

**IN THE MATTER OF THE POTENTIAL USE
OF ARMED FORCE BY THE UK AGAINST IRAQ
AND IN THE MATTER OF RELIANCE
FOR THAT USE OF FORCE
ON UNITED NATIONS SECURITY COUNCIL RESOLUTION 1441**

OPINION

1. We are asked to advise the Campaign for Nuclear Disarmament on whether the United Kingdom (UK) can rely on United Nations Security Council Resolution 1441 (SCR 1441), which was adopted on 8 November 2002, to use force against Iraq.

Summary of advice

2. In summary our opinion is that:
 - (1) Security Council Resolution 1441 does not authorise the use of force by member states of the UN.
 - (2) The UK would be in breach of international law if it were to use force against Iraq in reliance on Resolution 1441 without a further Security Council Resolution.

The text of the resolution

3. SCR 1441 was sponsored jointly by the UK and the United States (US). The resolution states at paragraph 1 that the Security Council acting under Chapter VII of the United Nations Charter

“Decides that Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq's failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 687 (1991;”.

4. Consequently SCR 1441 offers Iraq a ‘*final opportunity to comply with its disarmament obligations*’ and sets up what is described at paragraph 2 as

‘an enhanced inspection regime with the aim of bringing to full and verified completion the disarmament process established by resolution 687 (1991) and subsequent resolutions of the Council’.

5. Paragraphs 4, 11 and 12 of SCR 1441 deal with the event of non-compliance by Iraq with the terms of the resolution. By these paragraphs the Security Council

“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;

...

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;

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”.

6. By paragraph 13 of SCR 1441 the Security Council

“Recalls, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations”.

Background to the resolution

The draft resolutions

7. A draft of the resolution was first circulated at the United Nations at the beginning of October. That first draft contained the following paragraph:

“The Security Council...

Determined to secure full compliance with its decision

Acting under Chapter VII of the Charter of the United Nations...

Decides that false statements or omissions in the declaration submitted by Iraq to the Council and the failure by Iraq at any time to comply and cooperate fully in accordance with the provisions laid out in this resolution, shall constitute a

further material breach of Iraq's obligations, and that such breach authorises member states to use all necessary means to restore international peace and security in the area." (Emphasis added)

8. This paragraph was highly controversial, receiving the notable opposition of Russia and France, two of the five permanent members of the Security Council. As a result, on 23 October 2002, the UK and US presented a draft to the Security Council which had been modified to remove any reference to authorisation to '*member states to use all necessary means*'. The paragraph (which was now paragraph 4) read instead:

"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."

9. In addition paragraph 12 was inserted into the resolution.
10. Further negotiations and discussions amongst the Security Council members led to a new draft being submitted to the Security Council on 6 November 2002. That draft was identical to the form of the resolution which was finally adopted save for two changes. Paragraph 4 stated that a breach of Iraq's obligations would "*be reported to the Council for assessment in accordance with paragraphs 11 or 12 below*"; and paragraph 12 concluded with the words "*in order to restore international peace and security.*"

Statements of the Ambassadors to the UN

11. Following the adoption of SCR 1441 on 8 November 2002 the ambassadors to the United Nations from the 15 members of the Security Council made public statements including the following.

12. Ambassador Greenstock from the UK stated:

“...We heard loud and clear during the negotiations the concerns about “automaticity” and “hidden triggers” – the concern that on a decision so crucial we should not rush into military action; that on a decision so crucial any Iraqi violations should be discussed by the Council. Let me be equally clear in response, as a co-sponsor with the United States of the text we have adopted. There is no “automaticity” in this Resolution. If there is a further Iraqi breach of its disarmament obligations, the matter will return to the Council for discussion as required in Operational Paragraph 12. We would expect the Security Council then to meet its responsibilities....

if Iraq chooses defiance and concealment, rejecting the final opportunity it has been given by the Council in Operational Paragraph 2, the UK – together, we trust, with other Members of the Security Council – will ensure that the task of disarmament required by the Resolutions is completed.”

