiating the

457. The Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 56, art. II.

458. Tariq Rauf & Jan Lodding, *UNSCR 1540 and the Role of the IAEA*, in *GLOBAL NON-PROLIFERATION AND COUNTER-TERRORISM: THE IMPACT OF UNSCR 1540* 86, 92 (Olivia Bosch & Peter Van Ham eds., 2007).

459. Georg Nolte, *Lawmaking through the UN Security Council: A Comment on Erika de Wet's Contribution*, in *DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING* 237, 241 (Rüdiger Wolfrum & Volker Röben eds., 2005) (discussing this ability of the Security Council in the context of Resolution 1373 and its counter-terrorism efforts).

NPT or commencing the negotiations for a new instrument. However, the Security Council did this through approximately one hour of formal debate within the Security Council and a unanimous vote of only fifteen members of the international community.⁴⁶⁰ Nevertheless, as the principal agent of the international community,⁴⁶¹ the Security Council's circumvention of the treaty negotiating process shows a level of commitment of the international community to the adoption of effective measures regardless of consent. Unfortunately, the imposition of such supply-side controls in such a heavy-handed manner, such as in Resolution 1540, are not guaranteed to lead to tangible results, as dual-use technology is becoming so advanced that key items are bound to evade the best efforts at detection and inspection.⁴⁶² In an ideal world, the most effective way to combat WMD proliferation would involve the slow persuasion of States through diplomatic negotiations to give up their demand for WMD, although such negotiations often take too much time and lead to relatively unpredictable results.⁴⁶³ The Security Council is not powerless to affect the demand-side of the equation. For example, a clear Security Council commitment that it will authorize the use of force against a State that deploys or threatens to deploy a WMD would help to create the environment necessary to convince a State that they can give up their WMD and WMD ambitions. In the end, a combination of supply-side and demand-side measures likely will be necessary to combat WMD proliferation effectively, as the High-Level Panel concluded in 2004.⁴⁶⁴

States obviously will be less eager to comply with resolutions that lack their preferred amendments or counter their interests. States and civil society invariably will complain that such heavy-handed imposition of obligations is undemocratic and contrary to the Security Council's mandate in the U.N. Charter, which does not enable it to act as a global legislature.⁴⁶⁵ Such critics must not forget the considerable discretion and power to bind that States gave to the Security Council when they joined

460. See U.N. SCOR Provisional Verbatim Record, 59th Sess., 4956th mtg. at 2, U.N. Doc. S/PV.4956 (Apr. 28, 2004).

461. See Ian Sinclair, *State Crimes Implementation Problems: Who Reacts?*, in INTERNATIONAL CRIMES OF STATE 256–57 (Joseph H.H. Weiler et al. eds., 1989); Antti Korkeakivi, *Consequences of "Higher" International Law: Evaluating Crimes of State and Erga Omnes*, 2 J. INT'L LEGAL STUD. 81, 102–03 (1996); Richard Butler, *The Evolving Role of the UN and Disarmament*, in THE FUTURE OF DISARMAMENT 176, 190 (United Nations ed., 1998); Bardo Fassbender, *The UN Security Council and International Terrorism*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 83, 100 (Andrea Bianchi ed., 2004).

462. See Dallmeyer, *supra* note 188, at 137.

463. Lewis & Joyner, *supra* note 192, at 301, 304.

464. See High-Level Panel Report, *supra* note 418; see also THAKUR, *supra* note 3, at 177.

465. See also THAKUR, *supra* note 3, at 169.

the United Nations, which discretion is provided by Articles 25 and 103, as well as by Chapter VII.

IV. CONCLUSION

Nobel Peace Prize Laureate and disarmament advocate Arthur Henderson asserted after the First World War that “[i]t has become impossible to give up the enterprise of disarmament without abandoning the whole great adventure of building up a collective peace system.”⁴⁶⁶ Whereas Henderson saw the collective security system as needing disarmament, in the intervening decades the system has evolved to the point that the realization of disarmament and arms control actually needs encouragement from the Security Council—the hub of the modern collective security system—for there to be real progress in certain situations. This Article has explored a variety of ways that the Security Council has imposed WMD disarmament and arms control obligations on States. The resolutions referred to in the first half of Part III act as evidence of what was possible during the Cold War when the United States and the Soviet Union were in agreement. The Security Council’s importance in the disarmament and arms control discourse seems to vary, depending on how well the permanent members of the Security Council cooperate.⁴⁶⁷ Just as the end of the Cold War brought a new era of cooperation in the United States and the Soviet Union reaching disarmament agreements both within and outside of the United Nations system,⁴⁶⁸ partial détente between the United States and the Soviet Union at certain times throughout the Cold War made possible the resolutions that the Security Council adopted during the Cold War.

Starting with Resolution 255, the ability of these two superpowers to agree to give security assurances to non-nuclear-weapon States was truly remarkable. However, before concluding that this was an anomaly in an otherwise cantacarious half-century of relations between the United States and the Soviet Union, it is interesting to note how some historians identify two Cold Wars following the Second World War,⁴⁶⁹ with Resolution 255 having occurred during that inter-war period.

466. http://www.brainyquote.com/quotes/authors/a/arthur_henderson.html.

467. See HERNANE TAVARES DE SÁ, *THE PLAY WITHIN THE PLAY: THE INSIDE STORY OF THE UN* 9 (1966).

468. Bourantonis & Evriviades, *supra* note 2, at 155; Ekéus, *supra* note 79, at 67 (noting, for example, the Treaty on Intermediate-Range and Shorter-Range Missiles, the Treaty on Conventional Forces in Europe, the Strategic Arms Reduction Treaties I and II, the CWC, and Security Council Resolution 687 regarding the disarmament of Iraq).

