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The legality of the UK's grounds for the use of force against Iraq in 2003

The UK's position

1. If Security Council Resolution (UNSCR) 1441 had expressly authorised the use of force there would be no grounds for disputing the legality of the UK's military action. As UNSCR1441 does not authorise States to "use all necessary means" or contain other words which authorise the use of force, the UK has to rely on previous Security Council resolutions.

2. In a written answer to Parliament, Lord Goldsmith, the Attorney-General advised that:

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

   In his opinion of 7th March 2003 he advised that UNSCR 1441 revived the authority in UNSCR 678 to use force and that such authority was suspended, not terminated, by UNSCR 687. The legality of the UK's actions therefore depends on the correct interpretation of these three resolutions.

The interpretation of Security Council Resolutions:

3. Security Council resolutions are made under the powers conferred by a treaty - the Charter of the United Nations. Article 31 of the Vienna Convention on the Law of Treaties (VCLT) provides that a treaty must be interpreted

   > "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*."

   In its Advisory Opinion on "Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo,"[2] the International Court of Justice (ICJ) acknowledged that the VCLT may provide guidance in the interpretation of Security Council resolutions. Therefore the first step is to consider each resolution, using a "literal, systematic and teleological interpretation."[3]

4. If the text of a resolution is ambiguous or obscure or leads to a result which is manifestly absurd, Article 32 VCLT would allow supplementary means, such as the preparatory work,

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[2] 22 July 2010
[3] Cassese, *International Law,* OUP 2991 p134

to be used. Private communications between the Attorney-General and diplomats from other countries are not preparatory work

5. The proper interpretation of Security Council resolutions may require the consideration of other material. In its Advisory Opinion on Kosovo the ICJ stated that,

> "*the interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issues as well as the subsequent practice of relevant United Nations organs and of States affected by those resolutions*."[4]

Revival of UNSCR 678

6. The Attorney-General argued that because Iraq was in material breach of UNSCR 1441, the authorisation to use force as contained in UNSCR 678 was revived. There are several objections to this argument – the status of 'revival' as a legal rule, the difficulty of applying 'revival' to the Iraqi situation, and the incompatibility of 'revival' with the clear words of UNSCRs 678, 687 and 1441.

7. The 'revival' of Security Council resolutions is not a rule of customary international law. It has not been accepted by other States. It is unlikely ever to be accepted because it is unsound in principle – the Security Council does not give indefinite or ambiguous authorisations to use force.

> "*The argument, [for revival] aptly described by Lord Steyn as scraping the bottom of the barrel, is fatuous: no-one could reasonably suppose that the 1990 Security Council resolutions lay dormant, like the seeds of exotic plants in the desert, until some State which happened to be a veteran of the 1990 Kuwait conflict might decide to water them back into bloom."*[5]

UNSCR 678:

8. Even if the argument for revival is legally sound, it cannot be used to justify the revival of UNSCR 678. UNSCR 678 required Iraq to comply fully with UNSCR 660 which was passed on 2nd August 1990 - the day that Iraq invaded Kuwait. OP2 of UNSCR 660 demanded that,

> "*Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990*."

UNSCR 678 also authorised States to

> "*use all necessary means to uphold and implement resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area*."

[4] Paragraph 94
[5] Lowe, *International Law,* OUP 2007, p273

All subsequent relevant resolutions meant resolutions on the Kuwait-Iraq issue from UNSCR 660 up to UNSCR 678 i.e. UNSCRs 661, 662, 664, 665, 666, 667, 669 670, 674 and 677 which required Iraq to withdraw from Kuwait and to respect international humanitarian law. Authorisation did not include UNSCR 687 or UNSCR 1441 which did not exist at the time.

The authorisation in UNSCR 678 to use force was limited to removing Iraq from Kuwait. Arguably UNSCR 678 authorised the use of force to compel Iraq to respect international humanitarian law during hostilities. In either case, the authorisation in UNSCR 678 to use force expired with the liberation of Kuwait. Once Iraqi forces had withdrawn from Kuwait, the conditions for using force ceased to exist.

9. UNSCR 678 was addressed to the Member States cooperating with Kuwait (the "Coalition") in 1990 to remove Iraqi forces from Kuwait. This Coalition ceased to exist when Iraqi forces were removed from Kuwait and Iraq accepted the ceasefire. The UK was no longer a Member State cooperating with Kuwait. It could not invoke UNSCR 678 to authorise military force against Iraq. Alternatively, if the Coalition could be said to exist in 2003, then all Coalition states, including the UK, were bound by the ceasefire established by UNSCR 687.

