

IRAQ – A LEGAL BASIS FOR THE USE OF FORCE?
Observations on the FCO Memorandum of 17 March 2003

A Submission to the Iraq Inquiry
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The arguments advanced by the UK in justification of the use of force against Iraq by itself, the United States and their allies in March 2003 do not, as I understand it, depend upon the assertion of any special status or privilege on their part, other perhaps than their common membership of the United Nations Organisation and their identification as states that had been acting in support of Kuwait in the aftermath of the 1990 Iraqi invasion. These qualifications might be thought to follow from the fact that the constituency specifically authorised by Security Council Resolution 678 to “use all necessary means to uphold and implement Security Council Resolution 660 (1990) and all subsequent resolutions and to restore international peace and security in the area” was “Member States co-operating with the Government of Kuwait”. The consequence of this observation is that, if the arguments in question can be shown to exhibit objective legal validity, they will have been equally open to invocation by any other state falling within that constituency (which numbered, it seems, around 30 in total.) Thus, the ultimate acid test of the cogency of the British arguments is that, had the strategic position of the UK and the US in January-March 2003 been that the weapons inspectors should be left to do their work, and no further force employed against Iraq for the time being, but had *some other government* within the constituency – France, Saudi Arabia or Syria, shall we say – insisted upon deploying its own military forces as a means of coercing Iraq towards more meticulous compliance with its obligations, the UK should have been bound to acknowledge that government’s legal entitlement to adopt such a course of action (at least until such time as the Security Council might impose restraints upon them). This would seem to be the consequence of the argument in the FCO Memorandum that the authorisation to use force “was suspended but not terminated by Security Council resolution (SCR) 687 (1991) and revived by SCR 1441 (2002)”: clearly, if it were to be revived for one member of the relevant constituency it must necessarily be revived for all. In the (admittedly highly unlikely) event that such a state of affairs should have arisen, can it seriously be believed that the UK would have acceded to any such claim?

Be that as it may, the crux of the matter analytically lies in the more detailed arguments raised in the memorandum regarding the alleged “revivification” of the authorisation to use force. These are grounded in the paper’s assertion that, in Resolution 1441, the Security Council had made the following three findings (or, to use the words of the memo itself, “has determined”):

- (1) that Iraq’s possession of weapons of mass destruction (WMD) constitutes a threat to international peace and security;
- (2) that Iraq has failed – in clear violation of its legal obligations – to disarm; and
- (3) that, in consequence, Iraq is in material breach of the conditions for the ceasefire laid down by the Council in SCR 687 at the end of the hostilities in 1991, thus reviving the authorisation in SCR 678...

There are, however, significant difficulties attached to each of these claims, all of which are, at the very least, technically inaccurate. Indeed, these statements carry more of the flavour of tendentious political argumentation than objective legal analysis. No doubt the political pressures at play during the time the Memorandum was written were acute. The issues may be elaborated as follows.

(1) Possession of WMD

As to (1), the statement seems calculated to create the impression that the Security Council had, in SCR 1441, arrived at a specific, formal determination that Iraq was in "possession" of WMD and that this state of affairs represented a threat to international peace and security. It is far from clear, however, that any such determination had in reality been made. The only determination of existing fact to occur in the operative clauses of the resolution is to very different effect, expressed in the decision that "Iraq has been and remains in material breach of its obligations under relevant resolutions, ... in particular through Iraq's failure to co-operate with United Nations inspectors and the IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 687..." The more specific matters to which the Memorandum refers are addressed only in the preamble, though that is not in itself a reason to deny them definitive effect for this purpose – indeed, the original determination that the Iraqi invasion of Kuwait entailed a breach of international peace and security appeared in the preamble to SCR 660. So, too, in this case, the preamble to SCR 1441 very clearly contains a number of determinations of fact, whether express or implicit, including that Iraq had not provided full and accurate disclosure of matters relating to its weapons programmes, that it had obstructed access to designated sites, that monitoring and inspection had not occurred for some time, etc., etc. It is much less clear, however, that the statement to which the Memorandum seems to be referring can be placed within this category. Specifically, it appears in the third preambular recital and reads:

Recognizing the threat Iraq's non-compliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles poses to international peace and security, ...

