SUBMISSION TO THE IRAQ INQUIRY

On the legal basis for the 2003 UK use of force against Iraq

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On 2 June 2010, the Iraq Inquiry invited public international lawyers in the United Kingdom to make submissions concerning the legal arguments relied on by the UK government as the basis for the military action in Iraq which commenced in 2003.

The legal basis for that action, as explained by the Attorney General in his advice to the Prime Minister of 7 March 2003, was essentially that UN Security Council Resolution ('UNSCR') 1441:

- determined that the conditions of the ceasefire established pursuant to UNSCR 687 had been materially breached;
- gave Iraq a "final opportunity" to comply with the conditions established in UNSCR 687 and supplemented in subsequent resolutions including UNSCR 1441;
- failing Iraqi compliance with those conditions, had the effect of 'reviving' the authorisation on the use of force set out in UNSCR 678, without requiring either a further Security Council authorisation for the use of force, or a further determination by the Security Council of Iraqi non-compliance.

As you will be well aware, this analysis was at the time and remains very much a minority view among international lawyers. Much of the focus for the criticism of this argument has been directed at its interpretation of UNSCR 1441 as allowing individual states to make their own determination of whether Iraq had complied with the terms of UNSCR 1441 (and previous Resolutions), and to use force unilaterally on the basis of such a determination. The better view is certainly that UNSCR 1441 was not sufficient on its own terms to authorise force based on a state's unilateral determination of Iraqi non-compliance with the terms of the Resolution, without a further Security Council Resolution. It may, however, also be open to conclude that UNSCR 1441 was the product of diplomatic negotiations which left its text fundamentally ambiguous in order to achieve agreement – a practice on which a number of states have no doubt had cause to reflect critically in light of subsequent events.

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The focus of this submission is not on the difficult and perhaps intractable issue of the 'correct' interpretation of UNSCR 1441, but rather on the validity of the 'revival argument' as a matter of principle, as dealt with in paragraphs 7-11 of the Attorney General's advice of 7 March 2003, focusing on UNSCRs 678 and 687. If the 'revival argument' fails, the interpretation of UNSCR 1441 becomes irrelevant to the question of the legality of the use of force – it is incontestable that UNSCR 1441 does not *itself* authorise the use of force. Although the 'revival argument' had previously been relied on by the US and UK for the use of force in Operation Desert Fox in December 1998, this met with strong condemnation from other Security Council members[3], and the Attorney General's advice accurately described it as "controversial" and "not widely accepted among academic commentators" – but nevertheless adopted it.

For an authorisation to 'revive', it must have existed in the past. In relation to the 2003 use of force, the revival argument depends on the interpretation of UNSCRs 678 (1990) and 687 (1991) as giving rise to an authorisation for the use of force which remained active more than 12 years later and which was sufficiently broad to encompass a full scale invasion of Iraq. There are two possible arguments which might be relied on to support this claim.

1. UNSCR 678 itself authorised force on terms which encompassed the 2003 invasion of Iraq.
2. UNSCR 678 authorised force on narrower terms, but UNSCR 687 had the effect of enlarging the scope of the authorisation provided under UNSCR 678 such that it subsequently encompassed the 2003 invasion of Iraq.

These two arguments will be dealt with in turn.

1. The argument that UNSCR 678 itself authorised force on terms which encompassed the 2003 invasion of Iraq.

Under paragraph 2 of UNSCR 678, the Security Council authorised "Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area".

There are two reasons why this Resolution cannot be interpreted to authorise the 2003 invasion of Iraq, but must rather be interpreted strictly as authorising force only for the purpose of liberating Kuwait.

First, UNSCR 678 requires that force be used by states "co-operating with the Government of Kuwait". To the extent that the Resolution might be viewed as authorising action beyond the liberation of Kuwait (such as, for example, eliminating Iraqi Weapons of Mass Destruction ('WMDs')), the terms of the Resolution would appear to grant Kuwait a veto on any such action. This inexplicable outcome is avoided if the Resolution is understood to authorise only such force as was necessary to liberate Kuwait. The exercise of such force would necessarily require action in the territory of Kuwait, and although legally justified by Security Council authorisation, would

[3] UN Doc. S/PV.3955 (16 December 1998).

essentially be an act of collective self-defence in accordance with Article 51 of the UN Charter.[4] The requirement to cooperate with Kuwait makes it clear that the authorisation to use force under the Resolution was limited to the restoration of the territorial integrity of Kuwait.

