
**11. Further Opinion of Rabinder Singh QC
and Charlotte Kilroy, made Public 3 March 2003**

**IN THE MATTER OF THE POTENTIAL USE
OF ARMED FORCE BY THE UK AGAINST IRAQ AND
THE DRAFT US/UK RESOLUTION PUBLISHED ON 24
FEBRUARY 2003**

OPINION

1. Further to our previous advice (**OP1441**) on whether the United Kingdom (**UK**) can rely on United Nations Security Council Resolution 1441 (**Resolution 1441**) to use force against Iraq¹, we are asked to advise the Campaign for Nuclear Disarmament on whether the draft resolution released by the United States and the United Kingdom on 24 February 2003 (the “**Draft Resolution**”) would, if adopted by the United Nations Security Council, authorise the US and the UK to take military action against Iraq.

Summary of advice

2. For the reasons set out below, our opinion is that:
- (1) The Draft Resolution would not authorise the US and the UK to use force against Iraq if it were adopted.
 - (2) In the present circumstances as known to us, if there is no further Resolution clearly authorising force, the US and the UK would be acting in violation of international law if they were to attack Iraq.

The text of the Draft Resolution

3. The Draft Resolution comprises a long preamble and two short operative paragraphs. The preamble ‘recalls’ all the Security Council’s previous relevant resolutions, and continues:

“Recalling that in its Resolution 687 (1991) the Council declared that a ceasefire would be based on acceptance by Iraq of the provisions of that resolution, including the obligations on Iraq contained therein,

”Recalling that its Resolution 1441 (2002), while acknowledging that Iraq has been and remains in material breach of its obligations, afforded Iraq a final opportunity to

comply with its disarmament obligations under relevant resolutions,

"Recalling that in its Resolution 1441 (2002) the Council decided that false statements or omissions in the declaration submitted by Iraq pursuant to that resolution and failure by Iraq at any time to comply with, and to cooperate fully in the implementation of that resolution would constitute a further material breach,

"Noting, in that context, that in its Resolution 1441 (2002), the Council recalled that it has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations,

"Noting that Iraq has submitted a declaration pursuant to its Resolution 1441 (2002) containing false statements and omissions and has failed to comply with, and cooperate fully in the implementation of that resolution,

"Reaffirming the commitment of all member states to the sovereignty and territorial integrity of Iraq, Kuwait and the neighbouring states,

Mindful of its primary responsibility under the charter of the United Nations for the maintenance of international peace and security,

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

"Determined to secure full compliance with its decisions and to restore international peace and security in the area, ..."

4. The operative part of the Draft Resolution states that the Security Council:
 - "Acting under Chapter VII of the charter of the United Nations,
 - (1) Decides that Iraq has failed to take the final opportunity afforded to it in Resolution 1441 (2002),
 - (2) Decides to remain seized of the matter."
5. In an article in the *Guardian* dated 25 February 2003 Julian Borger reported that the Draft Resolution was far milder than the US originally had in mind. The article reported that prior to the report of Hans Blix on 14 February 2003 the US had considered going further, '*demanding the security council approve the use of "all necessary means" to enforce its*

will. A British official was reported as saying, “*The Americans’ original language was quite tough on requiring the words ‘material breach’ and so on. We said you simply have to refer back to resolution 1441 otherwise you’re simply not going to get the nine votes.*” (Emphasis added)

6. Newspaper reports suggest that it is anticipated that the Draft Resolution will be put to the vote at the Security Council in the week beginning 10 March 2003, and that war will begin shortly afterwards.

Issues

7. In our earlier opinion OP1441 we concluded that Resolution 1441 did not authorise the US and the UK to use force against Iraq in the event that it breached the terms of Resolution 1441. We concluded that a further Security Council Resolution clearly authorising force would be needed.
8. The Draft Resolution appears to be the US and the UK ’s proposal for meeting this requirement. It seems clear that, if it is adopted by the Security Council, the US and the UK will seek to rely on the Draft Resolution either on its own or in conjunction with Resolution 1441 as authorising them to attack Iraq.
9. The crucial question therefore is whether the Draft Resolution would in fact authorise the use of force against Iraq.

Legal Background

10. The United Nations Charter provides the framework for the use of force in international law.
11. Article 1 states:

“The Purposes of the United Nations are:

 - (1) *To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.*”
12. Article 2(4) states:

“*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*”
13. Chapter VII of the Charter (Articles 39-51) confers on the Security Council the duty of determining the existence of any threat to the peace,

breach of the peace, or act of aggression, and of deciding what action should be taken to maintain or restore international peace and security.