The first point is that the reference regarding WMD here is actually not to *possession* at all, but to *proliferation*, which is a significantly wider concept, potentially embracing the acquisition or transfer of materials, information etc. A state might certainly be in breach of the Non-Proliferation Treaty, for example, without physically being in possession of proscribed weapons. In similar vein, SCR 687, paragraph 12 had specifically imposed obligations on Iraq not to acquire or develop "nuclear-weapons-usable material or any subsystems or components or any research, development, support or manufacturing facilities related to the above." Plainly, the unwarranted re-characterisation of this statement as one affirming actual possession creates the impression of a much more serious and immediate threat to security than can properly be justified by reference to the terms of the resolution itself.

Secondly, and in any event, the statement in question is not really couched – certainly not unambiguously – in the language of a concrete factual determination, being more in the nature of a general reflection or judgment upon a contingency. That is to say, the international community was reaffirming its view that a state of affairs in which Iraq failed to comply with SC resolutions while engaged in the proliferation of such weapons was unacceptable in terms of its propensity to undermine peace and security, without making any explicit pronouncement (in that recital, at least) regarding the extent to which such a state of affairs actually pertained at that precise moment in time. This interpretation is strongly reinforced by the location of the statement, by comparison with those that plainly do amount to specific assertions of fact: these are all sited later on in the preamble, and, as might be expected, immediately *after* the reaffirmation in the fifth recital that

resolution 687 had imposed obligations upon Iraq as necessary means of restoring peace and security. So located, they serve as indications of the extent to which Iraq was in default of those obligations, and why further action was now deemed necessary. The recital quoted above, by contrast, appeared much earlier in the text, immediately after the introductory recapitulation of past resolutions on this issue, where it is much more naturally read as a reminder of the overall governing principles in accordance with which the SC was acting, and not as a specific finding of fact (whether explicit or implicit) at all.

While this second point in particular, and its precise legal consequences, may admittedly be contestable, what can be concluded with absolute certainty is that SCR 1441 is not open to the interpretation, advanced or insinuated by the FCO memorandum, that the Security Council had specifically *determined* that Iraq was in *possession* of WMD and *in that respect* constituted a threat to international peace and security. This conclusion is strongly reinforced by the obvious consideration that the Council was never in a position to make such a finding, in view of the lack of any reliable information (as opposed to mere suspicion, supposition or speculation) by which it might be sustained. Indeed, one of the very purposes of the regime established by SCR 1441 was surely to obtain the information needed to resolve the matter one way or the other. Unfortunately, the UK government had already publicly committed itself to certain rather extravagant factual claims in that regard.

(2) Failure to disarm

The second substantive claim – that Iraq, in clear violation of its obligations, had failed to “disarm” – is no less troubling. Although it seems calculated to bolster the previous assertion regarding Iraq’s possession of WMD, it is scarcely easier to locate any sound basis for it in the text of the resolution itself. What is evident instead, from operative paragraphs 2 and 3 in particular, is the recognition of Iraq’s failure “to comply with its disarmament obligations”, which is plainly a very different matter indeed. That is to say, the “disarmament process established by resolution 687 and subsequent resolutions”, the completion of which SCR 1441 sought to secure, entailed much more than disarmament alone. In particular, a state which had completely relinquished or destroyed such weapons of mass destruction as it possessed (or, indeed, which had never actually possessed such weapons at all) could still be in breach of its “disarmament obligations” through failure to pursue or permit all the various processes of disclosure, access, inspection, monitoring and verification envisaged by the resolutions in question: what is more, these were precisely the complaints levelled against Iraq by the numerous, lengthy recitals in the preamble to SCR 1441. There is, of course, nothing remotely surprising in any of this: if international peace and, more particularly, *security* was to be conclusively restored, disarmament (like justice) had not only to be done but seen to be done. The consequence of this analysis, however, is that it cannot be accepted that the Security Council had reached any definitive determination that Iraq had failed to “disarm”.

