
Part IV:

LEAD-UP TO HOSTILITIES

**AN OPINION GIVEN TO THE CAMPAIGN FOR
NUCLEAR DISARMAMENT (CND): RABINDER SINGH
QC AND CHARLOTTE KILROY, 23 JANUARY 2003**

**10. In the Matter of the Potential Use
of Armed Force by the UK against Iraq**

FURTHER OPINION

1. Further to our previous Opinion dated 15 November 2002 on whether the United Kingdom (**UK**) can rely on United Nations Security Council Resolution 1441 (**Resolution 1441**) to use force against Iraq, we are asked to advise the Campaign for Nuclear Disarmament (**CND**) on whether the UK can rely on the authorisation to use force contained in UN Security Council Resolution 678 (**Resolution 678**), which was adopted on 29 November 1990, to take military action against Iraq.

Summary of advice

2. For the reasons set out below, our opinion is that the UK cannot rely on the authorisation to use force in Resolution 678 to take military action against Iraq.

Background

3. On 2 August 1990 Iraq invaded Kuwait. In response, on the same day, the United Nations Security Council adopted Resolution 660 which, at paragraph 2, called upon Iraq to “*withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990*”. When Iraq failed to comply with Resolution 660, the Security Council on 6 August 1990 adopted Resolution 661, which imposed sanctions on Iraq in order to secure its compliance with Resolution 660. Nine further resolutions followed, including Resolution 674, adopted on 29 October 1990, paragraph 10 of which stated that the Security Council

“Requires that Iraq comply with the provisions of the present resolution and its previous resolutions, failing which the Council will need to take further measures under the Charter.”

Resolutions 678, 686 and 687

4. On 29 November 1990 the Security Council adopted Resolution 678. It stated that the Security Council:

*“..Noting 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...*

Acting under Chapter VII of the Charter,

1. *Demands that Iraq comply fully with resolution 660 (1990) and all subsequent relevant resolutions, and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of goodwill, to do so;*
 2. ***Authorises 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...*** (emphasis added)
5. Following the suspension of hostilities, the Security Council adopted Resolution 686 on 2 March 1991. Resolution 686 stated that the Security Council;

“...Noting the suspension of offensive combat operations by the forces of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990).

Bearing in mind the need to be assured of Iraq’s peaceful intentions, and the objective expressed in resolution 678 (1990) of restoring international peace and security in the region.

Underlining the importance of Iraq taking the necessary measures which would permit a definitive end to the hostilities....

Acting under Chapter VII of the Charter ..

2. *Demands that Iraq implement its acceptance of all twelve resolutions noted above and in particular that Iraq:*
 - (a) *Rescind immediately its actions purporting to annex Kuwait;..*
3. *Also demands that Iraq:*
 - (a) *Cease hostile or provocative actions by its forces against all Member States, including missile attacks and flights of combat aircraft;...*

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4. ***Recognises that during the period required for Iraq to comply with paragraphs 2 and 3 above, the provisions of paragraph 2 of resolution 678 (1990) remain valid;***... (emphasis added)
 8. *Also decides, in order to secure the rapid establishment of a definitive end to the hostilities, to remain actively seized of the matter.*"
6. On 3 April 1991 the Security Council adopted Resolution 687. That Resolution, by paragraphs 8 to 13, established the conditions for a formal cease-fire and the requirement on Iraq to accept the destruction of all chemical and biological weapons, and to agree not to acquire or develop nuclear weapons or nuclear-weapon usable material, to submit declarations on its possession of any such weapons or materials and to submit to a regime of inspections. The Resolution stated as follows:
- "...Bearing in mind its objective of restoring international peace and security in the area as set out in its recent resolutions,*
- Conscious of the need to take the following measures acting under Chapter VII of the Charter,*
1. *Affirms all thirteen resolutions noted above, except as expressly changed below to achieve the goals of the present resolution, including a formal cease-fire....*
 4. *Decides to guarantee the inviolability of the above-mentioned international boundary and to take, as appropriate, all necessary measures to that end in accordance with the Charter of the United Nations;*
 5. *Requests the Secretary-General, after consulting with Iraq and Kuwait, to submit within three days to the Council for its approval a plan for the immediate deployment of a United Nations observer unit to monitor the Khawr' Abd Allah and a demilitarised zone, which is hereby established....*
 6. *Notes that as soon as the Secretary-General notifies the Council of the completion of the deployment of the United Nations observer unit, 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 consistent with resolution 686 (1991)....*
 33. ***Declares that, upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the above provisions, a formal cease-fire is effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with resolution 678 (1990).***

