

Security Council Resolution 1441 and the Potential Use of Force Against Iraq

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Introduction

Table of Contents-----

Introduction.....	2
Table of contents.....	2
About the Author.....	2
Synopsis.....	2
Abbreviations.....	3
Principal Sources.....	3
The UN Charter framework, the 1991 ceasefire and the preemptive use of force.....	4
SCR 1441 and the US position on whether SCR 1441 constrains potential US use of force against Iraq.....	6
How the US might use SCR 1441 to domestically and internationally justify using force against Iraq.....	6
Endnotes.....	19

Date-----

6 December 2002

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Synopsis-----

This document discusses several specific issues that arise from *Security Council Resolution* (SCR) **1441**, unanimously passed on 8 November 2002. Owing to the resolution's relevance to the possible (although not inevitable) US use of force against Iraq, the aim of this document is to discuss and/or detail:

- Section 1:** The past SCR and UN Charter context for evaluating SCR 1441.
- Section 2:** What US officials say about SCR 1441 and potential US use of force against Iraq.
- Section 3:** How US might use certain paragraphs to justify using force against Iraq (also contains US officials' quotes regarding using force against Iraq). What paragraphs the US might be more likely to use. How the US might try to undermine the inspection process and/the inspectors.

The analysis draws several main conclusions, based in part on statements by US officials:

- The UN Charter, 1991 ceasefire with Iraq and SCR 1441 together prohibit all member states from using force against Iraq without Security Council authorization or Iraq actually attacking a member state.
- US officials and the US Congress have ignored the UN Charter and misinterpreted the 1991 ceasefire and other SCRs, including SCR 1441, to argue that the US is free to use force against Iraq.
- The US seems likely to use the Government of Iraq's internal repression of civilians to supplement main US pretexts to use force, notwithstanding US policies that have played a primary role in Iraq's ongoing humanitarian crisis and US inaction regarding the Iraqi Government's suppression.
- SCR 1441's words (three paragraphs in particular) may be structured to position the US to undermine the weapons inspectors and/or weapons inspections process, so that the US may argue that the only way to disarm Iraq is to use force.

Abbreviations-----

SCR:	Security Council Resolution
PP:	Preambulatory paragraph. PPs are the paragraphs unnumbered in the SCRs
OP:	Operative Paragraph. OPs are the paragraphs numbered in the SCRs.
Para.:	Paragraph
Art.:	Article
Fn.:	Footnote
Sec.:	Section
Pg.:	Page

Principal Sources-----

SCR 1441: <http://www.casi.org.uk/info/undocs/scres/2002/res1441e.pdf>

UN Charter, Chapter VII: www.un.org/Overview/Charter/chapter7.html

Other Iraq-related SCRs: www.casi.org.uk/info/scriraq.html

1. The UN Charter Framework, the 1991 Ceasefire and the Preemptive Use of Force

The UN Charter framework

Chapter VII of the UN Charter is the primary framework for Council force authorization and the use of force by UN member states. It is also the primary framework for this SCR 1441 analysis. The Council determines “the existence of any threat to the peace, breach of the peace, or act of aggression”.¹ It may recommend or decide “what measures shall be taken...to maintain or restore international peace and security”.² Permissible authorized measures include the use of force.³ There are only two instances when a member state may use force without Council authorization: to defend itself only after an armed attack has already occurred against it (“individual self-defense”) or to assist a member state that itself has already been attacked (“collective self-defense”)⁴ and requests assistance. Regarding “collective self-defense”, a member state may not use force to assist an attacked member state, unless the attacked state requests and permits assistance. If the attacked state prohibits a particular member state from assisting it, the barred member state is not allowed to unilaterally attempt to provide assistance.

The 1991 ceasefire

In SCR 678 (29 November 1990) the Council invoked Chapter VII and “[a]uthorize[d] 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”, if Iraq failed to fully implement SCR 678 and previous Council SCRs by 15 January 1991.⁵ Iraq failed to comply and cooperating member states began to use force against Iraq on 16 January 1991.⁶ On 27 February 1991 the President of the Security Council confirmed that Iraq had withdrawn all of its forces from Kuwait.⁷ SCR 687 (2 April 1991) established the ceasefire terms. It stated that once Iraq officially notified the Secretary-General and the Council that Iraq accepted SCR 687’s provisions, then an official ceasefire would be in effect between Iraq and Kuwait/cooperating member states acting as SCR 678 authorized.⁸ Iraq’s only ceasefire obligation was official notification. SCR 687 contains no other ceasefire conditions. Iraq officially notified the required parties on 6 April 1991.⁹ Since then, a ceasefire has been in effect.

The Council had achieved its originally stated primary peace and security objective: Iraq’s military forces were out of Kuwait. However, the Council decided in SCR 687 that Iraq’s pre-Gulf War non-conventional* weapons development and use made Iraq a continuing

* For the Council, in Iraq’s case, “non-conventional” refers to biological, chemical and nuclear weapons, along with ballistic missiles with a range greater than 150 KM. “Non-conventional” also seems to cover related “materials” and “all related subsystems and components and all research, development, support and manufacturing facilities”. Note that the Security Council uses the term “weapons of mass destruction”. (Security Council Resolution 687, S/RES/687, 3 April 1991, OPs 8 and 12)

threat to “international peace and security.” SCR 687 mentioned other issues, but non-conventional weaponry was the primary one. SCR 687 details Iraq’s ongoing non-conventional disarmament “obligations”. These “obligations” were not ceasefire conditions. Rather, they were actions, in addition to the ceasefire term, that the Council required Iraq to take in the name of “international peace and security”. Because Iraq has not gained Council “...agreement that Iraq has completed all [relevant] actions”,¹⁰ the Council has continued to remain “seized” of Iraq as an “international peace and security issue”. Nevertheless, Council authorization for member states to use against Iraq ended with the ceasefire. Member states would have had continued force authorization only if Iraq had failed to execute its ceasefire obligation.

