

SUBMISSION TO IRAQ INQUIRY

1. INTRODUCTION

This analysis is prepared on behalf of the Solicitors' International Human Rights Group (SIHRG) in response to the Iraq Inquiry's call for submissions on the United Kingdom's justification for the legality of the March 2003 military intervention in Iraq.

SIHRG seeks to promote awareness of international human rights within the legal profession and mobilises solicitors into effective action in support of those rights. SIHRG encourages human rights lawyers overseas and conducts related missions, research, campaigns and training. SIHRG is grateful to the International Human Rights Committee of the Law Society of England and Wales for its assistance in facilitating this submission.

This submission addresses two key points:

- a) the strength of the proposition that the mandate to use force was contained in Security Council Resolution (UNSCR) 1441 (2002), and revived by earlier resolutions; and
- b) the nature and scope of authority to determine the existence of a material breach for the use of force, if any, provided in UNSCR 1441.

2. THE REVIVAL ARGUMENT

The so-called revival argument can be restated as follows:

- (a) UNSCR 1441 had 'revived' the authority to use force against Iraq provided by the Security Council in UNSCR 678 (1990); and
- (b) Iraq was in "further material breach" of the ceasefire obligations contained in UNSCR 687 (1991) (the ceasefire resolution)¹.

¹ See paragraphs 7-11 of the Attorney General's advice of 7 March 2003 on the legality of military action.

A. *Precedent use*

We agree that the Attorney General's reliance on the 'revival argument' was not without precedent. The memorandum from the Foreign and Commonwealth Office on 17 March 2003 corroborated the position that use of force had been authorised by the Security Council in UNSCR 678 before. Once by the Secretary General to justify military action in 1993, and again by the UK government in 1998 to initiate Operation Desert Fox.²

However a closer look at the reception history of those decisions, particularly of the 1998 decision reveals that the 'revival argument' did not gain general support. In fact its only outright proponent was Japan, with China calling the action a "groundless" and "unprovoked military attack" and Russia stating that "the resolutions of the Security Council provide no grounds whatsoever for such actions".³

Therefore, although precedent would have afforded some room to rely on the 'revival argument' in 2003, it could not provide an established authority in this regard.

B. *Restricted application of UNSCR 678 if authority was implied*

Even if the 'revival argument' was theoretically applicable, it had to be given teeth by a further authority, that a breach of the stipulations of UNSCR 687 could revive the provisions for the use of force in UNSCR.

In UNSCR 678, Operative Paragraph (OP) 2, the Security Council stated that it authorised:

"Member States...unless Iraq on or before 15 January 1991 fully implements...the above-mentioned resolutions [set out in the preamble to UNSCR 678], to use all necessary means to uphold and implement resolutions 660 (1990) and all subsequent relevant resolutions and to restore international peace and security".

The government's 'revival argument' in 2003 rested on the proposition that the phrase "all subsequent resolutions" referred not only to those resolutions as at the date of UNSCR 678, but to any and all subsequent resolutions relating to Iraq (most crucially UNSCR 687).

We do not agree with the view that the scope of UNSCR 678 was unrestricted.

First, it is not easily reconcilable with the actual text of UNSCR 678.

² See Foreign and Commonwealth Memorandum dated 17th March 2003, paragraph 6, relating to military action in 1993: "In the light of Iraq's continued breaches of Security Council resolution 687 and thus of the ceasefire terms, and the repeated warnings given by the Security Council and members of the coalition, their forces were entitled to take necessary and proportionate action in order to ensure that Iraq complies with those terms" and paragraph 8, relating to military action in 1998, "Iraq is in clear breach of Security Council resolution 687 which laid down the conditions for the ceasefire at the end of the conflict. Those conditions included a requirement on Iraq to eliminate its weapons of mass destruction under international supervision. Those conditions have been broken."

³ UN SCOR, 53rd sess, 3939th mtg, UN Doc S/PV.3939 (1998) 4 and 5.

OP 2 of UNSCR 678 refers to certain “*above-mentioned resolutions*”, listed in its preamble.⁴ Common-sense and common rules of construction would suggest that if the Security Council took steps to draw up a list of resolutions, then it deemed that list closed. The reference to “*subsequent resolutions*” therefore could not mean the authorisation of the use of force *ad infinitum*.

