

STELLUNGNAHMEN

The Implementation of Disarmament and Arms Control Obligations Imposed upon Iraq by the Security Council

*Thilo Marauhn*¹

*1. Introduction*²

After the imposition of economic sanctions against Iraq beginning on 6 August 1990³, the authorization of military action against Iraq on 29 November 1990⁴ and the Allied military operations leading to the restoration to Kuwait of its sovereignty, independence and territorial integ-

¹ Research Fellow at the Institute.

Abbreviations: ACR = The Arms Control Reporter; ACT = Arms Control Today; AJIL = American Journal of International Law; App. = Appendix; BW = biological weapons; CBW = chemical and biological weapons; CFE Treaty = Treaty on Conventional Forces in Europe; CW = chemical weapons; EPIL Inst. = R. Bernhardt (ed.), Encyclopedia of Public International Law, Instalment; GA = General Assembly; HEU = highly enriched uranium; HuV-I = Humanitäres Völkerrecht – Informationsschriften; IAEA = International Atomic Energy Agency; ICJ Rep. = International Court of Justice, Reports of Judgments; ILM = International Legal Materials; LNTS = League of Nations Treaty Series; NPT = Non-Proliferation Treaty; para(s). = paragraph(s); Res. = resolution; SC = Security Council; UN = United Nations; UNSCOM = United Nations Special Commission; UNTS = United Nations Treaty Series.

² This section has to some extent been inspired by a paper presented by A. Rosas (Finland) on “Reactions to Non-compliance With a CW Convention” presented during a workshop in Rome (22–24 November 1991).

³ The following resolutions, dealing with the situation between Iraq and Kuwait, were adopted by the Security Council from 2 August 1990 until 28 November 1990: SC Res. 660 (2 August 1990), 661 (6 August 1990), 662 (9 August 1990), 664 (18 August 1990), 665 (25 August 1990), 666 (13 September 1990), 667 (16 September 1990), 669 (24 September 1990), 670 (25 September 1990), 674 (29 October 1990), 677 (28 November 1990).

⁴ SC Res. 678 (29 November 1990). For an analysis of this resolution see, e.g., A. Parsons, *The United Nations after the Gulf War*, The Round Table 1991, 265.

rity⁵, the Security Council, acting under Chapter VII of the UN Charter, on 3 April 1991, adopted resolution 687 (1991)⁶ laying down the conditions for a formal cease-fire between Iraq and the Allied powers. The Security Council, in adopting this resolution, for the first time reacted to issues involving the development, production, acquisition and stockpiling of certain categories of weapons. Also, the Council dealt with the destruction and rendering harmless of a number of specified military items. Given the veto power and the Security Council's inclination to avoid acting under Chapter VII of the Charter in the past, this resolution goes far beyond existing patterns and may even be seen as setting a remarkable precedent⁷.

However, it may be questioned whether resolution 687 can be based on Chapter VII⁸. Although art. 39 of the Charter, especially through its employment of the expression "threat to the peace", provides the Security Council with a wide margin of appreciation⁹, and although the wording of the subsequent provisions of Chapter VII does not expressly refer to what measures may be taken by the Security Council in the aftermath of an armed conflict, it may be argued that the mandatory measures decided upon in resolution 687 go beyond the powers of the Council as laid down in the Charter.

Paragraphs 1 and 4 of the preamble of resolution 687 indicate that the Security Council is convinced of a continuing threat to the peace posed by Iraq, although Iraq's occupation of Kuwait has come to an end¹⁰. This

⁵ The military operation of the Allied powers started on 16 January 1991 and ended on 28 February 1991. The Security Council adopted resolution 686 (1991) on 2 March 1991; this resolution dealt with preconditions for a definitive end to hostilities.

⁶ For excerpts of this resolution see the appendix to this article.

⁷ For a similar view see J. Krause, *Neuartiges internationales Regime mit Präzedenzwirkung? – Die Kontrolle der irakischen Rüstung durch Vereinte Nationen und IAEA*, Vereinte Nationen 40 (1992), 46, at 51.

⁸ For an analysis of these aspects of resolution 687 (1991) see W. Heintschel v. Heinegg, *Die Resolution 687 (1991) des Sicherheitsrats der Vereinten Nationen – Die Bedingungen für das Zustandekommen eines förmlichen Waffenstillstands zwischen dem Irak und den mit Kuwait kooperierenden Staaten*, HuV-I 4 (1991), 38.

⁹ See H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1951), 729 et seq.

¹⁰ Paragraph 1 of the preamble of resolution 687 (1991) recalls all other resolutions dealing with the situation between Iraq and Kuwait; paragraph 4 of the preamble reads as follows: "Reaffirming the need to be assured of Iraq's peaceful intentions in the light of its unlawful invasion and occupation of Kuwait".

is confirmed by further paragraphs of the preamble¹¹. Thus, to this extent, it can be properly argued that resolution 687 finds a legal basis in arts. 39 et seq.

Notwithstanding this result, if arts. 41 and 42 of the Charter are interpreted in a restrictive manner, the concrete non-military measures and the military action envisaged by these provisions can be regarded as the only mandatory measures upon which the Security Council may decide. However, there is no evidence that such an interpretation was intended. Moreover, art. 2, paragraph 7 of the Charter underlines that the application of enforcement measures under Chapter VII shall not be prejudiced by the prohibition of intervention in internal affairs. The International Court of Justice in the “Case Concerning Certain Expenses of the United Nations” confirmed that

“... when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such an action is not *ultra vires* the Organization”¹².

Following this position of the Court, Schachter argues that the provisions of Chapter VII were thought to

“leave room for almost any action by the Security Council that might reasonably be related to ensuring continued peace and security in the gulf region”¹³.

In the *Nicaragua* Case the International Court of Justice underlined that there are no rules of international law – except those accepted by the state concerned – limiting the level of armaments of a sovereign state¹⁴. However, this position of the International Court of Justice does not bar the Security Council from determining that – taking into account the specific circumstances – certain armaments may pose a threat to international peace and security¹⁵. As the Security Council in resolution 687 repeatedly points to the relationship between Iraq’s armed attack on Kuwait and the level of armaments existing in Iraq, its mandatory measures can be regarded as constitutional under the UN Charter.

