SILC* submission to the Iraq Inquiry

On the correct approach to the interpretation of the United Nations Security Council resolutions relevant to the UK's military intervention against Iraq

This document represents the views of the Surrey International Law Centre (SILC) on some of the legal questions raised by the Iraq Inquiry that point to the legal basis relied upon by the British government in order to give legal support to its military intervention against Iraq in 2003.

Although there is no doubt about the legal importance of all the issues presented by the Inquiry, SILC wishes to focus on the correct logical approach to the interpretation of the United Nations Security Council (UNSC) resolutions relevant to the UK's legal basis for military action against Iraq. For this purpose, a very brief look at the legal structure of the international regime governing the use of force is necessary.

Article 2.4 of the UN Charter sets a prohibition on the threat or use of force in the relations among states. This prohibition, which constitutes a cardinal principle of contemporary international law, is also based on peremptory international customary law or *jus cogens*.[1]

However, such a legal *prohibition* is not absolute and allows some *exceptions*, one of which is a development of UN's practice agreed upon by all member states: the authorisation by the UNSC to a single member state or a coalition of member states to use force against other states in order to restore or achieve a given *status quo* which is meant to be the most suitable for international peace and security.

This development is therefore based on the UNSC competencies for the maintenance of international peace and security as provided by the UN Charter in its chapter VII, also known as the "collective security system". These competencies imply that the UNSC *alone* has the legal power to determine the existence of a risk to or breach of international peace and security and, in the event that it deems it necessary, to *authorise* "what measures shall be taken [...] to maintain or restore international peace and security"[2].

This was the legal basis of UNSC resolution 678 (1990), authorising "Member States co-operating with the Government of Kuwait [...], to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions"[3]. This resolution called for the application of an international embargo

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[1] See *Military and Paramilitary Activities in and against Nicaragua*, Merits, ICJ Reports 1986, pp. 99-101

[2] Article 24 pars. 1 and 2, and articles 39 to 44 of the UN Charter

[3] Operative Paragraph 2

against Iraq, the end of the Iraqi occupation of Kuwait and the compliance by Iraq with international humanitarian, diplomatic and consular law.

Four months later, once the international coalition had accomplished its military objectives, UNSC resolution 687 (1991) *terminated* the previous authorisation by a cease-fire between Iraq and Kuwait and the Member States co-operating with the Kuwait[4].

Now, the UK position assumed that UNSC resolution 687 (1991) did not actually terminate but merely *suspended* some kind of permanent authorisation that would be reactivated should Iraq not comply with all its obligations under it. Nevertheless, such an idea would have been inconsistent not only with the UN Charter but also with the wording of relevant UNSC resolutions.

Obviously, the core problem here is of an interpretative nature. It cannot be denied from a legal perspective that there is room for both an interpretation that favours termination and the suspension interpretations. However, the second interpretation is based on a disregard of the legal nature of both the prohibition of the use of force set by the UN Charter and of the authorisation for the military intervention by the UNSC.

If the peremptory prohibition embodied in Article 2.4 of the UN Charter is one of the fundamental principles of contemporary international law and, thus, the general rule applying to the international regulation governing the use of force, then there is no doubt that an authorisation to use force issued by the UNSC should be understood as an exception to this rule. This does not mean that UNSC competences are exceptional. According to the UN Charter it is up to the UNSC, and only to the UNSC, to decide when and to what extent the exercise of its competences is necessary. This means that from a legal perspective, any legal basis relied upon to use force by a state against another should be regarded as an exception and thus never interpreted in a lax way.

Coming back to UNSC resolution 687, it expressly changes precedent resolutions in so far as necessary to achieve its goals, the first of which is the cease-fire[5] (i. e., the cease-fire is not just a reward offered to Iraq in order to strike a bargain and achieve the other goals – disarmament obligations, etc). The cease-fire is one of – if not the- main goal of the resolution[6]. The idea of conditioning the cease-fire to the compliance with the rest of the goals of the resolution does not find any support in its wording. Moreover, UNSC resolution 678 does not call for the use of “all necessary means” in order to apply resolution 687, the terms of which are to be interpreted under a new light and intention once the liberation of Kuwait had been accomplished and new international objectives had been set.

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[4] O.P. 33; The cease-fire entered into force after Iraq’s acceptance of UN peace plan, including the Iraqi commitment not to develop nuclear, chemical or biological weapons and to allow for international inspection to certify this.

[5] A cease-fire is traditionally defined as a temporary interruption of hostilities for a humanitarian purpose which is limited to a specific area. However, state practice has made this concept more similar to an armistice, meaning a permanent interruption of hostilities, especially when a UNSC binding resolution follows this cease-fire, unless the parties expressly decide otherwise. See GREENWOOD, Ch., “Termination of Hostilities”, in FLECK, D. (ed.) *The Handbook of International Humanitarian Law*, 2nd edition, Oxford University Press, 2008, pp. 66-68; and UNSC resolution 598 (1987) with regard to the Iraq-Iran War

[6] O.P. 1 of the UNSC resolution 687 (1991)

According to this, the different obligations imposed upon Iraq by UNSC resolution 687 cannot be considered as a condition for the suspension of hostilities but as a starting point for its termination. Consequently, Iraq's subsequent compliance should be regarded as a new problem, in the face of which the UNSC will have to decide what new measures shall be taken.

If different interpretations are possible concerning a legal text that constitutes an exception to such a fundamental prohibitive rule as the one embodied in Article 2.4 of the UN Charter, the only correct position is to adopt the most restrictive interpretation. Thus, in presence of less harmful possibilities to the general rule and the interest protected by it, the only legal solution that is perfectly clear is the denial of UK's lax interpretation, which in fact undermines the entire legal regime, by assuming that with regard to Iraq peace is the exception and military action the rule.

In addition, the UK's interpretation relies on the assumption that UNSC resolution 1441 (2002) implicitly puts an end to the *suspension* of the purported continuous authorisation granted by resolutions 678 and 687 by identifying a breach of the legal obligations imposed upon Iraq by the resolution 687[7]. Nevertheless, this interpretation strikingly fails to explain why the UNSC is at the same time expressly adopting in the same resolution a set of measures aiming at a political solution that without a doubt preclude the interference of military action[8].

Finally, there is a more general argument that rules out the continuous authorisation plus suspension idea. It is at least very doubtful that the UN Charter has given the UNSC a legal power to permanently repeal Article 2.4 of the Charter with regard to a member state, as this would deprive Article 2.1 of any content. Even if UNSC's competences imply a legal power to go beyond member states territorial sovereignty (which is still the legal basis for the very same existence and competences of the organization) in so far as international peace and security requires, this could not be seriously taken to the point where state sovereignty is no more recognisable, as would be the case, should such a permanent legal title to threat or use force be given to other member states.

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Surrey International Law Centre

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[7] O.P. 1 and 4 of the UNSC resolution 1441 (2002)
[8] O.P. 2 and 11