

Politics

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Full text: Iraq legal advice

The full text of the advice about the legality of war with Iraq given by the attorney general, Lord Goldsmith, to the prime minister, Tony Blair, on March 7 2003

Thu 28 Apr 2005 18.33 BST

SECRET

PRIME MINISTER

IRAQ: RESOLUTION 1441

1. You have asked me for advice on the legality of military action against [Iraq](#) without a further resolution of the Security Council. This is, of course, a matter we have discussed before.

Since then, I have had the benefit of discussions with the Foreign Secretary and Sir Jeremy Greenstock (the then British ambassador to the UN), who have given me valuable background information on the negotiating history of resolution 1441. In addition, I have also had the opportunity to hear the views of the US Administration from their perspective as co-sponsors of the resolution.

This note considers the issues in detail in order that you are in a position to understand the legal reasoning. My conclusions are summarised at paragraphs 26 to 31 below.

Possible legal bases for the use of force:

2. As I have previously advised, there are generally three possible bases for the use of force: (a) self-defence (which may include collective self-defence);
(b) exceptionally, to avert overwhelming humanitarian catastrophe; and
(c) authorisation by the Security Council acting under Chapter VII of the UN Charter.
3. Force may be used in self-defence if there is an actual or imminent threat of an armed attack; the use of force must be necessary, ie the only means of averting an attack; and the force used must be a proportionate response. It is now widely accepted that an imminent armed attack will justify the use of force if the other conditions are met.

The concept of what is imminent may depend on the circumstances. Different considerations may apply, for example, where the risk is of attack from terrorists

sponsored or harboured by a particular State, or where there is a threat of an attack by nuclear weapons.

However, in my opinion there must be some degree of imminence. I am aware that the USA has been arguing for recognition of a broad doctrine of a right to use force to pre-empt danger in the future. If this means more than a right to respond proportionately to an imminent attack (and I understand that the doctrine is intended to carry that connotation) this is not a doctrine which, in my opinion, exists or is recognised in international law.

4. The use of force to avert overwhelming humanitarian catastrophe has been emerging as a further, and exceptional, basis for the use of force. It was relied on by the UK in the Kosovo crisis and is the underlying justification for the No-Fly Zones. The doctrine remains controversial, however. I know of no reason why it would be an appropriate basis for action in present circumstances.

5. Force may be used where this authorised (sic) by the UN Security Council acting under Chapter VII of the UN Charter. The key question is whether resolution 1441 has the effect of providing such authorisation.

Resolution 1441

6. As you are aware, the argument that resolution 1441 itself provides the authorisation to use force depends on the revival of the express authorisation to use force given in 1990 by Security Council resolution 678. This in turn gives rise to two questions:

(a) is the so-called "revival argument" a sound legal basis in principle?

(b) is resolution 1441 sufficient to revive the authorisation in resolution 678?

I deal with these questions in turn. It is a trite, but nonetheless relevant observation given what some commentators have been saying, that if the answer to these two questions is "yes", the use of force will have been authorised by the United Nations and not in defiance of it.

The revival argument

7. Following its invasion and annexation of Kuwait, the Security Council authorised the use of force against Iraq in resolution 678 (1990).

This resolution authorised coalition forces to use all necessary means to force Iraq to withdraw from Kuwait and to restore international peace and security in the area. The resolution gave a legal basis for Operation Desert Storm, which was brought to an end by the ceasefire set out by the Council in resolution 687 (1991). The conditions for the ceasefire in that resolution (and subsequent resolutions) imposed obligations on Iraq with regard to the elimination of WMD and monitoring of its obligations.

Resolution 687 suspended, but did not terminate, the authority to use force in resolution 678. Nor has any subsequent resolution terminated the authorisation to use force in resolution 678. It has been the UK's view that a violation of Iraq's obligations under resolution 687 which is sufficiently serious to undermine the basis of the ceasefire can revive the authorisation to use force in resolution 678.

In reliance on this argument, force has been used on certain occasions. I am advised by the Foreign Office Legal Advisers that this was the basis for the use of force between 13 and 18 January 1993 following UN Presidential Statements on 8 and 11 January 1993 condemning particular failures by Iraq to observe the terms of the ceasefire resolution. The revival argument was also the basis for the use of force in December 1998 by the US and UK (Operation Desert Fox). This followed a series of Security Council resolutions, notably resolution 1205 (1998).