¹¹ See e.g. paragraphs 8, 14, 15, 17, 24, 26 of the preamble of Res. 687; paragraph 17 reads as follows: “*Conscious* of the threat that all weapons of mass destruction pose to peace and security in the area and of the need to work towards the establishment in the Middle East of a zone free of such weapons”.

¹² ICJ Rep. 1962, 151, at 168.

¹³ O. Schachter, *United Nations Law in the Gulf Conflict*, AJIL 85 (1991), 467.

¹⁴ ICJ Rep. 1986, 14, at 135.

¹⁵ J.A. Frowein, in: B. Simma (ed.), *Charta der Vereinten Nationen* (1991), 559, at 567.

Before turning in detail to the obligations imposed by resolution 687 and their implementation it may be noted that Iraq was under no previous legal obligation to destroy certain arsenals. Moreover, the fact that Iraq threatened to use chemical weapons cannot create such an obligation as even breaches of relevant treaty law¹⁶ or customary law do not create a legal obligation to ban production and stockpiling.

2. The Obligations Imposed upon Iraq

Resolution 687 requires the destruction, removal or rendering harmless of Iraqi nuclear capability (paragraph 12), chemical weapons, ballistic missiles with a range greater than 150 kilometres, and biological weapons (paragraph 8). This obligation also covers related subsystems and components, all research, development, support and manufacturing facilities for nuclear, biological and chemical weapons, as well as related major parts, repair and production facilities for the above-mentioned missiles. The decision of the Security Council is accompanied by detailed provisions on the implementation of the said obligation (paragraphs 9 and 13). Whereas the International Atomic Energy Agency (IAEA) undertakes the responsibility for the implementation of paragraphs 12 and 13, a Special Commission (UNSCOM) is established according to operating paragraph 9 in order to deal with the other issues. The disarmament activities¹⁷ of the Special Commission and the IAEA are to be based on detailed plans submitted to the Security Council by the UN Secretary-General¹⁸ and the Director General of the IAEA¹⁹ according to paragraphs 9 (b) and 13 of resolution 687. The Council endorsed these plans on 17 June 1991²⁰.

The destruction and rendering harmless of the specified items involves a mechanism consisting of the following components. Iraq has to submit declarations of the locations, amounts and types of all relevant weapons and facilities to the Secretary-General as well as – with regard to nuclear material – to the Director General of the IAEA, and it must agree to urgent on-site inspections. UNSCOM and the IAEA have to carry out immediate on-site inspections based on the Iraqi declarations but may

¹⁶ 1925 Geneva Gas Protocol, LNTS 94, 65.

¹⁷ For the plans for future ongoing monitoring and verification and further arms control measures see below note 23.

¹⁸ S/22614 (17 May 1991).

¹⁹ The UN Secretary-General submitted the relevant letter of the Director-General of the IAEA to the Council on 17 May 1991 (S/22615).

²⁰ SC Res. 699 (1991), paras. 1 and 2.

also inspect any additional locations as designated by UNSCOM. Iraq has to yield possession of all CBW-related items to the Special Commission for destruction, removal or rendering harmless. Missile capabilities can be destroyed by Iraq itself, under the supervision of UNSCOM. All nuclear-weapons-usable materials must be placed under the exclusive control, for custody and removal, of the IAEA with the assistance and cooperation of the Special Commission. Hence, there are, based on the specific characteristics of the various armaments, three different ways of implementing Iraq's disarmament obligations. All of them, however, have to take place under international supervision. Further details of the implementation of these obligations will be discussed below²¹.

The Security Council in resolution 687 also decided to place Iraq under the obligation not to use, develop, construct or acquire chemical and biological weapons and related items, as well as ballistic missiles with a range greater than 150 kilometres and related major parts. In order to supervise the implementation of this obligation a plan for the future ongoing monitoring and verification of Iraq's compliance was developed by the Secretary-General in consultation with the Special Commission according to paragraph 10 of resolution 687. A similar plan was developed by the Director General of the IAEA in order to supervise Iraq's obligation not to acquire or develop nuclear weapons or nuclear-weapons-usable material and related items, and to observe the prohibition of research and related activities (paragraphs 12, 13). These arms control obligations are stricter than Iraq's obligations under the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968²². The plans for future ongoing monitoring and verification²³ were approved by the Security Council on 11 October 1991²⁴.

Especially the latter obligations related to the production, acquisition and stockpiling of weapons and the verification of their implementation go far beyond the scope of the present situation, i.e. they are not easily subsumed under art. 39. The Security Council, in paragraph 14 of resolution 687, takes note of this problem and links the obligations placed upon Iraq with attempts to establish in the Middle East a zone free from weapons of mass destruction and missiles for their delivery and to achieve a global ban on chemical weapons.

²¹ For a recent analysis see the Secretary-General's report of 25 January 1992 (S/23514) and update of 7 March 1992 (S/23687).

²² UNTS 729, 161; Iraq ratified this treaty on 29 October 1969, see C. Hardenbergh (ed.), ACR (1991), at 602.A.7.

²³ S/22871/Rev.1; S/22872/Rev.1 and Corr.1.

²⁴ SC Res. 715 (1991), para. 1.

Within the legal framework of resolution 687, the mandatory measures decided upon by the Security Council have to be proportional²⁵. To this extent, the powers of the Security Council are limited. These limits would have been surpassed if the Security Council had attempted to achieve a completely unilateral disarmament of Iraq without taking into account Iraq's legitimate security interests²⁶. Moreover, if the Security Council fails to establish a zone free of weapons of mass destruction in the Middle East, Iraq – after a certain period of time – may no longer be under the obligation to follow section C of resolution 687²⁷.

The subsequent Security Council resolutions 699 (17 June 1991), 707 (15 August 1991) and 715 (11 October 1991) complemented the obligations laid down by resolution 687. According to paragraph 4 of resolution 699 (1991), Iraq is liable for the full costs of carrying out the tasks authorized by section C of resolution 687. Resolution 707 condemns Iraq's violation of a number of obligations imposed upon it by section C of resolution 687 and further complements these obligations. Paragraph 3 of resolution 707 deals with wing and helicopter flights by inspection teams and demands that Iraq allows all such flights. Finally, resolution 715 – as already mentioned – approves the plans for future ongoing monitoring and verification.

