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**Iraq and the Serious Consequences of Word
Games: Language, Violence and Responsibility in
the Security Council**

By Craig Scott

Iraq and the Serious Consequences of Word Games: Language, Violence and Responsibility in the Security Council

By Craig Scott

A. Introduction*

[1] For some months now and with special intensity in the past few weeks, a battle over legal process – what may or may not the United States do militarily in Iraq without new authorization from the UN Security Council, and at what stage and under what conditions should a Council resolution give such authorization? – has simultaneously become a battle over what words in a resolution will be sufficient to count as implicit authorization. The current diplomatic discourse around a new Iraq resolution is focussing on one or more “hidden triggers” in the draft text presented by the US on October 21.¹

[2] Having been manoeuvred into going to the UN by the political response to the Cheney-Bush-Rumsfeld war drum beat over Iraq, the US continues to maintain that, while a new resolution would be desirable as a signal of renewed 'international community' resolve, such a resolution is not actually needed from a (US) legal perspective. According to the US, prior Council resolutions on Iraq already permit states to enforce the Council's disarmament regime. By Monday, October 28, the United States was using this claim as a basis for castigating the

* Associate Professor and Associate Dean (Research and Graduate Studies), Osgoode Hall Law School, York University, Toronto. The author wishes to thank Frédéric Mégret for his comments on the first draft of this article. The article was originally written on October 26, 2002, and has been updated to take into account developments up to and including Monday, October 28, 2002. Portions of this article will appear, in modified form, in a forthcoming piece on humanitarian intervention: C Scott, “Interpreting Intervention”, (2001) 39 *Canadian Yearbook of International Law* 333-369.

¹ Draft of a U.S.-British Resolution on Iraq and Inspectors, *New York Times*, 23 October 2002, A23. Note especially U.S.-U.K. draft clause 2 (“DECIDES that false statements or omissions in the declarations submitted by Iraq pursuant to this resolution or failure at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute further material breach of Iraq's obligations.”) and draft clause 3 (“RECALLS that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations.”). See also Julia Preston, “‘Big 5’ at the United Nations Still Jockeying Over Iraq Text,” *New York Times*, 23 October 2002, A23.

Security Council for dooming itself to irrelevance should it not agree to a text that the US can accept, for the US would act on its own views anyway.²

[3] However, feeling the heat to a sufficient extent to feel UN cover would be highly useful to facilitate that which the US and the UK are already willing – perhaps even itching – to do, the US continues to present itself as acting in good faith by engaging in a debate over what new action the Security Council should take. It is here that the US preference for one resolution and France's preference for two meet the world of word politics.

[4] Initially, France led resistance in the Security Council to the United States' insistence on a single Council resolution.³ The US sought a resolution that would specify the standards with which Iraq must comply with respect to its 'weapons of mass destruction' (WMD) and clearly permit (whether expressly or implicitly) states to then respond to non-compliance with force, extending to invasion, without the need for any further Council action. In France's view, two stages are needed: a new resolution that sets out the standards and then a second resolution authorizing force should Iraq fail to comply with the first (and should Council members then deem force to be justified).⁴

² David E. Sanger, "Iraq Makes U.N. Seem 'Foolish', Bush Asserts," *New York Times*, 29 October 2002, A13: "[t]he White House declared that time had run out at the United Nations, and that the United States would demand a vote on an Iraq resolution, whether it wins the wording it wants or not. With each [US Congress] campaign stop, Mr. Bush reiterated – sometimes nearly shouting – that the United States was willing to disarm Mr. Hussein without the explicit authorization of the United Nations. 'If the United Nations doesn't have the courage to disarm, for the sake of peace, for the sake of freedom, the United States will lead a coalition to disarm Iraq,' Mr Bush said..."

³ See e.g. "France lauds its own role in influencing UN resolution," *The Globe and Mail*, 19 October 2002, A21. The U.S.-U.K. October 21 draft resolution, *supra* note 2, also contains reference to a second-stage process without, however, making that process a condition precedent for military force. See draft clause 11 ("DIRECTS the executive chairman of Unmovic and the director general of the I.A.E.A. to report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including its obligations regarding inspections under this resolution.") and draft clause 12 ("DECIDES to convene immediately upon receipt of a report in accordance with Paragraph 11 above, in order to consider the situation and the need for full compliance with all of the relevant Security Council resolutions, in order to restore international peace and security."). The draft resolution ends with a standard final clause, Clause 13 ("DECIDES to remain seized of the matter.").

