

## The UK's legal basis for military action in Iraq

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On March 20, 2003, after tough negotiations within the United Nations Security Council (UNSC), the US-British coalition led a military action in Iraq.

The use of force has been controversial because this action does not result from a resolution of the UNSC authorizing expressly and explicitly this use of force, as with the Security Council Resolution (SCR) 678. This is why the U.S. and the UK have each developed a legal basis as an attempt to legalize military action. We are particularly interested in the UK's.

This legal basis is more commonly called Implicit Authorisation or Implied Authorisation. According to this argumentation, the use of force by states which rely on it is allegedly authorized by the UNSC and contained implicitly within a SCR.

In the Iraq 2003 case, the UK has developed this argument in three phases: 1. SCR 678 allows the use of force in Iraq and SCR 687 suspends it by setting a cease-fire conditioned by the compliance to the respect by Iraq of a strict regime of obligations<sup>1</sup>; 2. Violation by Iraq of its international obligations<sup>2</sup>; 3. The removal of the cease-fire and the reactivation of the SCR 678 authorisation in order to restore international peace and security<sup>3</sup>.

More than six years after the military action in Iraq, the question of the legality of the use of force remains and constitutes one of the evaluations of the Iraq Inquiry. The main object of this submission is to underline that the military action and its legal basis should not be assessed in light of the concept of legality but rather the concept of conformity with international law, which is more broadened. Furthermore, the evaluation leads us to note the difficulties of qualifying the UK legal basis and the military action as conform to the spirit of international law.

We therefore insist on the necessity to go beyond the concept of legality as a standard for the evaluation of the UK legal basis and the military action (I) before assessing it (II).

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- I. On the necessity to go beyond the concept of legality as a standard for the evaluation of the UK legal basis and the military action.

The evaluation of the legal basis developed by the UK in light of the concept of legality becomes irrelevant at the onset of a military action (a). Therefore, some solutions are presented to remedy the deficiency of the standard of legality (b).

- a. The irrelevance of the standard of legality in the assessment of the military action in Iraq

The irrelevance of the standard of legality in the evaluation of military action in Iraq (i) results in part to the illegality of the UK legal basis due to the current state of international law (ii).

- i. The irrelevance of one concept of legality in the evaluation of military action in Iraq

«The purpose of the enforcement action under Article 39 is not: to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law »<sup>4</sup>. This is how Hans KELSEN was already considering limits of the law of the Charter shortly after its adoption.

It follows the Council's practice that blockages occurring within it appear less of a negative vote by the latter than the risk of a veto, and which leads to a withdrawal of the draft resolution. In the previous case of Iraq which led to military action in 2003, the procedural blockages and difficulties within the Council as to the approach adopted to allow military action was a situation that could facilitate the pursuit of Iraq's program of weapons of mass destruction.

The precedent of Kosovo 1999 and Iraq in 2003 represent case studies related to the dangers posed by the inaction of the Security Council because of the existence of divergences among its members. The Security Council acts like a fuse that is often held responsible, even though its failure originates from those divergences. In Kosovo 1999, the Council's inaction led to the deterioration of the humanitarian situation. This served as justification by the outbreak of NATO military strikes. The legal arguments submitted by the

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<sup>4</sup> KELSEN, *The law of the United Nations: a critical analysis of its fundamental*, p. 294.

member states of NATO are based on an implied authorization of the Council<sup>5</sup>. In Iraq 2003, according to U.S. and UK, the Council's inaction was likely to allow Iraq to continue with impunity to expand its program of weapons of mass destruction. The military action in Iraq by the coalition would prevent the continuation of this situation. The UK has sought to justify these operations still based on an implicit authorization of the Council.

What we can learn from these case studies is that in matters of jus ad bellum in general, and military action in Iraq in 2003 in particular, the standard of legality, which must necessarily lead to compliance with the procedure of Chapter VII may be an obstacle even more aggravating circumstances as in the case of humanitarian risk, degree of an imminent terrorist attack... The article 39 of the Charter<sup>6</sup> defines the power of determination of the UNSC. Insofar as the procedure of Chapter VII is conditioned by the implementation of this article, the search of legality may become an obstacle to maintaining and restoring international peace and security. Therefore, the military action in Iraq 2003 without an express and explicit authorisation of the Council arises initially as an illegal action.

- ii. The illegality of the British argument because of the current state of international law

The implied authorisation may be initially presented as illegal for at least two reasons: 1. It is not provided by international law, nor by the law of the Charter; 2. it is not a secretion of the Security Council, as was the case for the assumption of SCR 678.