3. Problems related to the Implementation of Iraq's Obligations

The present section of this article concentrates on major events related to the subject-matter under discussion as well as a recent report of the Secretary-General to the Security Council²⁸ and the subsequent discussion within the Council on 11 March 1992²⁹. Iraq's obligation not to develop, produce or otherwise acquire certain categories of arms is treated as an arms control obligation³⁰ whereas the obligation dealing with the

²⁵ The principle of proportionality is a general principle of international law and has to be taken into account by the Security Council when acting under Chapter VII; see for art. 42 of the UN Charter Frowein (note 15), at 587 et seq.; for a general idea of the notion of proportionality see J. Delbrück, Proportionality, in: EPIL Inst. 7 (1984), 396.

²⁶ Heintschel v. Heinegg (note 8), at 41.

²⁷ Ibid.

²⁸ S/23514 and S/23687.

²⁹ UN press release SC/5382; subsequent information received until 30 April 1992 is included in this article; for a list of inspections until April 1992 see Krause (note 7), at 47.

³⁰ In order to avoid any misconceptions it may be noted that the plans for future ongoing monitoring and verification deal with the supervision of permitted activities.

destruction, removal or rendering harmless of Iraqi weapons is qualified as a disarmament obligation³¹.

a) The Establishment of UNSCOM and its Cooperation with the IAEA

The Special Commission was established as a subsidiary organ³² of the Security Council in accordance with resolution 687 on 19 April 1991. Shortly thereafter a secretariat was set up. This is stationed principally at the United Nations Headquarters in New York, with a field office in Bahrain and a support office in Baghdad. The Special Commission consists of 21 experts with Ambassador R. Ekeus (Sweden) serving as Executive Chairman. The inspection teams are composed of nationals of various countries³³. UNSCOM established a number of working groups in order to facilitate its work (nuclear/IAEA group, chemical/biological weapons group, destruction advisory panel, ballistic missiles group and future compliance monitoring group)³⁴. Responsibilities for operations support have been vested in the Executive Chairman. The secretariat of the Special Commission also ensures liaison with the IAEA. Resolution 687 (1991) requires the IAEA to inspect nuclear-weapons-related materials under the guidance of the Special Commission. The Special Commission provides the Director General of the IAEA with assistance and cooperation as required in paragraphs 12 and 13 of resolution 687. The IAEA established an action team placed under the direction of an Agency Deputy Director General (M. Zifferero) and composed of a Deputy Director for Administration and Management (D. Kay) and a Deputy Director for Operations (D. Perricos)³⁵. The UN agreed to reimburse the IAEA for its extraordinary costs³⁶. The status, privileges and immunities of the Special Commission, the IAEA and UN special agencies involved in implementing resolution 687 are based on an agreement with the government of Iraq

³¹ For a distinction between disarmament and arms control obligations see H.-J. Schütz, *Arms Control*, in: EPIL Inst. 3 (1982), 34, and J.H. Barton, *Disarmament*, in: EPIL Inst. 9 (1986), 102.

³² The power of the Security Council to establish subsidiary organs is based upon art. 29 of the Charter.

³³ At the end of 1991 about 280 experts from 34 states had participated in inspections of the Special Commission, see Krause (note 7), at 47.

³⁴ S/23165, Annex, App. I, para. 3.

³⁵ S/22615, Annex, Enclosure, para. 2; ACR (1991), at 453.B.109.

³⁶ IAEA document GOV/INF/609 of 2 May 1991.

which was concluded only after extensive and sometimes difficult negotiations. Further provisions concerning these issues can be found in the plans for future ongoing monitoring and verification as endorsed by resolution 707³⁷.

b) The Gathering of Data

In order to destroy certain categories of weapons and facilities and to verify the non-production of relevant items, the location and characteristics of existing stockpiles and production facilities, and other facilities, must be known. Hence, resolution 687 and subsequent resolutions put Iraq under an obligation to submit to the Security Council and the relevant subsidiary organs declarations of the locations, amounts and types of items subjected to destruction, removal or rendering harmless. Also, in order to carry out the plans for future ongoing monitoring and verification, the Special Commission and the IAEA have to be informed about a number of relevant projects and facilities; this information concerns permitted (dual-use) activities. Although the IAEA and UNSCOM can also rely on other sources³⁸, Iraq's declarations were intended to be an essential element of the implementation of the relevant resolutions. Such a procedural requirement is of major importance not only for ensuring the effectiveness of international supervision of arms control and disarmament obligations³⁹, but also for the creation of a minimum of trust⁴⁰ among those participating in the system under which these obligations arise⁴¹.

Notwithstanding the fact that the obligations discussed here are not treaty obligations but based on mandatory measures decided upon by the Security Council, Iraq could have assured the Council of its peaceful in-

³⁷ E.g. S/22871/Rev.1, Annex I, paras. 9 et seq.

³⁸ These include own assessments and data supplied to the Special Commission by states; see also S/22614, paras. 6 et seq.

³⁹ Cf. e.g. art. XIII CFE Treaty of 19 November 1990; ILM 1991, 6.

⁴⁰ For verification purposes see W. Graf Vitzthum, *Rechtsfragen der Rüstungskontrolle im Vertragsvölkerrecht der Gegenwart*, in: M. Bothe/W. Graf Vitzthum, *Rechtsfragen der Rüstungskontrolle im Vertragsvölkerrecht der Gegenwart*, *Berichte der Deutschen Gesellschaft für Völkerrecht*, Vol. 30 (1990), 95, at 118 et seq.

