

Comments on the US-UK draft resolution of 5 November 2002¹

These comments are designed to assist United Nations delegations in analysing the new draft resolution put to the Security Council on 5 November 2002 by the United Kingdom and United States. They provide an overview of how the draft needs to be altered in order to create a viable regime that will achieve the verifiable disarmament of Iraq's non-conventional weapons. At present, the UK-US draft, if accepted, is unlikely to achieve this goal. It is unnecessarily provocative, in that it attempts to establish mechanisms and criteria that are unrelated to the effective disarmament of Iraq but which will be a cause of considerable tension between the UN and Iraq. It attempts to legitimise prior UK-US military action, in contravention of the legal opinion of almost all other members of the United Nations, by falsifying history and by misappropriating and even misquoting past Security Council resolutions.

The draft of 5 November drops some of the more preposterous elements of the earlier two US drafts that have made their way into the public arena (2 October and 25 October), such as the granting of rights for P5 members to place their selected personnel on inspections teams (para.5 of the 2 October draft), and for any member of the UN to unilaterally declare a material breach of the resolution and use military force against Iraq (para.10 of the 2 October draft). These may have been provisions that US diplomats knew would never be backed by the Council, and so designed to act as negotiating devices; they could be dropped to demonstrate "compromise" at the UN. What is left in the draft resolution remains harmful and counterproductive enough for achieving a peaceful solution to the Iraq crisis.

PP1: "*Recalling ... 688 (1991)*".

In its first operative paragraph, the draft resolution brings SCR688 -- demanding that Iraq "immediately end" ... "the repression of the Iraqi civilian population" -- into a resolution purportedly on Iraq's disarmament. By incorporating mention of SCR688 into a resolution setting out the new standard for Iraqi compliance, the US and UK may be leaving the way open to claim that Iraq is not in compliance with the new resolution, even if there is full progress on the disarmament agenda.

SCR688 was adopted as a non-Chapter VII resolution during a civil war; its applicability for the present day is tenuous at best. This has not stopped successive US administrations from using SCR688 as a partial justification for ongoing military action against Iraq, in opposition to mainstream international legal opinion. The October 2002 Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq, passed by the US Congress, grants the authority of Congress to use military force to "achieve the goals of [SCR] 688". The mention of SCR688 in the draft resolution seems to be designed to broaden the *causis belli* in line with the Congressional stance. This hampers the possibility of a peaceful resolution to the Iraq crisis.

It is worth noting that the Council has not made reference to SCR688 in its previous resolutions on Iraq's disarmament -- for example, SCR1284, establishing UNMOVIC, does not mention SCR688.

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That there has now been a change of US-UK policy in this regard is an immediate cause for concern.

PP2: *"Recalling also .. 1382 (2001) .. and its intention to implement it fully"*.

The new reference to 1382, the only resolution mentioned in this paragraph and unmentioned in the previous drafts, is puzzling. Its renewal of the oil-for-food programme expired in May 2002 and has been supplanted by 1409 (2002), so the implementation clause is not a commitment to continue the oil-for-food programme. 1382 does not commit the Council to lift economic sanctions -- either the import or the export prohibition -- upon Iraqi compliance with its disarmament obligations: preambular paragraph 2 of 1382 only lists compliance in disarmament as a necessary, not sufficient, condition for the lifting of sanctions.

It is possible that Council members have been mis-sold this part of the resolution. According to reports, certain Council members wanted to relink Iraq's effective and verifiable disarmament to the lifting of sanctions. The US and UK may present this preambular paragraph as a concession to this argument, but in reality it is no concession at all.

PP4: *"Recalling that its resolution 678 (1990) authorized member states to use all necessary means to uphold and implement its resolution 660 (1990) .. and all relevant resolutions subsequent to Resolution 660 (1990) and to restore international peace and security in the area"*.

This paragraph is a clear attempt to provide post hoc legal justification for the bombing of Iraq since 1991. It suggests that resolution 678 authorised the use of force to implement all resolutions on Iraq from 1990 to the present day. This is clearly untrue: 678 only justifies the use of force to implement resolutions on Iraq passed between 2 August and 29 November 1990. This is a position that has been repeated by Council members ad nauseum since 1991, with no states but the UK and US holding anything other than a literal and meaningful construction of SCR678. If this draft resolution is passed, every country that has provided legal criticisms of US and UK bombing since 1991 will now be acknowledging that their past criticism was misconceived, and that US-UK bombing was legally justifiable after all.

PP7: *"Deploring further that Iraq .. ultimately ceased all cooperation with UNSCOM and the IAEA in 1998"*.

