INTERNATIONAL LAW SUBMISSION TO THE IRAQ ENQUIRY

The Political Context for the Legal Interpretation of UN Security Council Resolutions

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While much attention has been paid to the texts of the Security Council resolutions on the Iraq question, there has been little acknowledgement that the interpretation of such texts requires an understanding of their political context. Their legal status is affected by the practices of the United Nations. The four questions to be considered are whether articles of the Charter were invoked, what previous resolutions were cited, what wording was either diplomatic jargon or standard legal terminology and what statements were made in debates and in explanation of the voting. The first two questions are not contentious, so summary evaluations will be given in the conclusions.

The Use of Established Diplomatic and Legal Jargon

A) "All necessary means"

It is generally accepted that operative paragraph 2 of Resolution 678 on using "all necessary means" was an authorisation to use force. The phrase was an innovation, adopted during the Iraq crisis. It had not been used previously to authorise force. Subsequently, it quickly became diplomatic jargon, by repetition in resolutions covering a variety of different situations.

In conclusion, by November 2002, "all necessary means" was an established phrase. However, Resolution 1441 only uses it when recalling Resolution 678 and does not associate the phrase with any of its operative paragraphs.

B) The nature of the "material breach" argument

Under the 1969 and 1986 Vienna conventions on treaty law, a "material breach of a treaty" arises, if there is "the violation of a provision essential to the accomplishment of the object or purpose of the treaty".[1] When this occurs, a treaty may be terminated. On this basis, it has been argued on different occasions that the United Kingdom could suspend the ceasefire against Iraq.

It is crucial to note that the ceasefire was established by agreement between the government of Iraq and the Security Council as a whole. The text of Resolution 687 of 3 April 1991 required "official notification by Iraq" *to the UN* that it accepted the conditions for a ceasefire. Just three days later, Iraq concluded "it has no choice but to accept this resolution".[2] The Council President replied to Iraq "that the formal ceasefire referred to in paragraph 33 of that resolution is therefore effective".[3] This position was further endorsed indirectly in the preamble to Resolution 707 (1991). Thus the Council acted collectively on four occasions.

Whenever the UK government has claimed continuing authority to use force against Iraq, it has been done by a unilateral assertion that the ceasefire was no longer operative. A leaked memo, "Iraq: Legal Background", written in March 2002, rejected this position.

> As the ceasefire was proclaimed by the Council in resolution 687 (1991), it is for the Council to assess whether any such breach of those obligations has occurred. The US have a rather

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1 *Convention on the Law of Treaties*, done at Vienna on 23 May 1969, and *Convention on the Law of Treaties between States and International Organizations or between International Organizations*, done at Vienna on 21 March 1986, common Article 60.

2 UN document, S/22456, dated 6 April 1991.

3 UN document, S/22485.

different view: they maintain that the assessment of breach is for individual member States. We are not aware of any other State which supports this view.[4]

The Inquiry may wish to confirm that no Iraqi-UK bilateral ceasefire agreement exists.

Under the Vienna conventions, a formal process is specified for the response to a "material breach". A public announcement of termination of an agreement is not sufficient. The UN, as the aggrieved party, needs to decide to suspend the "operation in whole or in part" of the ceasefire agreement, to present a notification to Iraq of the suspension, to outline the grounds for invoking a "material breach" (as opposed to a trivial breach) and to announce the measures proposed.[5] The response is *at the discretion* of the offended party.

In conclusion, the determination of a "material breach" and its consequences must be notified to Iraq by the Security Council and not by the UK.

C) Use of the "material breach" argument in 1998

On 16 December 1998, the US and UK governments commenced a substantial bombing campaign in Iraq. The US statement to the UN argued Iraq had "once again, acted in flagrant and material breach of Security Council resolution 687 (1991)".[6] The UK statement simply recalled Iraq's decision to end all co-operation with UNSCOM on 31 October was condemned by "resolution 1205 (1998) of 5 November 1998 as a flagrant violation of resolution 687". Neither Resolution 1205 nor the UK statement itself claimed there had been a "material breach". No attempt at a legal justification for the bombing was made by the UK, beyond a claiming to "have acted on the basis of the relevant resolutions of the Security Council".[7] "Flagrant" is only a negative political term that does not define the scale of a violation as "essential" to the agreement. The FCO memo said

> Our interpretation of resolution 1205 was controversial anyway; many of our partners did not think the legal basis was sufficient as the authority to use force was no[t] explicit.[8]

In conclusion, the bombing in December 1998 was undertaken with negligible political support and without legal authority from the Security Council.

D) Use of the "material breach" argument in Resolution 1441 (2002)

The political situation in November 2002 was substantially different. Resolution 1441 decided Iraq was in "material breach" of its agreement to implement Resolution 687. It also specified the consequences: instead of suspending the ceasefire, the second operative paragraph

> *Decides* … to afford Iraq, by this resolution, a final opportunity to comply with its disarmament obligations ... and accordingly decides to set up an enhanced inspection regime.