While the phase of legalization of illegal situations becomes inoperable by the sole use of international law, states have been forced to introduce a parallel test in order to correct the standard of legality: the legitimization. The legitimization is to make a situation acceptable by the use of elements beyond law. The dialectic of legalizing and legitimizing the problem of the introduction of elements such as extra-legal or moral concern for justice are subjective elements. These elements pose a risk of instrumentalization of international law.

- b. The solutions to remedy the deficiency of the standard of legality

Two solutions may be envisaged to assess the military action in Iraq 2003 and the UK legal basis: the use of a strict intra-legal framework: **the legality of emergency** (i), or an intra-

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legal flexible concept: **conformity** (ii). Both solutions have the interest to put this in perspective evaluation always legal.

i. The use of a strict intra-legal framework: the legality of emergency

The legal framework established by the Charter of the United Nations has deficiencies that are particularly likely to occur so when it comes to differences between members of the Council. In this case, the definition of a legality of emergency becomes relevant. The existence of such a theory parallel to the resulting ordinary legality of Chapter VII would act legality of exceptional circumstances. The Security Council enjoys broad powers that would fall easily into the application of the doctrine of implied powers, and the details of implementation are dependent upon the achievement of several criteria, including the occurrence exceptional circumstances, the ability of a specific situation to justify a plea of necessity, and finally the trigger: the paralysis of the Council decision.

This solution has the advantage of dealing with exceptional circumstances, such as breaches of the peace whose answer is an obstacle due to the blockage of the Council. However, the implementation of the lawful exception requires the existence of a legal notice. This was not the case on the eve of military action March 20, 2003. Hence, the use of a more flexible legal concept: the conformity.

ii. The use of an intra-legal concept legal flexible than compliance

The concept of conformity refers to the quality of which is identical or in perfect agreement with another concept or idea. The teleological character of an action or behavior is the determining factor in evaluating its compliance with the concept. The concept of compliance does not undermine or challenge the legality, but allows a development of it in the means, while contributing to the same goals.

Thus, an illegal military action may be consistent with international law? This is the major issue which should be the engine of the evaluation of the British legal argument.

KELSEN clarifies the role of the Council, it "in Taking enforcement actions Under Section 39 [...] is bound to act 'in Accordance with the Purposes and Principles of the United Nations'"<sup>7</sup>. As part of a deadlock arising in the Council, the issue of compliance the transfer of power

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<sup>7</sup> KELSEN, *ibid.*, p. 294.

determination by the Council to one or more of its members may also prove interesting. The conformity assessment of military action and the legal arguments submitted by the UK may be possible from elements that we will lower / below. It will return earlier to make an assessment of the British legal argument as a basis for military action in Iraq.

## **II. On the evaluation of the British legal argument, called the implicit authorization**

After detailing the development of the British legal argument (a), our assessment leads us to conclude the difficulty of compliance as well as that of military action in Iraq in 2003 with the spirit of international law (b)

### **a. The development of the UK legal basis**

#### **i. The controversial role of the Attorney General in the adoption of the British legal argument**

##### **1. The position of the Attorney General on the legalization of the argument of implied authorization**

The Attorney General is the chief legal adviser of the Crown. The opinions issued between July 30, 2002 and March 17, 2003 and correspondence with other figures show a clear inconsistency between the initial position and his public position most recently held several days before surgery military in Iraq. This position is even more blurred when we observe the variations between March 7 and March 17, 2003.

The reading of declassified documents and the events tend to show us later that the remarks made by Attorney General stating the legal arguments were legal to give political weight more consistent to get a positive vote of Parliament. Lord Goldsmith, as Attorney General, is a member of Cabinet. Although a cornerstone in the development of legal policy outside the United Kingdom, membership in the government allowed it anyway a little leeway.

##### **2. The Attorney General is it a scapegoat for the external legal policy of the United Kingdom?**

The Attorney General is the person who was asked at the highest level, although Sir Michael and Elizabeth WOOD WILMHURST have rendered opinions contrary to the position held by

it. WILMSHURST has resigned from his post in order to distance themselves from the government's position. This is also the Attorney General that we see regularly be discussions of the Iraq Inquiry Commission. The pressures could be actually reflect the will of the government to legalize military action in Iraq. However, Lord Goldsmith is a member of the government and ultimately held that the argument in Iraq was legal.

Its role is indeed to translate political will into a legal instrument to be developed internationally. It works well as a technician in the service of political power and appears to be a fuse. Thus, the illegality of military action would be more the result of a political up in this direction, but the quality of an opinion.

## **ii. The modalities of implementation of the British legal argument**

The implementation of the British legal argument highlights common characteristics (a) essential in evaluating its compliance with international law (2).