The ceasefire has been authorized. In a hypothetical scenario, even if there were other SCR 687 ceasefire conditions and Iraq broke them, a member state (even if it once acted in cooperation with Kuwait) would violate standard international law if it used force on the basis that Iraq violated the ceasefire terms. Pre-1945, an “armistice” was the accepted practice between combatants. The armistice was a suspension of force, not an end. If a party violated the armistice terms, then the other party could once again use force, unless the armistice explicitly stated that it could not. Since 1945, the “ceasefire” has replaced the armistice. A ceasefire is a binding end to force, not a suspension. If a party violates the ceasefire terms, other signatories may not legitimately use force merely because there has been a ceasefire violation.¹¹

Preemptive use of force

The Charter also does not seem to permit unauthorized preemptive attacks. The International Court of Justice (ICJ), the world’s highest court and a principal UN organ, seemed to support this conclusion in a 1986 decision:

“[F]or one State to use force against another...is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack...In the view of the Court, under international law in force today – whether customary international law or that of the United Nations system – States do not have a right of ‘collective’ armed response to acts which do not constitute an ‘armed attack.’”¹²*

Note that the 1986 US Public Law 99-433 requires every US President to transmit to Congress an annual report on the “National Security Strategy of the United States of America”.¹³ US President George W. Bush’s required report, released in September 2002, includes US preemptive force as a pillar of his Administration’s “national security doctrine”.¹

* In this SCR 1441 analysis the author has made some words bold. Where words are bold they were not bold in the original text.

¹ “The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary,

As a related aside, it may be worth noting that according to the US Constitution, “...all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”.¹⁴ The UN Charter is such a treaty.

Summary of the UN Charter and the Use of Force Against Iraq

There are now only two scenarios in which the UN Charter would permit a state to use force against Iraq: One, Iraq would have to attack a member state. Or, two, the Council would have to explicitly authorize force under Chapter VII.

2. SCR 1441 and the US Position on Whether SCR 1441 Constrains Potential US Use of Force Against Iraq

Just prior to the SCR 1441 vote, White House Press Secretary Ari Fleischer said “[n]othing in this resolution handcuffs the [US] President”.¹⁵ Reportedly, “[s]enior U.S. officials insisted that the new resolution formally presented to the council [on 7 November] preserve[d] Bush’s authority to wage war against Iraq.”¹⁶ When explaining the US vote in favor of SCR 1441, US Permanent Representative to the UN Ambassador John Negroponte stated that “[i]f the Security Council fails to act decisively in the event of a further Iraqi violation, this resolution does not constrain any member state from acting to defend itself against the threat posed by Iraq, or to enforce relevant UN resolutions and protect world peace and security.”¹⁷ In mid-November, US President George W. President Bush said that “...the interesting thing about the U.N. Security Council resolution is all countries are free to act.”¹⁸ All of these statements seem to ignore the UN Charter and 1991 ceasefire, and related prohibitions on the use of force.

3. How the US Might Use SCR 1441 to Domestically and Internationally Justify Using Force Against Iraq

There are many possibilities. This document below focuses on three. The possibility presented in Section 3(iii) focuses on what might be the most important paragraphs in SCR 1441.

(i) US Officials might continue to ignore the 1991 ceasefire and UN Charter, and incorrectly interpret SCR 1441 warning language.

act preemptively.” (US President George W. Bush, “The National Security Strategy of the United States of America”, September 2002, pg. 15, <http://www.whitehouse.gov/nsc/nss.pdf>)

The context for SCR 1441 is the UN Charter and its use of force provisions, along with the 1991 ceasefire. Iraq has not attacked a member state since it invaded Kuwait. Since the SCR 678 authorization and later ceasefire that ended the authorization, the Council has not authorized member states to use force against Iraq. In SCR 678 the Council “[a]uthorize[d] Member States co-operating with the Government of Kuwait...to use **all necessary means**...to restore international peace and security in the area”.¹⁹ Notably, the 2 October US/UK SCR draft proposed that a “further material breach of Iraq's obligations...authorizes member states to use all necessary means to restore international peace and security in the area”.² SCR 1441 on the other hand contains no “**all necessary means**” language, or, for that matter, any text which authorizes member states to use force against Iraq. However, SCR 1441 is filled with strong language that US officials often invoke. In SCR 1441, the Council:

*“Recogniz[es] 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”²⁰*

*“Decides that Iraq has been and remains in **material breach** of its obligations under relevant resolutions”²¹*

*“Decides...to afford Iraq, by this resolution, a **final opportunity** to comply with its disarmament obligations under relevant resolutions of the Council”²²*

*“Decides that **false statements or omissions** in the declarations submitted by Iraq pursuant to this resolution and **failure by Iraq at any time** to comply with, and cooperate fully in the implementation of, this resolution shall constitute a **further material breach** of Iraq’s obligations and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below”²³*

*“Decides to **convene immediately** upon receipt of a report in accordance with paragraphs 4 or 11...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”²⁴*

² [“The Security Council...Acting under chapter VII of the Charter of the United Nations,] [d]ecides that false statements or omissions in the declaration submitted by Iraq to the Council and failure by Iraq at any time to comply and cooperate fully in accordance with the provisions laid in this resolution, shall constitute a further material breach of Iraq's obligations, and that such breach **authorizes member states to use all necessary means** to restore international peace and security in the area”. (US/UK, draft Security Council Resolution, 2 October 2002, OP 10, www.cam.ac.uk/societies/casi/info/usukdraftscr021002.html. Note that this was the first draft SCR that the US/UK circulated to other Security Council permanent members. The US/UK never formally tabled it.)