⁴¹ For an example of the importance of trust among parties to an arms control agreement see the case of the CFE Treaty in 1990/1991: L. Rühl, *Der Vertrag über konventionelle Streitkräfte: Höhe- oder Schlußpunkt europäischer Rüstungskontrolle?*, *Außenpolitik* 42 (1991), 116, at 116 et seq.

tentions⁴². However, Iraq on numerous occasions failed to cooperate in this respect and did not fulfill its obligations. The reports Iraq presented had to be corrected more than once⁴³. The general lack of Iraqi cooperation led to serious tensions between the Council and Iraq⁴⁴. On 23 September 1991, for example, the government of Iraq seized certain documents from an IAEA inspection team⁴⁵. Not all of the documents were returned to the inspection team. In a report submitted to the Secretary-General in October 1991 the Executive Chairman of UNSCOM stated:

“The inspections undertaken have had to be energetic, rigorous and intensive because of the failure of Iraq, particularly in the nuclear field, to adopt the candid and open approach to the disclosure of its capabilities which is called for in section C of resolution 687 (1991). While cooperation from Iraq has generally been forthcoming at the field level ... in relation to activities and resources declared by Iraq, a totally different attitude of non-cooperation, concealment and sometimes false information has emerged in relation to non-declared activities, resources and sites that have been designated by the Special Commission on the basis of its own assessments or of data supplied to it by States”⁴⁶.

In paragraph 1 of resolution 707 (15 August 1991) the Security Council condemned Iraq's lack of cooperation and confirmed that this constituted a material breach of the relevant provisions of resolution 687. In March 1992 the update of a report of the Secretary-General⁴⁷ referred to the information issue with regard to resolution 707 as follows:

“In the report of 18 February, the Executive Chairman of the Special Commission indicated that ... Iraq was continuing to refuse to make the full, final

⁴² See preamble of SC Res. 687, para. 4; the Executive Chairman in his report of 24 October 1991 pointed out that “the elements of misinformation, concealment, lack of cooperation and violation of the privileges and immunities of the Special Commission and IAEA have not created any trust in Iraq's intentions. They have had a negative impact on relations with Iraq and have engendered an atmosphere of profound scepticism, particularly in the nuclear area ...” (S/23165, Annex, para. 19).

⁴³ For Iraqi reports on its nuclear material see ACR (1991), at 453.B.116.1 et seq.

⁴⁴ On 23, 25, 28 June 1991 a nuclear inspection team was denied access to certain facilities and, on the latter occasion, shots were fired by the Iraqi military to deter the team from photographing trucks transporting materials previously removed from Iraqi nuclear programme sites. See S/22739, S/22743, S/22746, S/22761 and S/22762.

⁴⁵ S/23122, Annex, Enclosure, App. (chronology of activities of the 6th IAEA nuclear inspection team).

⁴⁶ S/23165, p. 7, Annex, para. 16.

⁴⁷ For the obligation to report every 6 months see para. 3 of Res. 699 (1991) and para. 8 of Res. 715 (1991); the report of the Secretary-General of 25 January 1992 (S/23514), update of 7 March 1992 (S/23687).

and complete disclosure called for under Council resolution 707 (1991) of all its programmes and capabilities relating to weapons of mass destruction and ballistic missiles with a range greater than 150 kilometres. While some additional information on Iraq's programmes for the production of weapons of mass destruction had been obtained since 25 January 1992, this had to be done through a procedure of question and answer. The Special Commission was convinced that such a procedure could not result in detection of as yet undeclared elements of the Iraq programmes and that its usefulness had been exhausted⁴⁸.

The destruction, removal and rendering harmless of existing stocks has since then begun, and the gathering and assessment of information has reached a certain standard in this regard. However, serious problems persist in respect of data essential to the system of future monitoring. In its report to the Council of 10 April 1992, the Special Commission said that as of 8 April, Iraq had failed to submit sufficient information on specific activities, facilities and items, as well as a report on the legislative and administrative measures taken to implement resolution 687, as requested by the Council⁴⁹. If the situation does not improve UNSCOM may be unable to initiate the programme for future ongoing monitoring and verification⁵⁰.

c) The Destruction, Removal and Rendering Harmless of Specified Items

As envisaged by resolution 687 and the subsequent plans submitted to the Council by the Secretary-General and the Director General of the IAEA, the next step after the gathering and assessment of information was to destroy, remove or render harmless the identified weapons and facilities. The separate procedures to be applied to the various items in question are examined in this section. Due to the fact that not all sources are available, only an outline of the major problems concerning these procedures can be given.

According to paragraphs 12 and 13 of resolution 687 nuclear-weapons-usable material and related items have to be placed under the exclusive control of the IAEA for custody and removal. Iraq has to accept the destruction, removal and rendering harmless of this material. The Secu-

⁴⁸ S/23687, Annex I, para. 3.

⁴⁹ UN press release DHL (13 April 1992).

⁵⁰ S/23687, Annex I, para. 19; see also, Ambassador Rolf Ekeus: Unearthing Iraq's Arsenal (interview with ACT), ACT 22/no.3 (1992), 6 at 8.

rity Council endorsed the plan presented by the Director General of the IAEA⁵¹ and put the Director General under an obligation to report on the progress made at least every 6 months⁵². It may be noted that the Council in resolution 707 – in order to deal with the events of June 1991⁵³ – explicitly determined that

“Iraq retains no ownership interest in items to be destroyed, removed or rendered harmless pursuant to paragraph 12 of resolution 687 (1991)”⁵⁴.

The plan for the rendering harmless and removal of specified nuclear material and certain facilities acknowledged that nuclear-weapons-usable material could not be destroyed or rendered harmless in Iraq⁵⁵. Therefore, the IAEA entered into negotiations with countries possessing the technology for transport and storage and also considered options for long-term disposal or rendering harmless of the identified material⁵⁶. It should be noted that IAEA safeguards were applied to all direct-use material removed from Iraq^{57,58}. Special attention during inspections was paid to research and other facilities designed for isotopic enrichment and reprocessing of irradiated fuel. As already indicated above, inspections were difficult⁵⁹. However, conclusive evidence was soon found that the government of Iraq had a programme for developing an implosion-type nuclear weapon⁶⁰. These findings were based on on-site analysis and on the analysis of samples, *inter alia*, at the IAEA’s Seibersdorf laboratories (Austria). As early as July 1991, France and Britain had agreed to dilute Iraqi highly enriched uranium (HEU) to less than 20% under a contract signed with the IAEA⁶¹. The HEU transported to Britain was to be reprocessed at Dounreay⁶². In November the Special Commission trans-

⁵¹ SC Res. 699 (1991), para. 2.

⁵² SC Res. 699 (1991), para. 3.

⁵³ See note 40.