Second, the authorisation in UNSCR 678 is *conditional* – it provided for an authorisation for the use of force "unless Iraq, on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions", namely, UNSCRs 660, 661, 662, 664, 665, 666, 667, 669, 670, 674 and 677. Those Resolutions do not impose any obligations on Iraq with reference to the possession or development of WMDs, but are focused on the conduct of hostilities by Iraq and the restoration of the territorial integrity of Kuwait.[5] If Iraq had in fact complied with those conditions by 15 January 1991, principally by withdrawing its troops from Kuwaiti territory, it is clear that force could *not* have been used without a further authorisation – the conditions for this authorisation to be activated would not have been satisfied. The conditionality of UNSCR 678 defines the purpose of the Resolution, and thus the limits of its authorisation. If UNSCR 678 was intended to authorise states to use force in broader circumstances (such as to eliminate Iraqi WMDs), then its authorisation would not have been purely conditional on Iraq failing to restore Kuwait's territorial integrity.

The only basis for arguing that UNSCR 678 could authorise the 2003 invasion of Iraq hinges on the inclusion of the words "and to restore international peace and security in the area". These words are, however, at best a highly ambiguous justification for a broad interpretation of UNSCR 678. The words could be interpreted to mean one of two things: that states were authorised to use force to liberate Kuwait "and [*also*] to restore international peace and security in the area", or, that states were authorised to use force to liberate Kuwait "and [*thereby*] to restore international peace and security in the area". The first interpretation would render much of the authorisation redundant. Under the second, it is clear that the reference to international peace and security is not a poorly-defined expansion in the *purpose* of the authorisation, but an acknowledgment of its *legal basis* under Chapter VII of the UN Charter. The use of the word "restore" adds a strong textual indication that peace and security was defined in reference to the situation that existed prior to Iraq's invasion of Kuwait. This interpretation is also strongly supported by policy considerations – the UN Charter system was intended to establish that, outside situations of self-defence covered by Article 51, States are prohibited from using force without Security Council authorisation. Any Security Council resolution authorising Member States to use force must necessarily be interpreted narrowly, as it represents a departure from a fundamental principle of the international legal system.

This narrow interpretation of the authorisation to use force in UNSCR 678, limiting it to the restoration of the territorial integrity of Kuwait, is supported further by the weight of historical evidence, including the following:

- In Security Council debates following the adoption of UNSCR 678, Sir David Hannay, the then UK Ambassador and Permanent Representative to the United Nations, described

[4] See also UNSCR 661; UN Doc. S/PV.2934 (9 August 1990); UN Doc. S/21492 (10 August 1990) (United States).
[5] In the statements made at the time of the adoption of UNSCR 678, WMDs were only mentioned in reference to the conduct of hostilities as regulated by the Geneva Conventions: see UN Doc. S/PV.2963 (29 November 1990) at 68 (France), 82 (United Kingdom), 96 (USSR), and 103 (United States).

the objectives of the Resolution as "the withdrawal of Iraq from Kuwait, the return of Kuwait's legitimate Government and the restoration of peace and stability to the region", and clarified, in reference thereto, that "[w]e are seeking the liberation of Kuwait, no more and no less".[6]

- In 1993, the then UK Prime Minister, Mr. John Major, confirmed this narrow understanding of the authorisation to use force pursuant to UNSCR 678, recalling, in response to the question "do you regret not dealing with Saddam Hussein tougher two years ago?" that "we were operating under a UN mandate; that mandate had been enforced; we had no legal authority to do more".[7]
- Contemporaneous statements by other Security Council members emphasised that the purpose of the military campaign was "the liberation of Kuwait".[8]
- On 8 May 1991, before the House of Commons Defence Committee, in response to a question as to whether UNSCR 678 was discharged "in full", Sir Peter de la Billiere (Commander of British troops in Desert Storm) stated that "[o]ur commitment was to restore sovereignty to Kuwait, to destroy the Iraqi forces in Kuwait, so they could not initiate new, fresh operations, and we did that and no more. Indeed, the criticism is perhaps we ought to have done more, but had we done any more, then we would have been stepping outside those limits".[9]

It is clear that UNSCR 678 should be interpreted as having authorised force only for the purpose of the restoration of the territorial integrity of Kuwait, in order to satisfy the conditions set out in the prior Resolutions mentioned in paragraph 1 of UNSCR 678. UNSCR 678 is the *only* authorisation for the use of force provided by the Security Council with respect to Iraq, and therefore must be the sole basis for any argument that the use of force in 2003 was lawful. The only remaining argument to consider is that the authorisation in UNSCR 678 was somehow 'enlarged' by the terms of UNSCR 687.