Second, an intentional use of the word “*cease-fire*” in UNSCR 687 would suggest, by definition, a level of finality that could only be overridden by the Council (as the body who had seized on the matter and effected the ceasefire).

Third, the text of UNSCR 1441 attempts to narrow the scope of authority for action. For example, OP 13 of UNSCR 1441 merely “*recalls... that the Council has repeatedly warned Iraq that it will face serious consequences*” for failing to comply with its obligations.

A survey of the Council resolution's language points to the deliberate and nuanced use of this phrase. Where the Security Council has chosen to authorize the use of force, or warn that force may be authorised, it has often done so explicitly, through the use of definitive language such as the formulation, “*all necessary means*” may be used. This was the categorical threshold that the Security Council adopted when it authorised the use of force by French troops in Côte D'Ivoire to support a U.N. peacekeeping mission in UNSCR 1528 (2004), as well as when the Security Council adopted UNSCR 940 (1994), authorizing a multinational force to use “*all necessary means*” to restore democracy in Haiti, and in UNSCR 1706 (2006) to provide a mandate for the use of force for the UN peace keeping mission in the Sudan in order to protect UN personnel and civilians and for the purpose of disarmament.

In this light, the phrase “*serious consequences*” could only reasonably refer to a range of other measures which fall below the Council's mandatory threshold used to express authorisation for the use of force (e.g. economic and political sanctions). Moreover, the fact that Iraq had been “*repeatedly warned*” that it will face “*serious consequences*” (per OP 13, UNSCR 1441) without any suggestion that the power to use force had been authorised or 'revived' on those occasions, [undermines any implied authority].⁵

In coming to our view, we have considered what inferences, if any, can be made by the absence of provisions requiring a second resolution approving the use of force in UNSCR 1441. After all, the Member States were alive to the possibility that force may be required if Iraq did not accept its “*final opportunity*” to comply with the resolution (OP 12, UNSCR 1441). The negotiating history reveals that certain Member States were vocal about removing automaticity of the use of force (see Section 3(C) below). Why, then, does UNSCR 1441 fail to prohibit the use of force, or expressly require a second resolution? Legal scholars have responded to similar arguments raised in the context of the US authorities, which we will not endeavour to address for the Inquiry here, save for indicating our agreement that all Member States are bound by the requirement to act in good faith of their obligations under the Charter.

⁴ The list includes resolutions from UNSCR 660 (1990) to UNSCR 678.

⁵ See Vaughan Lowe, “The Iraq Crisis: What Now?”, 4 *International and Comparative Law Quarterly* 52 (2003), p. 865 *et seq.*

Nevertheless, in our view, for the reasons set out above, we believe that a reasonable case for the revival of the use of force was not adequately made out.

3. THE AUTHORITY TO DETERMINE THE EXISTENCE OF A “FURTHER MATERIAL BREACH”

Even if the 'revival argument' was legitimate, the use of force would be necessary if Iraq committed a material breach of its disarmament obligations (OP 2, UNSCR 1441).

A. *The scheme of UNSCR 1441*

OP 4 of UNSCR 1441 specified certain acts and omissions that would amount to a “*further material breach*”, for example, false statements or omissions in the declarations submitted by Iraq. OP 4 further specified that any such acts were to be “*reported by the Council for assessment in accordance with OP 11 and 12*”. OP 11 and 12 required UNMOVIC and the IAEA to report “*immediately*” any failure by Iraq to comply with its disarmament obligations. OP 12 stated that the Council would sit immediately upon receipt of such a report “*in order to consider the situation and the need for full compliance*”.

B. *Interpretation of UNSCR 1441 in light of this scheme*

No part of UNSCR 1441 displaces the fundamental presumption of state sovereignty, a concept bedrocked in the Charter prohibition against the use of threat or force (unless for self-defence) “against the territorial integrity or political independence of any State.”⁶

If it were for Member States to determine if Iraq failed to avail itself of a “*final opportunity*”, and to instigate action unilaterally, then the contemplated process in OPs 4, 11 and 12 would be, at best, rendered redundant.