Yet, as unconvincing as these FCO claims appear, they are perhaps ancillary to the main issue, in the sense that they are essentially designed (as indicated by the words “in consequence” in point 3 of the FCO memo quoted above) to lay the foundations for the third claim, namely that Iraq was in breach of the conditions for the ceasefire laid down in 1991, and that the authorisation to use force was thereby revived. While it should certainly not be overlooked that the inability to make good the

first two claims almost inevitably produces the effect of undermining the third, the crucial point which must be appreciated is that the third claim is of itself wholly unwarranted quite independently of this particular weakness.

(3) Breach of Ceasefire Conditions

Although the memorandum claims that the Security Council had, in SCR 1441, determined that Iraq was “in material breach of the conditions for the ceasefire laid down by the Council in SCR 687 at the end of the hostilities in 1991” it is quite clear that there is, once again, no explicit determination to that effect. What is actually stated, in operative paragraph 1, is (ostensibly, at least) very different, namely that “Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687”. The only reference to the ceasefire occurs in the 10th recital of the preamble, which recalls the Council’s declaration in resolution 687 “that a ceasefire would be based on acceptance by Iraq of the provisions of that resolution, including the obligations on Iraq contained therein”. The FCO claim can therefore only be justified if and to the extent that a “material breach of obligations under relevant resolutions” can somehow be equated in a substantive sense with a “material breach of the conditions for the ceasefire”. In order to investigate whether any such equivalence can truly be established, it is plainly necessary to examine the exact nature of the conditions upon which the ceasefire was established. The matter was addressed in paragraph 33 (Section I) of the lengthy resolution, whereby the Council declared

that, upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the provisions above, a formal cease-fire is effective between Iraq and Kuwait and the Member States cooperating with Kuwait...

The “provisions above” of course referred to the lengthy list of accommodations, procedures and requirements regarding disarmament and other matters which the Council had stipulated in the earlier paragraphs of the resolution. Despite their undoubted importance to the long-term re-establishment of peace and security in the area, these aspects were plainly of an essentially ancillary nature: the principal objective of the military action – namely the restoration of Kuwaiti sovereignty and territorial integrity – had already been achieved, and hostilities accordingly suspended pursuant to resolution 686. In these circumstances, it is no surprise at all that the only precondition deemed necessary before a cease-fire could be definitively established was precisely the one which paragraph 33 imposed – the single, simple act of *notification* by Iraq of its acceptance of the specified provisions. Once that formality had been completed, hostilities were definitively concluded. There could be no occasion or possibility of their being automatically or unilaterally “revived” under any circumstances, as the only contingency upon which their termination had been made dependent by the Council had already been fully and finally accomplished.

Given that this conclusion seems to follow inexorably from what is so clearly stated in SCR 687, it is extremely difficult to understand what more there is to be said on the matter, but in deference to alternative perspectives, and because the FCO memorandum in particular seeks to advance a very different view, it becomes necessary to explore the issue more thoroughly. Perhaps the crucial point to emphasise in this connection is that although there is a very obvious substantive *connection*

between (i) the conditions which were imposed by the Council before a ceasefire could be implemented and (ii) the obligations which it imposed on Iraq in order to restore international peace and security in the longer term (in the sense that the conditions imposed entailed acceptance of those obligations), there is equally plainly *no identity or equivalence* (as the FCO memo strenuously implies) between breach of the former and breach of the latter: put simply, the conditions for the ceasefire entailed *formal acceptance* of the obligations and not their *substantive performance*. Indeed, given that the obligations in question were extremely extensive and demanding, and might take many months or even years to complete, it would surely have been absurd to make the establishment of the cease-fire dependent upon their *actual performance*, as that would have created from the outset a situation of ongoing uncertainty as to whether military action might at any moment be reinstated by any of the relevant states at their individual initiative, magnifying still further the inherent temptation for Iraq to conceal as much as it could of its weapons programmes and combat-preparedness and thereby undermining the very long-term stability that SCR 687 sought to accomplish. Much more importantly, there is absolutely no trace of a reference to “performance” in the relevant paragraph (i.e., 33) of SCR 687. Finally, Resolution 1441 later specifically confirmed in its preamble’s 10th recital (cited above) that it was *acceptance* of the relevant obligations, rather than their performance, that had constituted the precondition to the cessation of hostilities.