UNSCR 687:

10. UNSCR 687 established the ceasefire between Iraq and Kuwait (and the Member States cooperating with Kuwait under UNSCR 678). The Security Council affirmed all of its previous resolutions including UNSCR 678

> "*except as expressly changed below to achieve the goals of the present resolution, including a formal ceasefire*."

By definition the use of force is contrary to a ceasefire. Even if the authorisation to use force survived the liberation of Kuwait, that authority was terminated on 3rd April 1991 by UNSCR 687.

11. UNSCR 678 authorised the use of force to "restore international peace and security." This authorisation did not survive UNSCR 687. Under OP34 of UNSCR 687 the Security Council decided,

> "*to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region*."

Once the Security Council is "seized" of a matter, only the Security Council can decide how to deal with it.

> *"The whole point of the UN system is that when the Security Council is seised of a problem it is the Council, and not individual Member States, that has the right to control matters. If the Security Council had intended that the United States, the United Kingdom*

and others should invade Iraq in 2003 with its blessing and its mandate, it would have said so. It did not."[6]

Once the ceasefire was established, only the Security Council could decide whether and when to end the ceasefire.

UNSCR 1441

12. The UK has argued that because Iraq was in material breach of UNSCR 1441, the use of force was justified. This argument conflicts with the text of UNSCR 1441.

13. In OP1, the Security Council decided that Iraq had been and remained in material breach. In OP2, the Security Council decided to give Iraq a "final opportunity" to comply with its disarmament obligations. The rest of OP2 stated that the Security Council's aim was,

> "*bringing to a **full and verified completion** the disarmament process established by resolution 687 and subsequent resolutions of the Council."* (emphasis added)

14. That aim was to be achieved by "an enhanced inspection regime." In OP10 the Security Council requested all Member States to give full support to UNMOVIC and the IAEA in the discharge of their mandates. Under OP7 the Security Council decided to send more personnel to Iraq to implement the enhanced disarmament regime. This would have been completely irresponsible unless the Security Council, including the UK who voted for UNSCR 1441, believed that force could not be used without some further decision from the Security Council. The UK's use of force against Iraq was therefore contrary to the express purpose of UNSCR 1441 which was to complete the disarmament process through enhanced inspection and which required the UK to assist the inspectors, not make it impossible for them to fulfil their function.

15. What was to happen if Iraq failed to comply with the enhanced inspection regime? OP4 stated that any false statements or omissions or any failure to comply or cooperate fully would amount to a material breach by Iraq. That material breach would have to be reported to the Security Council for assessment in accordance with OP11 and OP12. OP11 required the heads of UNMOVIC and IAEA to report immediately to the Security Council. At this stage, force would still not be an option.

16. The Attorney-General stated in his opinion (paragraph 21), "Whether a report comes to the Security Council under OP4 or OP11 the critical issue is what action the Council is required to take at that point." This "critical issue" was addressed in OP12 which required the Security Council to convene immediately,

> "*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] Lowe, *International Law,* OUP 2007*,* p273

The procedure established by UNSCR 1141 for dealing with a material breach by Iraq, was therefore: report, assess and consider what to do next. There was no scope for the UK to take a unilateral decision. It was clear from UNSCR 1441 that even though Iraq was in material breach, and had been for 11 years, the Security Council was unwilling to authorise military action.

17. The Attorney-General argued that "consider" was chosen deliberately to allow further discussion but no decision. This view is untenable. Under Article 42 of the UN Charter force may be used only if the Security Council "considers" that other measures are inadequate. The purpose of UNSCR 1441 was to complete the disarmament process started by UNSCR 687. If the new inspection regime was not working, the Security Council would have to consider what measures to take. "Consider" was not a pointless formality to be gotten through before the UK could use force. At the very least, the Security Council would have had to "consider" whether to remove its inspectors or grant their request for additional time to complete their investigations.

18. UNSCR 1441 gave Iraq a "final opportunity" to comply. Only the Security Council had the legal authority to decide whether that final opportunity had expired, and if so, what action should be taken. There was no scope for the UK, acting as an individual state outside of the Security Council, to decide to "enforce" UNSCR 1441 or UNSCR 687.

Implied Authority

19. Since there was no express authorisation in UNSCR 1441, the UK has argued that there was implied authorisation.

20. Article 2(4), "which is the cornerstone of the Charter system"[7] prohibits the use of force:

> "*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."*

Apart from self-defence, force is allowed only if authorised by the Security Council. First the Security Council must decide that there is a threat to peace. Then Article 41 requires the Security Council to

> *"decide what measures* ***not involving the use of armed force*** *are to be employed to give effect to its decisions."* (emphasis added).