The fact that UNMOVIC and the IAEA were required to report their findings to the Security Council to enable it to carry out an “*assessment*” indicates that the Security Council’s role was not passively to discuss, but actively to evaluate and agree on the appropriate course of action.

UNSCR 1441 supports this view by proposing a process for monitoring Iraq's compliance: the Security Council will “*convene immediately upon receipt of a report ...[from UNMOVIC or the IAEA] to consider the situation*”. OP 4 suggests that the assessment process was meant to occur at this meeting.

Furthermore, UNSCR 1441 is silent as to the consequences that would flow from a finding of a “*further material breach*”. We interpret this to mean the Security Council wanted to retain discretion to determine the consequences at this later meeting.

⁶ "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" in Annex to General Assembly resolution 42/22 (1987)

The proposition that the consequences were foretold by UNSCR 1441 (i.e. that they would be "serious", i.e. including the use of force) is short-sighted. Had such meeting occurred, the Council would have at a minimum needed to decide:

- (i) whether the material breach amounted to the necessary level of seriousness, and whether it was serious enough to merit sanctions or another remedy; and
- (ii) if concluding that force was necessary, the extent to which it could be used.

Having regard to the previous practice of the Security Council, precisely this approach was adopted by the Security Council in UNSCR 678, where the Council also offered Iraq "*one final opportunity*" to comply with its demands and at the same time specified that "*unless Iraq on or before 15 January 1991 fully implements ...[the relevant] resolutions*" Member States had authorisation "*to use all necessary means.*"

C. *Statement of Security Council members*

As noted by the International Court of Justice in its advisory opinion on the *Unilateral Declaration of Independence in Respect of Kosovo*, statement made by Security Council members provide an additional tool for interpreting Security Council resolution.⁷ The analysis of the statements of representatives of the Member States adds further weight to the view that the Security Council did not anticipate the unilateral action of Member States in UNSCR 1441.⁸

For example, the Mexican representative noted: "*should Iraq fail to comply, the Council's response will be defined on the basis of its own determination as to the existence of a threat to international peace and security*" and that "*this resolution...eliminates the concept of automaticity in the use of force in response to a serious violation without the explicit agreement of the Council*". Mexico "*welcome[d] the fact that a two-stage process has been accepted*". Indeed, Mexico could hardly have been more explicit in its interpretation of the position stating "*we reiterate the belief reflected in the agreed text that the possibility of the use of force is valid only...with prior explicit authorisation required from the Security Council*".

Similarly, the Irish representative to the Security Council welcomed "*the assurances given by the sponsors that their purpose in presenting this resolution was to achieve disarmament through inspections, and not to establish a basis for the use of military force*". The Irish representative further noted:

"It is for the Council to decide on any ensuing action. Our debate on 17 and 18 October made it clear that this is the broadly held view within the United Nations. However, we are confident that, should it be necessary, the Council will, in the words of the Secretary-General, face its responsibilities."

⁷ *Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Advisory Opinion, para. 94, 22 July 2010.

⁸ The transcripts of these statements can be found at Security Council, 4644th Meeting, 8 November 2002, UN Doc. S/PV.4644.

The statement of the French representative to the Security Council provides further support for the view that the discretion to determine whether Iraq had committed a “further material breach” and any consequences that should flow from this remained with the Council and not Member States, indicating that:

"The resolution strengthens the role and authority of the Security Council. That was the main and constant objective of France throughout the negotiations which have just concluded. That objective was reflected in our request that a two-stage approach be established and complied with, ensuring that the Security Council would maintain control of the process at each stage. ... France welcomes the fact that all ambiguity on this point and all elements of automaticity have disappeared from the resolution."

In a similar vein the Russian representative noted that:

"It is particularly important that — as many of my colleagues have said today — in the event of any kind of disagreement over disarmament matters...that it is the Council that will consider the situation that has developed. That is the sequence set forth clearly in paragraphs 4, 11 and 12 of the resolution."

The Chinese President also expressly stated his support for the “two-stage approach” set out in UNSCR 1441. He stated that “[a]ccording to the resolution that has just been adopted, only upon receipt of a report by UNMOVIC and the IAEA on Iraq’s non-compliance and failure to cooperate fully in the implementation of the resolution, will the Security Council consider the situation and take a position”.