14. Article 39 states

“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

15. Article 41 states

“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

16. Article 42 states

“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

Advice

What is the effect of a breach by Iraq of Resolution 1441?

17. Much of the Draft Resolution refers back to Resolution 1441. It is important therefore to examine the meaning of that Resolution.
18. In OP1441 we considered whether Resolution 1441 authorised the use of force in the event that Iraq failed to comply with its terms. We concluded that it did not for three principal reasons.
19. First, Resolution 1441 does not expressly authorise Member States to use force. The resolutions adopted by the Security Council over the years, including Resolution 678, show that that the language used to authorise force is bold and consistent. Member states are ‘authorised’ to ‘use all necessary means’ or ‘take all necessary measures’ in pursuit of a specified goal.² These words are manifestly absent from Resolution 1441.
20. Secondly, as a matter of principle international law precludes Member States from relying on any implied authorisation to use force. The

prohibition on the use of force contained in Article 2(4) of the UN Charter is one of the most fundamental principles in the Charter. Member States may only derogate from that prohibition in self-defence or following an authorisation from the Security Council to use force made under Chapter VII of the Charter.

21. The fundamental nature of the prohibition against the use of force means that if a resolution is ambiguous on the question of whether force is authorised, then it should be assumed that force is not authorised. Furthermore the power given to the Security Council alone under Chapter VII to decide to use force to restore peace is intended to ensure that any decisions on the use of force are reached collectively. Article 1 of the Charter which sets out the Purposes of the UN makes it clear that collective measures are all that is envisaged by the Charter. Use of force without clear collective authorisation would therefore be in conflict with the fundamental principles of the Charter and in violation of international law.
22. Thirdly, even if implied authorisation to use force were permissible under international law, Resolution 1441 does not contain such an implied authorisation. The wording and scheme of Resolution 1441 and the discussions leading up to its adoption make it abundantly clear that any decision on the actions to be taken in the event of breach of Resolution 1441 by Iraq will be taken by the Security Council. Paragraphs 4 and 11 provide that, in the event of false statements or omissions in Iraq 's weapons declaration or non-compliance with its disarmament obligations, either UNMOVIC or the IAEA will make a report to the Security Council. Paragraph 12 of Resolution 1441 provides as follows:

12.[The Security Council] Decides to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security”.
23. This contemplates that the Security Council, not Member States acting unilaterally, will decide on any further action to be taken against Iraq in the event of any non-compliance by Iraq with its obligations under Resolution 1441. In other words Resolution 1441 does not set out what will happen if it is breached, but leaves it to the Security Council to decide.
24. We also made it clear in OP1441 that in our view the use of the word 'serious consequences' in paragraph 13 of Resolution 1441 does not amount to an authorisation to Member States to use force. Paragraph 13 of Resolution 1441 states that the Security Council “*Recalls, in that context, that the Council has repeatedly warned Iraq that it will face*

serious consequences as a result of its continued violations of its obligations.” The words ‘*in that context*’, clearly indicate that any serious consequences which Iraq will face are to be decided upon in the context of the discussion by the Security Council envisaged by paragraph 12 of Resolution 1441. In any event, this paragraph does not itself warn of serious consequences but is a reference to warnings made on previous occasions which this part of the Resolution “recalls”. The new Draft Resolution simply “notes” in the preamble that that is what Resolution 1441 said and does not itself authorise “serious consequences”.

25. In summary the effect of Resolution 1441 in international law is as follows. If Hans Blix (for UNMOVIC) or Mohamed El Baradei (for IAEA) conclude that Iraq is not complying with the terms of Resolution 1441 they will make a report to the Security Council. The Security Council will then consider the situation and the need to secure full compliance with its resolutions and will decide, in accordance with Chapter VII of the UN Charter, what action to take. Iraq is reminded that the consequences of breach will be serious, but it remains a matter for the Security Council to determine what the precise consequences will be and when they will take effect.
26. The question arises, therefore, of what the Security Council will have determined if it adopts the Draft Resolution.

Does the Draft Resolution authorise force?

