

Iraq Inquiry

Submission to the Inquiry on the UK's Legal Justification for the Iraq War and the Relevant Legal Advice

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1. This submission follows the Iraq Inquiry invitation to international lawyers for submissions on the UK's legal basis for military action against Iraq. Due to space constraints, the reasoning below cannot provide a comprehensive analysis of the legal issues raised by the US-led invasion of Iraq in 2003, and will focus only on questions specifically singled out in the Inquiry's invitation. Some background facts and issues that are obvious and undisputed will not be mentioned.

The correct approach to the interpretation of Security Council Resolutions

2. The lawfulness of the 2003 invasion is contingent on whether it has been authorised by a Chapter VII resolution of the UN Security Council. This question can only be clarified through interpreting the pertinent resolutions.

3. Security Council Resolutions are agreements between States-members of the Security Council. Even though they are adopted as institutional decisions of the Council, they are beforehand negotiated and agreed by member-States. Even if they can bind States that have voted against them or are not even members of the Council, they still remain agreements as between States that constitute the majority specified in Article 27 of the UN Charter that has voted for the resolution in question. Resolutions should therefore be interpreted as agreements pursuant to Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties. Although Articles 31 and 32 are not formally designated to apply to Security Council resolutions, their paramount rationale to help identifying the meaning of the agreed written word so that then States can place reliance upon them is no less pressing in the case of resolutions.

4. It is suggested that the drafting of resolutions is a complex process some aspects of which are known publicly and others are not, and that the "overall political background" has to be considered in interpreting resolutions. Arguably, then, "it becomes highly artificial, and indeed to some extent simply not possible, to seek to apply all the Vienna Convention rules *mutatis mutandis* to SCRs."¹ But resolutions are not more political than other international transactions which also undergo a complex drafting process yet are subjected to the Vienna Convention regime.

5. Questions regarding the above conclusion will necessarily arise as the International Court has suggested in the *Kosovo* Advisory Opinion, in somewhat obscure terms, that

"While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also requires that other factors be

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¹ M Wood, *The Interpretation of Security Council Resolutions*, 2 *Max-Planck YBUNL* (1998), 74, 79-81, 95, although in principle accepting the law of treaties analogy as per Lord McNair, *id.*, 95

taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty.”²

The Court did not specify what these “other factors” are, and how the drafting process of resolutions is “very different” from that of treaties. In reality, however, both these drafting processes relate to arriving at the agreement between States (whether within an institutional framework or outside it), enshrining that agreement in the written text and enabling the relevant States to place reliance on it whenever their rights and obligations are at stake. In general, it is not uncommon in the Court’s jurisprudence to pay a lip-service to the “special” nature of certain “non-treaty” acts, but ultimately interpret them in compliance with the Vienna Convention regime.³ This outcome is all the more pressing given that international law includes no set or rules on interpretation other than those codified in the Vienna Convention. No alternative set of the rules of interpretation formulated by academics, legal advisers or diplomats can have the same authority of law as the codified set of rules under Articles 31 and 32 of the Vienna Convention.

6. The interpretation of resolutions pursuant to Articles 31 and 32 shall thus demonstrate the objectively intelligible content of the resolution in question and of the agreement between States it embodies. Only the factors expressive of that agreement have to be considered, above all the text of the resolution in the light of its object and purpose as could be inferred from the resolution’s overall structure. Resolutions have also to be interpreted as reflecting the pertinent provisions of the UN Charter from where every resolution derives its validity. Thus resolutions cannot be interpreted as free-standing instruments in isolation from the Charter; much as they are agreements between Council members, they have to be presumed not to include such agreement as would do away with the requirements under the relevant provision of the Charter. A further requirement is to read multiple resolutions as mutually consistent so as not to presume that the Security Council has expressed mutually incompatible positions.