34. *Decides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region.*" (emphasis added)

Issues

7. It has been argued by the United Kingdom and the United States in the past that a material breach of the terms of the formal cease-fire contained in Resolution 687 would reactivate the authorization to use force contained in Resolution 678. In particular the UK and the US have argued that breach of the requirements of paragraphs 8 to 13 of Resolution 687, relating to the destruction of chemical and biological weapons and to the non-development of nuclear capability, entitle Member States to use force against Iraq under Resolution 678 without a further UN Security Council Resolution.
8. In this Opinion therefore we will address the following question:
- Whether the authorization to use force contained in Resolution 678 may be reactivated on Iraq's breach of Resolution 687 so as to entitle the UK to take military action against Iraq without a further UN Security Council resolution.
9. In our previous opinion we addressed the issue of whether the use of force by a Member State in the absence of express authorization from the Security Council was as a matter of principle compatible with the UN Charter and with customary international law, and concluded that it was not (at paragraph 48). In our view those observations apply with equal force here.
10. Furthermore Peacerights¹ has received an opinion dated 10 September 2002² which addressed the extent to which the UK can rely on the existing body of UN Security Council resolutions as authorising the use of force without a Security Council Resolution. That opinion concluded at paragraph 70 that none of the existing Security Council Resolutions authorised the use of force.
11. We will concentrate therefore in this Opinion on the specific question of whether the authorisation to use force in Resolution 678 can be reactivated upon a breach of the provisions of Resolution 687 so as to permit the use of force without a further UN Security Council Resolution expressly authorizing such force.

Analysis

12. Resolution 678 authorised Member States acting in co-operation with Kuwait to use all necessary means to uphold and implement resolution

660 (1990) and all subsequent resolutions (which, in the context of the resolution read as a whole and having regard to the words we have emphasised above, was clearly a reference to the subsequent relevant resolutions listed in the Preamble to the Resolution 678) and to restore international peace and security in the area. Since Resolution 660 and the resolutions subsequent to it were devoted to ending the invasion of Kuwait and restoring her territorial integrity and independence, and since that invasion is now at an end, the argument that force is still authorised by Resolution 678 has focused on the authorisation to use all necessary means to '*restore international peace and security in the area*'.

13. The argument appears to be constructed as follows:
 - (1) Resolution 687 does not explicitly revoke the authorisation to use force contained in Resolution 678, but rather affirms it at paragraph 1.
 - (2) The cease-fire contained in resolution 687 was therefore only a suspension of the authorisation to use force.
 - (3) Resolution 687 had as its objective the restoration of international peace and security in the area in conformity with Resolution 678.
 - (4) The provisions of Resolution 687 relating to disarmament of Iraq's nuclear, chemical and biological weapon capability (paragraphs 8 to 13) were designed to restore international peace and security in the area.
 - (5) Resolution 687 required Iraq to accept the provisions relating to disarmament of its nuclear, chemical and biological weapon capability as a condition precedent to the effecting of the formal cease-fire.
 - (6) Iraq's failure to comply with those provisions is therefore a threat to international peace and security, and a breach of the terms of the cease-fire.
 - (7) The suspension of the authorisation to use force represented by the cease-fire is therefore lifted and Resolution 678 reactivated in order to ensure Iraq's compliance with the terms of Resolution 687.
14. In our view, however, it is clear from the terms of Resolution 687, and from the context in which it was adopted that the formal cease-fire, once effected, terminated the authorization to use force in Resolution 678, and that any steps to be taken for the implementation of Resolution 687 and to secure peace and security in the region were now once more a matter for the Security Council and not for the Member States.
15. Our reasons for this conclusion are set out below.

