

Declassified. My : *copy why no longer say Op 4.*

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IRAQ: INTERPRETATION OF RESOLUTION 1441 *(more reworded)*
Strength of view of US admin
Op 11 + Op 4.

1. Since our meeting on 14 January, I have had the benefit of discussions with the Foreign Secretary and Sir Jeremy Greenstock, who have given me valuable background information on the negotiating history of resolution 1441. In addition, I have also had the opportunity to hear the views of the US Administration from their perspective as co-sponsors of the resolution. I am now therefore in a position to give you my considered views on whether resolution 1441 authorises the use of force without a further decision of the Security Council.

2. It is clear that resolution 1441 (2002) does not expressly authorise the use of force. It follows that the resolution may only be relied on as providing the legal basis for military action if it has the effect of reviving the authorisation to use force contained in resolution 678 (1990). My predecessors have advised that it may be argued that the authorisation in resolution 678 revives where the Security Council has determined that there has been a breach of the ceasefire conditions imposed on Iraq by resolution 687 (1991) which is sufficiently grave to undermine the basis of the ceasefire (the so-called "revival argument"). I agree with this advice, although the arguments are not straightforward. However, I do not believe that the revival argument would be defensible if, in a particular case, the Council has made it clear either that action short of the use of force should be taken to ensure compliance with the terms of the ceasefire or that it intends to decide subsequently what action is required to ensure compliance.

3. Certain aspects of resolution 1441 indicate that the Security Council intended to revive the authorisation in resolution 678. Preambular paragraphs 4, 5 and 10 recall the authorisation to use force in resolution 678 and that resolution 687 imposed obligations on Iraq as a necessary condition of the ceasefire. Operative paragraph (OP) 1 provides that Iraq has been and remains in material breach of its obligations under relevant resolutions, including the resolution 687. OP13 recalls that Iraq has been warned repeatedly that "serious consequences" will result from continued violations of its obligations. The previous practice of the Council and statements made by Council members during the negotiation of resolution 1441 demonstrate that the phrase "material breach" signifies a finding by the Council of a sufficiently serious breach of the ceasefire conditions to revive the authorisation in resolution 678 and that "serious consequences" is accepted as indicating the use of force.

4. However, it is clear that the Council did not intend that the authorisation in resolution 678 should revive immediately following the adoption of resolution 1441, since OP2 of the resolution affords Iraq a "final opportunity" to comply with its disarmament obligations under previous resolutions by cooperating with the enhanced inspection regime described in OPs 3 and 5-9. OP2 has the

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effect therefore of suspending the legal consequences of the OP1 determination of material breach, which would otherwise have triggered the revival of the authorisation in resolution 678. But OP2 also implies that the Council has determined that compliance with resolution 1441 is Iraq's last chance before the ceasefire resolution will be enforced.

5. The provisions relevant to determining whether or not Iraq has taken the final opportunity given by the Security Council are contained in OPs 4, 11 and 12 of the resolution. These are the key paragraphs for assessing whether resolution 1441 is alone sufficient to revive the authorisation in resolution 678.

- OP4 provides that false statements or omissions in the declaration to be submitted by Iraq under OP3 and failure by Iraq at any time to comply with and cooperate fully in the implementation of resolution 1441 will constitute a further material breach of the ceasefire resolution and will be reported to the Council for assessment under paragraphs 11 and 12 of the resolution.

- OP11 directs the Chairman of UNMOVIC and the Director-General of the IAEA to report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including the obligations regarding inspections under resolution 1441.

- OP12 provides that the Council will convene immediately on receipt of a report in accordance with paragraphs 4 or 11 "in order to consider the situation and the need for compliance with all relevant resolutions in order to secure international peace and security".

There are a number of ambiguities in the drafting of these paragraphs which leave their interpretation and the relationship between them unclear.

6. First, the wording of OP4 indicates that any failure by Iraq to comply with and cooperate fully in the implementation of the resolution will constitute a further material breach (leaving aside the question of whether false statements or omissions in the OP3 declaration is an additional requirement). However, public statements have been made to the effect that only serious cases of non-compliance will constitute a further material breach. For example, the Foreign Secretary stated in Parliament on 25 November that "material breach means something significant; some behaviour or pattern of behaviour that is serious. Among such breaches could be action by the Government of Iraq seriously to obstruct or impede the inspectors, to intimidate witnesses, or a pattern of behaviour where any single action appears relatively minor but the action as a whole add up to something deliberate and more significant: something that shows Iraq's intention not to comply". The US take a different view, however. They say that OP4 means what it says: the words "cooperate fully" were included specifically to ensure that any instances of non-cooperation would