⁴ For a key official statement of France's public position as it remained as of the week of October 27, see "Irak: La maison blanche presse l'ONU", *Le Monde*, 28 octobre 2002: "Le ministre des affaires étrangères, Dominique de Villepin, a ainsi récusé l'idée d'une résolution américaine sur l'Irak à la carte, donnant à Washington dans le cadre de l'ONU un "chèque en blanc" pour attaquer ce pays. "Il ne peut pas y avoir à la fois une action collective et une action unilatérale. Il faut choisir, a-t-il déclaré lors d'une conférence de presse à l'issue d'un entretien avec son homologue finlandais, Erki Tuomioja. Dès lors que nous sommes dans le cadre du Conseil de sécurité, il faut que la responsabilité collective s'exerce à plein. Et cette

[5] However, that was then and this may be now. By the weekend of October 25-27, the world of power politics and the world of language have come together in such a way that a mutual saving of face (who has given in to whom?) will still result in a final text that leaves space for US interpretive unilateralism. It will surprise no one familiar with international politics that it is possible that France is playing a double game, according to which it can claim to have stood up to the US unilateralist-militarist impulse while knowingly leaving intact language in a Council resolution that has in the past been used by the US to justify using force against Iraq – albeit in the form of one-off targeted attacks in contrast to the current invasion scenario.

[6] This article seeks to lay bare what is stake with respect to Security Council Resolution textual semantics, in light of the interplay over the past decade between Council resolutions, a hybrid warning-threat discourse of “serious consequences” and aerial bombardments by the US (along with the UK, and, on at least one occasion, France itself) of Iraq in 1993, 1997 and 1998. After showing what the serious consequences of “serious consequences” could be, I end by arguing that, since Council texts are not all-governing but instead are located in a web of associated interpretive signals, it is crucial for key states to delegitimize US claims to UN endorsement of its war agenda by going on record with their interpretations of what the resolution does *not* permit.

B. The First Hidden Trigger: “Material Breach”

[7] The US draft that began circulating in the week of October 20 refers to Iraq being a persistent delinquent with respect to previous Security Council resolutions since the end of Iraq’s annexation of Kuwait. It does this by using a term of art – “material breach” – drawn from the law of treaties. *Pour mémoire*, according to the law of treaties, a material breach of a treaty by a party to that treaty permits other parties to consider the treaty as having been repudiated – whether suspended or terminated.⁵ In using the language of “material breach”, US government lawyers and a number of legal academics have presented Council resolutions setting out

responsabilité collective ne peut pas se déléguer. Nous ne pouvons pas faire une partie du chemin avec les Nations unies et en même temps imaginer qu’un chèque en blanc puisse être donné”, a-t-il souligné. “Nous sommes déterminés à prendre nos responsabilités dans le cadre de cette sécurité collective parce que nous sommes convaincus que c’est la seule façon d’être véritablement efficace dans une crise”, a-t-il encore ajouté. M. de Villepin a réitéré que “tout doit être fait pour que le recours à la force soit véritablement la dernière option possible”. “Nous voulons une résolution qui soit à la fois claire, ferme et déterminée, qui adresse un message très fort à l’Irak, et l’ensemble de la communauté internationale est d’accord pour cet objectif, y compris le monde arabe”, a-t-il expliqué.”

⁵ See Article 60 of the Vienna Convention on the Law of Treaties, January 27, 1969, 1155 U.N.T.S. 331.

standards and finding non-compliance with those standards by Iraq as creating a relationship between the UN Security Council and Iraq that is akin to a relationship between parties to an international agreement (treaty). I set out below the trajectory of the legal argument that the US and the UK clearly intend to be available to them should a new Council resolution on Iraq contain the "material breach" language.