This is a wholly disingenuous claim, in that it presents the termination of inspections in Iraq as a consequence of Iraq's cessation of cooperation with UNSCOM. The only period in which Iraq ceased all cooperation with UNSCOM in the period between 1991 and 16 December 1998 was for two weeks from 31 October to 14 November 1998. This period of non-cooperation began on the day that the US President signed into law the Iraq Liberation Act of 1998, to further the long-held goal of overthrowing the Iraqi regime, in defiance of Security Council resolutions which affirm the sovereignty and political independence of Iraq. Iraq reannounced its intention to cooperate fully with UNSCOM in a letter of 14 November; the US response to incomplete but extensive Iraqi cooperation was to order weapons inspectors to leave Iraq on 16 December. For the draft resolution to portray the termination of UNSCOM's work in terms of the earlier and unrelated brief Iraqi stance is to misrepresent the history of the inspections process entirely.

PP8: *".. in spite of the Council's repeated demands that Iraq provide .. access to [UNMOVIC]"*.

This is a pure fabrication: the Council has not made "repeated demands" that Iraq comply with UNMOVIC -- it has only made one such demand, in resolution 1284 (1999). No resolution subsequent to its creation even mentions UNMOVIC.

***".. regretting the consequent ... suffering of the Iraqi people"*.**

The draft resolution states here that because Iraq has not complied with its disarmament obligations, the Iraqi people have suffered. This seems to be the most frank acknowledgement yet by the US and UK that economic sanctions have caused suffering.

PP10: *"Recalling that in its resolution 687 (1991) the Council declared that a ceasefire would be based on acceptance by Iraq of the provisions of that resolution.."*

This is an even more egregious re-writing of history than those cited above: the draft resolution simply misquotes the Security Council's earlier resolution. The ceasefire was not based on Iraq's acceptance of the provisions of resolution 687: it was based on "official notification by Iraq to the Secretary-General and to the Security Council of its acceptance" of that resolution (resolution 687, para.33). The difference is highly significant: the US-UK draft text implies that the ceasefire would no longer be operative if Iraq is taken by them as no longer accepting its full disarmament obligations, thus leaving open the justification to use force against Iraq without further Council authorisation. The ceasefire is thus portrayed as continually conditional upon Iraqi compliance. This is contrary to the position of every other Council member since 1991: this consistent position has been that the ceasefire can only be terminated if there is new Council authorisation to use force. Through this paragraph, the US-UK are attempting to award themselves the legal right to use force if they alone perceive Iraq as non-compliant; the abandonment of the specific authorisation to use force that was in earlier drafts is thus resuscitated in an oblique but legally equivalent form here.

OP1: *"Decides that Iraq .. remains in material breach of its obligations .. in particular through Iraq's failure to cooperate with United Nations inspectors.."*

This claim is made without any legal basis. Iraq, through the letter of its Foreign Minister of 16 September 2002, has made an unconditional offer to allow inspectors into Iraq in order to fulfil all their tasks in line with existing resolutions. Iraq simply does not "remain" in breach -- material or otherwise -- of any obligations relating to cooperation with weapons inspectors, as it has fully accepted the existing terms for the re-entry of inspectors. By labelling compliance as violation, the message from the Council to Iraq is that acting in accordance with the terms of the Council's resolutions is a purposeless and unproductive activity.

OP2: *"..decides to set up an enhanced inspection regime.."*

The draft resolution recognises that the new resolution is creating a different inspections regime from that agreed in 1991. As such, the resolution is explicitly imposing new obligations on Iraq, in addition to those already accepted. Therefore, the US and UK can no longer claim that they are trying to ensure Iraq's compliance with resolutions dating back to 1991.

OP3: *"Decides that .. the Government of Iraq shall provide .., not later than 30 days from the date of this resolution, a currently accurate, full, and complete declaration of all aspects of its programmes to develop .. 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, sub-components, 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"*

This long paragraph, firstly, raises the barrier for Iraqi compliance; and secondly, may make compliance impossible to achieve at all. It raises the barrier by including items in the list of weapons open to disclosure that were not previously regarded as prohibited. Iraq has not been prohibited from developing aerial vehicles or dispersal systems. The draft resolution compels Iraq now to disclose not only these items but also sub-components and "related material" of these items.

It may make compliance impossible because it, if read literally, is asking for Iraq to provide a full "declaration of all aspects of its programmes" in the chemical field, including those activities not

relating to weapons issues. If this draft is accepted, Iraq would be compelled to produce within 30 days a full inventory of all the activities of all the chemical facilities throughout the country, including those engaged in relatively trivial and harmless activities. It is difficult to see how any country could possibly compile and guarantee the validity of such a declaration, given the logistical problems that would be encountered. Any inaccuracies in this declaration would, in accordance with OP4, constitute a "material breach" by Iraq of this resolution. As such, this paragraph ensures that the resolution cannot be complied with. At the very least, the final clause needs to be re-written or removed.

