

Submission on the UK's legal basis for military action in Iraq

Tarcisio Gazzini, LLM (Nottingham) PhD (Padova) *

SUMMARY

- I. Introduction
- II. Interpretation of Security Council resolutions
- III. Textual interpretation
- IV. Contextual interpretation
- V. Object and purpose
- VI. Legislative history
- VII. Conclusions

I. Introduction

1. Whether UN Security Council resolution 1441 (2002), alone or in conjunction with resolutions 678 (1990) and 687 (1991), provided a legal basis under international law for the 2003 military intervention in Iraq is essentially a question of interpretation.
2. After briefly discussing the rules of interpretation applicable to Security Council resolutions, this submission deals with the textual and contextual interpretation of resolution 1441 and in particular of its operative paragraphs (OPs) 1, 4, 11 and 12.
3. It then considers the object of resolution 1441 and related official declarations made by members of the Security Council as well as the significance of the principle of good faith. It finally touches upon the legislative history of Resolution 1441.

* Associate Professor in International Law, Department Transnational Legal Studies, VU University Amsterdam. Author of *The Changing Rules on the Use of Force in International Law* (Manchester University Press, 2005) and several articles and chapters on the use of force and collective security law.

II. Interpretation of Security Council resolutions

4. Security Council resolutions are political decisions taken by the political body the members of the Organization have conferred the primary responsibility to maintain and restore international peace and security. They are adopted by qualified majority in accordance with Article 27 (3) of the UN Charter.
5. Nonetheless, Security Council resolutions can have important legal effects such as modifying the legal obligations and affecting the subjective rights of the members of the Organization. Most importantly for the purpose of this submission, they can authorise the members of the Organization to use military force in derogation to the general prohibition embodied in Article 2 (4) of the UN Charter.
6. Although Security Council resolutions are radically different from treaties, it is submitted that they can be interpreted by applying *mutatis mutandi* some of the canons on treaty interpretation as codified in Articles 31 - 33 of the 1969 Vienna Convention on the Law of Treaties.¹ Under Article 31, in particular, a treaty must be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and in the light of the object and purpose of the treaty.
7. It must be recalled that “[i]nterpretation is a process involving the deployment of analytical and other skills: it cannot be reduced to a few propositions capable of purely automatic application in all circumstances”.² Furthermore, interpretation is a “holistic exercise that should not be mechanically subdivided into rigid components”³ whereas the different elements of Article 31 are ordered as “a logical progression”.⁴

¹ M C Wood, “The Interpretation of Security Council Resolutions”, 2 *Max Planck Yearbook of United Nations Law* (1998) 73. The Convention entered into force on 27 January 1980, 1155 UNTS 331. Available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. The International Court of Justice has on several occasions held that Article 31 and 32 reflect customary international law, see, recently, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment, 26 February 2007, *I.C.J. Reports 2007*, para 160; *Case Concerning the Dispute Regarding Navigational and Related Rights*, Judgment, 13 July 2009, <http://www.icj-cij.org/docket/files/133/15321.pdf>, para 47.

² I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester University Press, 1984), p. 153.

³ WTO Appellate Body, *EC – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, 12 September 2005, para 176.

⁴ A. Aust, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge University Press, 2007), p. 234.