13. Ambassador Negroponte from the US stated:

“As we have said on numerous occasions to Council members, this Resolution contains no “hidden triggers” and no “automaticity” with respect to the use of force. 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. The Resolution makes clear that any Iraqi failure

to comply is unacceptable and that Iraq must be disarmed. And one way or another, Mr. President, Iraq will be disarmed. If 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.”¹

14. The statements from the ambassadors of France, Russia and China, in common with those of many other of 15 Security Council members, welcomed the inclusion in the resolution of the ‘two-stage approach’ whereby the Security Council in the words of the French ambassador ‘*maintains control of the process at each stage*’, and the absence of all traces of ‘automaticity’. In a later joint statement issued on 8 November 2002 France, Russia and China stated
- “Resolution 1441 (2002) adopted today by the Security Council excludes any automaticity in the use of force. In this regard, we register with satisfaction the declarations of the representatives of the United States and the United Kingdom confirming this understanding in their explanations of vote, and assuring that the goal of the resolution is the full implementation of the existing Security Council resolutions on Iraq's weapons of mass destruction disarmament. All Security Council members share this goal.*

In case of failure by Iraq to comply with its obligations, the provisions of paragraphs 4, 11 and 12 will apply. Such failure will be reported to the Security Council by the Executive Chairman of UNMOVIC or the Director General of the IAEA. It will be then for the Council to take position on the basis of that report.

¹ It will be noted that the last words used by the Ambassador refer to the possibility of the use of force *outside* the scope of authority by a UN Security Council resolution on two bases: first, self-defence and, secondly, to enforce UN resolutions. While the right of self-defence is in principle recognised in international law, reliance on it will depend on the particular circumstances in which a state finds itself. We do not consider that there is any right in an individual member of the UN or the Security Council to use force to enforce UN resolutions without clear authorisation from the Security Council itself.

Therefore, this resolution fully respects the competences of the Security Council in the maintenance of international peace and security, in conformity with the Charter of the United Nations.”

Press statements of UK Ministers

15. Despite these clear statements on the meaning of SCR 1441, several Ministers of the UK Government and US officials have indicated that, in the event of non-compliance with SCR 1441 by Iraq, the UK and the US would be entitled to take military action against Iraq even without a further Security Council resolution.

16. Colin Powell is reported² as saying: *“The United States believes because of past material breaches, current material breaches and new material breaches there is more than enough authority for it to act.....I can assure you if he doesn’t comply this time we are going to ask the UN to give authorisation for all necessary means, and if the UN isn’t willing to do that, the United States with like-minded nations will go and disarm him forcefully.”*

17. Jack Straw, meanwhile, stated on 10 November 2002 that: *‘military action is bound to follow if Saddam Hussein does not fully cooperate with the terms of this resolution’*³.

18. Furthermore, in response to MPs’ questions⁴ on the resolution in the House of Commons on 7 November 2002 Mr Straw stated,

“I do not want to anticipate what will happen if there is a breach, except to say that although we would much prefer decisions to be taken within the Security Council, we have always made it clear that within international law we have to

² Daily Telegraph, 11 November 2002

³ In an interview with Radio 4

⁴ Hansard 7 November 2002, Col 435; Jack Straw’s statement appears to have been made on the basis of the penultimate draft of the resolution not the version which was eventually adopted.

*reserve our right to take military action, if that is required, within the existing charter and the existing body of UN Security Council resolutions, if, for example, a subsequent resolution were to be vetoed.”*⁵

Issues

19. The question therefore arises from the statements set out above to what extent the UK is entitled to rely on either:

- 1) SCR 1441,
- 2) The existing body of UN Security Council resolutions,
- 3) The UN Charter, and/or
- 4) Customary International law

as the basis for the use of force against Iraq, *without* a further Security Council resolution.

20. Peacerrights⁶ has already received an opinion on the extent to which the UK can rely on the existing body of UN Security Council resolutions, the UN Charter and/or customary international law as authorising the use of force without a Security Council Resolution. That opinion concluded:

- (1) The use of force against Iraq would not be justified under international law unless:
 - (a) Iraq mounted a direct attack on the United Kingdom or one of its allies and that ally requested the United Kingdom’s assistance; or

⁵ Note the important caveat “within international law”.

⁶ A recently formed non-governmental organisation concerned with issues of international law and international human rights law particularly in the context of weapons of mass destruction and the peaceful resolution of conflict.