⁵⁴ SC Res. 707 (1991), para. 4; for a similar provision with regard to CBW and missile related material see S/22871/Rev. 1, para. 22.

⁵⁵ S/22615, Annex, Enclosure, para. 4.

⁵⁶ S/22615, Annex, Enclosure, para. 10.

⁵⁷ According to the report direct-use material is nuclear material that can be converted into nuclear explosives components without transmutation or further enrichment, as for instance plutonium containing less than 80 per cent plutonium-238, highly enriched uranium (HEU) and uranium-233, see S/22615, Annex, Enclosure, note a at p. 5.

⁵⁸ For Iraq’s safeguards agreement with the IAEA see IAEA document INF/CIRC/172.

⁵⁹ For the incidents of June 1991 see S/22739, S/22761; for the September 1991 events during the 6th nuclear inspection see S/23122.

⁶⁰ For a detailed report on the Iraqi nuclear weapon programme see, *inter alia*, S/23215.

⁶¹ ACR (1991), at 453.B.116.8 (10 July 1991), and 453.B.116.11 (17 July 1991).

⁶² ACR (1991), at 453.B.116.32 (15 November 1991).

ported fresh HEU of Soviet origin to Moscow; this was to be processed at an appropriate facility and returned to the IAEA after isotopic dilution⁶³.

The Security Council in resolution 687 decided that Iraq had to yield possession of CBW-related items to the Special Commission for destruction, removal or rendering harmless⁶⁴. During this process requirements of public safety were to be taken into account⁶⁵. According to the plan approved by the Council⁶⁶ separate procedures were worked out for the disposal of weapons and facilities. Special attention was paid to possible safety and environmental hazards⁶⁷ when dealing with chemical weapons. Therefore, the movement of chemical weapons and agents was to be minimized⁶⁸. In order to limit the dangers, the inspections were intended also to assess the conditions of stocks and facilities. The first chemical weapons destruction team visited Iraq from 22 February to 27 March 1992. Due to the fact that the rockets to be destroyed during the mission were in an unstable state they were not transferred to a central destruction site but destroyed at their storage site (a total of 463 rockets); approximately 2.5 tons of the nerve-gas agent sarin were destroyed during this mission⁶⁹. At the Muthanna State Establishment a plant for the destruction of chemical weapons is being built under the supervision of UN-SCOM. This plant will include an incinerator for the destruction of mustard-gas agents as well as some other chemicals and a large-scale hydrolysis installation for the neutralization of nerve-gas agents. Large-scale destruction is due to start in the summer of 1992⁷⁰. The manner in which environmental and safety aspects of the disposal of chemical weapons and related equipment are taken into account may be regarded as a rather important development in the implementation of the CW disarmament obligations under the relevant Security Council resolutions⁷¹.

The destruction of ballistic missiles with a range greater than 150 km

⁶³ For further activities under the plan for future ongoing monitoring and verification, see below 3.d).

⁶⁴ According to UN press release IK/98 of 3 April 1992 Iraq violated the provisions of SC Res. 687 (1991) when it unilaterally destroyed a large number of chemical munitions.

⁶⁵ SC Res. 687 (1991), para. 9 (b) (ii).

⁶⁶ SC Res. 699 (1991), para. 1; S/22614.

⁶⁷ S/22614, para. 16.

⁶⁸ S/22614, para. 18.

⁶⁹ UN press release IK/97 (31 March 1992).

⁷⁰ UN press release IK/102 (16 April 1992).

⁷¹ Until February 1992 no evidence of a BW production system was found in Iraq, ACR (1992), at 701.B.87; see also Ekeus interview (note 50), at 8; Iraq, however, had

and related facilities is to be performed by Iraq under the supervision of the Special Commission⁷². In a recent report to the Security Council the Special Commission pointed out that Iraq had unilaterally destroyed a number of missiles and related equipment. Although an inspection team of UNSCOM later identified the remnants of most of the unilaterally destroyed missiles, this was a clear violation of obligations imposed upon Iraq by resolution 687⁷³ because international supervision of the destruction of any proscribed item forms an essential part of these obligations⁷⁴. It may be noted that during the period from 21 March until 30 March 1992 ballistic missiles-related production equipment was destroyed⁷⁵. The process of the destruction of Iraq's ballistic missile capabilities has proceeded quite far. Although major problems still occurred in February 1992 when Iraq refused to undertake the destruction of certain of its ballistic missile capabilities as directed by the Special Commission⁷⁶, an inspection team on 27 April 1992 was at least able to confirm that

“Iraq can no longer produce ballistic missiles with a range greater than 150 kilometres at three of its major production sites ...”⁷⁷.

There still remains much to be done according to the Special Commission⁷⁸. However, on the basis of the information received so far, the major problems related to destruction activities can be identified and some progress can be noted.

d) Implementing the Plans for Future Ongoing Monitoring and Verification

The obligation not to develop, produce, acquire, or stockpile certain categories of weapons is certainly one of the most difficult aspects of the

pursued a BW research programme at least from 1986 until 1990, see Krause (note 7), at 49.

⁷² SC Res. 687 (1991), para. 9 (b) (ii).

⁷³ With regard to this problem, Ambassador R. Ekeus recently stated in an interview (note 50), at 7: “But all right, we do not cry over spilt milk”.

⁷⁴ See UN press release IK/98 (3 April 1992).

⁷⁵ See S/23673, list A.

⁷⁶ See S/23673, S/23687.

⁷⁷ UN press Release IK/103 (27 April 1992).

⁷⁸ UN press Release IK/98 (3 April 1992).

law of arms control. The problem is not only to define prohibited weapons and activities but also to ensure efficient verification⁷⁹.

Resolution 687 only outlines the obligations imposed upon Iraq in respect of implementation and verification. As Iraq's nuclear weapons programme violated the Non-Proliferation Treaty of 1 July 1968 and the safeguards agreement concluded between Iraq and the IAEA⁸⁰, resolution 687 invited the Iraqi government to reaffirm its obligations under the NPT. The plans for future ongoing monitoring and verification further extended Iraq's relevant obligations and were endorsed by resolution 715, which attached a mandatory character to the plans. The plan developed by the IAEA⁸¹ includes inspection and other rights and elaborates on paragraphs 12 and 13 of resolution 687 and paragraph 3 of resolution 707. According to this plan, Iraq has to adopt national implementation measures to ensure that all obligations are met. Only a very limited number of peaceful applications of isotopes imported from other states remains permitted after prior approval by the IAEA⁸². In order to supervise the implementation of these obligations, UNSCOM and the IAEA must be provided by Iraq with full, correct, and timely information on all relevant items and activities⁸³.