Whether by virtue of UN Security Council Resolutions 678, 687 and 1441, the elements were in place for a properly authorised use of force

7. The UK argument in favour of the use of force against Iraq centred around the following points: Resolution 687(1991) suspended but did not terminate the authority to use force under Resolution 678(1990); a material breach of resolution 687 would revive that authority under resolution 678; resolution 1441(2002) determined that Iraq was in material breach of resolution 687; the authority to use force thus revived.⁴ In order to ascertain the merit of these arguments, each pertinent resolution has to be examined.

² *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, General List No. 141, Advisory Opinion of 22 July 2010, para. 94

³ In *Fisheries Jurisdiction (Spain/Canada)* the International Court has stated that the Optional Clause declarations of the acceptance of the Court’s jurisdiction are *sui generis* instruments. However, the actual process of interpretation in this case was conducted in the same way as the faithful application of the 1969 Vienna Convention would require, by reliance on the textual meaning of the Canadian declaration as the crucial factor of the ascertainment of its meaning, *Fisheries Jurisdiction (Spain v Canada)*, *ICJ Reports*, 1998, 432, especially paragraphs 61 to 80.

⁴ *The Use of Force against Iraq*, The Attorney-General’s Opinion, 52 *ICLQ* (2003), 811 at 811-812; 54 *ICLQ* (2005), 769

a) Resolution 678(1990)

8. Under paragraph 2 in resolution 678, and in response to Iraq's invasion of Kuwait in August 1990, the Security Council authorised member States cooperating with Kuwait "to use all necessary means to uphold and implement resolution 660(1990) and all subsequent relevant resolutions and to restore international peace and security in the area." The proper scope of this authorisation is crucial for whether resolution 678 can be seen as supporting the use of force against Iraq in 2003.

9. It is doctrinally contended that the open-ended language in resolution 678, namely the words "to restore international peace and security in the area" could be interpreted as authorising the use of force up to the point of removing the Iraqi regime and occupying Iraq for some time, if that was deemed necessary to restore the peace in the area.⁵ Furthermore, the argument is made that resolution 678 (1990) has not lapsed because of the passage of time, allegedly because

"there is no principle that Security Council resolutions lapse after a particular time. Unless the Council sets a time limit on the life of a resolution, it remains in force until its purpose is achieved or the Council decides to terminate it. ... then it necessarily follows that there remained scope for military action being taken under that resolution and thus for military action being taken without the need for an entirely fresh "all necessary means" resolution to be adopted."⁶

10. Greenwood also suggests that if the phrase "restore peace and security in the area" refers merely to the liberation of Kuwait then it is redundant, and moreover "the liberation of Kuwait could lawfully have been accomplished anyway by the exercise of the right of collective self-defence."⁷ Presumption against redundancy is assuredly an accepted principle of interpretation and certainly applies to Security Council resolutions. However, the problem in this case can be disposed by the contextual reading of resolution 678 which saw the "breach of the peace" in Iraq's invasion of Kuwait – no other event – and thus authorised the Chapter VII force to deal with, and "restore peace and security in the area" after, that "breach of the peace". Once this "breach of the peace" would be reversed, peace and security in the area would be restored. There is thus no genuine problem of redundancy arising in interpreting resolution 678, because no objective of "restoring peace and security in the area" additional to the liberation of Kuwait has ever been formulated by the Council.

b) Resolution 687(1991)

11. The FCO Paper on *Legal Basis for the Use of Force* suggested that

"SCR 687 did not repeal the authorisation to use force in paragraph 2 of SCR 678 ... The authorisation was suspended for so long as Iraq complied with the conditions of the ceasefire. But the authorisation could be revived if the Council determined that Iraq was acting in material breach of the requirements of SCR 687."⁸

⁵ M Matheson, *Council Unbound* (2006), 146-147; Greenwood regards this as central to the justification of the use of force against Iraq in 2003, C Greenwood, *The Legality of the Use of Force: Iraq in 2003*, in M Bothe, ME O'Connell & N Ronzitti, *Redefining Sovereignty: the Use of Force after the End of Cold War* (Brill, 2005), 387 at 414