Although, once again, this point might seem too clear to admit denial, the controversy which has actually emerged renders it necessary to consider certain counter-arguments that might conceivably be raised. These might run as follows:

(a) *That the plain wording of SCR 687, paragraph 33 should somehow be ignored or rejected as repugnant or absurd, on the grounds that mere notification of acceptance (as opposed to actual performance) by Iraq of the relevant obligations served no useful purpose or significance.* Perhaps the argument might continue to the effect that the Security Council was already, by virtue of the powers conferred upon it under the UN Charter, in a position to impose legally binding obligations upon Iraq and therefore that the latter’s formal acknowledgement of their existence was entirely superfluous. It is plain, however, that any such argument would be profoundly flawed, as it overlooks several important considerations. First, in a political sense, such a declaration would represent an overt manifestation of submission to the will of the world community, the kind of ritual gesture that is widely encountered not only in human affairs but throughout the animal kingdom as a necessary prelude to dispute resolution, and is likely to have been considered important by some of the key participants in the process. At the same time, it provided some formal, objective assurance of Iraq’s current peaceful intentions, the need for which had been expressly underlined in the preamble to SCR 687 (fourth recital). Secondly, beyond the realm of mere politics, such a declaration would in reality carry important legal implications, since it would represent precisely the kind of public commitment which the World Court has more than once recognised to be legally binding even if made purely unilaterally, and would effectively put it out of Iraq’s power (or at the very least render it substantially more difficult) for it subsequently to dispute the validity of the measures in question in any relevant international forum. In that sense, it was no more redundant, or less significant, in practical legal terms than the ratification by a state of a treaty that does not go beyond mere codification of existing principles of customary law. Indeed, the parallel with more typical treaty relationships is instructive in other senses as well, since although it is commonplace in that context to speak of a state expressing its consent to be bound by ratification, accession, approval or, indeed “acceptance” (see, e.g., Vienna Convention on the Law of Treaties, Article 11), it

is plain that that process is typically only actually perfected when some formal, external manifestation of such consent occurs on the international plane, typically through exchange, deposit or "notification" of an appropriate instrument (VCLoT, Article 16). These are the standard mechanisms in international law by which obligations are voluntarily assumed. Consequently, it is no surprise at all that the notification of acceptance of relevant terms should be invested with such significance. Its independent effect seems in fact to be recognised in passing in the FCO Memorandum itself, in paragraph 6: "These terms are binding in themselves *but have also been specifically accepted by Iraq as a condition for the formal ceasefire to come into effect*".

(b) That although not necessarily identical to "performance", the concept of "acceptance" in SCR 687, para.33 must be taken to have imported some continuous, ongoing temporal dimension, such that subsequent non-performance by Iraq of its disarmament obligations, of such an egregious character as to amount to a material breach thereof, must be treated as an effective repudiation of its earlier acceptance, otherwise the intention of the Security Council would inevitably be defeated. Once again, the argument is no more than superficially attractive. The most obvious, and of itself definitively conclusive, objection to it is that, as noted above, SCR 687 actually referred in express terms to mere "notification" of acceptance by Iraq as the precondition to a ceasefire, and not to "acceptance" in any broader, substantive, temporally continuous sense. The fact that, when recalling this measure in SCR 1441 (in the 10th preambular recital), the Council did so in terms of a declaration "that a ceasefire would be based on *acceptance* by Iraq" of the relevant provisions, rather than "notification" of acceptance, cannot in any way call this point into question, for a number of reasons. The most important of these is that the discrepancy in wording should properly be regarded as wholly inconsequential, on the grounds that there is not actually any necessary or inherent difference of meaning between the two modes of expression. That is to say, the word "acceptance" in SCR 1441 can readily be construed to connote an *act of acceptance* (i.e., formal notification) rather than, as the argument highlighted above would require, an *ongoing state of acceptance*. This would preserve perfect continuity of meaning between the two resolutions, while remaining fully consistent with the way in which such terms are regularly used in international law, most commonly for the purposes of the law of treaties.