[8] In 1990 Security Council Resolution 678 authorized states cooperating with Kuwait to use "all necessary means" to force Iraq's withdrawal from Kuwait and also to "restore international peace and security in the area."⁶ After Operation Desert Storm succeeded in ousting Iraqi forces from Kuwait, the Security Council adopted Resolution 687.⁷ It imposed a cease-fire on all combatants and also established the United Nations Special Commission (UNSCOM), which was the United Nations' most ambitious and sophisticated monitoring regime to date. UNSCOM was charged with the mandate of discerning Iraq's continuing weapons of mass destruction (WMD) programs and verifying that its weaponry and weapon-making capacity had been destroyed by Iraq. A comprehensive sanctions regime was also associated with the weapons-inspection regime. The removal of sanctions was the intended prize for Iraq once it had complied with all requirements to eliminate its WMD capacity. In relatively short order, Iraq resisted the UNSCOM inspections regime.

[9] Iraq's tactics included engaging in periodic games of brinkmanship with the United States and the United Kingdom whenever these states made clear that they were willing to employ military force as a response to Iraq's non-compliance with Resolution 687. Starting with the United States, some states began to advance or accept an interpretive theory that contended that, if the inspection requirements of Resolution 687 were "materially breached," then the cease-fire mandated by Resolution 687 could reciprocally be considered by states that had been cooperating with Kuwait as having been suspended. The consequence of this suspension of the requirement to respect the cease-fire would be, according to this theory, that the original Resolution 678 would become applicable again, including, in particular, the authorization to use "all necessary means ... to restore international peace and security in the area."

[10] There are significant problems with the plausibility of this interpretive theory of the relationship between Resolutions 687 and 678, not least being the

⁶ UN Security Council Resolution 678 (1990), November 29, 1990, text can be accessed online at <<http://www.un.org/Docs/scres/1990/678e.pdf>> (last visited March 28, 2002).

⁷ UN Security Council Resolution 687 (1991), April 3, 1991, text can be accessed online at <<http://www.un.org/Docs/scres/1991/687e.pdf>> (last visited March 28, 2002).

chronological problems of Resolution 678 having envisioned a *restoration* of peace and security. Such a mandate, quite clearly, did not contemplate the *revision* of the *status quo ante* through a comprehensive disarmament program aimed at Iraq. However, in the present context, it would be a mistake to focus on the plausibility of the US theory of material breach as if it were some kind of 'pure' legal question to be decided in the realm of sound analytical reasoning.

[11] Legal theories and associated specific arguments ultimately achieve validation by complex processes of acceptance by and from within relevant communities of interpretation. In domestic legal systems, the judiciary is the key (although far from only) community whose adherence needs to be secured, or at least predicted, but, in international peace and security law, we do not have this luxury. Instead, a more diffuse and power-compromised community of judgement is the key audience. In matters of military violence, the views of and stances taken by all states matter, but, at any given moment, the five permanent members of the Security Council and rotating group of ten other states have the power to decide whether to endorse or not endorse a given theory. In an ideal legal world, this decision would be produced through a process of unforced persuasion but in the real normative world of the Security Council, a combination of coercive and pork-barrelling tactics are often employed to secure 'acceptance' of powerful states' preferences.

[12] Thus it is that context matters. The US "material breach" theory is known intimately by all other Security Council actors, not to mention all observing states not themselves members of the Council. Leaving in the "material breach" language will transform the US arguments from one that was bordering on being a bad-faith rationalization of the will to power to being one that can be presented in some good faith as 'law' acquiesced by other law-makers. Council members need only have read the Saturday New York Times, in case they were on a break during the relevant corridor discussions at the UN on Friday, October 25. "American diplomats said this language was central because it could allow them to argue, if Iraq balked at the arms inspections, that Baghdad's new violations compounded its past ones and nullified the cease-fire agreements that ended the Persian Gulf war in 1991. This would open the legal way for military action."⁸

Counting against my double-game fears about France's strategy is the fact that France appears to be continuing to resist the US. As of the weekend of October 26, both France and Russia were circulating their own informal texts as working documents, although they have both stopped short of tabling their texts as

⁸ Julia Preston, "U.S. Raises Pressure on Russia and France for Iraq Resolution," New York Times, 26 October 2002, A8.

competing draft resolutions. The French draft drops all references to “material breach.” An unnamed French diplomat presents France’s concerns in the New York Times of Saturday, October 26, in the following way: “This is war and peace. You cannot adopt a text with ambiguities.”⁹