Resolution 686

16. Resolution 686 provides the clearest possible indication that Resolution 687 was not intended to continue the authorization to use force in Resolution 678. Resolution 686 was adopted in acknowledgement of the suspension of hostilities which had by that point occurred. It required Iraq to abide by the terms of a provisional cease-fire with the ultimate aim of achieving ‘*a definitive end to the hostilities*’ (see Preamble paragraph 7, Operative paragraph 8). Paragraph 4, however, explicitly recognised that *during the period required for Iraq to comply with the terms of the provisional cease-fire*, the authorization to use force in Resolution 678 would remain valid. Paragraph 4 provided this explicit recognition despite the fact that paragraph 1 had affirmed that Resolution 678 continued to have full force and effect.
17. No such explicit language is used in Resolution 687. On the contrary, Resolution 687 clearly provides for the Member States cooperating with Kuwait to bring their military presence to an end following the deployment of the United Nations observer unit (paragraph 6), and for a formal cease-fire to be effective upon official notification by Iraq of ‘*its acceptance*’ of the provisions of Resolution 687. It also provides that Resolution 678 was affirmed “*except as expressly changed ...to achieve the goals of the present resolution, including a formal cease-fire*”. If the Security Council had sought to keep the authorization to use force contained in Resolution 678 alive pending Iraq’s **compliance** with the provisions of Resolution 687, in our view Resolution 686 demonstrates that it could and would have done so (see Jules Lobel and Michael Ratner, *Bypassing the Security Council: Ambiguous Authorisations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, AJIL [1999] 124 at 148-9; “Judgment” of Professor Vaughan Lowe, 21 December 2002, Today Programme, Radio 4 website http://www.bbc.co.uk/radio4/today/reports/international/iraq_hearing.shtml, at paragraph 109; Opinion of Professor Colin Warbrick of 30 September 2002, at www.matrixlaw.co.uk at page 11.).

Resolution 678

18. Resolution 678 authorised not Member States in general but “*Member States co-operating with the Government of Kuwait*”. In our view therefore, it is clear that although the authorization was not just to restore the sovereignty and territorial integrity of Kuwait, but also to restore international peace and security in the area, once the coalition authorized to achieve those goals was no longer in existence, a cease-fire having been implemented, the authorization could not outlive it (see Professor Lowe above at paragraph 108, and Professor Warbrick above at page 12). This point is reinforced by the fact that the specific goals

for which the UK and the US are attempting to revive the authorization, namely paragraphs 8 to 13 of 687, were formulated after the adoption of Resolution 678, and after the coalition had achieved its main goal, the liberation of Kuwait. Resolution 687 is clearly not one of the “subsequent” resolutions to which Resolution 678 referred because that was confined to the resolutions which had been passed *up to that time*. The goals of Resolution 687 for the most part were not directly related to the conflict which Resolution 678 had been designed to solve, but were intended to prevent future and potentially more devastating conflicts (see the Preamble, operative paragraph 14 and below).

The language of Resolution 687

19. In our view it is clear from the language of Resolution 687 that, the coalition having achieved its main goal, the liberation of Kuwait, and the restoration of international peace and security in the area at that time at least, the Security Council imposed a cease-fire and then assumed its proper responsibility for the long-term restoration of international peace and security in the area. It expressly remained seized of the matter.
20. Paragraph 4 of Resolution 687 expressly reserves to the Security Council and not Member States the right to use force to guarantee the inviolability of the boundary between Iraq and Kuwait. As Professor Lowe points out in his “judgment” (above, at paragraph 116) this is a clear indication that the Security Council considered that the authorization granted to the coalition would not survive the cease-fire, as if any authorization to the coalition under Resolution 678 were to remain active it would be the power to protect Kuwait from further incursions into its territory by Iraq (see also Lobel and Ratner, above, at 149).
21. Paragraph 34 of Resolution 687 meanwhile expressly states that the Security Council decides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region. As both Professor Lowe (above, at paragraph 118) and Lobel and Ratner (above, at 150) point out, this paragraph makes it clear that it is the Security Council that will decide upon, and take, whatever steps are necessary to implement the terms of the resolution and to secure peace and security in the area, and not Member States.
22. Moreover it is simply not correct to assert that the implementation of the obligations to which Iraq agreed under paragraphs 8 to 13 was a condition of the formal cease-fire. As pointed out above the condition of the cease-fire was Iraq’s notification of its acceptance of the provisions of Resolution 687 (paragraph 33), and a condition of the withdrawal of the military presence of the coalition from Iraq was the deployment of the United Nations observer unit (paragraph 6). Once those steps had

been taken, the cease-fire was formally in place, the role of the coalition was brought to an end and any decisions on the further steps to be taken to ensure compliance with the terms of the Resolution 687 were to be taken by the Security Council under paragraph 34.

23. The long-term nature of the obligations in paragraphs 8 to 13 in our view supports the view that their implementation was not a condition of the cease-fire, and was to be monitored by the Security Council and not the coalition of Member States. As paragraph 14 of Resolution 687 states, the Security Council notes that '*the actions to be taken by Iraq in paragraphs 8 to 13 represent steps towards the goal of establishing in the Middle East a zone free from weapons of mass destruction and all missiles for their delivery and the objective of a global ban on chemical weapons*'.