*“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”²⁵*

US officials seem willing to use SCR 1441 language to suggest that SCR 1441 simultaneously validates and frees the US to use force against Iraq, while acknowledging that it does not give the US explicit authorization. They seem argue that the Charter is extraneous, that the ceasefire had conditions other than the actual one, and that SCR 1441 contains strong warning language and does not explicitly prohibit the use of force. Thus, they seem to conclude the US is at liberty to use force against Iraq.

US President George W. Bush has, on several occasions, referred to SCR 1441 as a “final test”²⁶ and has suggested that “[a]ny act of defiance or delay will indicate that [Saddam Hussein] is taking the path of deception once again, and this time the consequences would be **severe**”,²⁷ thereby drawing from the phrases “final opportunity” and “serious consequences”. He has also stated that “[t]he United States has agreed to discuss any material breach with the Security Council, but without jeopardizing our freedom of action to defend our country. If Iraq fails to fully comply, the United States and other nations will disarm Saddam Hussein.”²⁸

US Secretary of State Colin Powell has also similarly used SCR 1441 language. A few days after SCR 1441 was passed, Powell wrote a newspaper opinion piece in which he stated:

*“Every member of the Security Council understands that if Hussein fails to comply with Resolution 1441, there must be **serious consequences**...The Security Council has confronted Saddam Hussein and his regime with a moment of truth. If they meet it with more lies, they will not escape the **consequences**.”²⁹*

Secretary Powell has also said:

“[Saddam Hussein] hasn't complied in the past, and that's why we put it in this resolution that this is a last chance, because if he doesn't comply this time, that lack of compliance goes right to the Security Council, who are to convene immediately to consider what should be done. And serious consequences are held out within this current resolution.”³⁰

Perhaps even more explicitly than the US President, Powell has attributed to the US President the belief that the “international community” is obliged to take actions that the US President believes are necessary, and that the US will use force against Iraq without Security Council authorization.

“I can assure you if [Saddam Hussein] doesn't comply this time, we are going to ask the U.N. to give authorization for all necessary means. If the U.N. isn't willing to do that, the United States, with like-minded nations, will go and disarm him forcefully. And the

*president has made this clear...the president has made it clear that he believes it is the obligation of the international community, in the face of new non-compliance, to take whatever actions the president feels necessary to remove those weapons of mass destruction. And if the U.N. does not act, then the president is prepared to act. He's made it clear for months.*³¹

US Deputy Secretary of Defense Paul Wolfowitz echoed a similar theme in mid-November when he stated that “I think the president has made it clear [that] if we can get the support of the United Nations, that’s great, and if we can't get it, we’re not going to have our hands tied.”³²

(ii) US officials (with help from UK officials) may invoke the Government of Iraq’s internal repression (explicitly mentioned in SCR 1441) when they domestically seek to justify US force against Iraq.

Additionally, US officials may incorrectly interpret SCR 678, SCR 687 and SCR 688 and state that those resolutions authorize the US to use force against Iraq. US Public Laws have also misinterpreted those resolutions. Primarily for a domestic audience, US officials might invoke US Public Law, in addition or as a supplement to SCRs, to justify using force against Iraq.

US public laws that misinterpret SCR 678, SCR 687 and SCR 688

SCR 1441 explicitly invokes SCR 678 and SCR 688 (5 April 1991)³³ and purports to paraphrase SCR 687.³⁴ It seems more than incidental that several US Public Laws³ and US officials incorrectly interpret some combination of SCR 678, SCR 687 and SCR 688. These misinterpretations, as explained below, are seemingly primarily aimed at a domestic US audience.

The SCR 678 misinterpretation is that SCR 678 authorizes member states to use force (at their discretion) against Iraq to “enforce” or “support” SCR 678 and all post-SCR 678 Iraq-related SCRs (including SCR 687 and beyond).³⁵

The SCR 687 misinterpretation is that the ceasefire depended on Iraq acting in addition to officially notifying the required parties that Iraq accepted SCR-1.5(e)1059 3

George H.W. Bush's 15 February 1991 remarks (and the Iraqi civilian and military conclusion that the US would thus help their efforts): "There is another way for the bloodshed to stop: And that is, for the Iraqi military and the Iraqi people to take matters into their own hands and force Saddam Hussein, the dictator, to step aside and then comply with the United Nations' resolutions and rejoin the family of peace-loving nations".³⁹ "Iraqi troops and security services acted with great brutality in quelling the uprising"⁴⁰ and created massive internal displacement and external refugee flows. It was in this context that over a month after the uprising and related repression began, the Security Council passed SCR 688.