An additional régime was set up under the plan of the Secretary-General⁸⁴ for CW-related items and facilities. This plan includes obligations similar to those designed to control nuclear-weapons-usable material. However, as a large number of chemical substances can be used not only for CW purposes but also has legitimate civilian uses, a special régime for dual-use chemicals was established. Under this régime, inspectors now employ two lists. List A comprises all chemicals in the draft CWC⁸⁵ except those in List B, plus hydrogen fluoride and the irritant agent CS. These chemicals and the equipment and facilities related to them are subject to regular data-reporting requirements. List-B chemicals are excluded

⁷⁹ M. Bothe, *Rechtsfragen der Rüstungskontrolle im Vertragsvölkerrecht der Gegenwart*, in: Bothe/Graf Vitzthum (note 40), at 53 et seq., and W. Graf Vitzthum, *ibid.*, at 122 et seq.

⁸⁰ See IAEA document GOV/2532; A/45/1047, S/22812, App.; for the safeguards agreement see INFCIRC/172 and INFCIRC/172/Add.1.

⁸¹ S/22782/Rev.1.

⁸² See S/22782/Rev.1, Annex 4.

⁸³ For difficulties in so far see S/23687.

⁸⁴ S/22871/Rev.1.

⁸⁵ See CD/1116 (20 January 1992), Annex on Chemicals, at p. 56 et seq. (latest version of the so-called rolling text).

from the Iraqi economy except by prior arrangement with UNSCOM⁸⁶. This list comprises Schedule 1 of the draft CWC⁸⁷ plus dimethyl methylphosphonate, the NN-dialkylphosphoramidic dihalides, and thiodiglycol⁸⁸. The actual functioning of this system may hold significance for the implementation of the prospective CW Convention⁸⁹.

As far as biological weapons are concerned, it should be mentioned that Iraq ratified the BW Convention on 8 April 1991⁹⁰ as required by resolution 687⁹¹.

Major problems related to the implementation of the plans for future ongoing monitoring and verification arose with regard to data-gathering and data-assessment⁹², aerial surveillance flights⁹³ (facilities, privileges and immunities), and political acceptance by Iraq of the obligations embodied in resolutions 707 and 715⁹⁴. These problems have not yet been solved. In Annex I of the Secretary-General's report to the Security Council of 7 March 1992, the Special Commission stated that it will be

“neither legally nor practicably able to initiate the programme for ongoing monitoring and verification of Iraq's compliance with its obligations under section C of Security Council resolution 687 (1991)”⁹⁵.

This situation had not changed by 8 April 1992⁹⁶.

e) Financial Aspects

As stated in the Secretary-General's report of 7 March 1992, financial

⁸⁶ S/22871/Rev.1, para. 32.

⁸⁷ CD/1116 (20 January 1992), Annex on Chemicals, at p. 58 et seq.

⁸⁸ For a case-study on the difficulties of verifying dual-use chemicals under the prospective CW Convention see S.J. Lundin (ed.), *Verification of Dual-use Chemicals under the Chemical Weapons Convention: The Case of Thiodiglycol*, SIPRI Chemical & Biological Warfare Studies no. 13 (1991).

⁸⁹ The obligation imposed upon other states not to transfer to Iraq certain specified items is based on paras. 24, 25, 27 of Res. 687 (1991); see also S/22872/Rev.1, paras. 28 et seq.

⁹⁰ ACR (1991), at 701.B.71 (8 April 1991); BW Convention: UNTS 1015, 163.

⁹¹ The Security Council invited Iraq to ratify the BW Convention; Res. 687 (1991), para. 7.

⁹² See above 3.b).

⁹³ For recent problems see UN press release DHL, 15 April 1992.

⁹⁴ According to UNSCOM Iraq has not yet accepted its obligations under Res. 707 (1991) and Res. 715 (1991); UN press release IK/98 (3 April 1992).

⁹⁵ S/23687, Annex I, para. 19.

⁹⁶ UN press release DHL, 13. April 1992. According to Ekeus a first outline for initial declarations was transmitted in connection with the Security Council meeting in March (note 50), at 8.

commitments for the implementation of the obligations at issue amounted to \$ 18.6 million as of 29 February 1992. Certain member states contributed the amount of \$ 8.6 million⁹⁷; another \$ 10 million was provided by the Advisory Committee on Administrative and Budgetary Questions under the provisions of GA resolution 44/203 of 2 December 1989 on unforeseen and extraordinary expenses⁹⁸. As already noted the UN will reimburse the IAEA for its extraordinary costs⁹⁹. Nevertheless, Iraq remains liable for the full costs¹⁰⁰. A certain amount of Iraq's oil revenues may be used for these purposes¹⁰¹. However, the financial basis of the implementation activities is not very strong, as became clear in late 1991 when an IAEA inspection had to be postponed due to lack of financial resources¹⁰².

f) Evaluation of Facts, Violation of Obligations and Possible Sanctions

Iraq has to pass on specified information to the Special Commission and the IAEA in order to verify its compliance with the relevant resolutions. In addition UNSCOM and the IAEA have the right to conduct on-site inspections, to rely on aerial surveillance and to receive information from other states. The facts have to be evaluated in order to detect possible violations of obligations placed upon Iraq. The evaluation of facts and the question of how to determine whether or not an arms-control obligation has been violated is a difficult aspect of all existing arms control agreements¹⁰³. The question is not only who is competent to decide on a potential violation but also how to react to violations. As Dunay puts it:

“One may conclude that neither international lawyers nor strategic analysts have a clear idea what should be done if the violation of an arms control agreement ... is detected”¹⁰⁴.

⁹⁷ The Security Council invited member states to contribute to the work of UNSCOM, see Res. 699 (1991), para. 4 and Res. 715 (1991), para. 6. In addition to financial support substantial assistance in kind was received by UNSCOM, see, e.g., S/23165, App. VI.