III. Textual interpretation

8. As for international treaties,⁵ the interpretation of Security Council resolutions is 'the process of determining the meaning of a text'⁶. The text of the resolution as formally adopted is normally the final product of a process of negotiations and refinement. As such it is presumed to reflect the intention of the organ.
9. Resolution 1441 has been adopted unanimously on 8 November 2002 under Chapter VII of the UN Charter following the determination that non compliance by Iraq with previous Security Council resolutions and proliferation of weapons of mass destruction posed a threat to international peace and security (preambular paragraph 3).
10. The key OPs for the purpose of establishing the content of the resolution with regard to the use of force are OPs 1, 2, 4, 11, 12 and 13.
11. In these paragraphs, which must be read and interpreted together, the Security Council
 - (a) decided that Iraq had been and remained in breach of its disarmament obligations imposed *inter alia* by resolution 687 (1991) (OP 1);
 - (b) offered Iraq a final opportunity to comply with its obligations (OP 2);
 - (c) decided that failure by Iraq to meet its obligations will be reported, by the Executive Directors of UNMOVIC and IAEA (OP 11) or by Member States to the Security Council for assessment (OP 4);
 - (d) decided to convene immediately to consider the situation and the need for full compliance with all relevant Security Council resolutions (OP 12);
 - (e) recalled that Iraq had been repeatedly warned that it will face serious consequences in case of non-compliance with its obligations (OP 13).
12. From a textual point of view, the sequence of OPs 1, 2, 4, 11, 12 and 13 is sufficiently clear about the content of the resolution. The use of force remained dependent on a further collective decision taken by the Security Council on the basis of its own assessment of the attitude of the Iraqi

⁵ See, for instance, International Court of Justice, *Sovereignty over Pulau Litigan and Pulau Sipadan* (Merits), *I.C.J. Reports* 2002, para 37. The UN International Law Commission has pointed out that "the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intention of the parties", 18 *Yearbook ILC* (1966-II), p. 221.

⁶ Harvard Law School, *Draft Convention on the Law of Treaty*, Comment to Article 19, in 29 *AJIL* (1935/Suppl.) 938. See also R. Jennings, A. Watts, *Oppenheim's International Law*, 9th ed. (London, Longman, 1991) p. 1267.

government.⁷ The Security Council remained in full control of the situation. Indeed it was for the Security Council to assess Iraqi conduct in violation of all relevant resolutions and to decide the measures necessary to maintain peace and security. These measures could have been – although they did not necessarily had to be – of military nature.

13. The use of the verb “to consider” rather than “to decide” in OP 12 hardly affect this conclusion.⁸ First, in accordance with OP 12, the Security Council was responsible to consider not only non-compliance by Iraq but also the need for full compliance *in order to secure* international peace and security. Second, OP 4 indicates that assessment of the situation – including the serious consequences Iraq would face in case of non-compliance – belonged exclusively to the Security Council. Third, the active role of the Security Council in managing the crisis is recognized by the United States in their declaration before the Security Council when they argued that unilateral use of force would be permitted “[i]f the Security Council fails to act decisively”.⁹
14. Nothing in the text of the resolution militates in favour of the unilateral use of force and at no point the resolution leaves open the possibility of using force without a further Security Council resolution.

IV. Contextual interpretation

15. Like treaties, SC resolutions must be interpreted in their context. Unlike treaty, however, the context of SC resolutions includes not only preamble and annexes but also, and most importantly, the UN Charter and other relevant SC resolutions.
16. In the case of resolution 1441, the interpreter must keep in mind that the prohibition on the use of force (Article 2 paragraph 4) is one of the cornerstones of the UN Charter. Apart from the exception of individual or collective self-defence (Article 51), military force can be used only in the common interest of the whole membership as defined by the Security

⁷ The Legal Department of the Ministry of Foreign Affairs of the Russian Federation, *Legal Assessment of the Use of Force Against Iraq*, 52 ICLQ (2003) 1059, has observed that ‘the whole mechanism of control and assessment with its obligations under the Security Council resolution is concentrated in accordance with resolution 1441 at the disposal of the Security Council’.

⁸ *Contra*, Foreign and Commonwealth Office Paper, *Iraq: Legal Basis for the Use of Force*, 52 ICLQ (2003) 812, p. 814.

⁹ Declaration before the Security Council following the adoption of the resolution, S/PV.4644, p. 3.