⁶ Greenwood in Bothe *et al.*, 406-407, 410

⁷ Greenwood in Bothe *et al.*, 405

⁸ *Iraq: Legal Basis for the Use of Force*, 52 *ICLQ* (2003), 813; Attorney-General's advice, 54 *ICLQ* (2005), 769, para. 7

12. It is unclear how a breach of resolution 687 would reactivate the authorisation granted by resolution 678 that was adopted considerably earlier and made no reference to Iraq's disarmament obligations. The revival argument is thus inevitably premised on the assumption that resolution 687 carried forward the authorisation under resolution 678 which had by then already achieved its purpose *and* expanded its remit to encompass the enforcement of Iraq's disarmament obligations to which resolution 678 had made no reference. Resolution 687 has been adopted *well after* Kuwait had been liberated and peace and security was restored in the sense of resolution 678; it identified the essentially new objective "of achieving balanced and comprehensive control of armaments in the region." It was this additional objective, unrelated to the original authorisation of the use of force under Resolution 678, which led the Council to impose disarmament obligations on Iraq. Resolution 687 was adopted as a forward-looking instrument designed to deal with the legacy of war in its multiple dimensions.

13. The Attorney-General's opinion suggests that Iraq's acceptance of disarmament obligations under resolution 687 was a condition for the declaration of formal cease-fire.⁹ Resolution 687 said in paragraph 33 that, upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance is disarmament and other obligations under this resolution, "a formal cease-fire is effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with resolution 678 (1990)."

14. A preliminary but necessary question to ask is whether, in 1991, the Coalition would have been entitled to continue combat operations up to the point of overthrowing the Iraqi Government had the latter not accepted those disarmament obligations under resolution 687. An affirmative answer to this question cannot be sensibly given in the absence of the Council's decision on this point. If one is inclined to view the effect of paragraph 33 merely as suspension of the use of force, it would obtain that a collectively authorised force was "suspended" by a collective decision and its resumption, if possible at all, would likewise need a collective decision.

15. Independently of the above preliminary point, however, resolution 687 is clear in acknowledging that the authorisation of the use of force under resolution 678 had lapsed. Despite the semantics, what happened in 1991 as between the Coalition States and Iraq was not really a cease-fire but termination of hostilities, and the end to war. Resolution 686(1991) spoke in its preamble and paragraph 8 of "the rapid establishment of a definitive end to the hostilities" as an aim. Even if resolution 687 spoke of a cease-fire, this has to be seen as a stage towards "a definitive end to the hostilities" as envisaged earlier, not as a temporary break in hostilities, if the Council's entire position is to be construed consistently. Both preamble and paragraph 6 of resolution 687 manifest the Council's intention to bring "military presence in Iraq to an end as soon as possible consistent with paragraph 8 of resolution 686." The "revival" argument advanced in 2003 is therefore not about resumption of hostilities after cease-fire as a matter of *jus in bello*, but the start of a new armed conflict as a matter of *jus ad bellum*.

⁹ 52 *ICLQ* (2003), 812

16. The outcome following from the interpretation of resolutions 678 and 687 compellingly suggests that these resolutions contained nothing supportive of the idea that the use of force against Iraq would be authorised beyond expelling it from Kuwait in 1990-1991; and therefore there was no subsisting authorisation of the use of force that could be “revived” under resolution 1441. This latter resolution, as is clear from its content, did not take that position either.

c) Resolution 1441(2002) and the “Revival” Argument

17. The Attorney-General’s principal argument regarding resolution 1441 has been that the “material breach” of resolution 687 and “serious consequences” contemplated for Iraq to face (paragraphs 1 and 13 SCR 1441) were “accepted as indicating the use of force.”¹⁰ This argument stretches the meaning of the words used by the Council much further than their ordinary meaning could bear.