- (b) an attack by Iraq on the United Kingdom or one of its allies was imminent and could be averted in no way other than by the use of force; or
 - (c) the United Nations Security Council authorised the use of force in clear terms.
- (2) Iraq has not attacked the United Kingdom or one of its allies, and no evidence is currently available to the public that any attack is imminent.
- (3) Existing Security Council resolutions do not authorise the use of force against Iraq. Such force would require further clear authorisation from the Security Council.
- (4) At present the United Kingdom is therefore not entitled, in international law, to use force against Iraq.

21. We adopt that opinion which is attached (**OP1**). We also note the views of Professor Colin Warbrick after an inquiry into these issues on 11 October 2002, which in substance accord with ours (that document is also attached).

22. In this advice therefore we will address only the question of whether the UK can rely on SCR 1441 as authorising the use of force..

Legal Background

23. As pointed out in OP1 at paragraphs 6- 14 the United Nations Charter provides the framework for the use of force in international law.

24. Article 1 states:

“The Purposes of the United Nations are:

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

25. Articles 2(3) and 2(4) then set out the fundamental principles governing the settlement of international disputes and the use of force. Article 2(4) states:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

26. In classifying the prohibition on the use of force contained in Article 2(4) as a principle of customary international law, the International Court of Justice (*Nicaragua v United States*, [1986] ICJ Reports 14, at para 190) referred to the widely held view that this principle was *ius cogens*, in other words a peremptory norm of international law from which states cannot derogate.

27. Chapter V of the Charter governs the constitution and powers of the Security Council. Article 24 of the Charter states:

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. *In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII....*
28. Chapter VII confers on the Security Council the duty of determining the existence of any threat to the peace, breach of the peace, or act of aggression, and the duty of deciding what action should be taken to maintain or restore international peace and security (Article 39).
29. Article 41 gives the Security Council the power to take peaceful measures to give effect to its decisions, and by Article 42, where the Security Council considers that those measures would be, or have proved to be, inadequate it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.
30. Chapter VII⁷ originally envisaged that the Security Council would carry out such enforcement action itself using the armed forces of Member States⁸. As a consequence there is no express authority for the Security Council to delegate to Member States the competence to carry out enforcement action under their own command and control (see Danesh Sarooshi, The United Nations and the Development of Collective Security, (Oxford, 1999), at p143).
31. The only express reference in Chapter VII to the use of force by Member States acting alone is at Article 51 which states: *“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”*

⁷ See Articles 43-49

⁸ See Jules Lobel and Michael Ratner ‘*Bypassing the Security Council: Ambiguous Authorisations to use Force, Cease-fires and the Iraqi Inspection Regime.*’ [1999] AJIL 124 at 126; Danesh Sarooshi, The United Nations and the Development of Collective Security, (Oxford, 1999), at pp142-3

32. Nonetheless a practice has arisen of authorising Member States to carry out enforcement action on the Security Council's behalf. It is important to emphasise, however, that there is no express authority in the UN Charter for Member States to carry out actions under Article 42 under their own command and control either with or without a Security Council Resolution.

Does SCR 1441 authorise the use of force?

Express authorisation

33. It is clear that SCR 1441 does not expressly authorise Member States to use force in the event of non-compliance. A study of resolutions adopted by the Security Council, including Resolution 678, shows that that the language used to authorise force is bold and consistent. Member states are '*authorised*' to '*use all necessary means*' or '*take all necessary measures*' in pursuit of a specified goal.⁹ (See OP1 at paragraph 52).

34. As can be seen from the excerpts of the draft resolutions set out above, the UK and the US sought express authorisation in such terms in the first draft of their resolution. Such express authorisation is manifestly lacking in the final draft. This was for reasons which the other Security Council permanent members Russia, China and France made clear: they did not want the resolution to authorise force.

35. Instead SCR 1441 provides at paragraphs 4, 11 and 12 that in the event of non-compliance the matter will be referred to the Security Council, which will convene to consider the need for full compliance with all of the relevant Security

⁹ See inter alia S/Res/940 (Haiti), S/ Res/1264 (East Timor), S/Res/1080 (The Great Lakes)

Council resolutions. This clearly contemplates that it is the Security Council, which will decide on any further action to be taken against Iraq.