### **1. The practical details of the argument of implied authorization**

The British legal argument is implemented through the use of implicit authorization indirect (a) direct or (b).

#### **a. The combination of Resolutions 678, 687 and 1441 UNSCOM, indirect or implicit authorization**

According to this position, the UNSC Resolution 1441 states that Iraq remains in material breach of its international obligations contained in Resolution 687. This reactive facto authorization to use force contained in Resolution 678. This position poses three problems:

#### **• The use of the phrase "material breach" after the law of treaties in UNSC Resolution:**

Article XX of the Vienna Convention provides that a material breach has a treaty. A treaty requires the existence of two wills joint contractors, so that Resolution 687 is a unilateral act of the UNSC imposed on Iraq. This formulation is therefore ineffective;

- **The ability of Resolution 1441 to revive a resolution adopted more than a decade ago:**

Under the Charter, the UNSC is able to reclassify an international situation, and challenge a previous resolution. However, this right is reserved to the Security Council but may not be transferred to its member states. This would amount to a questioning of Article 39 of the Charter.

- **The use of preparatory work for the adoption of resolution 1441 leaves the prospect of a peaceful settlement in two stages:**

Ambassador Jeremy Greenstock was referring in particular to this approach, the draft resolution does not have a detonator hidden potentiality of the use of force should be further discussions before the Security Council.

**b. The use of Resolution 1441, direct or implied authorization**

According to this view, the words "serious consequences" contained in Resolution 1441 represents a diplomatic code authorizing use of force. This position poses a major problem:

- The use of diplomatic language in use is a hidden trigger:

See supra.

**2. Common features of the practice of the British argument**

**a. The broad interpretation and subjective UNSC Resolutions**

The legal argument is clearly based on a broad interpretation and subjective provisions of Resolution 1441 by the mechanisms described above.

**b. the sidelining of the UNSC**

Furthermore, the UK is a permanent member of the UK and therefore has a veto. What is not without risk to the authority of Council resolutions and the setting aside of it. Indeed, the questioning of the power of determination by the Council (Article 39) may constitute a grave

violation of its authority and responsibility MPSI. Therefore, the legal argument and British military action that results both have problems of compliance with international law.

**The difficulties in the classification of the legal arguments and the military intervention as consistent with the spirit of international law.**

The declaration of conformity of military action and its legal basis is challenging because of the lack of positioning of the Council (i) on the issue and the inclusion of state positions on the issue (ii).

**i. The lack of positioning of the Security Council on the issue**

The Security Council did not condemn (1) or approve it (2) of the UK practice of military action and its legal basis.

**1. The Security Council did not condemn the British practice**

The day of military action, the United Nations in general and the Security Council in particular have been distinguished by their silence. The SG did not appeal to Article 99 and the UNSC has not entered the military action in the agenda of the Council's discussions. It has no more to the liability of the coalition at a later resolution.

**2. The Security Council did not endorse either the UK practice**

The Security Council has not approved the military action. UNSC Resolution 1483 comes only take note of the military occupation of Iraq.

**ii. Taking into account the positions of state in determining the compliance of the British legal argument**

The lack of response from the Council reflects the position of UK and U.S. as PM and, therefore, have powers in the listing or not of an international situation in the agenda of Council meetings. Therefore, other factors must be taken into account in assessing the compliance of the legal basis and the military action: the use of a rule of interpretation (1) and with the preparatory Council Resolutions (2)

**1. The principle of using the general rule of interpretation for assessing conformity of**



## **practice**

The conformity of the legal basis and UK military action in international law could be assessed through the use of a rule of interpretation. Although applicable to treaties, its implementation may be relevant. Under Article 31 of the Vienna Convention, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in light of its object and purpose".

### **2. The importance of the *travaux préparatoires* in the interpretation of SCR and evaluation of the UK legal basis**

The synthesis of the preparatory work for the Resolution 1441 shows that a majority of members of the Council joined the two-step approach and a return to the Security Council to discuss a use of force in non-compliance by Iraq with Resolution 1441. The consensus on this approach was even a requirement for some states in the adoption of this Resolution

In conclusion, the common point between Kosovo 1999 and Iraq in 2003 is the use of implied license and unresponsiveness of the Council. The difference is that Iraq in 2003 has prompted criticism from the States much more than in Kosovo, which can be likened to a declaration of conformity or not the spirit of international law

Beyond these precedents, and the care taken by the UK in the process of legalization of the action show three things:

1. The rule of international law as an instrument of international relations;
2. The necessity of finding a clear mandate;
3. The duty of accountability and good faith of the members of the Council when acting under Chapter VII ◊ self-assessment of the Council.