Only if measures under Article 41 would be inadequate or have proved to be inadequate can the Security Council authorise the use of force. Any Security Council resolution to use force must therefore be clear and unambiguous if it is to override the general prohibition on the use of force. Implied authorisation is legally unsound. The UN security system is

[7] Brierly, *The Law of Nations* (6th edition, edited by Sir Humphrey Waldock) OUP 1963 p414

"*based upon the primary role of the Security Council and.....reflects the international consensus that individual States or a group of States, cannot resort to force (for purposes other than self-defence), except with the express authorisation of the United Nations.*"[8]

If there is any doubt whether force is authorised, the issue is easily resolved. The State wishing to use force must obtain clear authorisation from the Security Council. It is precisely because the UK could not obtain a second resolution authorising the use of force, that the UK is forced to argue on the basis of implied authorisation, an argument which undermines the UN system itself.

"The doctrine of implied authorisation is a dangerous one; there is a serious risk that the Security Council will become reluctant to pass resolutions under Chapter VII condemning state action if here is a possibility that such resolutions might be claimed as implied justification for regional or unilateral use of force."[9]

Even if implied authorisation was recognised as a valid basis for force, the express provisions of UNSCR 1441, including the setting up of an enhanced inspection regime, exclude implied authorisation.

21. As noted above, the ICJ has stated that other factors may be taken into account in interpreting Security Council resolutions. In the case of UNSCR 1441, these other factors make it clear that the UK's use of force was not authorised by the Security Council. The UK's own admission that there was "no automaticity" in UNSCR 1441 indicates that some other step was necessary before force could be used. Other States, including former Coalition members, (e.g. France), made it clear that they did not believe that the use of force was justified. Of the original thirty-nine States that formed the coalition thirty-four either opposed the use of force or simply did not take part. The Secretary-General of the United Nations condemned the invasion as illegal.[10]

22. The Security Council has had ample opportunity to say that the use of force was justified. It has not. Instead in the preamble to UNSCR 1483 adopted on 22 May 2003, the Security Council reaffirmed

"the sovereignty and territorial integrity of Iraq"

and stressed

"the right of the Iraqi people freely to determine their own political future and control their own natural resources."

This resolution, which uses the language of the self-determination of States, one of the goals of the UN, just stops short of explicitly calling the action illegal.

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[8] Brownlie, *Principles of Public International Law* (Seventh edition) OUP p746
[9] Gray, *International Law and the Use of Force*, OUP p195
[10] http://www.guardian.co.uk/world/2004/sep/16/iraq.iraq

Conclusion

23. The UK's use of force is illegal on several grounds. Force was not authorised by the Security Council in UNSCR 1441 nor by a combination of UNSCRs 678, 687 and 1441. The revival argument has no basis in law. Even if there was such a legal argument, the plain meaning of UNSCRs 678, 687 and 1441 is incompatible with the revival of UNSCR 678.

24. UNSCRs 687 and 1441 established the rules governing the ceasefire and disarmament. UNSCR 1441 established a clear process for dealing with Iraq's material breach of its obligations. Under Article 25 of the UN Charter, the UK agreed to accept and carry out the decisions of the Security Council. By acting contrary to UNSCRs 687 and 1441, the UK breached its Charter obligations.

25. Collective measures through the UN are the basis of the international system for maintaining peace and security. There were serious differences among States as to whether force should be used in Iraq. Collective measures for the use of force were therefore impossible. The UK's use of force was not a part of any collective measures. The fact that five States jointly use force does not make it "collective" within the meaning of the UN Charter. The UK's use of force was therefore contrary to the UN Charter.

26. Article 26 VCLT provides that

> *"Every treaty in force is binding upon the parties to it and must be performed by them, in good faith."*

If there is any doubt about the meaning of a Security Council resolution made under the UN Charter, a Member State, if it is acting in good faith, must look to the UN Charter for guidance. The UK's use of force against Iraq was incompatible with the overarching UN Charter goals of peace and security, the prohibition on force, the allocation of responsibility to the Security Council and the requirement for collective action. Straining the meaning of Security Council resolutions, ignoring the clear refusal of the Security Council to authorise force, and relying on unconvincing legal arguments in order to justify the invasion of another sovereign State are wholly inconsistent with good faith performance by the UK of its obligations under UNSCR 1441 and the UN Charter.

27. UNSCR 687 also affirmed in its preamble the commitment of all Member States to the sovereignty, territorial integrity and political independence of Kuwait and Iraq and in OP4 guaranteed the inviolability of the international boundary. The UK's use of force against Iraq conflicted with Iraq's rights as a sovereign state and conflicted with the provisions of UNSCR 687. To break the ceasefire established by UNSCR 678, without express authority from the Security Council, was not "restoring peace and security" but amounted to the crime of aggression.