In SCR 688, the Council stated that the Council was

"Gravely concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions, which threaten international peace and security in the region". It "Condemn[ed] the repression of the Iraqi civilian population", stated that "[those] consequences...threaten international peace and security in the region" and "demande[d]" that the Government of Iraq end this repression" and grant full access to humanitarian aid agencies.⁴¹

SCR 688's primary impetus, repression of civilians during an uprising and resulting refugee flows, no longer exists. After ending the 1991 uprising, the Government of Iraq has continued to repress Iraqi civilians, albeit in a non-uprising context.⁴² The Council has omitted this differently contextualized repression from the set of Iraq issues on which the Council has acted. Whenever the Council has passed an Iraq-related resolution, it has "[r]ecall[ed] its previous relevant resolutions" and then noted particular resolutions that are important to the one that it just passed. Until SCR 1441, and strong indications that the US may wish to go to war with Iraq, the Council has not singled out for attention SCR 688 and the Government of Iraq's internal repression. While talking generally about why the US may use force against Iraq, the US President and other US officials sometimes mention that the Government of Iraq represses its civilian population.⁴³ One may imagine similar references to internal repression if the US decides to use force against Iraq. Such references would probably be aimed at the US public and designed to garner support for US military action against Iraq.

Select past and present US role in Iraqi human rights

SCR 1441 deplores the Iraqi Government's refusal to readmit weapons inspectors and "regret[s] the consequent prolonging of the crisis in the region and the suffering of the Iraqi people".⁴⁴ Successive US Administrations have stated that the Iraqi Government's non-compliance and/or ostensible failures to fully utilize sanctions exceptions (namely the "oil-for-food program") are to blame for Iraq's humanitarian crisis. However, irrespective of the Government of Iraq's actions, the US does have policy alternatives. There is responsibility that comes from continuing to drive (with UK support) the Council to link Iraq's humanitarian situation to ostensible non-conventional weapons objectives, and thus maintain economic sanctions on Iraq that have had and continue to have foreseeably grave consequences for Iraqi civilians. It is true that Chapter VII permits the Council to authorize

and impose economic sanctions,⁴⁵ but there seems to be a growing sense that economic sanctions may be at odds with the rest of the UN Charter.⁴⁶

By definition, effective economic sanctions foreseeably damage a target economy, which in turn predictably leads to civilian suffering.⁴⁷ Economic sanctions play a role in this suffering, regardless of why decision-makers apply them or what target governments do in response to them. UN Secretary-General Kofi Annan,⁴⁸ UNICEF Executive Director Carol Bellamy,⁴⁹ the Security Council's 1999 Humanitarian Panel,⁵⁰ and even the Security Council itself⁵¹ (among others) have noted the link between Council sanctions and Iraq's humanitarian crisis. The UN High Commission on Human Rights concluded in 2000 that "the current sanctions regime is having a disproportionately negative impact on the enjoyment of human rights by the Iraqi population."⁵² The estimated 500,000 extra dead children under the age of five (1991-1998),⁵³ among many other systematically estimated and anecdotally observed indicators, certainly seem to support the High Commission's conclusion.⁵⁴

On the possible impact that a war might have on Iraqi civilians, several organizations and experts have written on the potentially large-scale, devastating and deadly consequences.⁵⁵ The recently released UK "dossier"⁵⁶ on the Iraqi Government's human rights violations might also be viewed as part of this use of force mobilization. Reportedly the "document...contained no new material".⁵⁷ In response to the question, "[b]ut it has been happening, Prime Minister, for a very long time in Iraq, hasn't it? Saddam Hussein has been in power now for more than 20 years, why only now?" UK Prime Minister Tony Blair responded "[b]ecause the issue of weapons of mass destruction is there and that is the basis on which the international community is acting."⁵⁸ "Richard Bunting, a spokesman for the human rights group Amnesty, said: "We are afraid this is opportunistic and selective. Iraq's human rights record is appalling but we have been saying this for years." "The British and US are being selective, conveniently ignoring other countries and using that record to drive forward foreign and military goals."⁵⁹

Past US inattention and inaction regarding the Government of Iraq's human rights violations,⁶⁰ US-propelled Council economic sanctions, and the seemingly likely humanitarian catastrophe that a US war on Iraq would cause, all seem to point to the Amnesty International Secretary General's conclusion that "[t]he human rights situation in Iraq is being invoked with unusual frequency by some western political leaders to justify military action."⁶¹

SCR 1441 and the US/UK "No-Fly Zones"

The US and UK often invoke SCR 688 to argue that it authorizes them to "support" or "enforce" (these are common US and/or UK official buzzwords on this topic) SCR 688 through their use of force the US/UK "no-fly zones".⁴ "However, unlike the military

⁴ "USCENTCOM [US Central Command] continues to enforce UN Security Council resolutions 688 and 949 in order to protect Iraq's population from their own government, deter enhancement of Iraq's military

campaign to expel Iraqi forces from Kuwait, the no-fly zones were not authorised by the UN and they are not specifically sanctioned by any Security Council resolution....the resolution [688] did not say the Security Council was acting under Chapter VII of the UN Charter, which provides for enforcement action...nor did it say that all necessary means could be used.”⁶²