Then, the Council again required the formalisation of an agreement between the UN and Iraq (op. para. 9). The Secretary-General duly notified Iraq. On 13 November Iraq replied "we will deal with resolution 1441" and on 23 November confirmed the "decision ... to comply".[9] These exchanges again represent a collective Security Council agreement with Iraq to maintain the ceasefire.

Thus, the general requirements of the two Vienna conventions and the implementation of operative paragraph 9 provide the basis for the interpretation of operative paragraphs 4, 11 and 12. An advanced warning, under paragraph 11, that certain failures by Iraq would "constitute a further

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4 "Iraq: Legal Background", 8 March 2002 internal memo at the FCO. This document was first leaked by Michael Smith and used in two Daily Telegraph stories on 18 September 2004. It is available from the US Public Broadcasting Service at www.pbs.org/newshour/bb/middle_east/jan-june05/legalbackground.pdf and from *The Times*, at www.timesonline.co.uk/tol/news/uk/article533409.ece. It is mentioned by Michael Wood, Legal Adviser at the FCO, at www.iraqinquiry.org.uk/media/43698/document2010-01-27-100332.pdf.

5 Common Article 65 to the two Vienna Conventions.

6 UN document S/1998/1181.

7 UN document S/1998/1182. The only resolution specifically mentioned was Resolution 1205 (1998).

8 "Iraq: Legal Background", cited above.

9 Unlike in April 1991, the Secretary-General's notification was not published. The two Iraqi's replies were in UN documents S/2002/1242 of 13 November 2002 and S/2002/1294 of 25 November 2002.

material breach" cannot possibly constitute a notification at a later date that such failures have occurred. Any non-compliance by Iraq after November 2002 had to be significant enough to constitute an essential violation of the new inspection regime. Thus, operative paragraph 4 provided any "false statements or omissions" had to be "reported to the Council for assessment". The existence of a report was not sufficient to authorise unilateral use of force. The report had to be subject to a collective assessment, resulting in an explicit determination of a "material breach" of the enhanced regime and a statement of proposed response to the breach, followed by a notification to Iraq of these decisions.

In conclusion: the determination of the "material breach" did not suspend the ceasefire. Because there was no "second resolution" in February-March 2003, there was no determination of a "material breach" by Iraq of the revised agreement.

E) Use of the term "serious consequences" in Resolution 1441 (2002)

In the penultimate operative paragraph of Resolution 1441, the Security Council

> *Recalls* ... that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations.

It is impossible to interpret this text as a decision to take any specific action. Firstly, "recalls" is much weaker than "reaffirms" and refers to the past rather than the future. Secondly, the words do not appear in the Charter. Thirdly, "serious consequences" were not mentioned in any of the twenty-four resolutions on Iraq in 1990-1991 nor in any of the resolutions cited in Resolution 1441. The phrase does start to appear in statements by the President of the Security Council from June 1991 onwards, but such statements are of lower political and legal status than resolutions.[10] Lastly, the phrase was not given any specific meaning during the debates.

In conclusion: there is no basis for claiming "serious consequences" can be equated with the use of force.

Positions taken on Resolution 678 (1990), in December 1998 and on Resolution 1441 (2002)

A) Explanations of Votes on Resolution 678

All fifteen members of the Council, plus Iraq, spoke in the debate on Resolution 678. Four countries that voted in favour, (Canada, Malaysia, the UK and the US), made it explicit that "all necessary means" was intended to authorise use of force. A further three, (France, Colombia and Zaire), referred to the threat of war, but only implied a link to the resolution's text. The remaining five countries voting in favour spoke in vague general terms. There is no hint that any of them did not foresee the utilisation of force. It is striking that Iraq, as a guest speaker, and the two countries, (Cuba and Yemen), that voted against the resolution also had the same understanding of the text. Finally, China abstained precisely because they did not wish themselves to endorse an ultimatum.[11]

In conclusion, not a single member of the Council cast any doubt on the authorisation of force, by the use of the phrase "all necessary means" within Resolution 678 (1990).

B) Positions taken on 16 December 1998

Six Council members, (Brazil, China, Costa Rica, Kenya, Russia and Sweden) made intense objections to the reliance by the US and the UK on the UNSCOM report and to their unilateral statements, discussed above, justifying the bombing of Iraq. They all asserted that a collective decision was required. Four other speakers made relatively neutral comments. Only two governments, Japan and Portugal, gave any support to position taken by the US and the UK and that was in general political terms.[12]

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10 The words "serious consequences" first appear in relation to Iraq in UN document S/22746.

11 UN document S/PV.2963, which records verbatim the Security Council proceedings on 29 November 1990 and the votes on Resolution 678 (1990).

12 UN document S/PV.3955, covering the debate on 16 December 1998.

In conclusion, no other members of the Security Council endorsed the US and UK arguments that unilateral action was legitimate.

C) Explanations of Votes on Resolution 1441 (2002)

Resolution 1441 only had two sponsors, the US and the UK, and they were surprisingly ambiguous when speaking about the text. Both countries stressed there could be "serious consequences", but without any link to the use of force. Equally, there was no direct statement that a further "material breach" would invalidate the ceasefire. The sponsors explained their vote as follows.