27. It is clear that the Draft Resolution does not expressly authorise force any more than Resolution 1441 does. There is no paragraph which authorises Member States to use “*all necessary means*” or “*take all necessary measures*”. Indeed the newspaper report referred to above indicates that this wording was contemplated by the US but not pursued on the grounds that it would not receive the full support of the Security Council.
28. In our view, if wording exists which clearly authorises force, and this wording has not been pursued in favour of alternative wording which does not, then this is the clearest indication that, if adopted, this Draft Resolution would do something less than authorise force. To conclude otherwise not only flies in the face of common sense but severely undermines the fundamental principles of the Charter for the reasons set out above (see also OP1441). Those principles require that decisions on the use of force be taken by the Security Council, not Member States, and that the authorisation of force be enunciated in the clearest of terms so that it is beyond doubt that the Security Council has in fact authorised the use of force. They also enable the Security Council to retain control and supervision over such use of force as it does authorise, for example with clear timescales set out in its resolutions. In contrast, unilateral use of force by one or more Member States carries

- the serious risk that there will be a “free for all”, threatening rather than maintaining international peace and security.
29. Even assuming this argument is wrong, however, in our view the Draft Resolution cannot be construed as authorising force either alone or in combination with Resolution 1441.
 30. The bulk of the Draft Resolution is the Preamble. Preambles do not have operative effect, and cannot therefore be relied upon as authorising action of any kind. Where the words of the operative part of the Resolution are ambiguous, however, the Preamble may be used as a tool of interpretation.
 31. The Preamble to the Draft Resolution sets out the history of Iraq’s international obligations and failure to comply with those obligations and at Preamble paragraph 9 ‘*recognises*’ the threat to international peace and security posed by Iraq’s non-compliance with Security Council resolutions.
 32. Operative paragraph 1 in the Draft Resolution then states that the Security Council acting under Chapter VII of the UN Charter “*Decides that Iraq has failed to take the final opportunity afforded to it by Resolution 1441.*” This is a decision as to a *question of past fact*, not an authorisation as to *future action by other Member States*.
 33. All that paragraph 1 does is refer back to the “final opportunity” afforded in Resolution 1441. As set out above, however, Resolution 1441 does not authorise force in the event that Iraq fails to take the final opportunity afforded to it, but expressly envisages that a further decision will be taken by the Security Council as to what steps should be taken under Chapter VII.
 34. In our view the most that paragraph 1 of the Draft Resolution can be said to determine, when read in conjunction with the Preamble, is that Iraq poses a threat to the peace. Paragraph 1 of the Draft Resolution might therefore be said to be a determination under Article 39 of the Charter, which determination is a prerequisite to any decision to use measures short of force under Article 41 or force under Article 42 of the Charter. What paragraph 1 clearly does not do, however, is go on to decide what measures shall be taken in accordance with Articles 41 and 42 in order to restore international peace and security.
 35. This interpretation is reinforced by the consideration that it would have been very easy for the Draft Resolution to include an operative paragraph setting out what it was that it authorised in the form of *future action by Member States*. That paragraph would state what measures the Security Council should take in the light of its decision under paragraph 1. The Security Council might decide to take measures under either Article 41 (for example, further sanctions or an enhanced weapons inspection regime) or under Article 42 (blockades or military action).

36. In our view the fact that the words ‘final opportunity’ are used cannot mean that force automatically follows. The Security Council might, for example, decide to take measures under Article 41 before it takes measures under Article 42. Under Article 42, it might decide to mount a blockade before it takes military action. A determination that there has been a breach of the peace under Article 39 does not automatically entail military action. That is why Article 39 expressly provides that the Security Council should make recommendations or decide what measures to take.
37. It is not open to the US and the UK to simply assume that the Security Council has authorised measures under Article 42. Those measures are for the Security Council to decide upon. Even if the Security Council were to decide to authorise measures under Article 42 it might, for example, wish to limit the measures to action by land in order to minimise civilian casualties, bearing in mind its obligation to take into account human rights and humanitarian considerations under Article 1 of the Charter.
38. Nor in our view does the reference to ‘*serious consequences*’ in Resolution 1441 mean that, once Iraq has been declared by the Security Council to have failed to take the final opportunity afforded to it, those ‘*serious consequences*’, whatever they are, will automatically ensue. As set out above, the context in which the ‘*serious consequences*’ were referred to in paragraph 13 of Resolution 1441 makes it clear that the Security Council was to decide upon what those serious consequences would be and when they would ensue. Indeed, as explained above, any other interpretation of that paragraph would be in conflict with Articles 39, 41 and 42 of the UN Charter.

Conclusion

39. In our view, the Draft Resolution, if adopted, would not provide the US and the UK with an authorisation to use force against Iraq, either alone or in conjunction with Resolution 1441. Nor does Resolution 1441 authorise force in the event that it is breached by Iraq.
40. Any attack by US and the UK on Iraq in reliance on the Draft Resolution either alone or in conjunction with Resolution 1441 would be in breach of international law.

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FOOTNOTES

¹ Dated 15 November 2002

² See inter alia S/Res/940 (Haiti), S/ Res/1264 (East Timor), S/Res/1080 (The Great Lakes).