In SCR 1441 the Council “Decides further that Iraq shall not take or threaten hostile acts directed against any representative or personnel of the United Nations or the IAEA or of any Member State taking action to uphold any Council resolution”.⁶³ Reportedly, “Russia’s deputy U.N. ambassador, Gennady Gatilov said Wednesday [20 November] that during negotiations for Resolution 1441, the council received assurances from British diplomats - including British Ambassador Jeremy Greenstock - that the resolution did not refer to the no-fly zone patrols. ‘He said, absolutely no, we don’t mean that,’ Gatilov recalled Greenstock as saying. A British diplomat confirmed that.”⁶⁴ White House Deputy Press Secretary Scott McClellan stated at a mid-November press briefing that “the United States believes that firing upon our aircraft in the no-fly zone or British aircraft is a violation, it is a material breach. And what that -- what the U.N. resolution allows us to do is it gives us the option, if we choose, to take that to the Security Council.”⁶⁵

That and select other Administration comments notwithstanding, reportedly “[t]he administration also appeared to be acknowledging that it would be difficult to use confrontations between allied planes and Iraqi forces on the ground in the no-flight zones – the equivalent of a low-level war that has been going on for years – as the sole reason for taking new military action against Saddam Hussein...faced with the near certainty that Russia and some other countries would not agree that Iraq’s firing on the patrol planes violated the resolution, administration officials said they would not bring the issue before the Security Council for the moment.”⁶⁶ It seems unlikely that the US will use events in the US/UK “no-fly zones” as a pretext to use force against Iraq. What seems more likely is that the US will have another pretext and include Iraqi actions in those “zones” as part of a broader, domestically-focused, justification for why the US must use force against Iraq.

Summary of a potential US Public Law argument

SCR 678’s force authorization ended with the ceasefire, when Iraq officially notified the designated parties that Iraq accepted SCR 687’s provisions. Nevertheless, US officials may ignore the actual ceasefire details and repeat misinterpretations from US Public Law and other sources. Most likely, the language will focus on the US “Congress”, rather than “Public Law”.⁵ The argument may go as follows:

General Tommy Franks, statement to US House of Representatives Armed Services Committee, 27 February 2002)

⁵ E.g., “With tonight’s vote in the United States Senate, America speaks with one voice. The Congress has spoken clearly to the international community and the United Nations Security Council. Saddam Hussein and his outlaw regime pose a grave threat to the region, the world, and the United States. Inaction is not an option, disarmament is a must. I commend members of the Senate for the strong bipartisan vote authorizing the use of force, if necessary. The Senate, like the House, conducted this important debate and vote in the finest traditions of our democracy.” (US President George W. Bush, statement, *Office of the Press Secretary*, 11 October 2002, <http://www.whitehouse.gov/news/releases/2002/10/20021011.html>)

Some combination of SCRs 678, 678 and 688 authorizes the US to use force against Iraq at US discretion, post ceasefire.

US Public Law is consistent with SCRs 678, 687 and 688.

US Public Law (or the US “Congress”) has authorized the US President to use force against Iraq.

The Public Law argument would probably be almost exclusively for a domestic US audience.

It might be worth noting that authorization in international law does not depend on domestic law.

(iii) Regarding the potential US use of force against Iraq, OPs 4, 11 and 12 may be the most interpretationally and consequentially serious. Together they determine a “further material breach” in advance of the Council actually determining that there has been a “further material breach”. They may also circumvent UNMOVIC/IAEA as the exclusive “reporting” agents regarding a “further material breach”. Additionally, the Council must consider and act in response to a “report” from alternative sources such as a member state. Thus, the Council may potentially receive “reported” Iraqi “false statements” or “omissions” from a member state (most likely the US) and base related Council actions on such a “report”, rather than UNMOVIC/IAEA “reports” alone. The US may also use the “reporting” system, in conjunction with UNMOVIC/IAEA’s mandate, to undermine inspections and/or the inspectors as mechanisms in Iraq’s non-conventional disarmament.

There are many paragraphs that may be consequentially problematic. For example, OP 3 gives Iraq until 8 November to submit to UNMOVIC/IAEA and the Council

“a currently accurate, full, and complete declaration of all aspects of its programmes to develop chemical, biological, and nuclear weapons, ballistic missiles, and other delivery systems such as unmanned aerial vehicles and dispersal systems designed for use on aircraft, including any holdings and precise locations of such weapons, components, subcomponents, stocks of agents, and related material and equipment, the locations and work of its research, development and production facilities, as well as all other chemical, biological, and nuclear programmes, including any which it claims are for purposes not related to weapon production or material”.

In his 28 October Security Council briefing notes UNMOVIC Executive Chairman Hans Blix wrote that “[a] declaration regarding weapons programme should be possible within 30 days and the same should be true for declaring remaining permitted peaceful nuclear programmes...To declare all other chemical programmes in a country with a fairly large chemical industry, as well as other biological programmes might be more problematic in a short time.”⁶⁷ Blix repeated on 25 November “I had said here as you probably know that with a country having petrochemical industry to declare all the programmes they may have in chemistry might be difficult within 30 days”.⁶⁸ If Iraq submits an 8 December declaration regarding its ostensibly civilian biological and/or chemical facilities, and the declaration is incomplete because the 30 time period was insufficient, will the US then contend that “omissions” are grounds for military action?

OP 4, OP 11 and OP 12 text

The paragraph though to which one perhaps ought to pay closest attention may be OP 4, in conjunction with OP 11 and OP 12.