Conclusion

24. In our view therefore, the language of Resolution 687 and the context in which it was adopted make it clear that the authorization to Member States to use force against Iraq under Resolution 678 did not outlive the formal cease-fire agreement which was effected pursuant to paragraph 33 of Resolution 687. In our view, the argument that the authorization to use force was simply suspended by Resolution 687 and may be reactivated in the event of a breach of paragraphs 8 to 13 thereof is, on proper analysis, incorrect.
25. Even if, we are wrong about this, however, and the authorization may be reactivated it would not be open to a Member State, even a member of the Security Council, unilaterally to decide to do so. Given the fundamental nature of the prohibition on the use of force contained at Article 2(4) of the Charter and the requirement for the Security Council to retain a measure of control over the operations it authorises, in our view it is not open to a Member State to make a unilateral decision to revive an authorisation which was granted 12 years earlier and which has been the subject of a subsequent cease-fire agreement imposed by the Security Council.³
26. As Professor Thomas Franck stated at proceedings of the American Society of International Law in 1998:
"The Security Council has authorised a combined military operation; has terminated a combined military operation; has established the terms under which various UN agency actions will occur to supervise the cease-fire, to establish the standards with which Iraq must comply; has established the means by which it may be determined whether those standards have been met (and this has been done by a flock of reports by the inspection system); and has engaged in negotiations to secure compliance. After all these actions, to now state that the United Nations has not in fact occupied the field, that there remains under Article 51 or

under Resolution 678, which authorised the use of force, which authorisation was terminated in Resolution 687, a collateral total freedom on the part of any UN member to use military force against Iraq at any point that any member considers there to have been a violation of the conditions set forth in Resolution 687, is to make a complete mockery of the entire system.” (ASIL Proceedings, 1998, ‘*Legal Authority for the Possible Use of Force Against Iraq*, at 139.)

(See also the Opinion of Rabinder Singh QC and Alison Macdonald, above, at paragraphs 71-76).

27. The Security Council in passing Resolution 1441 on 8 November 2002 determined that Iraq was in material breach of its obligations under Resolution 687 (at paragraph 1). For the reasons we have set out above, we do not consider that Resolution 678 can be reactivated, or that it is compatible with the UN Charter for Member States to rely on anything other than an express authorization to use force. Even if we are wrong on these points, however, in our view this declaration in Resolution 1441 would not be sufficient to reactivate the authorization in Resolution 678 given that the negotiations leading up to the adoption of Resolution 1441, as set out in our earlier Opinion, provide clear evidence that the Security Council did not consider its declaration to amount in any way to an authorization to any Member State to use force without a further UN Security Council Resolution.⁴
28. In our view therefore any military action taken by the UK against Iraq on the basis of the authorization to use force contained in Resolution 678 would not be justified under international law.

**Rabinder Singh QC
Charlotte Kilroy
23 January 2003**

**IN THE MATTER OF THE POTENTIAL USE
OF ARMED FORCE BY THE UK AGAINST IRAQ**

FURTHER OPINION

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FOOTNOTES

¹A recently formed non-governmental organisation concerned with issues of international law and international human rights law particularly in the context of weapons of mass destruction and the peaceful resolution of conflict.

²Opinion of 10 September 2002, Rabinder Singh QC and Alison Macdonald

³We have seen a memorandum on the Legality of Using Force Against Iraq by Professor Greenwood QC dated 24 October 2002, which states, at paragraph 19: “*..it is open to the Security Council to determine that Iraq continues to be in breach of the ceasefire conditions in resolution 687 and that that breach involves a threat to international peace and security which peaceful means have failed to resolve. The effect of such a determination would be that the authorization of military action in Resolution 678 would again be rendered active. That would not necessarily require a Security Council resolution. It could be done by means of a Presidential Statement (which would require a consensus in the Council).*” Even on this argument therefore the reactivation of Resolution 678 is a matter for the Security Council to consider whether by adopting a new Resolution, or by means of a Presidential Statement. What is crucial is that it is not open to Member States, even members of the Security Council, to take unilateral action: they have to act through decisions of the Security Council.

⁴The argument has also been made that a violation of the cease-fire agreement of itself justifies those States who were involved in the hostilities that preceded the cease-fire in using military action, whether or not the authorisation to use force in Resolution 678 remains alive. The United Nations Charter makes it clear that the use of force may only be used where it is authorised by the Security Council, or under the right of self-defence contained in Article 51. Where it is clear that the authorisation to use force has been terminated by the Security Council by a formal cease-fire agreement, in our view Member States may not rely on a breach of that cease-fire alone as a justification for military action without further authorisation from the Security Council (see Christopher Greenwood QC at paragraph 28 of his Memorandum, above).