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amount to a further material breach. The US analysis of OP4 is undoubtedly more consistent with the view that no further decision of the Council is necessary to authorise force, because it can be argued that the Council has determined in advance that any failure will be a material breach. If, on the other hand, the view is taken that only serious cases of non-compliance amount to a material breach, then it inevitably follows that any Iraqi misconduct must be assessed to determine whether it is sufficiently serious. The UK view of the revival argument has always been that it is for the Security Council, not individual member States, to determine whether Iraq is in material breach. So if OP4 requires an assessment of the seriousness of Iraqi misconduct, it must be for the Council to make that assessment. It is untenable to argue that a Member State can unilaterally determine whether or not particular conduct is sufficiently serious to constitute a further material breach. In short, the public statements which have been made regarding the interpretation of OP4 are not helpful to the argument that no further Council decision is required.

7. Second, it is not clear what the effect is of the words in OP4 "and will be reported to the Council for assessment in accordance with paragraphs 11 and 12". If OP4 means that only serious cases of non-compliance amount to a further material breach, then these words arguably reinforce the view that it is for the Council to assess any misconduct to determine whether or not it constitutes a further material breach. That in turn suggests the need for a further determination by the Council because an assessment of this nature must have an outcome. However, the US view of OP4 (which sees material breach as a matter for objective determination), is that "assessment" refers to a consideration by the Council of what action to take in response to a further material breach. In either case, the assessment is to be carried out "in accordance with paragraphs 11 and 12", which indicates that the procedures in paragraphs 11 and 12 explain what is involved in the "assessment".

8. Third, it has been suggested that it is possible to establish that Iraq has failed to take its final opportunity through the procedures in OPs 11 and 12 without regard to OP4, in which case it is unnecessary to consider the effect of the words "for assessment". I do not consider that this argument is sustainable. I accept that it is possible that a Council discussion under OP12 may be triggered by a report from Blix and El-Baradei under OP11 and that this may have the effect of establishing that Iraq has failed to take the final opportunity granted by OP2. But I do not consider that it can be argued seriously that OP4 does not apply in these circumstances. It is clear from a comparison of the wording of paragraphs 4 and 11 that any Iraqi conduct which would be sufficient to trigger a report from the inspectors under OP11 would also amount to a failure to comply with and cooperate fully in the implementation of the resolution and would thus also be covered by OP4. In addition, the reference to paragraph 11 in OP4 cannot be ignored. It is not entirely clear what this means, but the most convincing explanation seems to

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be that it is a recognition that an OP11 inspectors' report would also constitute a report of further material breach within the meaning of OP4 and would thus be assessed by the Council under OP12. Moreover, it is clear that the US see OP4 as an essential part of the mechanism for establishing that Iraq has failed to take its final opportunity.

9. In any case, whether a report comes to the Council under OP4 or OP11, the critical issue is what action the Council is required to take at that point. In other words, what does OP12 require. ~~In my view, this paragraph is the key to determining whether or not a further Council decision is required.~~ It is clear that the language of OP12 was a compromise by the US from their starting position that the Council should authorise in advance the use of all necessary means to enforce the ceasefire resolution in the event of continued violations by Iraq. It is equally clear, however, that the language does not expressly provide that a further Council decision is necessary to authorise the use of force, which is what the French sought during the negotiations, but were denied. The paragraph indicates that in the event of a report of further material breach (whether under OP4 or OP11) there will be a meeting of the Council to consider the situation and the need for compliance in order to secure international peace and security. The Council thus has the opportunity to take a further decision expressly authorising the use of force or, conceivably, to decide that other enforcement means should be used. But the Council might fail to act. The resolution does not state what is to happen in those circumstances. The clear US view is that, whatever the reason for the Council's failure to act, the determination of material breach in OPs 1 and 4 would remain valid, thus authorising the use of force without a further decision. My view is that different considerations apply in different circumstances. The OP12 discussion might make clear that the Council's view is that military action is appropriate but that no further decision is required because of the terms of resolution 1441. In such a case, there would be good grounds for relying on the existing resolution as the legal basis for any subsequent military action. The more difficult scenario is if the views of Council members are divided and ~~then~~ a further resolution is not adopted either because it fails to attract 9 votes or because it is vetoed.

