AN ASSESSMENT OF THE UK'S LEGAL JUSTIFICATION FOR THE USE OF FORCE AGAINST IRAQ IN 2003

1. In discussing and assessing the legality of the UK's use of force against Iraq in 2003 one must undertake such an assessment with the two intrinsic structural realities of the international legal system at the forefront, that is, its decentralised and auto-interpretative nature. Consequently, states themselves are the actors involved in making, interpreting and applying the law, as well as being its key subjects.

2. In the context of Security Council (SC) resolutions, and the actions that they lawfully permit, the key actors involved are the permanent and non-permanent member states within the SC. Regardless of the text of a resolution ultimately adopted, the legal significance and meaning of this text must ultimately be determined by those within this body as part of a collective exercise. Indeed, what one is attempting to do in determining the legality of the 'revival' argument put forward by the UK is to discern the general intersubjective interpretation given to the relevant resolutions by the members of the SC as a whole.

3. Whilst the permanent members of the SC have a veto, this is in regards to the adoption of resolutions, not on how they should be interpreted. Thus, the UK, as a permanent member of this organ, does not have *de jure* any more interpretive authority than other members sitting within the SC chamber, although its voice may, on many occasions due to its status within the SC and on the wider international stage, be more loudly heard.

4. Upon this basis, this submission will offer an assessment of Lord Goldsmith's legal advice as to the legality of the use of force, as most clearly and directly set out in his written reply to Baroness Ramsay of Cartvale's question in the House of Lords on 17 March 2003.[1] This focused on the interpretation and application of SC Resolutions 678 (1990), 687 (1991), and 1441 (2002).

Security Council Resolution 678 (1990): The root authorisation

5. Given the UK's revival argument as set out in the Attorney-General's written reply, the first port of enquiry is whether Resolution 678 (1990), the sole resolution in the context of Iraq expressly to contain the understood formula authorising the use of force, that is, 'all necessary means', by its own terms and in the context of its adoption, remained active with the possibility of its revival up to 2003.

An expiration date for the authorisation?

6. There is an argument that when an authorisation to use 'all necessary means' is to be temporally limited by the SC a time limit is expressly provided in the authorising resolution. Resolution 678 (1990) contained no such time limit. Whilst a few states

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[1] See http://www.fco.gov.uk/resources/en/news/2003/03/fco_not_180303_legaladvice. This was expanded upon in www.ico.gov.uk/.../annex_c__memorandum_by_foreign_and_ commonwealth_office_170303.pdf,

commented upon the lack of control over the authorisation the time limit was not a general issue with those within the SC at this time.[2] Nevertheless, it has to be conceded that in the text of the resolution no express time limit was set for the authorisation. Consequently, one must turn to the mandate contained within this resolution in an attempt to discern whether this limited the time for which the authorisation remained active with the possibility for revival.

The mandate contained in Security Council Resolution 678 (1990)

7. In operative paragraph 2 of Resolution 678 (1990) the SC expressly authorised member states to use 'all necessary means' so as 'to uphold and implement Resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area'.

8. In connection with the first part of this mandate, the sole demand made, and object and purpose of, Resolution 660 (1990) was to ensure that 'Iraq withdraw immediately and unconditionally all its forces to the position in which they were located on 1 August 1990'.[3] This was subsequently achieved through *Operation Desert Storm* in 1990-91.

9. However, in determining the identity of the 'subsequent relevant resolutions' referred to and their object and purpose, and whether these included those up to and including Resolution 1441 in 2002, the preamble of Resolution 678 (1990) provides some insight.[4] Here the text clearly states that 'despite all efforts by the United Nations, Iraq refuses to comply with its obligation to implement Resolution 660 (1990) and *the above-mentioned subsequent relevant resolutions*, in flagrant contempt of the Security Council' (emphasis added). The referred to resolutions were stated as those adopted between 660 of 2 August 1990 and 677 of 28 November 1990 inclusively, thereby excluding those adopted after Resolution 678 (1990). Logically speaking, it would be a *reductio ad absurdum* to conclude that the SC was giving *carte blanche* authorisation to implement resolutions which had not even been conceived of at the point of adoption of Resolution 678 (1990) and outside the context of the expulsion of Iraq from Kuwait. This interpretation is perhaps confirmed by the member states within the SC upon the adoption of Resolution 678 (1990) when none of its members referred to the resolution as applying to disarmament.[5]

10. In connection with the second part of the mandate, only if Iraq were to reinvade Kuwait (an option which since 1991 was most unlikely) would the 'restore international peace and security in the area' part of the mandate have any purpose. The difficulty lies in the fact that this specific purpose would have been achieved by