2. *The argument that UNSCR 678 authorised force on narrower terms, but UNSCR 687 had the effect of enlarging the scope of the authorisation provided under UNSCR 678 such that it subsequently encompassed the 2003 invasion of Iraq.*

As is well known, UNSCR 687 established the conditions for a formal cease-fire to the first Gulf War. Many of those conditions mirrored the terms under which force was authorised in UNSCR 678 – that is, full and effective restoration of Kuwait's territorial integrity through compliance with the Resolutions noted in paragraph 1 of UNSCR 678. The language of paragraph 6 makes it clear that upon re-establishing Kuwait's territorial integrity and border security, "the conditions will be established for the Member States cooperating with Kuwait in accordance with resolution 678 (1990) to bring their military presence in Iraq to an end", thus terminating the authorisation in UNSCR 678. The text of this paragraph confirms the analysis set out above – that the

[6] UN Doc. S/PV.2977 (14 February 1991) (Closed), reprinted in Weller (ed), "Iraq and Kuwait: The Hostilities and their Aftermath" (Cambridge International Documents Series, Volume 3, 1993) (henceforth, 'Weller'), at p.39.
[7] Transcript of Statement by the Prime Minister in Downing Street on 13 January 1993 (Weller, p.737).
[8] Address by President Bush to the Nation, 16 January 1991 (Weller, p.280). See also UN Doc. S/22149 (25 January 1991) (Malaysia); UN Doc. S/22185 (31 January 1991) (Yemen).
[9] See also Malaysia's letter to the UN Secretary General noting the accomplishment of the objectives of UNSCR 678 following the liberation of Kuwait: UN Doc. S/22282 (28 February 1991).

restoration of Kuwait's territorial integrity fulfils the purpose of UNSCR 678, and thus, on satisfaction of this condition, the authorisation to use force in UNSCR 678 is exhausted and therefore unrevivable. Had the Security Council intended for the UNSCR 678 authorisation to continue, it would have included language to that effect, as it did in UNSCR 686, which recognised that "the provisions of paragraph 2 of resolution 678 (1990) remain valid" during the period required for Iraq to comply with the preliminary conditions for a ceasefire established under UNSCR 686.

If UNSCR 687 had done nothing more than require full and effective restoration of Kuwait's territorial integrity, there would be no basis on which to argue that the authorisation for the use of force under UNSCR 678 could be revived by Iraq's non-compliance with Security Council resolutions concerning WMDs. Section C of UNSCR 687 did, however, address the issue of Iraq's possession, acquisition and development of WMDs. It is the breach of these provisions which is the basis of UK arguments for a revived authorisation for the use of force under the authority of UNSCR 678. For this argument to justify the action taken in 2003, the effect of UNSCR 687 must have been to enlarge the scope of the authorisation for the use of force under UNSCR 678, to extend to authorising force to enforce Iraqi compliance with the WMD obligations. No provision of UNSCR 687 expressly changes the scope of the authorisation under UNSCR 678. Such an enlargement would essentially constitute a new authorisation for the use of force, and ought to require the same clear and express language as an initial authorisation. This requirement of express language is indeed confirmed in paragraph 1 of UNSCR 687 which affirms previous resolutions "except as expressly changed below to achieve the goals of the present resolution, including a formal cease-fire".

The advice on this issue in the FCO Memorandum entitled "Iraq: Legal Basis for the Use of Force" of 17 March 2003 hinged (in paragraph 7) on a statement made by the UN Secretary General on 14 January 1993, in relation to a strike against Iraqi military targets the previous day. This was taken to support the claim that UNSCR 678 had not been 'exhausted' by the liberation of Kuwait, but rather continued to authorise further uses of force against Iraq. The Secretary General's press release suggested that this action had "received a mandate from the Security Council, according to Resolution 678 and the cause of the raid was the violation by Iraq of Resolution 687 concerning the cease-fire". The Secretary General's opinion on the meaning of a Security Council resolution is, however, in no way determinative of legal rights and obligations. The military strikes on 13 January 1993 were, in any event, in response to Iraqi raids into Kuwaiti territory over the prior three days and an Iraqi missile attack on a US plane, and thus offer scant justification for an expansive interpretation of the authorisation under UNSCR 678. The strikes on 13 January (on which the Secretary General was commenting) were directed solely against anti-aircraft targets. Escalated US attacks on 17 January against suspected WMD sites (which the Secretary General could not have been endorsing) were in any case met with protests by numerous states including France and Russia. The UN Press Spokesman delivering the 14 January 1993 statement is further reported to have clarified that the use of force "was not specifically authorised by a United Nations resolution, but he understood that the Member States involved felt that there was authorisation within the overall framework of the resolutions, specifically resolution 688 (1991), which dealt with humanitarian aid. He added that questions about how member states interpreted resolutions should be directed to member states."[10]

[10] Weller, p.742.