18. The Attorney-General’s Opinion refers to the difference between the US and British views, the former asserting that the Council’s inaction coupled with determination of a “material breach” of resolution 687 under resolution 1441 already constituted the authorisation to use force against Iraq, and the latter holding that it is actually the discussion within the Council under operative paragraph 12 that will clarify “that military action is appropriate”, but “no further decision is required because of the terms of resolution 1441.”¹¹

19. This position is logically inconsistent. As far as the British position is concerned, the only way the Council could clarify that anything is appropriate is to adopt a collective decision manifesting its collective position. If such decision is not adopted, it cannot be sensibly contended that the Council has thought that anything is “appropriate.” If, on the other hand, the terms of resolution 1441 are sufficient for providing authorisation, it becomes unclear why the Council’s additional discussion is needed to discuss the appropriateness of what has already been authorised. The matter then reverts to the analysis of the terms of resolution 1441 to clarify whether they authorise the use of force and, as it becomes clear, they do not.

The legal effect of Operative Paragraphs 1, 4, 11 and 12 of UNSCR 1441

20. Under paragraphs 1 and 4 the Council stated the essence of the problem, namely that Iraq’s failure to cooperate with UN inspectors and the IAEA amounted to a material breach of resolution 687(1991); under paragraphs 11 and 12 the Council expressed its intention to obtain the information regarding Iraq’s further non-compliance and non-cooperation, and “consider” the need to ensure Iraq’s compliance. The legal effect of these paragraphs is straightforward in pointing to the standing of the Council as the sole entity that has to ascertain the facts of Iraq’s non-compliance and to consider and decide the steps that should address this problem. As such, paragraphs 1, 4, 11 and 12 entail no other effect.

The significance of the phrase “consider” in Operative Paragraph 12 of SCR 1441

¹⁰ 54 *ICLQ* (2005), 770

¹¹ 54 *ICLQ* (2005), 773

21. The Attorney-General's reference to the use of the word "consider" in paragraph 12 SCR 1441 is crucially linked to his assertion that the use of force had already been authorised under resolutions 678 and 687, and that the relevance of resolution 1441 has been to provide for arrangements to revive the suspended authorisation to use force under those two earlier resolutions. As shown above, resolutions 678 and 687 entailed no such effect; and therefore resolution 1441 could not revive that which did not previously exist. But the use of the word "consider" in resolution 1441 still invites an interpretative analysis.

22. The FCO paper as well as the Attorney-General's legal advice suggested that the use of the word "consider" in paragraph 2 SCR 1441 did not

"mean that no further action can be taken without a new resolution of the Council. Had that been the intention, it would have provided that the Council would decide what needed to be done to restore international peace and security, not that it would consider the matter. The choice of words was deliberate; a proposal that there should be a requirement for a decision by the Council, a position maintained by several Council members, was not adopted."¹²

According to the Attorney-General, the word "consider" was inserted to indicate the need for a further discussion, but not a decision.¹³

23. The Attorney-General further pointed out that the French and Russian proposals to include a requirement for the second resolution were rejected.¹⁴ But this approach hardly fits with any accepted method of interpreting Security Council resolutions. Resolutions should be interpreted in terms of what their text says *and* in a way compatible with what the Council is allowed to do under the Charter; not by reference to what they do not say. Rejection of the proposal to include the requirement for the second resolution does not entail the Council's collective position that the second resolution was not needed. A strong affirmation for the primacy of the ordinary meaning of text of the resolution follows from the approach taken by the International Court in the *Namibia* case that the failure by an international organ to adopt a particular proposal does not equate to its support for the opposite proposal.¹⁵

24. The word "consider" has to be understood in accordance with its plain and ordinary meaning,¹⁶ and in its context that includes both resolution 1441 as a whole and the pertinent provisions of the UN Charter on the basis of which this resolution has been adopted. In literal terms, "consider" is essentially neutral; it includes discussion, deliberation, reflection and exchange of views, but not decision. This is understandable, as the Council cannot commit itself that it will adopt a further decision, for such always requires a further agreement, obtaining which cannot be taken for granted in advance. The implication is that if the need for a further decision to authorise the use of force would arise, the Council would consider adopting such decision under Article 42 of the Charter.