OP 4: Decides that false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below

OP 11: 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 its obligations regarding inspections under this resolution

OP 12: 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

The safety net with a hole: “two parts” that may be only one

UK Foreign Secretary Jack Straw stated before the UK House of Commons on 25 November “the operational Paragraph 4 makes it clear that a material breach is a failure of disclosure and other failure to comply. So there are two parts of it.”⁶⁹ A “Senior US Official” told reporters on 8 November that failure to cooperate and comply meant “failure to cooperate with the inspectors”.⁷⁰ Reportedly, “[t]he use of ‘and’ rather than ‘or’ was intensively debated by the security council, and was a condition for its unanimous support for the resolution. Despite hints to the contrary from Tony Blair, British government officials say the declaration alone will not provide a justification for military action. The US state department privately agrees.”⁷¹

It seems to actually be unclear that “failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution” is in fact specific to inspections and/or entirely distinct from “false statements or omissions in the declarations submitted by Iraq pursuant to this resolution”. Although OP 11 (to which OP 4 refers) refers to “inspections” and “inspection activities”, it also refers to “any failure by Iraq to comply with its disarmament obligations”. SCR 1441-wise, “disarmament obligations” presumably include “a currently accurate, full, and complete declaration”. The US might potentially argue that “reported” declaration “false statements or omissions” ARE “failure[s]...to comply with...and cooperate fully in the implementation of...this resolution” or “failure[s] by Iraq to comply with its disarmament obligations”. Thus, the US might contend that a declaration-related “report” alone is sufficient to constitute a “further material breach”.

A “further material breach” seems to be already determined

OP 4 seems to preemptively determine “further material breach”. This is certainly how the US seems to interpret it. US Secretary of State Colin Powell stated a few days after the SCR 1441 vote that “[OP 4] says clearly that if there is this violation, that very fact of a violation is a material breach, not a judgment to be made by somebody else, either by Dr. Blix or the head of UNMOVIC or by the Security Council. It is a material breach.”⁷² In other words, there is no latitude given for judgment by UNMOVIC/IAEA or by the Security Council. There is no opportunity for the Security Council to review a “report” and then decide whether the “reported” Iraqi action actually constitutes a further material breach. There is no caveat that a “reported” Iraqi action will be a “further material breach” only after the Council assesses and establishes it to be as such.

Why is it so potentially important that SCR 1441 determines in advance that a “reported”, unreviewed, unjudged action is a “further material breach”? Why is it perhaps so consequentially relevant that a “further material breach” is a foregone conclusion and that the only question is “what next”? The importance exists because the US may use it as a pretext to use force against Iraq and minimize debate about force usage. US President George W. Bush has said “the world must not lapse into unproductive debates over whether specific instances of Iraqi noncompliance are serious. Any Iraqi noncompliance is serious”.⁷³

Powell further stated on 10 November “at that point, it is referred to the Security Council under Paragraph 12 for the Security Council to make a judgment as to what should be done. While the Security Council is doing that, the United States will also be reviewing the nature of this breach and making a judgment as to whether it should prepare or begin to prepare to take military action either as part of the U.N. effort, if the U.N. decides to do that, or separately with like-minded nations if that turns out to be the direction in which we’re heading.”⁷⁴

OP 4 seems to suggest that only “reported”, rather than “reported”, reviewed and established “failure [including declaration “false statements and omissions” and inspections] by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach”. Given the potential for the US to use a “reported” “failure” to justify using force against Iraq, “reporting” takes on increased significance.

UNMOVIC/IAEA do not seem to be the exclusive Council “reporters”: a member state may “report”

A 23 October French draft SCR (OP 10) suggest that the Council “[d]irects the Executive Chairman of UNMOVIC and the Director General of IAEA to report immediately to the Council any serious failure by Iraq to comply with its disarmament obligations, including its obligations regarding inspections, under this resolution”.⁷⁵ The French draft (OP 11) went

on to propose that the Council “[d]ecides to convene immediately, upon reception of a report in accordance with paragraph 10 above, in order to consider the situation and the needed steps to ensure full compliance with all of the relevant Security Council resolutions in order to restore international peace and security”. In the French draft, it seems that UNMOVIC/IAEA are the exclusive “reporters” to the Council, regarding “serious” Iraqi non-compliance. Only after the Council receives an UNMOVIC/IAEA “report” will the Council “convene”. The Council will only review an UNMOVIC/IAEA “report”. The Council will decide on future action, based on the UNMOVIC/IAEA “report”.

In SCR 1441, UNMOVIC/IAEA do not seem to be the exclusive “reporters” to the Council. OP 4 states that “...will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below”. Note the “and” in between “paragraphs 11 and 12”. OP 11 directs UNMOVIC/IAEA to “report” to the Council. In OP 12 the Council “[d]ecides to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11”. Note the use of the phrase “a report”. Further, note the reference to “paragraphs 4 [OR] 11”. OP 11 refers to UNMOVIC/IAEA. This means that OP 12 refers to a “report” from UNMOVIC/IAEA OR some other source, perhaps a member state.

When explaining the US SCR 1441 vote on 8 November, US Permanent Representative to the UN Ambassador John Negroponte stated that “If there is a further Iraqi breach, reported to the Council by UNMOVIC, the IAEA, **or a member state**, the matter will return to the Council for discussions as required in paragraph 12.”⁷⁶ If a member state “reports” an Iraqi “failure”, an act of ostensible non-compliance, regarding declaration and/or inspections, OP 4 and 12 establishes the “reported” “failure” as a “further material breach” and requires the Council to “convene immediately upon receipt of [such] a report...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”. The “further material breach” and “conven[ing]” could all take place even if UNMOVIC/IAEA doesn’t “report” an Iraqi compliance “failure” to the Council.