[13] The problem is that ambiguities are exactly what the French now seem to be willing to countenance. While focussing attention on the material-breach ‘hidden trigger’, France is leaving in place – and according to news reports, perhaps even beefing up – language from the US draft that is conducive to US arguments of implicit authorization: the language of “serious consequences.” That France knows that its own version still contains US-friendly ambiguities is made completely clear when the French text is contrasted to the Russian working document. Julia Preston, the reporter for the New York Times following the evolving discourse the most closely, sees clearly the difference: “The Russian proposal did little to strengthen the weapons inspection issue, and included no mention of ‘material breach’ or ‘serious consequences’ – *that is, no threat of military action.*”¹⁰

[14] Meanwhile, at the end of the weekend, Mexico, one of the ten rotating members of the Security Council, threw a monkey wrench into the (US) works by siding with the French informal resolution, and, Mexico makes clear, with the two-stage approach that it understands France to still be adhering to.¹¹ Mexico presents itself as a non-syncophantic friend of the US, a friend attempting to preserve both a multilateral consensus and a credible international signal of future force against Iraq: “‘What we want is a resolution that is approved by all 15 – or 14 – members of the Security Council,’ said [Mexican Foreign Minister] Casteñeda. ‘We think that’s more important for the United States’ cause.’”¹²

[15] Thus it is that the semantic stakes may well come down to whether or not – and, if so, how – the Council agrees to include “serious consequences” language in whatever resolution is adopted.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Tim Weiner, “Holding Swing Vote, Mexico Tells Bush It Won’t Support Iraq Resolution U.S. Favours,” New York Times, 28 October 2002, A11.

¹² *Ibid.*

C. The Second Hidden Trigger: “Serious Consequences”

[16] In order to drive home why Russia’s opposition to “serious consequences” language is grounded in a well-justified fear of what use the US and UK will make of the language without recourse to any further resolution, I will now proceed to excavate for the reader a less-straightforward interpretive evolution within Security Council practice. My narrative looks at the effect of warnings from the Security Council about the future “serious” or “severest” consequences of continuing non-compliance with Council resolutions. Although the immediate purpose of this upcoming discussion is more explanatory than judgmental, the purpose is indeed to get us to the crucial normative issue at stake in the current bargaining over the text of a Council resolution: should the international legal community accept warnings of unspecified consequences from unspecified quarters as being sufficient to authorize states to act militarily in order to force compliance, without having first received any further instructions from the Council?

[17] Two preliminary, but crucial, points must be made in order to prepare the reader for the nuanced nature of the normative signalling games in which states engage in the context of negotiating the space between the Charter’s multilateral monopoly over the use of force (other than in justifiable self-defence) and the reality of unilateral or oligopolistic judgments being made by states wishing, or simply being willing, to use force to secure (what are presented as) the ends of the international community as a whole.

[18] First of all, central to the narrative will be the linguistic acts of two actors — the President of the Security Council and the Secretary-General — who are not expressly accorded an authoritative role with respect to interpreting the meaning of Security Council resolutions, let alone a central one. A key part of the signalling game at stake in the Iraq context has been the relationship between their statements and the formally binding collective acts of the Security Council in the form of resolutions.

[19] Second, I have been using the term “warning” to describe the statements emanating from the Security Council, and I will continue to use this term. However, I do so advisedly, because a significant part of the ambiguity surrounding the import of these statements is precisely whether or not they are best characterized as *warnings* or, instead, as *threats*. The difference hinges on the relationship between the actor(s) uttering the threat or warning and the actor(s) that are meant to be understood as being prepared to act on that threat or warning should the triggering conditions (indicated in the threat or warning) be met. The actor who utters a threat will be the actor that will make good on the threat,

whereas the actor acting on a warning will be different from the actor issuing the warning.