36. Paragraph 13 states that the Security Council “*Recalls, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations.*” We consider that the words ‘*in that context*’, which appeared first in the 6 November draft, clearly indicate that any serious consequences which Iraq will face are to be decided upon in the context of the discussion by the Security Council envisaged by paragraph 12. In any event, we are of the view that the phrase “serious consequences” does not itself authorise the use of force but is a reference to previous warnings which this part of the Resolution “recalls”.

Implicit authorisation

37. OP1 at paragraphs 40- 76 addresses the arguments put forward by the UK and the US in the past that the Security Council resolutions previously adopted in respect of Iraq provide authorisation either expressly or impliedly for the resumption of the use of force against Iraq.

38. In particular OP1 describes at paragraph 58 the debate over whether Resolution 1154 gave Member States the automatic right to use force in the event of non-compliance. On that occasion no agreement was reached on the issue with the UK and the US maintaining that they did have such a right and other members such as Russia explicitly rejecting the argument that ‘automaticity’ was included in the resolution.

39. It appears to be because of the subsequent attempt of the UK and the US to invoke Resolution 1154 together with Resolutions 678 and 1205 as authority for its use of force (see OP1 paragraph 61) that Russia, France and China insisted on

detailed changes to the final draft of SCR 1441 to ensure the same arguments could not be used again. On this occasion, as can be seen above, agreement was reached on the issue of “automaticity” and “hidden triggers” with Russia, China, France, and even the UK and the US ambassadors agreeing that both were absent from SCR 1441.

40. It would be extraordinary if, having failed to obtain an express authorisation for the use of force, having incorporated minute changes to the final draft whose sole purpose was to exclude the possibility of ‘automaticity’ and ‘hidden triggers’ and to preserve the role of the Security Council, and having publicly agreed in their explanation of the vote for adoption of SCR 1441 that there was no such implied authorisation for force, the UK and the US were to be able to use SCR 1441 as authority for the use of force without a further Security Council Resolution.

41. For the reasons set out below and in OP1 our view is that any use of force by the UK in reliance on SCR 1441 without a further Security Council Resolution would be a violation of the Purposes of the UN Charter set out in Article 1, and of Article 2(4).

The Charter

42. OP1 at paragraphs 60-70 sets out the reasons why use of implied authorisation of force is in conflict with the fundamental objectives of the Charter set out in Articles 1 and 2 to preserve peace and to prohibit force save in specified circumstances. First, the fundamental nature of the prohibition against the use of force in Article 2(4) means that any ambiguities in interpretation should be resolved in favour of that prohibition. Secondly, the power given to the Security Council alone under Chapter VII to decide to use force to restore peace is intended to ensure that any decisions on the use of force are reached collectively. The implied authorisation arguments of the UK and the US permits states to make unilateral decisions on the use of force, which is precisely what Chapter VII and the Charter as a whole are designed to avoid.

43. Furthermore, as pointed out above, it is only the Security Council which has the power under Article 39 to determine whether there has been a breach of the peace or threat to the peace and to decide whether to take action under Articles 41 and 42.
44. Danesh Sarooshi argues that, since the Security Council is exercising powers delegated to it by Member States under Article 24 of the UN Charter, powers which it must exercise in compliance with the Purposes and Principles of the United Nations, it cannot delegate certain of its functions under Chapter VII to a Member State, and must retain effective authority and control over those functions which it does delegate (Danesh Sarooshi, The United Nations and the Development of Collective Security, (Oxford, 1999), at pp154-5; see also Niels Blokker, *Is the Authorisation Authorised? Powers and Practice of the UN Security Council to Authorise the Use of Force by 'Coalitions of the Able and Willing'* EJIL 2000 Vol 11 No 3 at 552). Sarooshi also argues that the limitations on delegation mean that the terms of a resolution which delegates Chapter VII powers are to be interpreted narrowly (The United Nations and the Development of Collective Security, above, at p 44). We agree.
45. It is clear that a practice has grown up of delegating the carrying out of enforcement action to Member States, but it is equally clear that in so doing the Security Council has increasingly sought to retain overall control of the operation with clear mandates, time-limited authorisations and reporting requirements (See Blokker, *ibid*, at 561-5).
46. In our view the implied authorisation arguments put forward by the UK and the US would undermine the control exercised by the Security Council which is an essential feature of lawful delegation under the Chapter VII. These arguments would effectively allow Member States to take unilateral decisions on the interpretation of resolutions, reading into them authorisation to take action which

does not appear clearly on the face of the resolution. This leaves the Security Council with little or no control of the functions it has delegated and, in our view, unacceptably waters down the protections built into Chapter V and VII which enshrine the principle of collective decision-making.