It is true that paragraph 33 of UNSCR 687 appears to make compliance with the WMD obligations a 'condition' of the cease-fire agreement. Under paragraph 33 of UNSCR 687, the cease-fire became operative "upon official notification by Iraq to the Secretary-General and to the Security Council" of its acceptance of the proposed terms. The cease-fire was therefore not conditional on *fulfilment* of the conditions it set forth, but only on their *acceptance* – a fact reaffirmed in the letter to Iraq from the President of the Security Council, in response to Iraq's acceptance of the terms of UNSCR 687.[11] The traditional understanding of a 'ceasefire' in international law, which allowed parties to resume hostilities if the conditions of a ceasefire agreement are breached, reflected the position in pre-UN Charter international law that states had a *right* to use force. This cannot be what is meant by a ceasefire adopted by the Security Council, particularly where the conditions for a cease-fire depart from the scope of the original authorisation to use force. A breach by Iraq of the WMD conditions could not give rise to a right for any state to resume hostilities, because there is no right to participate in hostilities beyond that granted by the Security Council[12], and the right granted by the Security Council was terminated by the cease-fire. The fact that these are 'conditions' of the cease-fire should therefore not be interpreted to mean that any authorisation for the use of force is ongoing or could revive if they are breached, but only that compliance with these obligations would be necessary for sanctions to be lifted (under paragraph 22 of UNSCR 687), and, conversely, a breach of these obligations could be the basis for a further Security Council authorisation to use force against Iraq in the future. That this was the understanding of the Security Council at the time of the adoption of UNSCR 687 is evident from the statement of the representative of India, Mr Gharekhan (in connection with the guarantee of the boundary between Iraq and Kuwait in paragraph 4 of UNSCR 687):

> ... it is India's understanding that [paragraph 4] does not confer authority on any country to take a unilateral action under any of the previous resolutions of the Security Council. Rather, the sponsors have explained to us that in case of any threat or actual violation of the boundary in future the Security Council will meet to take, as appropriate, all necessary measures in accordance with the Charter.[13]

To put this another way, given the Security Council's monopoly on authorising the use of force, UNSCR 687 should be characterised as establishing the terms of a ceasefire between Iraq and the Security Council, on behalf of Kuwait and the Member States of the United Nations, not between Iraq and the particular states using force under the authorisation of UNSCR 678. Any dispute over whether Iraq had satisfied the conditions of the cease-fire, such as that which arose in the build-up to the 2003 use of force against Iraq, should therefore have been characterised simply as a *legal* dispute concerning interpretation of and compliance with a Security Council Resolution. It is clear that the adoption of UNSCR 687 was not intended to establish a partial return to the pre-United Nations days when states could unilaterally use force to 'resolve' disputes under international law. It must be concluded that the approach taken to the legality of the use of force

[11] UN Doc. S/22485 (11 April 1991).
[12] Except in the context of individual or collective self-defence, which clearly did not apply in 2003.
[13] UN Doc. S/PV.2981 (3 April 1991) at 78; see also 103-4 (Russia); 127-8 (the President of the Security Council, speaking in his capacity as representative of Belgium).

against Iraq in 2003 was not simply wrong as a matter of international law, but contrary to the fundamental international policy commitments and security interests of the United Kingdom.

In summary:

1. The legal arguments relied on by the UK government as the basis for the military action in Iraq which commenced in 2003 are fundamentally dependent on the 'revival' of the authorisation for the use of force under UNSCR 678, either on its own or in conjunction with UNSCR 687.
2. The authorisation to use force under UNSCR 678 could not support the military action in 2003, as it was strictly limited to the restoration of the territorial integrity of Kuwait.
3. UNSCR 687 did not expand the scope of the authorisation under UNSCR 678 but rather terminated it, instead establishing the conditions for a cease-fire between the Security Council and Iraq, and thus the basis on which the Security Council might take further action against Iraq to maintain international peace and security in the region.
4. However UNSCR 1441 is interpreted, it therefore simply could not 'revive' any previous Security Council authorisation, as no such relevant authorisation existed.
5. There was thus no basis in international law for the use of force by the UK against Iraq in 2003.