The strength of the demand for continuity of meaning between the two resolutions is rendered irresistible by the fact that the relevant recital in SCR 1441 expressly declared itself to be "recalling" the terms of SCR 687, and there is no known mechanism through which the mere recall of an earlier provision can retrospectively alter its wording or purport in such a way as to undermine the basis of already concluded transactions. Even if such a revision might somehow be possible in principle, it would have to be accomplished advertently, and through a recognised procedure, and certainly not through the mere incidental, unheralded recasting of the earlier formulation into marginally different language. Possibilities might include the rectification of the original instrument, perhaps, or the adoption of an amendment with avowedly retrospective effect, but both of these would characteristically require to be conducted through due process and with the consent of all concerned. Indeed, a key point to note here, and the second reason why undue emphasis should not be placed upon this slight change of wording, is that although the arrangements established by SCR 687 were primarily designed to impose constraints and obligations upon Iraq, they also had the inevitable and intended consequence of creating certain *legal entitlements* or *legitimate*

expectations on its part. The most obvious one was that hostilities against it were now at an end, and it is unnecessary to rely on any specialised canons of construction or notions of *contra proferentem* interpretation to conclude that it could not lawfully be deprived of so critical a benefit through some side-wind of casual reformulation.

The FCO memorandum lays considerable emphasis upon the decision by the Council in operative paragraph 1 of SCR 1441 that Iraq was in “material breach” of its obligations under various resolutions, including SCR 687, and there can be no doubt that this is a notion of widely recognised and decisive significance for the purposes of international law generally. Within the law of treaties, for example, a material breach has the singular effect of justifying the termination of the treaty in question at the instance of the aggrieved party (VCLoT, Article 60). What it certainly does not do, however, is to nullify the original acceptance of the party in default or render the treaty itself void *ab initio* : indeed, Article 70(i)(b) VCLoT expressly stipulates that termination “does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.” The ceasefire arrangements definitively established in 1991 represented a closely analogous legal situation, which could not be retrospectively overturned by the eventuality of non-performance of associated obligations by Iraq. Indeed, the law governing the termination of hostilities generally has surely always drawn a clear distinction between breach of obligations (or failure of contingencies) which are stipulated as preconditions to the establishment of peace and breach of obligations which are designed to specify or elaborate the nature of the peace which is to be established. Hostilities initiated in respect of the latter category of breach would accordingly be regarded as a new war, rather than a continuation of the old. Sound practice would in any event have been to establish a dispute settlement procedure by which such eventualities could more appropriately be addressed, as in the case of Article 22 of the Peace Treaty with Japan.

That observation leads directly to a further reason why the hypothetical argument highlighted above must necessarily fail – namely that its underlying premise is also demonstrably false. That is to say, the intentions of the Security Council would *plainly not* be irrevocably defeated by Iraq’s subsequent failure conscientiously to perform the obligations laid down in the resolutions in question, because it had already established the means by which it might address them. In particular, paragraph 4 of SCR 1441 provided that any false statements or omissions by Iraq in the declarations it was required to make, or any other failure of cooperation should be reported to the Council, while paragraph 11 directed the Executive Chairman of UNMOVIC and the Director-General of IAEA to report any interference with the inspection process, or failure to comply with disarmament obligations. Paragraph 12 then envisaged the convening of an immediate meeting to “consider the situation”. Consequently, the Council had already set in place a procedure to address the eventuality of non-performance, which it will no doubt have anticipated from the outset as not unlikely to occur. In the event that it did, the Council would have an array of options at its disposal, including authorisation of the further use of force.