469. See generally McCauley, *supra* note 186; Matthew Leitner, HIE Lecture, *The First Cold War: The Battle for Europe*, May 8, 2006.

Resolution 487 stands as another example of the way in which the Security Council was able to impose obligations during the Cold War when the United States and the Soviet Union were in agreement. Here, agreement was possible in condemning a U.S. client State—namely, Israel—because the United States thought that Israel had violated the U.N. Charter by not exhausting the peaceful means of resolution that had been available to it,⁴⁷⁰ and that the IAEA should be “respected by all nations.”⁴⁷¹ The Soviet Union emphasized the need to respond strongly to Israel’s attack in order to preserve the IAEA safeguards system and the nuclear non-proliferation system.⁴⁷² Admittedly, members of the Security Council had varying reasons for opposing Israel’s actions against Iraq—with other States focused more on the IAEA’s determination that there was no evidence that Iraq was going to use the reactors to develop nuclear weapons, while others were opposed to Israel’s brand of anticipatory self-defense—although they all agreed that a relatively strong response against Israel was in order. However, it was the U.S.-Soviet agreement on this general matter that made Resolution 487 possible.

The limited resolutions relating to Iraq’s use of chemical weapons against Iran are important to see how U.S.-Soviet agreement on a particular issue can dampen the international outcry against such blatant violations of WMD norms. By reviewing the verbatim records of the Security Council during the resolutions involving Iraq’s use of chemical weapons against Iran,⁴⁷³ it would seem that the United States and the Soviet Union were in agreement over how to handle the situation in Iran: by paying some lip service to it without imposing any obligations on Iraq. Indeed, Iraq was the Soviet Union’s client State and so the Soviet Union was reluctant to condemn its actions against Iran. At the same time, the United States was not prepared to take up the plight of a State that had overrun its embassy and had taken many of its citizens hostage just a few years earlier. After all, Western States—especially the United States and France—supported Iraq against Iran,⁴⁷⁴ and so they were willing to keep the issue of Iraq’s use of chemical weapons from getting too much attention. Therefore, it is no surprise that there was little

470. See GRAY, *supra* note 137, at 133.

471. U.N. SCOR, 36th Sess., 2288th mtg. at 4, U.N. Doc. S/PV.2288 (June 19, 1981).

472. *Id.* at 15. *But see id.* at 13–14 (noting that the German Democratic Republic read this resolution as not requiring Israel to stop nuclear collaboration); *see id.* at 14.

473. See U.N. SC Provisional Verbatim Record, 41st Sess., 2666th mtg. at 22–28, U.N. Doc. S/PV.2666 (Feb. 24, 1986).

474. BOWLES, *supra* note 2, at 11–12.

international outcry following Iraq's extended use of chemical weapons against Iran.⁴⁷⁵

The rapprochement between the United States and the Soviet Union (and later the Russian Federation) that ended the Cold War made agreement within the Security Council far easier, which led to an increase in the number and strength of resolutions imposing disarmament and arms control obligations on States. Barring the deterioration of relations between the United States and Russia (or any other permanent members of the Security Council), it is likely that the Security Council will continue to impose coercive disarmament and arms control measures on States through its Chapter VII powers. Such reliance on coercive measures by the Security Council can help ensure that States comply with WMD norms.⁴⁷⁶ Although admittedly not all violations of WMD norms are equally threatening,⁴⁷⁷ the Security Council has been quite clear that any WMD proliferation is a threat to international peace and security.⁴⁷⁸ The first preambular paragraph of Resolution 1540 affirmed that WMD proliferation is a threat to international peace and security,⁴⁷⁹ thus warranting greater coercive measures in this field by the Security Council in the future.

That WMD proliferation *prima facie* equates to a threat to international peace and security has been a groundbreaking change in this field inasmuch as it signalled the Security Council's on-going commitment to combating WMD proliferation with all the force it has at its disposal. Just as Clark Eichelberger called in 1955 for "universal enforceable disarmament" through collective security,⁴⁸⁰ this newfound willingness of the Security Council to use its Chapter VII powers to respond to WMD proliferation issues reflects the possibility of this becoming a reality. In light of the resolutions discussed above, especially the resolutions against North Korea and Iran, the Security Council is well on its way to fulfilling the role as universal enforcer of such disarmament and arms control norms. Without maintaining this type of involvement, however, States prone to violating WMD norms are likely to think that serious consequences will not always flow from violations, which might not

475. See SUTTERLIN, *supra* note 2, at 105.

476. THAKUR, *supra* note 3, at 168.

477. CASES ON UNITED NATIONS LAW 994-95 (Louis B. Sohn ed., 1st ed. 1956) (stating that "it is [a] fact that many breaches of [arms limitation treaties] are of a minor, unintentional or technical character"). *But see* WRIGHT, *supra* note 36, at 122 (implying that all violations of disarmament agreements constitute a threat to international peace and security by not specifying that there might be minor violations that do not constitute such a threat).

478. The President of the Security Council, Note by the President of the Security Council, *supra* note 339, at 4; *see* Ekéus, *supra* note 79, at 68.

479. S.C. Res. 1540, *supra* note 64, ¶ 1.

480. EICHELBERGER, *supra* note 69, at 52-53.

adequately deter them in the future.⁴⁸¹ Therefore, Security Council vigilance in this endeavour is crucial.

481. Kono, *supra* note 177, at 111.