[20] If it is tolerably clear that the members of the Security Council at any given time intend the expressions “serious consequences” or “severest consequences” to refer to, or at least to include, military measures (in a manner not dissimilar to how “all necessary means,” as used in Resolution 678, is now understood as a term of art for an express authorization to use force), it is by no means clear in which of at least three possible ways the Security Council wishes to be understood. The options are: (1) as a threat that the Security Council, seized of the matter, will return to it and subsequently expressly authorize military measures; (2) as a warning that there are some states that will take matters into their own hands and adopt the military option (leaving this as a factual statement with no normative stance being taken towards this eventuality one way or the other); or (3) as a *hybrid in which threat and warning join hands* in such a way that the signal is that some states will adopt this option *and* that, if this happens, the Council will treat this conduct as lawful. It is the third validating signal that transmits a warning simultaneously as a threat — and, put differently, as an implicit authorization by the Council for states to act as its agent. I now turn to how it is that the combined role — even tag-team performance — of the Security Council President and the Secretary-General may have helped pave the way in the present Iraq crisis for a threat of future action by the Security Council (the first signal) and a warning of future action by unspecified states (the second signal) to be converted into this third hybrid signal.

[21] In early 1998, Secretary-General Kofi Annan went, on his own initiative, to Baghdad in order to seek concessions from Iraq that would have the effect of avoiding military strikes that were being threatened by the United States in particular. After Annan’s return to New York in March 1998 with the United Nations-Iraq Memorandum of Understanding (MOU), many in the United States’ foreign policy apparatus were incensed at his intervention, which had made it politically impossible at that time for the United States to go ahead with its military strikes — strikes that were viewed as being necessary in light of a persistent pattern of bad faith non-compliance by Iraq with the UNSCOM regime.¹³ To soften the sting, the Security Council adopted Resolution 1154, in which it was stated that the “severest consequences” would result should Iraq not live up to the MOU that it had just entered into with Secretary-General Annan.¹⁴ The employment of this

¹³ United Nations — Iraq Memorandum of Understanding, February 23, 1998, (1998) 37 I.L.M. 501.

¹⁴ See, UN Security Council Resolution 1154 (1998), March 2, 1998, at para. 3, text can be accessed online at <<http://www.un.org/Docs/scres/1998/sres1154.htm>> (last visited March 28, 2002): “The Security

phrase seemed designed to tap into a discursive precedent that seems to have become instantiated as a linguistic convention in prior Security Council practice vis-à-vis Iraq, albeit not within, but rather parallel to, Security Council resolutions — in the form of statements of the President of the Council. Note that, in this regard, the Presidency of the Security Council rotates amongst the different member states of the Council, with the President's statements being issued, by commonly accepted practice, only where the President of the Security Council, at the time, is confident that the statement in question reflects the consensus of the Security Council members.

[22] On at least two occasions prior to 1998, in 1993 and then again in 1997, the Security Council president used similar, while not identical, language when Iraq was warned of "serious consequences" should it continue to fail to comply with Security Council demands for cooperation with UNSCOM.¹⁵ Following the 1993 warning (indeed, only two days later), the United Kingdom, the United States, and France went on to bomb Iraqi targets in southern Iraq.¹⁶ Whether or not any firm consensus had evolved by 1998 amongst the permanent members of the Security Council with respect to at least a *de facto* acquiescence in recourse to military action following a presidential warning of "serious consequences," the aforementioned 1998 warning did seem to represent a qualitative shift in the Council's linguistic signalling practice, since it differed in two significant respects from those of 1993 and 1997 — in both form and content. In terms of form, the 1998 warning was inserted within Security Council Resolution 1154 itself, rather than being articulated at one step removed through the formally non-binding vehicle of presidential notes or statements. As for the content of the warning, the expression "severest consequences" is obviously an order of magnitude beyond "serious consequences." Combining form and substance, an external observer would be forgiven for interpreting there to have been a deeper level of collective resolve in 1998: if warnings of "serious consequences" outside the body of a Security Council

Council ... [s]tresses that compliance ... is necessary for the implementation of resolution 687 (1991), but that any violation would have severest consequences for Iraq."

¹⁵ Note by the President of the Security Council, UN Doc. S/25091 (1993). In 1997, the president said: "The Security Council warns of the serious consequences of Iraq's failure to comply immediately and fully." Statement of the President of the Security Council, UN Doc. S/PRST/1997/49, October 29, 1997, text can be accessed online at <<http://www.un.org/Docs/sc/statements/1997/prst9749.htm>> (last visited 28 March 2002).

¹⁶ See Christine Gray, "After the Ceasefire: Iraq, the Security Council and the Use of Force" (1994) 65 *British Yearbook of International Law* 135 at 154, 167.

resolution could be understood (that is, in the 1993 and 1997 precedents) as an implicit signal by the Security Council that force may be used, then “severest” consequences warned — or threatened — within a resolution must *a fortiori* be an even clearer signal: an implicit authorization.