Council through a qualified majority decision in accordance with Article 27 (3).¹⁰

17. After the end of the Cold War, the Security Council attempted to overcome the non-implementation of Art. 43 ff. by authorising member States to use military force. The authorisation is the result of a three-phase decision-making process composed of:
 - (a) the determination of the existence of an act of aggression, a breach of peace or a threat to international peace and security for the purpose of Article 39 of the UN Charter;
 - (b) the indication of what the concerned parties must do (or refrain from doing);
 - (c) the decision to allow armed force to be used.
18. The authorisation has a permissive effect: it makes lawful a conduct that otherwise would be contrary to the general prohibition to use or threaten to use force. Since it deprives the target State from the legal protection of a fundamental provision of the UN Charter – as well as of customary international law – the authorisation to use force must be given expressly.¹¹
19. Yet, resolution 1441 is silent on the unilateral use of military force by member States. Interpreting operative paragraph 12 as implying the possibility of unilateral use of military force should the Security Council fail to ensure compliance with its resolutions would be utterly contrary with the letter and the spirit of the UN Charter.
20. The context of resolution 1441 also includes previous resolutions and especially resolution 678 (1990) and 687 (1991). The first resolution authorized member States to use force to liberate Kuwait from the Iraqi forces. The second resolution provided for a cease-fire based on a comprehensive set of disarmament obligations.
21. The argument has been made by a number of States, including the United Kingdom,¹² the United States,¹³ Italy,¹⁴ Spain¹⁵ and Australia,¹⁶ that the

¹⁰ I. Brownlie, *The Use of Force by States in International Law* (Oxford: Clarendon Press, 1963), p. 273, observes: 'The whole subject of the Charter was to render unilateral use of force, even in self-defence, subject to the control of the Organisation'

¹¹ In the note dated 4 October 2002, Michael Wood clearly maintained that "[t]he use of force requires express authorisation", available at <http://www.iraqinquiry.org.uk/media/43701/document2010-01-27-100417.pdf>.

¹² See, for instance, Attorney General's Legal Advice on the Iraq War: Resolution 1441, 54 (2005) 767.

¹³ Letter to the Security Council, 20 March 2003, UN Doc. S/2003/351.

¹⁴ Prime Minister statement before the Parliament, Comunicazioni del Governo sugli sviluppi della crisi irachena, Camera dei Deputati, meeting n. 283, 19 March 2003.

material breach by Iraq of its disarmament obligations would have removed the conditions for the cease-fire and revived the authorization to use force.

22. The argument is not convincing. Under Resolution 687, the Security Council assumed full responsibility over the effective respect of the obligations incumbent on Iraq, even if these obligations largely reproduced those imposed upon Iraq by the coalition of states that liberated Kuwait. Resolution 687, accordingly, terminated the authorisation to use force granted in Resolution 678.
23. Additionally, Resolution 678 was given to all member states acting in co-operation with the government of Kuwait to put an end to Iraqi invasion of Kuwait territory. It could not be invoked in 2003 in the context of a crisis related to weapons of mass destruction that is completely different from that in which the authorisation had originally been granted.

V. Object and purpose

24. Textual and contextual considerations preclude interpreting Resolution 1441 as providing the legal basis for the unilateral use of force. It is nonetheless a useful exercise to double check whether this interpretation is consistent with the object of the resolution.
25. The object of the resolution reflects what the members of the Security Council, either unanimously or by qualified majority, expect to achieve through the resolution. Their positions concur to the formation of the common will of the Security Council.
26. In order to establish the object of the resolution, the interpret must consider not only the text of the resolution, including its preambular paragraphs, but also the position expressed by the members of the Security Council in the context of the adoption of the resolution.
27. The object of Resolution 1441 is quite straightforward: to ensure full and immediate compliance by Iraq without conditions or restrictions with its disarmament obligations (preamble, paragraph 11). From this perspective, Iraq is given the final opportunity to meet its obligations and warned that it would face serious consequences in case of defiance (OP 2).

¹⁵ Declaration before the Security Council, 19 March 2003, S/PV.4721, p. 15-16.

¹⁶ Letter to the Security Council, 20 March 2003, UN Doc. S/2003/352. See also Attorney General's Department and the Department of Foreign Affairs and Trade, Memorandum of Advice on the Use of Force Against Iraq, available at www.pm.gov.au.