9. Law Officers have advised in the past that, provided the conditions are made out, the revival argument does provide a sufficient justification in international law for the use of force against Iraq. That view is supported by an opinion given in August 1992 by the then UN Legal Counsel, Carl-August Fleischauer. However, the UK has consistently taken the view (as did the Fleischauer opinion) that, as the ceasefire conditions were set by the Security Council in resolution 687, it is for the Council to assess whether any such breach of those obligations has occurred.

The US have a rather different view: they maintain that the fact of whether Iraq is in breach is a matter of objective fact which may therefore be assessed by individual Member States. I am not aware of any other state which supports this view.

This is an issue of critical importance when considering the effect of resolution 1441.

10. The revival argument is controversial. It is not widely accepted among academic commentators. However, I agree with my predecessors' advice on this issue. Further, I believe that the arguments in support of the revival argument are stronger following adoption of resolution 1441.

That is because of the terms of the resolution and the course of the negotiations which led to its adoption. Thus, 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.

Operative paragraph (OP) 1 provides that Iraq has been and remains in material breach of its obligations under relevant resolutions, including the resolution 687. OP13 recalls that Iraq has been warned repeatedly that "serious consequences" will result from continued violations of its obligations. The previous practice of the Council and statements made by Council members during the negotiation of resolution 1441 demonstrate that the phrase "material breach" signifies a finding by the Council of a sufficiently serious breach of the cease-fire conditions to revive the authorisation in resolution 678 and that "serious consequences" is accepted as indicating the use of force.

11. I disagree, therefore, with those commentators and lawyers, who assert that nothing less than an explicit (underlined) authorisation to use force in a Security Council resolution will be sufficient.

Sufficiency of resolution 1441

12. In order for the authorisation to use force in resolution 678 to be revived, there needs to be a determination by the Security Council that there is a violation of the conditions of the ceasefire and that the Security Council considers it sufficiently serious to destroy the basis of the ceasefire. Revival will not, however, take place, notwithstanding a finding of violation, if the Security 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 cease-fire, or that it intends to decide subsequently what action is required to ensure compliance.

Notwithstanding the determination of material breach in OP1 of resolution 1441, it is clear that the Council did not intend that the authorisation in resolution 678 should revive immediately (underlined) following the adoption of resolution 1441, since OP2 of the resolution affords Iraq a "final opportunity" to comply with its disarmament obligations under previous resolutions by co-operating with the enhanced inspection regime described in OPs 3 and 5-9.

But OP2 also states that the Council has determined that compliance with resolution 1441 is Iraq's last chance before the ceasefire resolution will be enforced. OP2 has the effect therefore of suspending the legal consequences of the OP1 determination of material breach which would otherwise have triggered the revival of the authorisation in resolution 678. The narrow but key question is: on the true interpretation of resolution 1441, what has the Security Council decided will be the consequences of Iraq's failure to comply with the enhanced regime.

13. The provisions relevant to determining whether or not Iraq has taken the final opportunity given by the Security Council are contained in OPs 4, 11 and 12 of the resolution.

- 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 Iraq's obligations and will be reported to the Council for assessment under paragraphs 11 and 12 of the resolution.

- OP11 directs the Executive Chairman of UNMOVIC and the Director-General of the IAEA to report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including the obligations regarding inspections under resolution 1441.

- OP12 provides that the Council will convene immediately on receipt of a report in accordance with paragraphs 4 or 11 "in order to consider the situation and the need

for compliance with all of the relevant Council resolutions in order to secure international peace and security". It is clear from the text of the resolution, and is apparent from the negotiating history, that if Iraq fails to comply, there will be a further Security Council discussion. The text is, however, ambiguous and unclear on what happens next.

14. There are two competing arguments:

- (i) that provided there is a Council discussion, if it does not reach a conclusion, there remains an authorisation to use force;
- (ii) that nothing short of a further Council decision will be a legitimate basis for the use of force.