47. The fact that states have sought to rely on implied authorisation in circumstances where Members of the Security Council have made it quite clear in adopting the resolution that they do not intend that authorisation to be present only emphasises the flawed nature of the argument.

48. We conclude therefore that both the fundamental objectives and the constitutional framework of the Charter mean that the use of force by a Member State is not justified unless the Security Council authorises it in the clearest of terms. Use of force without such clear authorisation would therefore violate international law.

Interpretation of resolutions under Chapter VII

49. For the reasons set out above and in OP1 at paragraphs 60-70, we consider that an implied authorisation to use force is not compatible with the framework and the objectives of the Charter. Even if such implied authorisation were in principle compatible with the Charter it is in our view clear both from the terms of SCR 1441 and from the discussions of the Security Council members prior to the adoption of SCR 1441 that authorisation to use force cannot be derived from the terms of this particular resolution.

50. As stated above paragraphs 4, 11 and 12 of SCR 1441 provide a clear mechanism in the event of Iraq's non-compliance with its obligations under SCR 1441. Given that there is such a clear mechanism on the face of the resolution it is difficult to see on what basis it could be argued that an alternative mechanism should be implied into the resolution.

51. Furthermore, while the Ambassadors' statements set out above are not a definitive guide to their meaning, they provide the strongest possible evidence of the intentions of the Security Council members in adopting SCR 1441. In the *Namibia Advisory Opinion*, (1971) ICJ Reports 15, at p 53 the International Court of Justice stated that the language of a resolution should be carefully analysed before a conclusion could be made as to its binding effect under Article 25 of the Charter. The question of whether the powers under Article 25 had been exercised was to be determined "*having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general all circumstances that might assist in determining the legal consequences of the resolution....*"
52. We consider that the same exercise should be employed where the terms of a resolution are ambiguous or unclear. The suggestion that ambiguity or uncertainty should permit Member States to reach a unilateral view on the meaning of a resolution is in our view untenable. If the discussions and revisions leading up to the adoption of SCR 1441 are taken into account, it is clear that they rule out any arguments to the effect that paragraphs such as paragraph 13, which warns of serious consequences, and paragraph 2, which talks of affording Iraq a final opportunity, implicitly authorise the use of force.
53. On the basis of the arguments set out above we consider that any attempt by the UK to rely on SCR 1441 as the basis for taking military action against Iraq without a further Security Council resolution would be in violation of the terms both of the Charter.
54. We consider briefly below some of the other arguments which the UK and the US have hinted they might use if a further Security Council resolution were not forthcoming in the event of Iraq's non-compliance with SCR 1441.

The 'Material breach' argument

55. SCR 1441 at paragraph 1 declares Iraq to be in material breach of its obligations under relevant resolutions and at paragraph 4 states that Iraq's failure to comply with this resolution shall be a further material breach.
56. Colin Powell has stated that '*past material breaches, current material breaches and new material breaches*' provide more than enough authority for the US to act even without a fresh Security Council resolution. The UK approach is more muted but Jack Straw in his response to MPs' questions set out above indicates that he believes that the UK has the right to act within the Charter and the existing body of UN resolutions.
57. OP1 at paragraphs 71- 76 addresses the material breaches argument and concludes at paragraph 76 that neither breaches of the cease-fire agreement nor breaches of any other resolution authorise the unilateral use of force.
58. It is important to emphasise in this regard that there is no authority anywhere in the Charter for a Member State to decide to use force in order to enforce against breaches of Security Council resolutions. On the contrary that power is reserved to the Security Council at Article 42. It is only with an express delegation of that power that a Member State may use force against another Member State to force it to comply with a Security Council resolution.
59. Without that authorisation any use of force would be in clear contravention of the basic principle prohibiting the use of force in Article 2(4) of the Charter.