¹² 52 *ICLQ* (2003), 814

¹³ 54 *ICLQ* (2005), 771, 773

¹⁴ 54 *ICLQ* (2005), 771

¹⁵ *Namibia, ICJ Reports*, 1971, 36, para. 69

¹⁶ "Consider" means to think carefully about something, take something into account, look attentively at something, *Compact Oxford English Dictionary* (2005), 207

25. On the other hand, it would result in a severe overstretching of the meaning of the word “consider” to attribute to it the effect according to which the Council would merely discuss and deliberate, but then the faculty to use force against Iraq – not hitherto authorised by the Council collectively and under Article 42 – would automatically, that is by virtue of the Iraq issue having merely been “considered” in the Council, devolve to individual members such as UK and US. The use of the word “consider” cannot imply the Council’s adoption of a qualitatively new and different decision to authorise the use of force after that. For this outcome is not only unsound if the textual meaning of words is considered, but would also, and in a broader systemic context, mandate the replacement of the Council’s collective decision as to whether the use of force should be authorised by the decision made to the same effect by one or few members of the Council. Adopting such decision would put the Council’s resolution in conflict with the Charter, and the resolution’s text does not reveal any evidence that the Council intended that outcome. If it had done so – in a very unlikely case – such decision would be void for its conflict with the Charter.

26. Therefore, the word “consider” in paragraph 12 of resolution 1441 means whatever its literal meaning suggests; it neither obliges the Council to adopt a further decision on the use of force against Iraq, nor effects, by implication or otherwise, the devolution to individual members of the Council of the faculty to use such force.

The interpretation and effect of the statements made by the Permanent Members of the Security Council following the unanimous vote on UNSCR 1441

27. Security Council resolutions constitute collective decisions of the Council’s membership, adopted in line with the requirements stated under Article 27 of the UN Charter. They have such meaning as is supported by the majority that has voted for it. Therefore, statements made by permanent members following the vote on a resolution have no inherent or crucial value in determining, still less constituting, the meaning and effect of that resolution.

28. On the other hand, statements made by Council members (whether permanent members or not) can have a useful supplementary value in confirming the meaning and effect of the collectively adopted resolution as follows from its text. Needless to say, if a permanent or non-permanent member were to assert the meaning of the resolution that does not follow from its text as collectively adopted, this would remain a mere assertion. In relation to resolution 1441(2002), no permanent member has claimed that this resolution authorised the use of force. The British and American statements did not at that stage claim that this resolution contained an express or implied authorisation to that effect. In fact, the US Representative in the Council conceded that resolution 1441 contained no hidden triggers and no automaticity regarding the use of force.¹⁷

¹⁷ Security Council 4644th Meeting, SC Press Release SC/7564; S/PV.4644, 3; S/2003/351; the US statement instead was that if the Council would not act decisively in the event of further Iraqi violation, the resolution did not constrain any Member State from acting to defend itself against the threat posed by that country, or to enforce relevant resolutions and protect world peace and security. The US case for the use of force thus rested on claiming the right to use unilateral force as a matter of pre-emptive self-defence, as opposed to the force collectively authorised by the Council – in fact precisely in the absence of the Council’s decision to authorise such force. This would however not be a valid entitlement, given that “there is no entitlement in hands of individual members of the United Nations to

29. In addition, the representatives of France, China and Russia made their joint statement that resolution 1441 excluded any automaticity in the use of force; the three States “register[ed] with satisfaction the declarations of the representatives of the United States and the United Kingdom confirming this understanding in their explanations of vote.” In case of failure by Iraq to comply with its obligations, the provisions of paragraphs 4, 11 and 12 would instead apply, and it would then be for the Council as a collective organ to take position on the basis of UNMOVIC and IAEA reports.¹⁸ This position confirms, among others, that paragraphs 4, 11 and 12 did not go anywhere near to envisaging any authorisation of the use of force against Iraq.

30. This position has not been contradicted by anyone during the deliberations within the Security Council. Therefore, it has to be concluded that the interpretation of the statements of permanent members upon the adoption of resolution 1441 leads to the outcome that resolution 1441 did not authorise the use of force; the effect of these statements has been to confirm the meaning of resolution 1441 accordingly.