⁹⁸ S/23687, para. 8.

⁹⁹ IAEA document GOV/INF/609 of 2 May 1991.

¹⁰⁰ SC Res. 699, para. 4.

¹⁰¹ S/22792.

¹⁰² ACR (1991), at 453.B.116.32 (10 December 1991).

¹⁰³ D. Högel, *Rüstungskontrolle und Völkerrecht* (1990), 75.

¹⁰⁴ P. Dunay, *Verifying Conventional Arms Limitations – The Case of the November 19, 1990 Treaty on Conventional Armed Forces in Europe* (1991), 129.

Another important question is the position of the state party to an arms control agreement which is accused of a violation. In case of problems the relevant organization or other state parties may react, but the position of the accused state under such circumstances may be rather weak¹⁰⁵. In general, under the safeguards agreements with the IAEA an accused state has the right to a decision of an arbitral tribunal in case of a dispute with the Agency. Provisions for the institution of arbitral proceedings, however, are not common under arms control agreements. Nevertheless, at least the rule of law should be respected in cases when compliance with arms control obligations is at issue.

Under the régime established by resolution 687 and subsequent resolutions the Special Commission and the IAEA have to gather and assess relevant data; to a certain extent they also have the power to evaluate the facts¹⁰⁶. They are under an obligation to report to the Security Council. The Council, finally, has the power to evaluate the situation and to determine whether there has been a violation of any obligation¹⁰⁷. Acting under Chapter VII of the UN Charter, the Security Council has the power to react to violations of the relevant resolutions and to impose sanctions, as limited by provisions of the Charter. This includes the power to impose mandatory sanctions reaching as far as art. 42 of the UN Charter. However, during the implementation period the Council has so far always tried to seek some kind of settlement with Iraq unless Iraq was completely unwilling to comply with the obligations specified in the resolutions. Significantly, the rule of law, i.e. in this case mainly Iraq's right to be heard, has been respected at all times before a violation has publicly been condemned or any other reaction has been taken¹⁰⁸. Although no specific provision of the Charter requires the Security Council to respect such a principle it may be taken as a general rule to be applied to similar cases within the UN framework. Some support for this contention may be derived from the procedures for the peaceful settlement of disputes under Charter law.

¹⁰⁵ See, *inter alia*, art. IX paras. 1 and 2 of the draft CW Convention; for a dispute settlement mechanism see art. XVI CFE Treaty and Protocol on the Joint Consultative Group.

¹⁰⁶ E.g. S/23687, Annex I.

¹⁰⁷ See, *inter alia*, Res. 707 (1991), paras. 1 and 2; UN press release SC/5382 (11 March 1992).

¹⁰⁸ A number of high-level missions was sent to Iraq. Also, delegations of Iraq were invited to participate in the consideration of relevant issues in the Security Council, see, e.g., UN press release SC/5382.

4. Conclusions to be Drawn for the Implementation of Arms-Control and Disarmament Obligations in General

Although the situation with regard to Iraq may be quite different from other situations arising under arms control agreements, it allows a few general conclusions about the implementation of arms control and disarmament treaties¹⁰⁹. While data-reporting may not always be such a problem as in the case of Iraq, not all states may adopt a cooperative enough approach and some state parties may try to cheat. In order to avoid misconceptions when assessing the data reported to fulfil obligations under a treaty system, the organization collecting such data needs further information from other sources. This information can be based on on-site inspections but may also be provided by other states. If it is suspected that a state party has not presented proper data, this may cause it to carry the burden of proof. As the implementation of the Security Council resolutions in the case of Iraq has shown, on-site inspections may be quite effective in supplementing the required data; however, they should not be the only basis for information.

A second major conclusion which can be drawn from the case of Iraq is the necessity to deal with the relationship between disarmament obligations and aspects of environmental law. The destruction of weapons always affects the environment. This is obvious with regard to chemical weapons and even more so in connection with nuclear material. In the case of Iraq the Chemical and Biological Weapons Destruction Advisory Panel, a panel of international experts established by the Special Commission specifically to address the safe destruction of Iraq's chemical arsenal, has developed some criteria which may be of use for other international instruments¹¹⁰. Experience with the destruction of chemical weapons in Iraq should be further analyzed with respect to the implementation of the future CWC¹¹¹.

A third conclusion concerns the questions of how to evaluate the facts,

¹⁰⁹ Other writers adopt a more sceptical view on what conclusions may be drawn from experiences with the implementation of these Security Council resolutions, see Krause (note 7), at 49; for proposals that the Security Council should have a permanent body, such as the Special Commission, on hand to operate in other countries and in other situations see the Ekeus interview (note 50), at 9.

¹¹⁰ For further information on CW destruction see K. Lohs/S.J. Lundin/T. Stock, *The Destruction of Chemical Weapons and Chemical Warfare Agents* (1990).

¹¹¹ The present CWC draft contains a number of clauses obligating states parties to protect the environment when destroying chemical weapons and facilities, e.g. art. IV para. 7; art. V para. 9; art. VII para. 3.

how to determine a violation and how to guarantee at least a minimum of procedural rights to the suspected state. As noted above, Iraq's position was taken into account when evaluating facts and deciding upon possible reactions. This is an important development for arms control agreements if trust and confidence are regarded as essential elements of verification¹¹².

Finally, the case of Iraq indicates that the costs of implementation and verification should be taken into account when imposing arms control obligations. The situation of Iraq, *inter alia* as an oil-producing country, is extraordinary and cannot be taken as a precedent in so far as possible financial resources for other arms control agreements are concerned. Furthermore, the effectiveness of verification in the case of Iraq is limited. These factors point to the need to assess especially in view of the costs the verification systems of recent or forthcoming arms control agreements. To facilitate the most reliable detection of potential violations, it is important to determine how to limit the verification process to the extent absolutely necessary, rather than verify as much as possible¹¹³.

Annex

Resolution 687 (1991) (Excerpts)

"The Security Council,

(...)

