

The Iraq Inquiry

**Submission on the UK's legal basis
for military action in Iraq**

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INTRODUCTION

1. The intended scope of this submission is extremely narrow. The submission aims solely to shed light on the meaning of the single phrase in Security Council resolution 678 (1990) on which, in the final analysis, the UK's legal justification for its military action in Iraq rests.

THE UK'S LEGAL POSITION

2. The essence of the UK's stated legal position¹ is that its invasion of Iraq in March 2003 was authorized by the United Nations Security Council, albeit way back in November 1990. The UK's argument runs as follows: Security Council resolution 678 (1990) of 29 November 1990, passed in the wake of Iraq's invasion of Kuwait in August 1990, authorized UN Member states 'to use all necessary means to uphold and implement resolution 660 (1990) [of 2 August 1990, demanding Iraq's withdrawal from Kuwait] ... and to restore international peace and security in the area'; this authorization was suspended on 3 April 1991 by resolution 687 (1991), a ceasefire resolution which, in order to restore international peace and security in the area within the meaning of resolution 678, obliged Iraq to divest itself of weapons of mass destruction; the authorisation to use all necessary means to restore international peace and security in the area granted to UN Member states by resolution 678 was revived by Iraq's subsequent non-compliance with the disarmament obligations imposed by resolution 687; the US-led invasion in March 2003, aimed as it was at forcibly disarming Iraq, was undertaken to restore international peace and security in the area within the meaning of resolution 678, and was thus authorized by that resolution.

THE UK'S PERMISSIVE CONSTRUCTION OF SECURITY COUNCIL RESOLUTION 678 (1990)

3. The UK's legal justification ultimately hangs on the permissive construction of a single phrase in resolution 678, *viz* 'and to restore international peace and security in the area',

¹ See the reply of the Attorney-General (Lord Goldsmith) to the question of Baroness Ramsay of Cartvale [HL2172], House of Lords, 17 March 2003, 646 HL Deb WA2-3. For a fuller version of Her Majesty's Government's legal position at the time, see 'Iraq: legal basis for the use of force', Foreign and Commonwealth Office, 17 March 2003.

without which the resolution could not possibly be taken to have authorized the use of force for reasons other than to compel Iraq to withdraw from Kuwait. The UK's argument reads resolution 678 as authorizing the use of force to uphold and implement resolution 660 (that is, to compel Iraq to withdraw from Kuwait) and *also* to restore international peace and security in the area – in other words, as authorizing the use of force for two distinct, albeit related purposes. That is, on the UK's reading, resolution 678 contemplated and authorized the further use of force in the event that driving Iraq out of Kuwait was not enough to restore international peace and security in the area.

THE RESTRICTIVE CONSTRUCTION OF SECURITY COUNCIL RESOLUTION 678 (1990)

4. The alternative, restrictive construction of resolution 678 is that it authorized the use of force to uphold and implement resolution 660 (that is, to compel Iraq to withdraw from Kuwait) and *thus* to restore international peace and security in the area. That is, on the restrictive reading, resolution 678 gave the green light only to such military action as was necessary to drive Iraq out of Kuwait, Iraq's withdrawal constituting in itself the restoration of international peace and security in the area.

THE CORRECT CONSTRUCTION OF RESOLUTION 678 (1990)

The evidence from the Korean War resolutions

5. Persuasive evidence for the restrictive reading of resolution 678 can be derived from a consideration of the resolutions adopted by the Security Council when authorizing US-led military action in June 1950 to reverse the invasion of the Republic of Korea (South Korea) by North Korea – the sole occasion prior to resolution 678 on which the Council had authorized the use of force against a state in respect of a breach of² the peace within the meaning of article 39 of the United Nations Charter.