Lord Goldsmith’s evidence that the precedent was that a reasonable case was a sufficient lawful basis for taking military action

31. Presumably Lord Goldsmith’s “reasonable case” for the use of force against Iraq means, as expressed in his submissions to the Inquiry,

“a case which not just has some reasoning behind it, put in practical terms, it is a case that you would be content to argue in court, if it came to it, with a reasonable prospect of success. It is not making the judgment whether it is right or wrong, but it is -- I hope that gives a flavour of it.”

A case that can have “a reasonable prospect of success” could possibly refer to cases that can ultimately be defended on legal merits. On this interpretation, Lord Goldsmith is not advancing any free-standing criterion of reasonableness but merely suggests, in a somewhat circular way, that a case is reasonable if it has a reasonable prospect of succeeding on legal terms. If so, then there is no need to dwell on the notion of “reasonableness” any further; given moreover that under international law “reasonableness” has no established meaning and neither the legal framework of *jus ad bellum* nor that of the UN Charter incorporates this notion.

32. However, a case with “a reasonable prospect of success” could also be *any* case one would be content to argue before a court and could possibly include cases that may not succeed on merits if law is properly applied to facts. Therefore, a case with “a reasonable prospect of success” can be a case without a proper legal foundation. On this second interpretation – more plausible in the entire context of Lord Goldsmith’s submissions – the case for the use of force against Iraq was reasonable because one would be able to argue it before a court, whether or not the court in

enforce prior Security Council resolutions by the use of force,” R Higgins, *Problems and Process. International Law and How We Use It* (OUP 1997), 259

¹⁸ The Arab League subsequently expressed the identical position that the resolution 1441 did not trigger war “either implicitly or explicitly,” *The Security Council and regional organizations: facing the new challenges to international peace and security*, 11 April 2003, S/PV.4739, 15 (LAS)

question would actually rule that the use of force was lawful.¹⁹ Therefore, under this view, reasonable uses of force can include those that are unlawful under international law, and the implication of “reasonableness” would be to justify unlawful uses of force. This cannot be sensibly viewed as part of the legal position.

33. It has also to be stated that the merit of the “reasonableness” criterion is further undermined given that Lord Goldsmith’s reliance on it is reinforced by the reliance of the use of force against Yugoslavia in 1999, under the pretext of a “humanitarian intervention” whose legality was “reasonably arguable.”²⁰ The reaction of the overwhelming majority of the international community to this instance of the use of force has been to disapprove its legality and reject the notion of “humanitarian intervention.”²¹ A previous instance of the illegal use of force cannot reinforce future uses of force as “reasonable.”

Conclusion

34. All the available evidence invariably points to the lack, in any resolution ever adopted by the UN Security Council, of the authorisation to use force against Iraq in March 2003. More specifically,

- Resolution 678(1990) did not authorise the use of force against Iraq beyond the reversal its aggression against Kuwait;
- Resolutions 686(1991) and 687(1991) spoke of the definitive end of hostilities and thus acknowledged that the legal basis of the use of force against Iraq in 1990-1991 had lapsed;
- Resolution 1441(2002) could not revive a non-existing authorisation of the use of force; its text reveals no such intention; and the overwhelming opinion of Security Council members has been that no such decision has ever been adopted.

¹⁹ See further, to that effect, 54 *ICLQ* (2005), 776 (para. 30), where the Attorney-General was not confident that a court dealing with this would agree with his view and “might well conclude that Ops 4 and 12 do require a further Council decision to revive the authorisation in resolution 678.” But equally he considered that “the counter view can be reasonably maintained.”

²⁰ 54 *ICLQ* (2005), 776 (para. 30)

²¹ Cf. Statement by the Non-Aligned States (132 States), 24 September 1999, in I Brownlie, *Principles of Public International Law* (2008), 744; Statement by the Rio Group, Letter dated 26 March 1999 from the Permanent Representative of Mexico to the United Nations addressed to the Secretary-General, A/53/884, S/1999/347, 2; see also S/PV.3988, 23 March 1999 for the positions of India and China.