[2] SC 2963rd meeting, 29 November 1990, UN Doc. S/PV.2963.
[3] SC Resolution 660, 2 August 1990, UN Doc. S/RES/660 (1990), para. 2.
[4] It is not unusual for the SC to recall in the preamble of its resolutions previous resolutions in connection with the same issue. This goes to establishing the context of the resolution. See M. Wood, 'The Interpretation of Security Council Resolutions', (1998) 2 *MPYUNL* 73, at 87.
[5] See the statements made by members of the SC at the adoption of Resolution 678 (1990) in SC 2963rd meeting, 29 November 1990, UN Doc. S/PV. 2963 (1990). For example, the UK stated, at 78, that '[t]here is no ambiguity about what the Council requires in this resolution and in previous resolutions. We require that Iraq comply fully with the terms of resolution 660 (1990) and … withdraw all its forces unconditionally to the positions on which they stood on 1 August.'

the part of the mandate discussed in paragraph 8 above. As such, on the terms of Resolution 678 (1990) it is at least possible to interpret this part of the mandate more liberally so as to permit the use of force whenever peace and security are not pertaining and need to be restored, including the destruction of Iraq's weapons capability, an aim which was an important part of Resolution 687 (1991).

Security Council Resolution 687 (1991): The 'formal ceasefire'

11. Whilst the SC in Resolution 687 (1991) welcomed the 'restoration' of Kuwait's sovereignty,[6] it also adopted this resolution, which in large part initiated an inspection regime for Iraq's weapons, 'bearing in mind its objective of restoring international peace and security as set out in recent resolutions'.[7] Indeed, this could be interpreted as a clear reference to the latter part of the mandate to use force contained in Resolution 678 (1990). On the terms of the resolution itself this is not entirely clear.

Textual ambiguity

12. Resolution 687 (1991) contained a 'formal ceasefire'.[8] Ceasefires in UN parlance are normally temporary. Consequently, the added 'formal' emphasis leaves the ordinary meaning of the term somewhat ambiguous.

13. The textual ambiguity of Resolution 687 (1991) is heightened by the fact that the first operative paragraph 'affirms' Resolutions 660 (1990) to 686 (1991), including 678 (1990).[9] However, this affirmation of the resolutions, and in particular 678 (1990), had a qualification attached. Indeed, the resolutions were affirmed 'except as expressly changed below to achieve the goals of this resolution, including a formal ceasefire'.[10] Whilst it is true that at no place in Resolution 687 (1991) is Resolution 678 (1990) expressly changed, paragraph 33 does expressly mention it in regards to the formal ceasefire.[11] To be sure, the SC, in paragraph 33:

> *[d]eclare*[d] that, upon official notification by Iraq to the Secretary-General and the Security Council of its acceptance of the provisions above, a formal cease-fire [was] effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with resolution 678 (1990).

14. It would appear logical that, upon Iraq's acceptance, the formal ceasefire would implicitly change, if not expressly so, the authorisation to use force. However, the intentions of the SC are not absolutely clear and, on its terms, Resolution 687 neither expressly suspended nor expressly terminated Resolution 678.

[6] SC Resolution 687, 3 April 1991, UN Doc. S/RES/687 (1991), preamble.
[7] SC Resolution 687, *ibid.*, preamble.
[8] As noted in SC Resolution 687, *ibid.*, paras. 1 and 33.
[9] *Ibid.*, para. 1.
[10] *Ibid.*
[11] *Ibid.*, para. 33.

In context

15. At the meeting when Resolution 687 (1991) was adopted, the members of the SC who referred to it termed it a 'permanent ceasefire',[12] a 'proper ceasefire',[13] a 'definitive, formal ceasefire',[14] and a 'final settlement of the crisis'.[15]

16. In gauging its true nature, the previous resolution adopted by the SC, Resolution 686 (1991), adopted a month before on 2 March 1991, also becomes pertinent.[16] This resolution provided the initial conditions for Iraq to satisfy to 'permit a definitive end to the hostilities'.[17] These conditions were essentially in connection with Iraq's invasion of Kuwait, not its disarmament, and during the time required for Iraq to comply with these conditions the 'provisions of paragraph 2 of Resolution 678 (1990) remain[ed] valid'[18] for the sole purpose of fulfilling the conditions. However, the SC stressed that it looked forward to 'the rapid establishment of a *definitive end to the hostilities*'.[19] Consequently, the SC adopted the formal cease-fire embodied in Resolution 687 (1991) as the means for definitively ending hostilities.

17. The UK revival argument failed to take into account the views of other states at the adoption of Resolution 687 (1991) and did not take into account its 'formal' nature in the context of Resolution 686 (1990), thus arguing that it provided for recommencement of hostilities should Iraq be found in 'material breach'. It is to this key concept of the argument which this assessment now turns and on which the members of the SC had most to say.