Tellingly, even Ambassador Sir Jeremy Greenstock of the United Kingdom stated:

As we have said on numerous occasions to Council members, this resolution contains no “hidden triggers” and no “automaticity” with respect to the use of force... 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 for discussion as required in paragraph 12. We would expect the Security Council then to meet its responsibilities.

Ambassador Greenstock’s remarks confirm that this responsibility for making the determination belonged to the Security Council as a whole.

4. THE QUESTION OF WHETHER IRAQ WAS IN FACT IN “FURTHER MATERIAL BREACH” OF ITS OBLIGATIONS UNDER RELEVANT SECURITY COUNCIL RESOLUTIONS

The question of whether Iraq was in fact in further material breach of its obligations is not a matter in respect of which we express a view, this being a complex question of fact. We note that in his final briefing to the Security Council dated 7 March 2003, Hans Blix, Executive Chairman of UNMOVIC, did not express an unequivocal view

on this issue. He did, however, express concern regarding the cooperation and treatment of UNMOVIC staff by Iraqi authorities.⁹

In any event, it is our view that the question of whether Iraq was in “*further material breach*” of its obligations (and any consequences that should flow from this) was, as a matter of international law, a question to be determined by the Council in accordance with UNSCR 1441.

5. THE SCOPE OF AUTHORITY TO USE FORCE (IF ANY) PROVIDED BY UNSCR 1441

The authority to use force which UNSCR 1441 purportedly 'revived' was granted by UNSCR 678, OP 2 “*to use all means necessary...to uphold all subsequent resolutions*”.

Under UNSCR 1441 OP 2, Iraq was given the final opportunity to “*comply with its disarmament obligations under relevant resolutions of the Council*”.

Taken together, the scope of the 'revived' authority (if there was such authority) under UNSCR 1441 was to bring Iraq into compliance with its disarmament obligations under relevant Security Council resolutions. The question therefore arises as to whether the military action taken against Iraq was “*necessary*” (to use the concept contained in UNSCR 678 to obtain these ends.

It is our view that even if *some* degree of force was permitted by UNSCR 1441 the scope of that authority was necessarily limited¹⁰.

The extent to which military force was authorised was a matter circumscribed by the relevant Security Council resolutions (UNSCR 678 and UNSCR 1441 together) and the limited objectives contained therein, in particular, compliance with the weapons inspection, verification and disarmament programme created by UNSCR 687.

The nature and extent of the military action undertaken against Iraq (e.g. the invasion of the country, its military occupation and the removal of the government of the state) was not, in the words of UNSCR 678, “*necessary*”, to achieve the relevant ends for which it was purportedly authorised, namely to bring Iraq into compliance with its disarmament obligations under the relevant Security Council resolutions.

Even if use of force was “*necessary*” within a given limit, the permissibility of the actual force used must also be proportionate to the ends it seeks. Whether proportionality extended to include the occupation or regime change of Iraq is to be measured by an objective standard, and we believe in light of all the evidence that this standard was not met.

⁹ The text of Hans Blix's final briefing can be found at:
http://www.un.org/Depts/unmovic/new/pages/security_council_briefings.asp#5

¹⁰ See Gerry Simpson, “The War in Iraq and International Law”, 7 *Melbourne Journal of International Law* 167 (2005), p 202.

6. CONCLUSION

In conclusion we do not believe there was an adequate legal case to support the 2003 military intervention in Iraq.

First, the proposition that UNSCR 1441 'revived' the authority to use force contained in UNSCR 678 is tenuous. The text of UNSCR 678 indicates that the authorisation to use force related to the enforcement of resolutions that the Council had already passed rather than providing an open-ended authority to use force in respect of any resolution enacted at a later date.

Second, UNSCR 1441 gave Iraq a "*final opportunity*" to comply with its disarmament obligations. Considering the process laid down in UNSCR 1441, and the statements made at the time of its adoption, it was for the Security Council to determine whether Iraq had in fact availed itself of that chance Member States were not authorised to make unilateral determinations.

Finally, even if the use of force was, to some extent, authorised by the Council, its scope was limited and did not extend to cover a prolonged military intervention or the removal of the Iraqi governing regime.