- *USA* – "this resolution contains no 'hidden triggers' and no 'automaticity' with respect to the use of force."
- *United Kingdom* – "We heard loud and clear during the negotiations the concerns about 'automaticity' and 'hidden triggers' – the concern that on a decision so crucial we should not rush into military action; that on a decision so crucial any Iraqi violations should be discussed by the Council. Let me be equally clear in response … There is no "automaticity" in this resolution. If there is a further Iraqi breach of its disarmament obligations, the matter will return to the Council."

Further wording, in the US statement, that the text "does not constrain any Member State from acting ... to enforce relevant United Nations resolutions" and in the UK statement that "if Iraq chooses defiance..., the United Kingdom … will ensure that the task of disarmament required by the resolutions is completed" are the only points in the whole debate where the possibility of reactivating Resolution 678 authorising force was suggested. No other government went any way down this road.[13]

The fact that the US and the UK did assert – very subtly and unobtrusively – that a "second resolution" would not necessarily be required is insufficient to claim that the Security Council endorsed such a position. On the contrary, the majority saw authority as continuing to be located with the Council, as was acknowledged by Sir Jeremy Greenstock in his evidence to the Inquiry.

> Most members of the Council, however, made an assumption that further discussion in the Security Council about Iraqi compliance would itself lead to a decision for or against the use of force.

However, Sir Jeremy is not accurate in saying "only Mexico was absolutely explicit that this was their expectation" nor in concluding France and Russia "recognised that 1441 did not amount unambiguously to such a condition".[14] Four governments, (China, France, Ireland and Mexico), argued there was a "two-stage approach" and a further resolution would be required. Two of these could have vetoed the resolution if they thought there was any doubt on this question. Another four governments, (Bulgaria, Colombia, Russia and Syria), implied the need for a further resolution through ruling out the possibility of unilateral action and/or emphasising the absence in Resolution 1441 of any authority to use force. Another four governments, (Cameroon, Guinea, Mauritius and Norway) might appear to warrant Sir Jeremy's description. However, their statements provide no hint of an affirmation that Resolution 1441 itself authorised the use of force.[15]

In an unusual move, a formal written statement was issued jointly by China, France and Russia, immediately after the meeting.[16] It asserts the resolution "excludes any automaticity in the use of force". The existence of this written statement was announced during the debate. Thus, it can cast light on the oral statements made in the Council. The main effect is to produce a convergence in the spectrum of language used by China, France and Russia and it is evidence against Sir Jeremy's claim that their language made any concessions to the US or UK positions. The statement links the lack of "automaticity" to the absence of provisions for the use of force, and the necessity under "the

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13 UN document S/PV.4644, covering the debate on 8 November 2002.

14 Sir Jeremy Greenstock, "Developments at the UN", at www.iraqinquiry.org/media/38479/sirjeremygreenstock-statement.pdf: all the quotes are from p. 11.

15 The remaining Council member, Singapore, made no contribution to interpreting what had been agreed.

16 UN document S/2002/1236.

provisions of paragraphs 4, 11 and 12" (were Iraq not to comply), "for the Council to take a position", thus respecting "the competences of the Security Council". While reading of paragraph 12 out of context may leave room for argument whether "consider" required a further resolution, taking "a position" has no such ambiguity. The joint statement, along with many comments in the explanations of vote, is also important in committing the US and the UK to their own strong language on the absence of "automaticity" in the use of force and the lack of "hidden triggers".

In conclusion, other than the two sponsors, no government supported the proposition that Resolution 1441 itself authorised of the use of force without a further resolution.

The Overall Interpretation of Resolution 1441 (2002)

The political history and the political context provide no grounds for saying the text of Resolution 1441 authorised the use of force.

1) Resolution 1441 neither cited specific articles from the Charter nor used direct quotations that specifically and solely authorised "enforcement measures".

2) The citations of previous Security Council resolutions in the preamble to Resolution 1441 provided a political context to legitimise a possible future use of force, by "recalling" the previous use of force. However, there is no direct and explicit *reaffirmation* of a continuing authority under the previous resolutions.

3) Resolution 1441 did not "reaffirm" nor in any other way link "all necessary means" to the situation in 2002-2003. No determination of a "material breach" of the enhanced inspection regime, as provided for in operative paragraph 4, was made. "Serious consequences" was a relatively new term that did not cover the use of force. Thus, no standard language from diplomacy or international law provided authorisation to use force.

4) The explanations of voting on Resolution 1441 contrast sharply with the debate on Resolution 678 in that *no* government directly and explicitly claimed in 2002 that force had been authorised. It is perverse to claim that the minority position of the US and the UK had been adopted by the Council, when no governments supported their position and eight other governments explicitly rejected it. A total of nine Council members, including all the five permanent members, spoke of automaticity and all, but one (Cameroon), directly and explicitly referred to lack of automaticity in the use of force.

In conclusion, none of the four principles for interpreting Security Council resolutions provided any legal backing for the war in March 2003.