28. The members of the Security Council agreed that non-compliance would be reported to this organ and that it is for this organ to decide what action is necessary. They also excluded that the resolution did not automatically authorise the unilateral use of military force. The agreement, however, ends here.
29. As it is evident from the debate that followed the adoption of the resolution that a sharp division existed within the Security Council. Some members – especially the United States and in more nuanced terms the United Kingdom¹⁷ – interpreted the resolution as not precluding military unilateral measures to oblige Iraq to comply should the Security Council be unable to obtain such a result. Other members, declared – with different language and assertiveness – that no use of military force would be permitted without the express authorisation of the Security Council.¹⁸ In order to dissipate any possible doubt, on the very same day of the adoption of the resolution, France, the Russian Federation and China issued a joint declaration in this sense.¹⁹
30. Neither at the time of the adoption of the resolution or at any subsequent time,²⁰ the Security Council – as organ of the UN – prospected the residual use of unilateral military force. Quite the contrary, the unequivocal opposition of several members of the organ – including three permanent members – disqualifies any argument in favour of the use of military force without a further express authorisation by the Security Council.
31. It is submitted that this is the only interpretation of resolution 1441 respectful of both the real situation of sharp division existing within the Security Council and the principle of good faith that permeates international law.²¹ From this perspective, the good faith principle compels the interpreter to deduce from the evident and persistent lack of the qualified majority required under Article 27 (3) of the UN Charter that

¹⁷ See the declaration made before the Security Council immediately after the adoption of the resolution, S/PV.4644, respectively p. 3 and 5.

¹⁸ See, in particular, the declaration made by France (p. 5), Mexico (p. 6), Russian Federation (p. 8), Bulgaria (p. 9), Colombia (p. 10), Syria (p. 10).

¹⁹ Available at <http://www.iraqwatch.org/government/France/MFA/france-mfa-100802.htm>.

²⁰ See, for instance, the statements on Iraq made by France, Russia and Germany on 5 and 15 March 2003, available at <http://special.diplomatie.fr>.

²¹ As observed by the ICJ in *Anglo-Norwegian Fisheries Case*, Judgment, *I.C.J. Reports 1951*, p. 116, at p. 142, “[t]he principle of good faith requires that every right be exercised honestly and loyally. Any fictitious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will not be tolerated. Such an exercise constitutes an abuse of the right, prohibited by law”.

resolution 1441 could not and did not authorise the use of unilateral force without a further resolution.

VI. Legislative history

32. The legislative history of the resolution further confirms the above interpretation of resolution 1441. Paragraph 10 of the draft resolution prepared on 2 October 2002 by the United States and the United Kingdom would have had expressly authorised in case of material breach by Iraq of its disarmament obligations 'member States to use all necessary means to restore international peace and security in the region'²². The proposal was not even submitted to a formal vote due to the insurmountable opposition of several members.
33. Paragraphs 4, 11 and 12 of resolution 1441 clearly departed from paragraph 10 of the draft resolution. They coherently issued a last warning to Iraq and attributed to the Security Council the exclusive responsibility to ensure compliance by Iraq, if necessary by authorizing member States to use military force. Military action, in other words, depended on a further collective decision taken by the Security Council.

VII. Conclusions

34. As it is often the case, resolution 1441 is the result of compromises and mutual concessions at the expenses of the clarity and linearity of the text. It is nonetheless sufficiently evident from the text of the resolution, interpreted in its context and in the light of its object that no unilateral use of force would have been permitted without a further Security Council resolution.
35. Interpreting resolution 1441 as providing the authority for unilateral use of force would do violence not only to the canon of interpretation but also to logic²³. Indeed, the debates before the Security Council, several official documents, and the legislative history of resolution 1441 amply demonstrate that at all times three permanent members and several elected members openly opposed to the use of force.

²² Text available at <http://www.casi.org.uk/info/usukdraftscr021002.html>.

²³ As pointed out by P. Daillier, A. Pellet, *Droit international public*, 7th (Paris : L.G.D.J. 2002) 260, "l'interprétation c'est la logique au service du droit".