The first argument

15. The first argument is based on the following steps

(a) OP1, by stating that Iraq "has been and remains in material breach" of its obligations under relevant resolutions, including resolution 687 amounts to a determination by the Council that Iraq's violations of resolution 687 are sufficiently serious to destroy the basis of the ceasefire and therefore, in principle, to revive the authorisation to use force in resolution 678;

(b) the Council decided, however, to give Iraq "a final opportunity" (OP2) but because of the clear warning that it faced "serious consequences as a result of its continued violations" (OP 13) was warning that a failure to take that "final opportunity" would lead to such consequences;

(c) further, by OP 4, the Council decided in advance (underlined) that false statements or omissions in its declaration and "failure by Iraq at any time (underlined) to comply with, and cooperate fully in the implementation of, this resolution" would constitute "a further material breach"; the argument is that the Council's determination in advance (underlined) that particular conduct would constitute a material breach (thus reviving the authorisation to use force) is as good as its determination after (underlined) the event;

(d) in either event, the Council must meet (OP 12) "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", but the resolution singularly does not say that the Council must decide what action to take. The Council knew full well, it is argued, the difference between "consider" and "decide" and so the omission is highly significant. Indeed, the omission is especially important as the French and Russians made proposals to include an express requirement for a further decision, but these were rejected precisely to avoid being tied to the need to obtain a second resolution.

On this view, therefore, while the Council has the opportunity to take a further decision, the determinations of material breach in OPs 1 and 4 remain valid even if the Council does not act.

The second argument

16. The second argument focuses, by contrast, on two provisions in particular of the resolution: first, the final words in OP4 ("and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below") and, second, the requirement in OP12 for the Council 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". Taken together, it is argued, these provisions indicate that the Council decided in resolution 1441 that in the event of continued Iraqi non-compliance, the issue should return to the Council for a further decision on what action should be taken at that stage.

Discussion

17. So far as OP4 of the resolution is concerned, one view is that the words at the end of this paragraph indicate the need for an assessment by the Security Council of how serious any Iraqi breaches really are and whether they are sufficiently serious to destroy the basis of the ceasefire. This argument is supported by public statements to the effect that only serious cases of non-compliance will constitute a further material breach.

Thus, 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 of 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 that is right, then the question is who makes the assessment of what constitutes a sufficiently serious breach. On the UK view of the revival argument (though not the US view) that can only be the Council, because only the Council can decide if a violation is sufficiently serious to revive the authorisation to use force.

18. It is right to say, however, that such an argument has less force if OP4 operates automatically. Thus, the wording of OP4 indicates that any failure by Iraq to comply with and cooperate fully in the implementation of the resolution will constitute a further material breach (leaving aside the question of whether false statements or omissions in the OP3 declaration is an additional requirement).

If OP4 means what it says: the words "cooperate fully" were included specifically to ensure that any instances of non-cooperation would amount to a further material breach. This is the US analysis of OP4 and is undoubtedly more consistent with the

view that no further decision of the Council is necessary to authorise force, because it can be argued that the Council has determined in advance that any failure will be a material breach.

19. It has been suggested that it is possible to establish that Iraq has failed to take its final opportunity through the procedures in OPs 11 and 12 without regard to OP4, in which case it is unnecessary to consider the effect of the words "for assessment". I do not consider that this argument really assists. First, the resolution must be read as a whole. Second, I accept that it is possible that a Council discussion under OP12 may be triggered by a report from Blix and El-Baradei under OP11 and that this may have the effect of establishing that Iraq has failed to take the final opportunity granted by OP2.

But I do not consider that it can be argued seriously that OP4 does not apply in these circumstances. It is clear from a comparison of the wording of paragraphs 4 and 11 that any Iraqi conduct which would be sufficient to trigger a report from the inspectors under OP11 would also amount to a failure to comply with and cooperate fully in the implementation of the resolution and would thus also be covered by OP4.

In addition, the reference to paragraph 11 in OP4 cannot be ignored. It is not entirely clear what this means, but the most convincing explanation seems to be that it is a recognition that an OP11 inspectors' report would also constitute a report of further material breach within the meaning of OP4 and would thus be assessed by the Council under OP12. Moreover, the US see OP4 as an essential part of the mechanism for establishing that Iraq has failed to take its final opportunity.

· Read the **second part** of the advice.

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