² The Security Council did, however, authorize the use of force on one occasion during this period in response to a threat to, as distinct from a breach of, the peace, within the meaning of article 39 of the UN Charter. In resolution 221 (1966) of 9 April 1966, the Council, determining in paragraph 1 that the situation resulting from the continued supply of oil to the illegal regime in Southern Rhodesia via the port of Beira in Portuguese Mozambique constituted a threat to the peace, called upon the UK in paragraph 5 to

6. On 27 June 1950, in a measure understood as authorizing the use of force against North Korea by UN Member states, the Security Council recommended in resolution 83 (1950) ‘that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area’. Ten days later, the Council adopted resolution 84 (1950) of 7 July 1950, in which it welcomed the support UN Members had given ‘to its resolutions 82 (1950) and 83 (1950) of 25 and 27 June 1950 to assist the Republic of Korea in defending itself against armed attack and *thus* to restore international peace and security in the area’.³ The inclusion of the word ‘thus’ in the last-quoted clause of resolution 84 establishes beyond doubt that the phrase ‘and to restore international peace and security in the area’ included in resolution 83, the resolution which authorized military action, did not provide an independent mandate for the use of force against North Korea above and beyond that provided by the authorization to ‘furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack’.⁴
7. It will, of course, be apparent that the phrase ‘and to restore international peace and security in the area’ found in resolution 83, the resolution by which the Security Council authorized the use of force by UN Member states to reverse North Korea’s invasion of South Korea, recurs verbatim in resolution 678, by which the Security Council authorized the use of force by UN Member states to reverse Iraq’s invasion of Kuwait.
8. It is undoubtedly permissible to have interpretative recourse, should the ordinary meaning of the text of a Security Council resolution prove ambiguous, to the background

prevent, ‘by the use of force if necessary’, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia.

³ Emphasis added.

⁴ Note that the International Court of Justice stated in *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion*, 22 July 2010 (unreported), para. 94, that ‘[t]he interpretation of Security Council resolutions may require the Court to analyse ... other resolutions of the Security Council on the same issue ...’.

documentation relied on by the resolution's drafters;⁵ and while the evidence for reliance by the drafters of resolution 678 on resolution 83, as elaborated on by resolution 84, can only be circumstantial,⁶ it can hardly be supposed that the legal advisors to the key states represented on the Security Council in the second half of 1990 were not mindful of, and attentive to, such legal precedent as was available. Indeed, given the striking congruence of the relevant phrase as found in each resolution, there can be no serious doubt that the Council consciously reproduced in resolution 678, to the extent relevant, the formula for the authorization of force in response to a breach of the peace found in resolution 83. Nor can there be any serious doubt that the drafters of resolution 678 were aware of resolution 84's gloss on this formula and intended that resolution 678 be read accordingly.

9. If one accepts the admissibility of resolutions 83 and 84 as aids to the proper construction of resolution 678, the phrase 'and *thus* to restore international peace and security in the area'⁷ found in resolution 84—and intended therein as synonymous with the phrase 'and to restore international peace and security in the area' found in resolution 83 and later reproduced verbatim in resolution 678—seriously undermines the UK's construction of resolution 678 and with it its legal justification for the invasion of Iraq in 2003.

The true function of the key phrase in resolution 678 (1990)

10. It might be countered that the interpretation of the key phrase in resolutions 83 and 678 revealed above ('and *thus* to restore international peace and security in the area') renders this phrase syntactically parenthetical and therefore, strictly speaking, redundant, contrary

⁵ Cf Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 UNTS 331, art. 32(a), recognized as consonant with customary international law. Although the rules governing the interpretation of Security Council resolutions are not identical to those governing the interpretation of treaties, the International Court of Justice stated in *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (above n. 4), para. 94, that the latter 'may provide guidance'.

⁶ The drafting of Security Council resolutions, as distinct from the debates surrounding their adoption, takes place off the record.

⁷ Emphasis added.

to a well-established canon of legal construction.⁸ But quite apart from the fact that a mere canon of construction cannot prevail over express words,⁹ the restrictive construction of resolutions 83 and 678, while denying that the words ‘and to restore peace and security in the area’ provide an independent mandate for the use of force, does not render them redundant. Rather, it views them as a drafting device inserted to fulfil a formal legal function within the scheme of Chapter VII (articles 39 to 51) of the United Nations Charter, the chapter in accordance with which the Security Council may authorize the use of force.