10. The principal argument in favour of the view that no further decision is required to authorise force in these circumstances is that the language of the paragraph (ie "consider") was chosen deliberately to indicate the need for a further discussion, but not a decision. It is contended that this interpretation is supported by the negotiating history. The US insist that they made clear throughout to ~~the French~~ that they would not accept a text which subjected the use of force to a further Council decision. The French, ^(and others) therefore knew what they were voting for. On the other hand, this interpretation reduces the role of the Council discussion under OP12 to a procedural formality. Others have jibbed at this categorisation, but I remain of the view that this would be the effect in legal terms of the US view of OP12. The Council would be required to meet,

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and all members of the Council would be under an obligation to participate in the discussion in good faith, but even if an overwhelming majority of the Council were opposed to the use of force, the US could go ahead regardless. If it were clear that this is what the Council as a whole intended the effect of OP12 to be, then I would have no hesitation in endorsing the US analysis. The problem is that it is not clear that the Council was agreed on this.

11. Where the meaning of a resolution is unclear from the text, the statements made by members of the Council at the time of its adoption may be taken into account in order to ascertain the Council's intentions. The statements made during the debate on 8 November 2002 are not, however, conclusive. The US and UK stated that further breaches would be reported to the Council "for discussion". The UK added that it would then expect the Council to "meet its responsibilities", although (implicitly) it would be prepared to act without Council backing to ensure that the task of disarmament is completed. Only the US explicitly stated that it believed that the resolution did not constrain the use of force by States "to enforce relevant United Nations resolutions and protect world peace and security" regardless of whether there was a further Council decision. Conversely, two other Council members, Mexico and Ireland, made clear that in their view a further decision of the Council was required before the use of force would be authorised. Syria also stated that "the resolution should not be interpreted, through certain paragraphs, as authorising any State to use force". Most other Council members were less clear in their comments. The joint statement of France, Russia and China is somewhat opaque, but seems to imply that a further decision is required. Many delegations welcomed the fact that there was "no automaticity" in the resolution with regard to the use of force. But it is not clear what they meant by this. It could indicate that they did not consider that the resolution authorised the use of force in any circumstances by means of the revival argument. On the other hand there is some evidence from the negotiating history that their main concern was that the resolution should not authorise force immediately following its adoption on the basis of "material breach" in OP1 plus "serious consequences" in OP13. The UK and US stated that there was "no automaticity" because there would be a Council discussion before force was used.

Op 4 +
12. To sum up, the language of resolution 1441 is not clear and the statements made on adoption of the resolution suggest that there were differences of view within the Council as to the effect of OP12 of the resolution. In these circumstances, I remain of the opinion that the safest legal course would be to secure the adoption of a further Council decision, whether in the form of a resolution or Presidential statement, which would authorise the use of force. I have already advised that I do not believe that such a resolution or statement need be explicit in its terms. The key point is that it should make clear that the Council has concluded that Iraq has failed to take the final opportunity offered by resolution 1441.

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13. Nevertheless, having regard to the arguments of our co-sponsors which I heard in Washington, I am prepared to accept that a reasonable case can be made that resolution 1441 revives the authorisation to use force in resolution 678. In taking this position, I have taken account of the fact that on a number of previous occasions, including in relation to Operation Desert Fox in December 1998 and Kosovo in 1999, UK forces have participated in military action on the basis of advice from previous Law Officers that the legality of the action under international law was no more than reasonably arguable. [Indeed, it seems to me that the case for the legality of military action now without a further resolution is rather stronger than it was in December 1998 following adoption of resolution 1205.]

14. However, if action were to be taken without a further Security Council decision, particularly if the UK had tried and failed to secure the adoption of a second resolution, I would expect the Government to be accused of acting unlawfully. Therefore, if these circumstances arise, it will be important to ensure that the Government is in a position to put up a robust defence. This means that there must be very strong factual grounds for concluding that Iraq has failed to take the final opportunity granted by the Council. The Government will need to explain this clearly and convincingly, ie by setting out the deficiencies in the declaration and evidence that Iraq has failed to cooperate and comply with the inspection regime. In addition, the Government will need to be in a position to set out its legal justification, ie the basis on which it has concluded that the authorisation to use force in resolution 678 has revived. I will be happy to advise further on the terms on any papers prepared for this purpose.

15. Finally, I must stress that the lawfulness of military action depends not only on the existence of a legal basis, but also on the question of proportionality. Any force used pursuant to the authorisation in resolution 678 (whether or not there is a second resolution):

- must have as its objective the enforcement the terms of the ceasefire contained in resolution 687 (1990) and subsequent relevant resolutions;
- be limited to what is necessary to achieve that objective; and
- must be a proportionate response to that objective, ie securing compliance with Iraq's disarmament obligations.

That is not to say that action may not be taken to remove Saddam Hussein from power if it can be demonstrated that such action is a necessary and proportionate measure to secure the disarmament of Iraq. But regime change cannot be the objective of military action. This should be borne in mind in

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considering the list of military targets and in making public statements about any campaign.