Authorisation in the event of the Security Council's failure to reach a resolution

60. Both UK and US ambassadors to the UN and government ministers have made statements saying they expect the Security Council to 'meet its responsibilities' (Ambassador Greenstock). Jack Straw in his answer to MPs' questions set out above alluded to the right to use force in the event of a veto of a further resolution from the Security Council.

61. It is plain that this is not the correct approach to the interpretation of the Charter. It is the Security Council which is the final arbiter of whether to take measures and what measures to take under Articles 39, 41 and 42. As explained above and in OP1 this collective decision-making process is at the heart of the powers conferred on the Security Council by the Charter. It would be in contradiction to the fundamental objectives and the framework of the Charter for a Member State to review the decisions of the Security Council and take action in its stead if it does not agree with them.

62. Professor Colin Warbrick, at page 14 of his opinion, states,

"I am particularly sceptical of claims that the failure of diplomacy justifies resort to force "as a last resort". The whole process of the development of international law from the Kellogg-Briand Pact through the Charter and General Assembly Resolution 2625 demonstrates a trend to the contrary, a trend confirmed by the ICJ in the Nicaragua case. Nor do I find convincing in legal terms the claim that if a new resolution authorising the use of force fails to be passed by the Security Council (whether or not because of the veto), some residual right of individual States to secure Iraq's compliance with its obligations then emerges."

Why does SCR 1441 not expressly require the US and the UK to obtain a new resolution?

63. Some reports have suggested that government officials are asserting that the fact that there is no language in SCR 1441 explicitly ruling out the use by the UK or the US of force without a further Security Council resolution means that they are not “handcuffed” by the SCR 1441 into obtaining such a resolution¹⁰. In our view, this argument is flawed. Jules Lobel and Michael Ratner address a similar argument adopted by the US in relation to Resolution 1154: *“the failure to adopt a resolution opposing US action cannot be deemed dispositive when any such resolution would have been fruitless in the face of the US and UK veto power. Still the Council did the next best thing: it adopted a resolution that did not provide the United States with the authority it sought and the members stated their understanding that the resolution was intended to preclude any such authority.”* (*Bypassing the Security Council: Ambiguous Authorisations to use Force, Cease-fires and the Iraqi Inspection Regime.* [1999] AJIL 124).
64. In any event, in our view, for the reasons set out above, it is unnecessary to insert wording in a resolution expressly requiring Member States to obtain an authorisation to use force, when the Charter makes it quite clear that with the exception of the inherent right of self-defence in Article 51¹¹, only the Security Council can make a decision to use force and only in the circumstances set out in Chapter VII.
65. The US Ambassador may be right when he says that SCR 1441 itself *‘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*

¹⁰ See Anton La Guardia, 11 November 2002 in the Daily Telegraph

¹¹ As in OP1, we have not considered in detail the possibility of reliance upon another doctrine of international law (the doctrine of humanitarian intervention), whose precise status and contours are themselves controversial. This is because, as we understand it, no state has suggested that it can be relied upon in present circumstances to justify an attack on Iraq.

security' (see above). Member states are, however, constrained as explained above and in OP1 by customary international law and by the UN Charter.

The preamble

66. We have also been asked to consider whether the wording of the preamble in particular paragraphs 4, 5, 10 and 11 allows the UK to use force without a further resolution. The preamble to a resolution may be used as a tool of interpretation of the operative part of the resolution (see *Namibia Advisory Opinion* at p 53) but carries no operative force itself. This means that it cannot be relied upon to authorise action of any kind. Nor in our view may it be used to reinterpret resolutions previously adopted. Their meanings must be assessed according to their terms and the discussions which led up to their adoption.

67. For the reasons set out above, we consider that it is clear that SCR 1441 does not authorise military action by a member state against Iraq. In our view there is nothing in the preamble which alters this view. Indeed it is notable that a late insertion into the Preamble was the commitment of all Member States to the sovereignty and territorial integrity of Iraq, Kuwait and the neighbouring States.

Rabinder Singh QC
Charlotte Kilroy
15 November 2002