[23] However, in 1998, matters seem to have changed. During the debate over the terms of Resolution 1154, China stated emphatically that the warning of “severest consequences” in that resolution would, in China’s words, not lead to “automatic authorization of the use of force against Iraq.”¹⁷ On the surface of things, it would seem that China knew full well what normative stakes were involved in Resolution 1154’s terminology in light of the signalling games of 1993 and 1997, in which it, China, had participated. At this point, the role of soloist in the Security Council concerto, which had previously been that of the President, was now taken up by Secretary-General Annan himself. His solo performance in the interpretive tug-of-war over what Resolution 1154 was permitting involved an ABC television news appearance. Should Iraq not comply with the MOU he had brokered in early 1998, Annan was asked, would the use of military force require a new Security Council resolution or would Resolution 1154’s language be sufficient to allow willing states to take military measures against Iraq? In what were obviously very closely constructed sentences, Annan noted that the United States had consulted broadly throughout the crisis, and this action had resulted in Annan going to Baghdad to seek the MOU. Then, he added the following: “The Russians, the French and Chinese ... resisted [the] idea of automaticity. And therefore, if the United States had to strike, I think some sort of *consultations* with the other members would be required.”¹⁸ Some eight months later, in November 1998, the United States, the United Kingdom, and France eventually did decide to use military force on the basis that Iraq had continued to fail to comply with both Resolution 687 and the March 1998 MOU.

¹⁷ For the summary records of China’s remarks, see UN Doc. S/PV.3858, 1998, at 14. With respect to the fact that China was reported to have the support of two other permanent members, see John Goshko, “Three on Security Council Oppose ‘Automatic Trigger’ on Iraq,” *Washington Post*, February 28, 1998, at A20: “[D]iplomatic sources said that France, Russia, China and Council members belonging to the Non-Aligned Movement, all of which have opposed military strikes, are insisting that any resolution require further Council consideration before force is authorized. The sources said these countries are agreeable to warning Iraq of potential consequences but, as of now, refuse to accede to the idea of an automatic trigger.”

¹⁸ See “Annan: U.S. Must Consult before Attacking Iraq,” remarks of the Secretary-General, which can be accessed online at <<http://www.cnn.com/WORLD/9803/08/iraq.wrap/index.html>> (last visited March 28, 2002) [emphasis added]. The remarks of the Secretary-General were made on ABC News, *This Week* (ABC television broadcast, March 8, 1998).

[24] For the purposes of the present discussion, the key is to know the extent to which the UK and US engaged in consultations with other Security Council members before unleashing their bombing campaign in November 1998. All things considered, we are probably safe to assume they did. Recall China's own carefully chosen words in the debate over the language of Resolution 1154 — China had objected to an interpretation of the words "severest consequences," which would have permitted an *automatic* recourse to force — and Secretary-General Annan had glossed over that objection by seemingly suggesting that "consultations" would satisfy China's concerns with automaticity. To the extent that the United States, the United Kingdom, and France did consult prior to their strike in November 1998, did they do so in the belief that at some level China had sent a normative signal that it understood that force could result without a subsequent, fresh resolution by virtue of its own careful choice of words during the debates over Resolution 1154 and its subsequent lack of objection — or, at least, objection on the public record — to the Secretary-General's interpretive spin broadcast on US television, which was widely reported thereafter?

[25] What, precisely, is the relevance of the foregoing narrative? First of all, as I hope has emerged with some clarity from the discussion itself, a Security Council-oriented practice of engaging in layered signalling games blurs with the creation of real-world, shared understandings on how to go about interpreting Security Council resolutions in which the implicit authorization of the use of force (for example, in Resolution 1154) is at stake. Second, as a corollary to the first point, the handling of Iraq suggests how the frames of reference within which Security Council resolutions are drafted are constantly evolving. Another way of putting this point is to say that baseline understandings evolve in such a way that formulations that are initially viewed as being opaque by external viewers, and as being coded by internal participants, come to take on a clarity. For example, the search for implicit authorization of the use of force can evolve from a broad contextual inquiry into a simple semantic exercise of identifying a key phrase that has been invested with particular meaning at some point in time. So, just as "all necessary means" (recall Resolution 678) is now an accepted code for Security Council authorization of military force and, as such, is now thought of as virtually an *express* authorization within the language community in question despite no specific mention of anything to do with force or military means, the practice of warning of "serious consequences" is perhaps on the verge of becoming understood by the permanent members of the Security Council to be a warning — or, in line with the earlier discussion, a hybrid warning-threat — that future military action may occur without a subsequent Security Council resolution expressly authorizing this action. Measured against the standard conventions of drafting legal instruments, the lawyer concludes that, when the Security Council