Conscious also of the statements by Iraq threatening to use weapons in violation of its obligations under the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, and of its prior use of chemical weapons and affirming that grave consequences would follow any further use by Iraq of such weapons,

¹¹² For the relevance of the subjective element in verification see J. Voas, *The Arms Control Compliance Debate*, *Survival* 28 (1986), 8, at 9 et seq.

¹¹³ The manuscript for the present article was finalized on 18 May 1992. The following publications which are of relevance to its subject-matter could not be considered as they were not available to the author at the time of writing: E. Chauvistré, *The implications of IAEA inspections under Security Council resolution 687*, UNIDIR/Research paper no. 11 (1992); S. Sur, *La résolution 687 (3 avril 1991) du Conseil de sécurité dans l'affaire du Golfe: problèmes de rétablissement et de garantie de la paix*, UNIDIR/Research paper no. 12 (1992).

Recalling that Iraq has subscribed to the Declaration adopted by all States participating in the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States, held in Paris from 7 to 11 January 1989, establishing the objective of universal elimination of chemical and biological weapons,

Recalling also that Iraq has signed the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, of 10 April 1972,

Noting the importance of Iraq ratifying this Convention,

Noting moreover the importance of all States adhering to this Convention and encouraging its forthcoming Review Conference to reinforce the authority, efficiency and universal scope of the convention,

Stressing the importance of an early conclusion by the Conference on Disarmament of its work on a Convention on the Universal Prohibition of Chemical Weapons and of universal adherence thereto,

Aware of the use by Iraq of ballistic missiles in unprovoked attacks and therefore of the need to take specific measures in regard to such missiles located in Iraq,

Concerned by the reports in the hands of Member States that Iraq has attempted to acquire materials for a nuclear-weapons programme contrary to its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968,

Recalling the objective of the establishment of a nuclear-weapons-free zone in the region of the Middle East,

Conscious of the threat that all weapons of mass destruction pose to peace and security in the area and of the need to work towards the establishment in the Middle East of a zone free of such weapons,

Conscious also of the objective of achieving balanced and comprehensive control of armaments in the region,

Conscious further of the importance of achieving the objectives noted above using all available means, including a dialogue among the States of the region,

(...)

C.

7. *Invites* Iraq to reaffirm unconditionally its obligations under the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare,

signed at Geneva on 17 June 1925, and to ratify the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, of 10 April 1972;

8. *Decides* that Iraq shall unconditionally accept the destruction, removal, or rendering harmless, under international supervision, of:

- (a) All chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities;
- (b) All ballistic missiles with a range greater than 150 kilometres and related major parts, and repair and production facilities.

9. *Decides*, for the implementation of paragraph 8 above, the following:

- (a) Iraq shall submit to the Secretary-General, within fifteen days of the adoption of the present resolution, a declaration of the locations, amounts and types of all items specified in paragraph 8 and agree to urgent, on-site inspection as specified below;
- (b) The Secretary-General, in consultation with the appropriate Governments and, where appropriate, with the Director-General of the World Health Organization, within forty-five days of the passage of the present resolution, shall develop, and submit to the Council for approval, a plan calling for the completion of the following acts within forty-five days of such approval:
 - (i) The forming of a Special Commission, which shall carry out immediate on-site inspection of Iraq's biological, chemical and missile capabilities, based on Iraq's declarations and the designation of any additional locations by the Special Commission itself;
 - (ii) The yielding by Iraq of possession to the Special Commission for destruction, removal or rendering harmless, taking into account the requirements of public safety, of all items specified under paragraph 8 (a) above, including items at the additional locations designated by the Special Commission under paragraph 9 (b) (i) above and the destruction by Iraq, under the supervision of the Special Commission, of all its missile capabilities, including launchers, as specified under paragraph 8 (b) above;
 - (iii) The provision by the Special Commission of the assistance and co-operation to the Director-General of the International Atomic Energy Agency required in paragraphs 12 and 13 below;

10. *Decides* that Iraq shall unconditionally undertake not to use, develop, construct or acquire any of the items specified in paragraphs 8 and 9 above and requests the Secretary-General, in consultation with the Special Commission, to develop a plan for the future ongoing monitoring and verification of Iraq's compliance with this paragraph, to be submitted to the Security Council for approval within one hundred and twenty days of the passage of this resolution;

11. *Invites* Iraq to reaffirm unconditionally its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968;

12. *Decides* that Iraq shall unconditionally agree not to acquire or develop nuclear weapons or nuclear-weapons-usable material or any subsystems or components or any research, development, support or manufacturing facilities related to the above; to submit to the Secretary-General and the Director-General of the International Atomic Energy Agency within fifteen days of the adoption of the present resolution a declaration of the locations, amounts, and types of all items specified above; to place all of its nuclear-weapons-usable materials under the exclusive control, for custody and removal, of the International Atomic Energy Agency, with the assistance and cooperation of the Special Commission as provided for in the plan of the Secretary-General discussed in paragraph 9 (b) above; to accept, in accordance with the arrangements provided for in paragraph 13 below, urgent on-site inspection and the destruction, removal or rendering harmless as appropriate of all items specified above; and to accept the plan discussed in paragraph 13 below for the future ongoing monitoring and verification of its compliance with these undertakings;

13. *Requests* the Director-General of the International Atomic Energy Agency, through the Secretary-General, with the assistance and cooperation of the Special Commission as provided for in the plan of the Secretary-General in paragraph 9 (b) above, to carry out immediate on-site inspection of Iraq's nuclear capabilities based on Iraq's declarations and the designation of any additional locations by the Special Commission; to develop a plan for submission to the Security Council within forty-five days calling for the destruction, removal, or rendering harmless as appropriate of all items listed in paragraph 12 above; to carry out the plan within forty-five days following approval by the Security Council; and to develop a plan, taking into account the rights and obligations of Iraq under the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July

1968, for the future ongoing monitoring and verification of Iraq's compliance with paragraph 12 above, 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, to be submitted to the Security Council for approval within one hundred and twenty days of the passage of the present resolution;

14. *Takes note* that the actions to be taken by Iraq in paragraphs 8, 9, 10, 11, 12 and 13 of the present resolution represent steps towards the goal of establishing in the Middle East a zone free from weapons of mass destruction and all missiles for their delivery and the objective of a global ban on chemical weapons;

(...)"