What if a member state “reports” and UNMOVIC/IAEA do not?

A situation might develop where UNMOVIC/IAEA and a reporting member state actually disagree over ostensible Iraq non-compliance, regarding the declaration and/or inspections. OP 5 “requests” that UNMOVIC/IAEA update the Council no later than 95 days post-8 November. UNMOVIC/IAEA thus have to submit “an updating report” to the Council by 27 January 2003.⁷⁷ But otherwise, OP 4 and OP 11 seem to suggest that UNMOVIC/IAEA are only supposed to “report” to the Council if UNMOVIC/IAEA observe a “failure by Iraq at any time to comply with...and cooperate fully in the implementation of [SCR 1441]”, be the failure related to Iraq’s declaration, inspections or other Iraqi “disarmament obligations”.

It seems as though pre-“updating report”, UNMOVIC/IAEA are not mandated to “report” Iraqi inspections compliance or on the 8 December declaration, unless UNMOVIC/IAEA observe “any failure by Iraq to comply with its disarmament obligations”. Suppose

UNMOVIC/IAEA observe no Iraqi “failure” and thus do not “report” to the Council, post-8 December declaration and pre-UNMOVIC/IAEA updating “report”.

Suppose that pre-UNMOVIC/IAEA “updating report” the US “reports” that Iraq’s 8 December declaration has “false statements or omissions” and/or that there has “interference by Iraq with inspection activities”. If UNMOVIC/IAEA have not independently concluded the same, will the US “report” stand alone as the only “evidence” of “further material breach”? It would seem as if the only likely way that UNMOVIC/IAEA could even address the Council would be if a Council member requested that UNMOVIC/IAEA brief the Council. What would happen if another Council member, particularly a permanent member like the US moved to block an UNMOVIC/IAEA briefing? In terms of OP 12, would a requested UNMOVIC/IAEA briefing have the same weight as a member state “report”? If UNMOVIC/IAEA disagreed with or at least did not support the “report” findings, where would this leave the Council, given the “reporting” mechanism ambiguity?

The “reporting” mechanism and how the US might undermine UNMOVIC/IAEA by withholding “intelligence”

Since member states may “report”, it might be easier for the US to use the “reporting” “system” to try to discredit and undermine UNMOVIC/IAEA. The purpose of such tactics would be to argue that the use of force is the only way to successfully disarm Iraq. For example, SCR 1441 requests that member states “provid[e] [to UNMOVIC/IAEA] any information related to prohibited programmes or other aspects of their mandates, including on Iraqi attempts since 1998 to acquire prohibited items”.⁷⁸ “Some experts believe the US will produce new intelligence to prove Iraqi concealment in the December 8 declaration but others say the agencies have suspicions rather than facts.”⁷⁹ Regardless of whether the “intelligence” is “new” or a collection of “suspicions rather than facts”, the US might withhold “intelligence” from UNMOVIC/IAEA. As of 5 December, the US Administration reportedly suggested that it had evidence that Iraq has non-conventional weapons, contrary to Iraqi officials stating that Iraq dual-use equipment but no non-conventional weapons.⁸⁰ Whether the US has shared this information with UNMOVIC/IAEA, per the SCR 1441 request, seems to be unclear.

OPs 4 and 12 would allow the US to formally “report” its “evidence” directly to the Council as a “further material breach”. The Council would then have to consider the “report”. Council members then might ask UNMOVIC/IAEA to brief the Council on the US “report”. If allowed to do so, UNMOVIC/IAEA may state that they were unaware of the “report” contents. The US might then argue that this lack of awareness confirms that UNMOVIC/IAEA are unable to fully “confirm the evidence of voluntary and total disarmament.”⁸¹

The “reporting” mechanism and the US potentially arguing that UNMOVIC/IAEA are insufficiently “aggressive” to fulfill their disarmament mandate

Furthermore, if the US alone “reports” that Iraq is failing to comply with inspections and is thus in “further material breach”, the US as the “reporter” may partially frame the issue as being part of a bigger issue: UNMOVIC/IAEA timidity. SCR 1441 (OP 5) authorizes UNMOVIC/IAEA to conduct interviews outside Iraq and states that UNMOVIC/IAEA “may facilitate the travel of those interviewed and family members outside of Iraq”. On 8 November US Permanent Representative to the UN Negroponte stated “To the Secretary-General, Dr. Blix, and [IAEA Director General] Dr. El-Baradei: We urge you to make full use of the tools given to you in this resolution”.⁸²

In his 28 October notes for his then-soon Security Council briefing regarding the latest draft SCR, Blix wrote “I understand that the provision (in op. 5) under which UNMOVIC or the IAEA might ‘facilitate the travel of those interviewed and family members outside of Iraq’ is an authorization rather than a mandate. There would be great practical difficulties in using such authority, unless there was cooperation by the Iraqi side.”⁸³ Later, in early November, Reportedly, “Blix...[later] reiterated his concern about a U.S. proposal to grant him the power to interview Iraqi scientists and their families outside the country.”⁸⁴ “...Blix...[reportedly] questioned the measure’s practicality – how many family members and colleagues would the U.N. need to take for each expert, and once they left, would they face even more harassment upon their return? Or would they automatically become refugees?”⁸⁵ In late November Blix told an interviewer “nor do I think that we are an abduction agency...If people come to us with – and they say, ‘We don’t want to leave the country.’ What shall we do? Shall we take them out anyway? I can see the practical difficulties.”⁸⁶

Already the US is pressuring UNMOVIC/IAEA to utilize the interview mechanism.⁸⁷ If UNMOVIC/IAEA does not use the interview function, and if the US “reports” that Iraq is not fully cooperating with UNMOVIC/IAEA, the US might simultaneously argue that Iraq is in “further material breach” and UNMOVIC/IAEA are unwilling to “report” this “further material breach” and fulfill their disarmament mandate. The US might then contend that force is the only way to disarm Iraq.