goes on to use the same language again, this use is intentional and interpreters are meant to understand the words in the new case as they have come to be understood in light of previous practice.

[26] In light of the just-described practice surrounding past dealings with Iraq, it is starkly apparent that Russia is justified in worrying that the US and UK can move forward by invoking the “serious consequences” language as code for some kind of Council acquiescence, separate from and in addition to the “material breach” rationale. By taking care to go through some kind of P-5 or broader Security Council ‘consultation’ process before striking – strike that: invading – they will build on precedent while even more clearly cementing that precedent.

D. Language, Violence and Responsibility: Interpretively Outflanking the US and UK?

[27] It has not been my purpose to argue for or against the UN Security Council authorizing military action against Iraq – although, given the opportunity, I would make the argument that, in the focus on whether or not the US should be allowed to act unilaterally, too many are failing to fully engage with the morality and wisdom of even a multilateral military campaign in Iraq that is expressly authorized by the Security Council. In any case, my purpose has been to attempt to shine a spotlight on how the line between Council authorization and individual state aggression has been blurred by semantic politics and diplomatic signalling games.

[28] In this concluding section, my concern is to insist on states taking responsibility for their involvement in structuring a textual environment in which the US is given licence to rationalize its power-based and particular national-interest calculations in the form of legal arguments. If France (now supported by Mexico) intends to allow the US to engage in interpretive unilateralism – i.e. allowing the US to say that Council resolutions, especially a new resolution, can be interpreted to contain authorization for a single state to enforce those resolutions based on that state’s own assessments – then France has to be called on this and pressured to link the language it employs with its responsibility for violence that may eventuate.¹⁹

[29] As matters have evolved, France, like Mexico, is coming closer to acting in concert with the US than acting in opposition to it. Its reasons may be craven (e.g.

¹⁹ France would do well to remind itself of President Chirac’s noble statement: “La France en tant que membre permanent du Conseil de sécurité prendra ses responsabilités” (“Le dossier irakien aggrave les divergences entre la France et les Etats-Unis”, *Le Monde*, 16 octobre 2002).

favourable consideration for French oil companies), geopolitically Machiavellian (engaging in enough resistance to argue – whether or not believed – in the Arab world that they did what they could to resist the US), pragmatic (lessening the chances France will become a central target of terrorism), or all combined. Or, a core reason might very well be a tactical one: France may see themselves as playing, with the US and other partners, a kind of multi-level bargaining game in which France considers that, for Iraq to substantially comply with a renewed inspections regime, Iraq must actually be made to believe that the US will use force if there is clear non-compliance *and* that there will be some level of an unholy alliance with other powerful states in the form of a coded silence that can be presented as, at minimum, moral or political tacit approval and, maximally, as legal acquiescence.

[30] There is some evidence that the tactical consideration is active in guiding France's conduct and that France is willingly seeking to strengthen the hybrid warning-threat signal being sent to Iraq. As reported in the New York Times: "In its proposal today, France made a concession to the United States *by strengthening* its [France's] own *language about 'serious consequences'* and placing it at the end [of the draft resolution], a location normally reserved in the Council's resolutions for threats to be acted upon."²⁰ If this is France's game, this too has to be brought into the light of day so that all concerned actors understand fully that France is knowingly and deliberately participating in a brinkmanship policy. The danger of such a policy is obvious: such a policy puts credibility on the line, with the result that states engaging in threat or warning-threat strategies face the choice of having their bluff called or unleashing a war should Iraq substantially fail to comply. Too many have forgotten how, ultimately, the decision of NATO to go to war over Kosovo was related as much to NATO's credibility – following an employment of a threat strategy against Yugoslavia's Milosevic – as to a humanitarian motive.