In this context, the comments of Hans Blix, UNMOVIC's Executive Chairman, to the Security Council should be noted:

“A declaration regarding weapons programme should be possible within 30 days and the same should be true for declaring remaining permitted peaceful nuclear programmes (op.3). 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.” (Hans Blix, “Notes for the Briefing to The Security Council”, 28 October 2002, para. 7).

OP5: *"Decides that Iraq shall provide UNMOVIC and the IAEA .. private access to all officials and other persons whom UNMOVIC and the IAEA wish to interview further decides that UNMOVIC and the IAEA may at their discretion conduct interviews inside or outside of Iraq, may facilitate the travel of those interviewed and family members outside of Iraq"*.

This is perhaps the key "deal-breaker" in the resolution. The Council would be according to UNMOVIC and the IAEA the right to transport anyone -- seemingly without his or her permission - - outside the country. For example, the resolution would allow UNMOVIC the right to order senior governmental officials, including the Iraqi President, to leave the country at their discretion. The Council, if it endorses this draft, would be according to UNMOVIC the legal right to abduct individuals with their families, and to take them abroad. It would be wholly implausible to expect cooperation with such an unchecked range of powers. Even if UNMOVIC does use this power in a responsible way, the resolution would enable the US to encourage senior Iraqi scientists to defect once they have been taken outside the country. To expect open-ended cooperation from the Iraqi government in such a matter is not plausible. The only way to reach a resolution to the conflict, and to reach the verifiable disarmament of Iraq of its non-conventional weapons, is to set reasonable and achievable standards for cooperation. This is impossible to reconcile with provisions for taking Iraqi individuals outside the country.

OP7, sub-paragraph (iii): *"immediate, unimpeded, unconditional, and unrestricted access to Presidential sites equal to that at other sites"*.

This provision does away with resolution 1154, which endorsed the memorandum of understanding (MoU) that created special procedures for the inspection of eight defined and delineated Presidential sites. If this provision is accepted, it firstly causes a new and unnecessary arena for conflict between the UN and the Government of Iraq: the presidential sites can be inspected already under the terms of the MoU. Secondly it would demonstrate that agreements with the UN are without value, in that one party to the agreement has acquired a habit of nullifying them when it no longer suits its interests. For the UN to abandon the principle that the agreements that it makes can be overridden to the detriment of the other party would be to cast a grave aspersion on the United Nations and the fabric of international law.

OP7, sub-paragraph (v): *"sufficient UN security guards"*.

There is no description of the number or composition of these "guards". Iraq is being asked to accept a resolution that permits a foreign military presence on its soil, without knowing the nature of that military presence.

OP7, sub-paragraph (vi): "UNMOVIC and the IAEA shall have the right to declare .. exclusion zones, in which Iraq will suspend ground and aerial movements".

This provision again grants to the weapons inspectorate an extensive range of unchecked powers. For example, UNMOVIC could declare large areas of Iraq to be "exclusion zones" for an indefinite period of time. Limitations on the authority of inspectors need to be worked into the resolution to preserve a sense of the inspectors' legitimate role, with an obligation imposed on the inspectorate to limit the use of this measure to the environs of specific buildings and only for the duration of a specific inspection. Without such a provision, long-term cooperation between the parties is likely to be subject to periodic crises that would threaten to derail the on-going work of the inspectorate.

The experience of the weapons inspectorate - whose actions were discredited through the manipulation of their work by one outside party - demonstrated to the Security Council's own panel on disarmament and monitoring (the first Amorim Panel report, 1999) that an accountable system must be devised that can retain its rigorous standards for the implementation of Iraq's disarmament obligations. Without amendments of the form suggested above, progress in the field of disarmament is likely to remain elusive.

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References:

1. Draft resolution of 2 October in part at:
<http://www.guardian.co.uk/international/story/0,3604,803436,00.html>
2. Draft resolution of 25 October at:
<http://www.cam.ac.uk/societies/casi/info/usdraftscr021025.pdf>
3. Draft resolution of 11 November at:
<http://www.casi.org.uk/discuss/2002/msg02002.html>
4. Hans Blix, "Notes for the Briefing to The Security Council", 28 October 2002",
<http://www.cam.ac.uk/societies/casi/info/blix021028.pdf>
5. The Amorim Panel report on Disarmament and Monitoring, 27 March 1999
<http://www.un.org/Depts/UNMOVIC/documents/Amorim%20Report.htm>