If UNMOVIC/IAEA “report” Iraqi noncompliance, then the US might seek to undermine the inspections process, rather than the inspectors, and proceed with the use of force against Iraq

If UNMOVIC/IAEA do “report” Iraqi compliance “failure”, regarding the declaration, inspections or other “obligations”, then the US probably won’t discredit the inspectors as a mechanism to disarm Iraq. Instead, the US will probably altogether ignore the likelihood that ongoing monitoring and verifications would probably deter further meaningful Iraqi non-conventional weapons development.⁸⁸ US officials might commend the inspectors for

doing what the Council mandated them to do: uncover and “report” Iraqi “non-compliance” when it ostensibly occurs.

The next step would be to disregard the UN Charter and the lack of Council authorization to use force, misuse SCR 1441 language (e.g., “final opportunity”), misinterpret other SCRs, invoke the Iraqi Government’s internal repression and contend that the US must and will legally use force to disarm Iraq. To supplement its other arguments, the US might even draw from comments made by international leaders, such as UN Secretary-General Kofi Annan’s late November remark that “we ask the Iraqi Government to cooperate fully with the inspectors and respect its commitments without reservations. It is the only way to avoid a military conflict in the region.”⁸⁹

Finally, the US would probably begin its military operations. For that military action, as an alternative to ongoing monitoring and verification, “[t]he outer limit of costs would be around \$1.9 trillion, most of which fall outside of the direct military costs.”⁹⁰ More importantly, it would probably cost tens of thousands and perhaps hundreds of thousands of lives, primarily civilian.⁹¹

Endnotes

¹ United Nations Charter, art. 39

² Ibid.

³ Ibid., art. 42 and art. 51

⁴ Ibid., art. 51

⁵ Security Council Resolution 678, S/RES/678, 29 November 1990, OP 2

⁶ *UN Department of Public Information*, “The United Nations and the Iraq-Kuwait Conflict, 1990-1996” (New York City: UN Department of Public Information, 1996), pg. 121

⁷ Ibid.

⁸ Security Council Resolution 687, S/RES/687, 3 April 1991, OP 33

⁹ “Identical Letters Dated 6 April 1991 from the Minister for Foreign Affairs of the Republic of Iraq Addressed Respectively to the Secretary-General and the President of the Security Council”, S/22456, 6 April 1991

¹⁰ Security Council Resolution 687, S/RES/687, 3 April 1991, OP 22

¹¹ For general writing on armistices and ceasefires, see Richard Baxter, “Armistices and Other Forms of Suspension of Hostilities”, *Recueil des Cours*, 149 (1976), pg. 353-399 Sydney Dawson Bailey, “Cease-fires, Truces and Armistices in the Practice of the UN Security Council”, *American Journal of International Law*, 71 (1977), pg. 461-473. For writing on applying the ceasefire principle to Iraq, see Christine Gray, “After the Ceasefire: Iraq, the Security Council and the Use of Force”, *British Yearbook of International Law*, 65 (1994), pg. 135-74 (especially pg. 142-44)

¹² International Court of Justice, “Case Concerning Military and Paramilitary Activities in and Against Nicaragua” (Nicaragua v. United States of America), 27 June 1986, pg. 14. Quoted in David M. Ackerman, “International Law and the Preemptive Use of Force Against Iraq”, *Congressional Research Service*, 23 September, fn. 9,

www.usembassycanada.gov/content/issues/iraq_internationallaw_092302.pdf

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- ¹⁹ Security Council Resolution 678, S/RES/678, 29 November 1990, OP 2
- ²⁰ Security Council Resolution 1441, S/RES/1441, 8 November 2002, PP 3
- ²¹ Ibid., OP 1
- ²² Ibid., OP 2
- ²³ Ibid., OP 4
- ²⁴ Ibid., OP 12
- ²⁵ Ibid., OP 13
- ²⁶ E.g., US President George W. Bush, remarks in Rose Garden, *Office of the Whitehouse Press Secretary*, 8 November 2002, www.whitehouse.gov/news/releases/2002/11/20021108-1.html and US President George W. Bush, radio address, *Office of the Press Secretary*, 9 November 2002
- ²⁷ US President George W. Bush, radio address, 16 November 2002, *Office of the Press Secretary*, www.whitehouse.gov/news/releases/2002/11/20021116.html
- ²⁸ US President George W. Bush, remarks in Rose Garden, *Office of the Whitehouse Press Secretary*, 8 November

⁴⁶ See, e.g., Various NGO authors, “Iraq Sanctions: Humanitarian Implications and Options for the Future”, 6 August 2002, www.globalpolicy.org/security/sanction/iraq1/2002/paper.htm and Treaty-Monitoring Bodies of the UN Human Rights System, www.cam.ac.uk/societies/casi/info/un.html#hr

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