

CURRENT DEVELOPMENTS

PUBLIC INTERNATIONAL LAW

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I. The Use of Force against Iraq

II. International Law in English Courts—Recent Cases

I. THE USE OF FORCE AGAINST IRAQ

The answer of the Attorney-General Lord Goldsmith to a question in the House of Lords and a paper produced by the Foreign & Commonwealth Office explaining the United Kingdom's position on the legal basis for the use of force against Iraq are reproduced immediately below (from the 'Latest News' section, 18 March 2003, of the Foreign & Commonwealth Office website, www.fco.gov.uk). Contextual documentation and comment will be provided in the next Current Developments: Public International Law section in January 2004.

The Attorney General's Answer

Authority to use force against Iraq exists from the combined effect of resolutions 678, 687 and 1441. All of these resolutions were adopted under Chapter VII of the UN Charter which allows the use of force for the express purpose of restoring international peace and security:

1. In resolution 678 the Security Council authorised force against Iraq, to eject it from Kuwait and to restore peace and security in the area.
2. In resolution 687, which set out the ceasefire conditions after Operation Desert Storm, the Security Council imposed continuing obligations on Iraq to eliminate its weapons of mass destruction in order to restore international peace and security in the area. Resolution 687 suspended but did not terminate the authority to use force under resolution 678.
3. A material breach of resolution 687 revives the authority to use force under resolution 678.
4. In resolution 1441 the Security Council determined that Iraq has been and remains in material breach of resolution 687, because it has not fully complied with its obligations to disarm under that resolution.
5. The Security Council in resolution 1441 gave Iraq 'a final opportunity to comply with its disarmament obligations' and warned Iraq of the 'serious consequences' if it did not.

* This section deals with recent developments in British practice against the international and domestic context in which it takes place.

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6. The Security Council also decided in resolution 1441 that, if Iraq failed at any time to comply with and cooperate fully in the implementation of resolution 1441, that would constitute a further material breach.
7. It is plain that Iraq has failed so to comply and therefore Iraq was at the time of resolution 1441 and continues to be in material breach.
8. Thus, the authority to use force under resolution 678 has revived and so continues today.
9. Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all that resolution 1441 requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorise force.

I have lodged a copy of this answer, together with resolutions 678, 687 and 1441 in the Library of both Houses and the Vote office of the House of Commons.

The Foreign & Commonwealth Office Paper

IRAQ: LEGAL BASIS FOR THE USE OF FORCE

Summary

1. The legal basis for any military action against Iraq would be the authorisation which the Security Council, by its resolution 678 (1990), gave to Member States to use all necessary means to restore international peace and security in the area. That authorisation was suspended but not terminated by Security Council resolution (SCR) 687 (1991), and revived by SCR 1441 (2002). In SCR 1441, the Security Council 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.

The extent of the authority to use force contained in SCR 678

2. Chapter VII of the United Nations Charter gives the Security Council the power to authorise States to take such military action as may be necessary to maintain or restore international peace and security.

3. In the case of Iraq, the Security Council took such a step following the Iraqi invasion of Kuwait. Paragraph 2 of SCR 678 authorised 'Member States co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.' The phrase 'all necessary means' was understood then (as it is now) as including the use of force.

4. Following the liberation of Kuwait, the Security Council adopted SCR 687. This resolution set out the steps which the Council required Iraq to take in order to restore international peace and security in the area. Iraq's acceptance of those requirements was the condition for the declaration of a formal ceasefire. Those steps included the destruction of all WMD under international supervision and the requirement that Iraq

should not attempt to acquire such weapons or the means of their manufacture. As a means to achieving the disarmament required by the Security Council, SCR 687 also required Iraq to submit to extensive weapons inspection by UNSCOM (now UNMOVIC) and the IAEA. The Security Council was quite clear that these steps were essential to the restoration of international peace and security in the area.

5. SCR 687 did not repeal the authorisation to use force in paragraph 2 of SCR 678. On the contrary, it confirmed that SCR 678 remained in force. The authorisation was suspended for so long as Iraq complied with the conditions of the ceasefire. But the authorisation could be revived if the Council determined that Iraq was acting in material breach of the requirements of SCR 687. Although almost twelve years have elapsed since SCR 687 was adopted, Iraq has never taken the steps required of it by the Council. Throughout that period the Council has repeatedly condemned Iraq for violations of SCR 687 and has adopted numerous resolutions on the subject. In 1993 and again in 1998 the coalition took military action under the revived authority of SCR 678 to deal with the threat to international peace and security posed by those violations.