In these circumstances, the claim that the option was somehow retained for individual governments to resort to force against Iraq without further authorisation seems difficult to understand, let alone to endorse, as it would be no more compatible with preserving the authority of the Council than a failure by Iraq itself scrupulously to comply with its obligations. Effectively, it would mean that, if the Council became convinced that further military action was necessary, it could authorise it, but that even if it was never so convinced, certain states would nonetheless be entitled to go ahead on

their own initiative. It is surely wholly implausible to suppose that this can have been the intention. The FCO Memorandum, in paragraph 11, nevertheless attempts to suggest that it was. It asserts that paragraph 12 of Resolution 1441

does not mean that no further action can be taken without a new resolution of the Council. Had that been the intention, it would have provided that the Council would decide what needed to be done to restore international peace and security, not that it would consider the matter. The choice of words was deliberate: a proposal that there should be a requirement for a decision by the Council, a position maintained by several Council members was not adopted. Instead the members of the Council must consider the matter before any action is taken.

It is, however, an error very commonly encountered in the analysis of legal documents to assume that the omission of a proposed provision necessarily implies an intention to exclude or negate its substantive purport: to the contrary, an equally plausible and widely applicable explanation is that inclusion of the provision in question would be *redundant*, because its purport was already conveyed by other provisions, or so obviously implicit in the very nature of the transaction that it need not be stated expressly. So here, the true explanation of the omission of any provision explicitly requiring a further Council decision before force could be employed may well have been of this kind: i.e., while certain states might ideally have preferred its inclusion as *politically expedient*, in order to achieve an agreed text they did not ultimately insist upon it because they rightly recognised it as *legally superfluous*. Such an explanation is certainly no less likely than that they were knowingly consenting to the institution of a deliberative process that could be rendered futile at the whim of individual states. Indeed, if, as the Memorandum claims, the words of SCR 1441, paragraph 12 were deliberately chosen to achieve the latter effect, the choice would seem to have been singularly inept, for they do not state (as might have been expected) that the Council would “consider the situation *in the light of* the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security” but rather that they would “consider the situation *and* the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security”. Quite why such a form of words should ever have been chosen at all is surely a cause for bafflement, since the most obvious literal implication is that *the question whether the need for full compliance remained a prerequisite to the achievement of security was itself something that required further deliberation* – if this was the formula by which it was intended to be signalled that further force might lawfully be used without the approval of the Council as a whole, one can only suppose that all parties concerned were simultaneously provided with an encryption code.

Yet, as intriguing as these arguments undoubtedly are, it is to be hoped that the Inquiry will not become unduly preoccupied with them, for the mere embarkation upon such an exercise would of itself be an indication that the discussions had taken a wrong turn. SCR 687 established that the prerequisite to the cessation of hostilities was the formal act of notification of acceptance by Iraq of the various disarmament obligations imposed upon it, and once that formality was accomplished, no possibility of breach of the conditions for the ceasefire could arise, nor resort to force without further authorisation from the Security Council possibly be justified.

It is legitimate to point out, as the FCO Memorandum does in paragraph 7, that the UN Secretary-General appears to have stated, in response to air strikes that were carried out by the UK and the US against certain sites in Iraq in January 1993, and without specific Security Council authorisation, that such action was supported “by a mandate from the Security Council according to resolution 678, and the cause of the raid was the violation by Iraq of resolution 687 concerning the ceasefire. So, as Secretary-General of the United Nations, I can say that this action was taken and conforms to the resolutions of the Security Council and conforms to the Charter of the United Nations.” This plainly provides substantive support for the position advanced by the Memorandum; furthermore, the Secretary-General’s opinion in this regard is obviously entitled to the utmost respect. Yet it is not clear on what basis it might be judged to be conclusive. If by some means it could be so treated, that would present the apparently insuperable obstacle that, as pointed out by various authors, his successor as Secretary-General seems to have offered the quite categorical opinion in relation to the mooted invasion of Iraq in 2003, that “If the US and others were to go outside the Council and take military action, it would not be in conformity with the Charter.” The points raised in this paper are designed to demonstrate exactly why the later opinion is strongly to be preferred.

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