[31] Based on the foregoing analysis, we will be able to call various actors to account for their conduct after the fact – including for their silence in the face of knowledge of the import of the textual games they are playing or witnessing. However, the goal of this article is to contribute to transparency before the final Iraq-resolution text is settled upon – or in the immediate aftermath of a vote when interpretive explanations can still play a role in structuring the meaning that can be plausibly attributed to the text. By shining a spotlight on the serious consequences of "serious consequences", the hope is that key states will be pushed into a mode of public justification that will lead to US and UK interpretive unilateralism being interpretively outflanked.

²⁰ Preston, "U.S. raises pressure...", *supra*, A8.

There are three groups of states that must be forced to take responsibility.

[32] If France and Mexico do not want to be understood as having not only agreed to a hidden trigger but also having helped turn it into a hairtrigger, they must either join Russia in opposing the “serious consequences” language or they must insist that it stays in on condition that express language links the determination of those consequences to a subsequent Security Council process and (as the case may be) second-stage resolution.²¹ At the very least, France in particular must be pressured to state publicly that it does not view the resolution as allowing force without a further Council resolution. Even if only one permanent member – e.g. France – goes on record as explaining its vote in this way, then it becomes correspondingly disingenuous for the US or UK to say they have received authorization. Were both France and Russia to say that “serious consequences” does refer to military force but is not a coded authorization for unilaterally determined exercise of such force, any interpretive unilateralism on the part of the US or UK would more clearly stand to be condemned as the aggression it would be. Despite the likelihood of a Chinese abstention, it may be that China will join France and Russia in such an interpretive statement.

[33] If other Council members – for example, Singapore and Ireland, along with Mexico – do not want to endorse interpretive unilateralism, they must cast their votes accordingly in full knowledge that they can be accused of having given the US and UK tacit approval if they vote for a resolution with either a “material breach” or “serious consequences” clause, without there being safeguard language to counteract those clauses. Such safeguard language could include the express provision for a second-stage Council process, which itself could take the form of a revised version of the standard final clause of Council resolutions that says that the Council shall “remain seized” of the matter. As things stand, the United States’

²¹ None of this is to naively assume that Russia will maintain its own opposition. After the raid against the Chechen hostage-takers in Moscow, President Bush’s support for Putin’s approach to the crisis and Putin’s invocation of the Bush terrorism doctrine to say Russia will use force throughout the world wherever Chechen terrorists are ‘harboured’, it is entirely possible Russia will slip gently into line with the US – or, perhaps more likely, side with France and Mexico by double-voicedly relying on “serious consequences” language. See Steven Lee Myers, “Putin Vows Hunt for Terror Cells Around the World,” *New York Times*, 29 October 2002, A1, A10.

Nor is it to assume that the Americans will not succeed in having “material breach” language retained, now that chief arms inspector Hans Blix has welcomed that language – albeit in terms that suggest that he does not see it as an automatic trigger, without a further Security Council process following a report by him on compliance. See Julia Preston, “Arms inspectors want tough terms to pressure Iraq,” *New York Times*, 29 October 2002, A1, A13. American power and resolve to force a vote on their preferred resolution, and go ahead if they lose, may be such that the final end game will be either adoption of a version of the US draft resolution with some version of both “material breach” and “serious consequences” language retained, or no resolution at all should Security Council member states marshal the courage to defeat the US draft.

publicly articulated theory of material breach and its more subterranean theory of serious consequences do not see this standard final clause as barring individual-state enforcement action but rather as some kind of *pro forma* statement of ongoing Council attention to the matter – attention that is concurrent to action justified based on existing resolutions but not preclusive of it. Council members have to begin to make clear that this standard clause is not empty of content, but signals that the Council is the body to decide on what serious consequences shall be absent any clear language that it has already delegated that authority.

[34] Finally, there are states that are not members of the Council – states such as Canada – whose views also matter. If they are truly concerned, they have the means to interpretively surround the Security Council text by providing their own view of the contents and limits of the text. The authoritative interpretive (including interpretive evolution) of the UN Charter – including those legal acts authorized by the Charter – is ultimately in the hands of all member states of the UN and not simply a fluctuating group of 15 states with the P-5 at its controlling core.