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As handed to Prime Minister
on 14 Jan 2003

IRAQ: INTERPRETATION OF RESOLUTION 1441

1. It is clear that resolution 1441 contains no express authorisation by the Security Council for the use of force. An early US draft authorised States to "use all necessary means to restore international peace and security in the area", but this wording was deleted during the negotiations.

2. However, the authorisation to use force contained in resolution 678 (1990) may revive where the Security Council has stated that there has been a breach of the ceasefire conditions imposed on Iraq by resolution 687 (1991) which is sufficiently grave to undermine the basis of the ceasefire (the so-called "revival argument"). The revival argument has been relied on by the United Kingdom as the legal basis for the use of force against Iraq, most recently in relation to operation Desert Fox in December 1998.

3. But the revival argument will not be defensible if the Council has made it clear either that action short of the use of force should be taken to ensure compliance with the terms of the ceasefire or that it intends to decide subsequently what action is required to ensure compliance. This point is illustrated by operative paragraphs (OP) 1 and 2 of resolution 1441. OP1 contains a finding of material breach of the ceasefire, but OP1 contains a "firebreak" which gives Iraq a final opportunity to comply. It is accepted that the effect of OP2 is that the finding of material breach in OP1 did not immediately revive the authorisation to use force in resolution 678 (1990). The key question in relation to the interpretation of resolution 1441 is whether the terms of paragraph 12 of the resolution indicate that the Council has reserved to itself the power to decide on what further action is required to enforce the ceasefire in the event of a further material breach by Iraq.

4. In order to answer this question, it is necessary to analyse the terms of resolution 1441 as a whole to see whether it satisfies the conditions necessary to revive the authorisation to use force in resolution 678.

Preambular paragraphs 4, 5 and 10 recall the authorisation to use force in resolution 678 and that resolution 687 imposed obligations on Iraq as a necessary condition of the ceasefire. These paragraphs suggest that the Council had the revival argument in mind when adopting the resolution.

OP 1 provides that Iraq has been and remains in material breach of previous resolutions, including the ceasefire resolution. The previous practice of the Council and statements made by Council members during

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the negotiation of resolution 1441 demonstrate that the phrase "material breach" signifies a finding by the Council of a sufficiently serious breach of the ceasefire conditions to revive the authorisation in resolution 678.

OP2 affords Iraq a "final opportunity" to comply with its disarmament obligations by cooperating with the enhanced inspection regime described in OPs 3 and 5-9. Although this paragraph indicates that the finding of material breach in OP1 does not immediately trigger revival of the authorisation in resolution 678, it also implies that the Council has determined that compliance with resolution 1441 is Iraq's last chance before the ceasefire resolution will be enforced.

* OP4 provides that false statements or omissions in the declaration to be submitted by Iraq under OP3 and failure by Iraq at any time to comply with and cooperate fully in the implementation of resolution 1441 will constitute a further material breach of the ceasefire resolution and will be reported to the Council for assessment. The wording of the first part of OP4 suggests that the Council has already determined that any failure by Iraq to comply with or cooperate in the implementation of the resolution will constitute a material breach. However, the paragraph goes on to include a further requirement: "and will be reported to the Council for assessment under paragraphs 11 and 12". The key question is whether this is merely a procedural requirement for a Council discussion (the stated US/UK position), or whether it indicates the need for a determination of some sort by the Security Council, whether expressed in terms of a further resolution or by some other means, that force is now justified.

use of force
It appears to be accepted that only serious cases of non-compliance would constitute a material breach on the basis that it would be difficult to justify the use of force in relation to a very minor infringement of the terms of the resolution. The Foreign Secretary stated in Parliament on 25 November that "material breach means something significant; some behaviour or pattern of behaviour that is serious. Among such breaches could be action by the Government or Iraq seriously to obstruct or impede the inspectors, to intimidate witnesses, or a pattern of behaviour where any single action appears relatively minor but the action as a whole add up to something deliberate and more significant: something that shows Iraq's intention not to comply". If this is the case, then any Iraqi misconduct must be assessed to determine whether it is sufficiently serious to constitute a material breach. The question then arises as to who is to make that assessment.

OP12 provides that the Council will convene immediately on receipt of a report of a further material breach "in order to consider the situation and

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the need for compliance with all relevant resolutions in order to secure international peace and security". This does not state expressly that a further Council decision is required. It is also evident from the negotiating history that proposals to amend this paragraph which would have made clear that a further decision was required were rejected.

OP13 makes clear that "serious consequences" will follow a further failure to comply. The previous practice of the Council and statements made during the negotiation of the resolution demonstrate that this phrase is accepted as indicating the use of force.

5. The critical questions in my mind are:

- (a) whether it would be legitimate to rely on the revival argument; and
- (b) what are the conditions for revival.

As discussed above in relation to OP1 of the resolution, I consider that the previous practice of the Council and the negotiating history of the resolution indicate that a finding of "material breach" constitutes a determination of a sufficiently serious breach of the terms of the ceasefire resolution to revive the authorisation to use force in resolution 678. If OP4 had stopped at the words "breach of Iraq's obligations", there would have been a good argument that the Security Council was authorising the use of force in advance if there was a failure by Iraq to comply and cooperate fully with the implementation of the resolution. But the additional words in OP4 must mean something.

6. OP4 links the assessment to the terms of OPs 11 and 12. That suggests that the assessment is to be carried out by the Executive Chairman of UNMOVIC and the Director-General of the IAEA and by the Security Council itself, which is to "consider the situation and the need for compliance with all of the relevant Council resolutions in order to secure international peace and security". These words reflect the language of Article 39 of the UN Charter which confer on the Security Council the power to take measures to maintain and restore international peace and security. In view of this, I find it hard not to read these words as indicating that it is for the Council assess if an Iraqi breach is sufficiently significant in light of all the circumstances, including the need to secure international peace and security, to constitute a material breach and thus revive the authorisation to use force.