11. It is trite law that before the Security Council can authorize coercive measures against a state under Chapter VII of the Charter, it must first, in fulfilment of article 39 of the Charter, determine that the situation in question constitutes a threat to the peace, a breach of the peace or an act of aggression. Having made this determination, the Council, in fulfilment of article 39 once more, is to make recommendations or decide what measures, including armed force pursuant to article 42, are to be taken ‘to maintain or restore international peace and security’.
12. In resolution 82 (1950) of 25 June 1950, the Security Council engaged the trigger mechanism provided for in article 39 of the Charter when it determined that North Korea’s armed attack on South Korea ‘constitute[d] a breach of the peace’. The gist of the restrictive construction of the subsequent resolution 83 is that when the Security Council eventually, pursuant to article 42, authorized in this later resolution ‘the Members of the United Nations [to] furnish such assistance to the Republic of Korea as

⁸ For example, in *Anglo-Iranian Oil Co. (United Kingdom v. Iran), Preliminary Objection, Judgment*, ICJ Rep 1952, p. 93 at p. 105, the International Court of Justice stated that ‘a legal text should be interpreted in such a way that a reason and meaning can be attributed to every word in the text’. See also e.g. *Corfu Channel (United Kingdom v. Albania), Merits, Judgment*, ICJ Rep 1949, p. 4 at p. 24; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment*, 13 July 2009, para. 61. See too *Prosecutor v. Akayesu*, ICTR-96-4, Appeals Chamber, Judgment, 1 June 2001, para. 468 (International Criminal Tribunal for Rwanda). There is no doubt that this canon of construction applies to Security Council resolutions.

⁹ Although resolutions 83 and 678 do not themselves contain the word ‘thus’, the key phrase of resolution 84, intended therein as synonymous with the phrase ‘and to restore international peace and security in the area’ in resolution 83, does.

may be necessary to repel the armed attack and to restore international peace and security in the area’, the drafters inserted the phrase ‘and to restore international peace and security in the area’ (meaning ‘and *thus* to restore international peace and security in the area’) in order to indicate on the resolution’s face that the Council’s decision to authorize armed force was a decision taken ‘to ... restore international peace and security’—the prerequisite breach of which had been determined in resolution 82—in fulfilment and, indeed, in the words of article 39. In short, on the restrictive reading of resolution 83 as pointed to clearly by resolution 84, the phrase ‘and to restore international peace and security in the area’ (meaning ‘and *thus* to restore international peace and security in the area’) serves what might be called a constitutional function, as a formal textual reminder of the ultimate source of the Security Council’s power to authorize the use of force to repel North Korea’s armed attack on South Korea.

13. Similarly, the day after Iraq’s invasion of Kuwait in August 1990, the Security Council engaged the trigger mechanism provided for in article 39 by determining in resolution 660 ‘that there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait’. The resolution went on to demand that Iraq withdraw from Kuwait unconditionally. When, in resolution 678, the Security Council authorized the use of force ‘to uphold and implement resolution 660’, the phrase ‘and to restore international peace and security in the area’ was inserted, following the precedent established in resolution 83, so as to signpost once more that the Council’s decision to authorize armed force was a decision taken ‘to ... restore international peace and security’ in fulfilment of article 39. Again, although the phrase did not provide a mandate for the use of force against Iraq independent of the mandate to use force to compel Iraq to withdraw from Kuwait, it did have a meaning and serve a function within the hermeneutical system of Chapter VII of the Charter.

CONCLUSION

14. Comparison with Security Council resolutions passed in the context of the Korean War strongly suggests that resolution 678 was intended to authorize military action to remove Iraq from Kuwait and only to remove Iraq from Kuwait.