6. In relation to the action in 1993, the Minister of State at the Foreign and Commonwealth Office wrote: 'The Security Council determined in its statements of 8 and 11 January that Iraq was in material breach of resolutions 687 and its related resolutions, and warned Iraq that serious consequences would ensue from continued failure to comply with its obligations. Resolution 687 lays down the terms for the formal ceasefire between the coalition states and Iraq at the end of the hostilities mandated by the Security Council in resolution 678. 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. In the light of Iraq's continued breaches of Security Council resolution 687 and thus of the ceasefire terms, and the repeated warnings given by the Security Council and members of the coalition, their forces were entitled to take necessary and proportionate action in order to ensure that Iraq complies with those terms.'

7. On 14 January 1993, in relation to the UK/US military action the previous day, the then UN Secretary-General said: 'The raid yesterday, and the forces which carried out the raid, have received 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.'

8. In relation to the military action undertaken in 1998, the then Parliamentary Under-Secretary of State (now Minister of State) at the Foreign and Commonwealth Office, Baroness Symons of Vernham Dean stated: 'In our previous discussions in this House some of your Lordships asked about the legality of our action. Any action involving UK forces would be based on international law. The Charter of the United Nations allows for the use of force under the authority of the Security Council. The Security Council resolution adopted before the Gulf conflict authorised the use of force in order to restore international peace and security in the region. Iraq is in clear breach of Security Council resolution 687 which laid down the conditions for the ceasefire at the end of the conflict. Those conditions included a requirement on Iraq to eliminate its weapons of mass destruction under international supervision. Those conditions have been broken.'

Security Council Resolution 1441 (2002)

9. It is against that legal background that United Kingdom and the United States brought to the Council the draft resolution which was eventually adopted unanimously as SCR 1441 on 8 November 2002. The preamble to that resolution again expressly referred to SCR 678, confirming once more that that resolution was still in force. It also recognised the threat that Iraq's non-compliance with Council resolutions posed to international peace and security; and it recalled that SCR 687 imposed obligations on Iraq as a necessary step for the achievement of its objective of restoring international peace and security. In paragraph 1 the Council went on to decide that Iraq 'has been and remains in material breach' of its obligations under SCR 687 and other relevant resolutions. The use of the term 'material breach' is of the utmost importance because the practice of the Security Council during the 1990's shows that it was just such a finding of material breach by Iraq which served to revive the authorisation of force in SCR 678.

10. On this occasion, however, the Council decided (in paragraph 2 of SCR 1441) to offer Iraq 'a final opportunity to comply with its disarmament obligations.' Iraq was required to produce an accurate, full and complete declaration of all aspects of its prohibited programmes (paragraph 3), and to provide immediate and unrestricted access to UNMOVIC and IAEA (paragraph 5). Failure by Iraq to comply with the requirements of SCR 1441 was declared to be a further material breach of Iraq's obligations (paragraph 4), in addition to the continuing breach already identified in paragraph 1. In the event of a further breach (paragraph 4), or interference by Iraq with the inspectors or failure to comply with any of the disarmament obligations under any of the relevant resolutions (paragraph 11), the matter was to be reported to the Security Council. The Security Council was then to convene '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' (paragraph 12). The Council warned Iraq (paragraph 13) that 'it will face serious consequences as a result of its continued violations of its obligations'.

11. It is important to stress that SCR 1441 did not revive the 678 authorisation immediately on its adoption. There was no 'automaticity'. The resolution afforded Iraq a final opportunity to comply and it provided for any failure by Iraq to be 'considered' by the Security Council (under paragraph 12 of the resolution). That paragraph does not, however, 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 opted for the formula that the Council must consider the matter before any action is taken.

12. That consideration has taken place regularly since the adoption of SCR 1441. It is plain, including from UNMOVIC's statements to the Security Council, its Twelfth Quarterly Report and the so-called 'Clusters Document', that Iraq has not complied as required with its disarmament obligations. Whatever other differences there may have been in the Security Council, no member of the Council has questioned this conclusion. It therefore follows that Iraq has not taken the final opportunity offered to it and remains in material breach of the disarmament obligations which, for twelve years, the Council has insisted are essential for the restoration of peace and security. In these circumstances, the authorisation to use force contained in SCR 678 revives.