7. Three principal factors lead me to this conclusion.

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8. First, the words "for assessment" in OP4 imply the need for a substantive assessment by the Council. The view that OP12 requires merely a Council discussion, but no further decision, would reduce the Council's role to a procedural formality, so that even if a majority of the Council's members expressed themselves opposed to the use of force this would have no effect.

9. Second, it is accepted that ~~OP4~~ ^{OP4 & fur} does not mean that every Iraqi breach would trigger the use of force, so someone must assess whether or not the breach is "material". It is more consistent with the underlying basis of the revival argument, ie that the Council must determine whether there has been a sufficiently serious breach of the ceasefire, to interpret OP4 as meaning that it is for the Council to carry out that assessment.

10. Third, I do not find the contrary arguments concerning the meaning of "for assessment" sufficiently convincing. The strongest point is that there was an attempt during the negotiation of the resolution by the French and Russians to amend the language of OP4 to make it plain that a further breach by Iraq would only be "material" when assessed as such by the Council, but this change was not accepted. But what matters principally in interpreting a resolution is what the text actually says, not the negotiations which preceded its adoption. In particular, records of private discussions between only a few members of the Council are unlikely to be accepted as supplementary means of interpretation for the purpose of ascertaining the intention of the Council as a whole.

[NB: it was proposed before Christmas that it would be worthwhile to discuss the negotiation of the resolution and particularly the genesis of the words "for assessment" with Sir J Greenstock. It is not clear if and when he will be able to come to London for such a meeting.]

11. In any event, I do not find much difference for these purposes between the French proposals "shall constitute a further material breach when assessed by the Security Council" and "when established in accordance with OPs 11 and 12" and the eventual compromise "shall constitute a material breach...and shall be reported to the Council for assessment"¹. The reference in this paragraph to "material breach" does have the political advantage of locking the Security Council into a tough stance when it comes to consider further Iraqi misconduct, but this is not the same issue as whether further Security Council approval is required.

¹ See FCO telegram xxx dated 2 November reporting Straw/Powell conversation and UKMIS telegram xxx dated 7 November reporting P5 discussion.

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12. I have considered whether the statements made by members of the Council at the time of its adoption assist in ascertaining the Council's intentions. The statements made during the debate on 8 November 2002 are not, however, conclusive. Only the US explicitly stated that it believed force was authorised regardless of whether there was a further Council decision. On the other hand two Council members, Mexico and Ireland, made clear that in their view a further decision of the Council was required before the use of force would be authorised. The language of the joint statement of France, Russian and China is somewhat opaque, but I believe that it can be taken as implying that a further Council decision is required. Most other Council members were also less than clear in their comments. In short, the statements made on adoption do not assist greatly in determining the correct interpretation of the text of OPs 4 and 12.

13. In conclusion therefore, my opinion is that resolution 1441 does not revive the authorisation to use of force contained in resolution 678 in the absence of a further decision of the Security Council. The difference between this view of the resolution and the approach which argues that no further decision is required is narrow, but key.

14. The further decision need not be in the form of a further resolution. It is possible that following a discussion under OP12 of the resolution the Council could make clear by other means, eg a Presidential statement, that it believes force is now justified to enforce the ceasefire.

Proportionality

15. Any force used pursuant to the authorisation in resolution 678:

- must have as its objective the enforcement the terms of the ceasefire contained in resolution 687 (1990) and subsequent relevant resolutions;
- be limited to what is necessary to achieve that objective; and
- must be proportionate to that objective, ie securing compliance with Iraq's disarmament obligations.

That is not to say that action may not be taken to remove Saddam Hussein from power if it can be shown that such action is necessary to secure the disarmament of Iraq and that it is a proportionate response to that objective. But regime change cannot be the objective of military action. This should be borne in mind in making public statements about any campaign.

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Other legal bases

16. In ruling out the use of force without a further decision of the Council, I am not saying that other circumstances may not arise in which the use of force may be justified on other legal grounds, eg if the conditions for self-defence or humanitarian intervention were met. However, at present, I have seen nothing to suggest that there would be a legal justification on either of these bases.

17. I have also heard it suggested that if the Council fails to adopt a further decision that force may nevertheless be justified on the basis of the "Kosovo option". However, I must stress that the circumstances in which the UK engaged in military action in Kosovo do not provide a legal precedent for the use of force against Iraq if the Council were to fail to meet its responsibilities. The reason we were able to take action in Kosovo in the face of a Russian veto of a proposed Security Council resolution authorising the use of force was because there was an alternative legal base which could be relied on which did not depend on Council authorisation, namely intervention to avert an overwhelming humanitarian catastrophe.

18. It has further been suggested that if, following a flagrant violation by Iraq, one of the other P5 members perversely or unreasonably vetoed further Council decision intended to authorise the use of force, this might justify the coalition acting without Council authorisation. The UN Charter provides that all permanent members of the Council must concur in the adoption of resolutions on substantive matters. The scheme of the Charter therefore clearly envisages the possibility of a P5 veto and does not provide that such vetoes may only be exercised on "reasonable grounds". In these circumstances I do not believe there is room for arguing that a condition of reasonableness can be implied as a precondition for the lawful exercise of a veto. Thus, if one of the P5 were to veto a further Council decision pursuant to OPs 4 and 12 of resolution 1441, there would be no Council authorisation for military action.