Security Council Resolution 1441 (2002): The concept of 'material breach'

18. Resolution 1441 (2002) did not contain any authorisation to use 'all necessary means' if the 'final opportunity'[20] presented to Iraq to comply with its disarmament obligations was not seized.[21] Instead, after separately recalling Resolutions 678 (1990) and 687 (1991),[22] it held that Iraq 'has been and remains in material breach of its obligations'[23] and that a further 'failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach'.[24] This concept was thus at the core of Resolution 1441 (2002) and consequently the UK's revival argument.[25]

[12] SC 2981st meeting, 3 April 1991, UN Doc. S/PV. 2981 (1991), Zaire at 53, US at 83, USSR at 101.
[13] *Ibid.*, France at 92.
[14] *Ibid.*, India at 79-80.
[15] *Ibid.*, Cote d'Ivoire at 81.
[16] SC Resolution 686, 2 March 1991, UN Doc. S/RES/686 (1991).
[17] *Ibid.*, preamble.
[18] *Ibid.*, para. 4.
[19] SC Resolution. 686, *supra* n. 16, para. 8.
[20] SC Resolution 1441, 8 November 2002, S/RES/1441 (2002), para. 2.
[21] Furthermore, there was no deadline set for Iraq's compliance as in para. 2 of Resolution 678 (1990).
[22] SC Resolution 1441, *supra* n. 20, preamble.
[23] *Ibid.*, para. 1.
[24] *Ibid.*, para. 4.
[25] Ireland made this point at its adoption by noting that 'the concept of material breach is a key element of this resolution'. SC 4644th meeting, 8 November 2002, UN Doc. S/PV. 4644 (2002), at 7.

The consequences attached to a 'material breach'

19. The UK clearly had it in mind that a material breach in these circumstances led to the revival of the forcible means permitted in Resolution 678 (1990). None of the states expressly ruled out that an SC determination of a material breach *could* eventually lead to use of force.[26]

20. However, the focus in 2002 was placed firmly on peaceful measures,[27] such as a continuation of inspections,[28] and on the fact that force should be a last recourse[29] and, as the next section demonstrates, they clearly expressed the view that it would be for the SC to determine such a breach in the context of the use of force.

The issue of automaticity

21. On this issue the consensus among the member states of the SC was clear, with the majority opting for what became known as the 'two-stage approach'.[30] This can be broken down into two separate yet sequential steps: the authority to report a suspected material breach and the authority to make the final determination as to one and the ensuing consequences involved.

The authority to report a 'material breach'

22. The issue of preliminarily reporting a material breach was addressed in paragraphs 4 and 11 of Resolution 1441 (2002). After '*[d]ecid*[ing] that … the Government of Iraq shall provide to *UNMOVIC, the IAEA, and the Council*, … a currently accurate, full, and complete declaration of all aspects of its [weapons] programmes',[31] the SC, in paragraph 4 declared that '*a further material breach of Iraq's obligations … will be reported to the Council for assessment* in accordance with paragraphs 11 and 12 below.[32] Paragraph 11 then:

> *[d]irect*[ed] the *Executive Chairman of UNMOVIC and the Director-General of the IAEA* to report immediately to the Council any interference by Iraq with

[26] Only three members of the primary interpretive community, including the US and the UK, even mentioned the term 'material breach' in the debates prior to the adoption or Resolution 1441. The other was Ireland who also noted its basis in the VCLT (1969). See SC 4644th meeting, *ibid.*, at 7-8. There was no doubt concern regarding the concept in light of the UK's previous reliance on it to justify the use of force in 1993 and 1998. Indeed, the Russian delegate noted that 'the wording is not ideal' (at 8) and in a previous French draft of the resolution the concept was intentionally absent owing to concerns that the words might be used again as a trigger for the use of force (See T. Weiner, 'Threats and Responses', *NY Times*, 28 October 2002).
[27] Cameroon was clear that the SC had 'just adopted unanimously a resolution on the peaceful disarmament of Iraq'. SC 4644th meeting, *ibid.*, at 11. See also France at 5, Mexico at 6, Russia at 8, Bulgaria at 9, Norway at 10, Guinea at 11, Mauritius at 12, China at 12.
[28] Ireland noted that '[t]his is … a resolution about disarmament, not war. It is about removing all threat of war'. SC 4644th meeting, *ibid.*, at 7. See also Russia at 8, China at 13.
[29] SC 4644th meeting, *ibid.*, in particular France at 5, Ireland at 7, Mexico at 6.
[30] Those who expressly mentioned this approach in the meeting before the adoption of Resolution 1441 (2002) include France at 5, Mexico at 6, Ireland at 7, China 12. SC 4644th meeting, *ibid.*
[31] SC Resolution 1441, *ibid.*, para. 3 (second emphasis added).
[32] *Ibid.*, para. 4 (second emphasis added).

inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including its obligations regarding inspections under this resolution.[33]

23. Whilst the UK clearly believed that individual member states could report a material breach other members in the SC approached the issue differently, with many stressing that it was UNMOVIC and the IAEA that were to make the reports without any mention of member States possessing this right.[34]

24. The inspection agencies did not report a material breach and, in presenting their regular reports, steered well clear of such language. Furthermore, any interference or failure to comply was to be reported 'immediately'. There were no reports delivered with a sense of urgency and no meetings of the SC urgently convened.

25. In regards to the Iraqi declaration of its weapons programmes, if it was to be provided to 'UNMOVIC, IAEA, and the Council', it should be for these bodies collectively to report any breaches contained within it. Just as a single individual of the inspection teams would not have the authority to report a material breach, the same goes for member states of the SC.

<u>*The authority to determine a 'material breach' and the ensuing consequences*</u>

26. In an astute piece of drafting, paragraph 12 of Resolution 1441 (2002) stated that the SC:

> *[d]ecide*[d] 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.[35]

27. In the meeting where Resolution 1441 (2002) was adopted, the UK, in interpreting this provision and asserting that '[t]here is no "automaticity" in this resolution', nevertheless asserted that:

> '[i]f there is a further Iraqi breach of its disarmament obligations, the matter will return to the Council for *discussion* as required in 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 paragraph 2, the United Kingdom — together, we trust, with other Members of the Security Council — will ensure that the task of disarmament required by the resolutions is completed.'[36]

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[33] *Ibid.*, para. 11 (second emphasis added).

[34] Mexico clearly stated that 'the resolution stipulates that should Iraq fail to comply, it will be the inspectors who will report to the Council.' SC 4644th meeting, *supra* n. 26, at 7. See also France at 5, Ireland at 7, Russia at 8, China at 13.

[35] SC Resolution 1441, *supra* n. 20, para. 12 (second emphasis added).

[36] SC 4644th meeting, *supra* n. 25, at 5 (emphasis added).

28. In this brief statement, the UK was claiming that, as required by paragraph 12, the SC should convene to 'consider' the situation, but if it failed to come to a *decision* through its discussions, the UK reserved the right to use force under the SC resolutions if the SC itself did not live up to its responsibility to enforce them.

29. Whilst none of those within the SC on this occasion took direct issue with the UK over its particularly bellicose position, the consensus in the meeting was clear. Indeed, whilst the UK acknowledged that the SC should be consulted, the rest of the SC emphasised the 'central role' of the SC[37] so as to 'ensur[e] that the Security Council would maintain control of the process at each stage.'[38] In expressly rejecting 'automaticity' or the 'automatic' use of force,[39] those within the SC made it clear that should the inspection agencies report a breach to the SC, it was for that body to decide 'what is appropriate'[40] or on 'any ensuing action'.[41] Any subsequent determination on the appropriateness of force should be through 'explicit agreement of the Council'[42] and 'prior explicit authorization'.[43] Indeed, '[t]he resolution should not be interpreted, through certain paragraphs, as authorizing any State to use force.'[44]

30. The language used in Resolution 1441 (2002) is, it has to be acknowledged, to a large extent ambiguous. Indeed, on the basis of the text alone perhaps one could make a 'reasonable case' that force was authorised and provide a sufficient legal basis for taking military action.

31. However, the auto-interpretive nature of international law does not permit each state to interpret the law as it wishes. Instead, and especially in connection with resolutions of the SC, what other members within this body say collectively is determinative as to legality. The fact that the UK chose to ignore this throws a negative light on its legal justification. Indeed, upon the analysis of this submission, the use of force against Iraq in 2003 was, at best, of questionable legality.

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[37] *Ibid.*, Syria at 10. See also Ireland at 7, Bulgaria at 9, Columbia at 11, Cameroon at 11, Guinea at 11, Mauritius at 12.
[38] *Ibid.*, France at 5.
[39] *Ibid.*, France at 5, Mexico at 6, Ireland at 7, Russia at 8, Syria at 10, Bulgaria at 9, Columbia at 11, Cameroon at 11, China at 13.
[40] *Ibid.*, Mexico at 7.
[41] *Ibid.*, Ireland 7. This State claimed that previous SC debates had 'made it clear that this is the broadly held view within the United Nations.' *Ibid.*, at 7.
[42] *Ibid.*, Mexico at 6.
[43] *Ibid.*
[44] *Ibid.*, Syria at 10.