

INSPECTIONS AND THEIR ENFORCEMENT: A MODEST PROPOSAL

Recent crises in Kosovo and Iraq, although in many ways very different, have both illustrated certain lacunae in the operation of the United Nations Charter that have impeded effective responses by the Organization to situations that require preventive measures and a credible capacity to enforce them.

In both situations, the UN Security Council, acting under Chapter VII of the Charter, imposed mandatory controls on a state it had found to be a threat to international peace and security, and promised to take further measures, if necessary, to enforce these controls.¹ Still, the resolutions did not specify who would decide whether there had been the material breach of the controls imposed on the transgressor (Serbia, Iraq) that would trigger preauthorized enforcement. The absence of such provisions for automatic response, and of agreed means for ascertaining whether a material breach had actually occurred, has marked UN controls as paper tigers, incapable of deterring violations.

In both the Kosovo and the Iraq crises, the Security Council responded by passing binding resolutions under the aegis of its Chapter VII enforcement powers. These imposed firm requirements: in the one instance, on the authorities in Belgrade² and, in the other, on Baghdad.³ In each instance, the Council had determined that these authorities' unlawful actions had risen to the level of "threats to the peace or breaches of the peace" and set out the precise remedial actions required to come into compliance with the Charter. In both resolutions, the Council hinted at consequences in the event of noncompliance. But in neither case did the Council spell out exactly what would happen. It did not create automaticity of designated consequences, although in the Kosovo case it eventually validated a strong military enforcement presence. And it also left unclear who would determine whether there had been noncompliance sufficient to trigger consequences.

These omissions, in future, must be remedied. Security Council resolutions imposing conditions under Chapter VII—for example, to end a war against a transgressor fought by a coalition of the willing or a regional grouping—should make clear that a material breach of the imposed postwar regime would automatically trigger the authority of states to respond with all necessary force. Such preauthorization subject to a condition subsequent is not unprecedented, having been employed by the Security Council in respect of Iraq in its Resolution 678 of 1990.⁴

It should also be resolved in advance, and specified in the peacemaking resolution, who is to determine that a material breach has occurred. One might begin by eliminating the evidently wrong answers. It would surely be unacceptable to make the implementing of automatic, preauthorized use of force depend solely upon the discretion of any single, interested state. It follows that the resolution conditionally authorizing recourse to force in the event of a material breach could not leave to any and every state the sole auto-determination of whether such a breach had occurred and, thus, whether to resort to military enforcement.

¹ In the case of Iraq, those are spelled out in Security Council Resolutions 687 (1991) and 715 (1991), as well as UN Doc. S/1998/166. SC Res. 687, UN SCOR, 46th Sess., Res. & Dec., at 11, UN Doc. S/INF/47 (1991), *reprinted in* 30 ILM 846 (1991); SC Res. 715, UN SCOR, 46th Sess., *supra*, at 26; UN Doc. S/1998/166, *reprinted in* 37 ILM 504 (1998). In the instance of Kosovo, the controls and explicit or implicit threat of enforcement action in the event of their violation are found in Security Council Resolutions 1203 (1998) and 1207 (1998). SC Res. 1203, UN SCOR, 53d Sess., Res. & Dec., at 15, UN Doc. S/INF/54 (1998); SC Res. 1207, *id.* at 19, *reprinted in* 38 ILM 254 (1999).

² SC Res. 1244, UN SCOR, 54th Sess., Res. & Dec., at 32, UN Doc. S/INF/55 (1999), *reprinted in* 38 ILM 1451 (1999).

³ SC Res. 687, *supra* note 1. Resolution 1154 (1998) speaks of "severest consequences for Iraq" in the event of further violation of its obligations. SC Res. 1154, UN SCOR, 53d Sess., *supra* note 1, at 23, *reprinted in* 37 ILM 503 (1998).

⁴ SC Res. 678, UN SCOR, 45th Sess., Res. & Dec., at 27, UN Doc. S/INF/46 (1990), *reprinted in* 29 ILM 1565 (1990).

By the same reasoning, however, recourse to armed enforcement could not be left solely to a subsequent substantive resolution of the Security Council in which each permanent member, by virtue of the veto, could prevent enforcement each time a breach was alleged.

The only way out of this double conundrum (enforcement by anyone and enforcement by no one) is to authorize the Security Council to determine whether a material breach has occurred, but to do so by a majority of nine of the fifteen members, without a veto.

Fortunately, such a veto-less vote is authorized by the Charter in Article 27(2). This provision states that “[d]ecisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members” without the veto. By virtue of the “San Francisco Declaration”⁵ of the permanent members, agreed in 1945 concurrently with the endorsement of the UN Charter, the decision whether a matter is procedural or not is to be taken by the Council in a vote that does require permanent-member unanimity. Thus, a permanent member could exercise its veto when the control regime was being designed, but not when it was being implemented or enforced. A majority of any nine would trigger enforcement by a coalition of the willing. One member could neither launch, nor prevent, enforcement.

This sort of institutional innovation is perfectly within the members’ prerogative. Each of the principal organs has primary responsibility for interpreting its part of the Charter. For example, the members have already interpreted Article 27(3), the “veto” clause—which literally requires the “concurring votes of the permanent members”—as being satisfied despite a permanent member’s abstention.

If the members of the Organization want a way to facilitate responsible collegial enforcement of Chapter VII mandates, they already have the legal means at hand. A small increment of innovation would get them there.

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⁵ Declaration of June 7, 1945, Doc. 852, III/2/37(1), 11 U.N.C.I.O. Docs. 711–14 (1945).