Submission to Iraq Inquiry

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With the benefit of a number of the testimonies by witnesses before the Iraq Inquiry (Inquiry) during the week of 25 January 2010, each of which grappled with the proper application of the law related to the use of force to the March 2003 invasion of Iraq, can it be said that the invasion complied with international law?

The testimonies of Sir Michael Wood, Elizabeth Wilmshurst, and Rt. Hon. Lord Goldsmith QC before the Inquiry during that week in late-January 2010 each grappled with the proper application of the *jus ad bellum* to the invasion of Iraq,[1] and implicit in each of them was the conviction of consent, the idea that since the United Kingdom had voluntarily agreed to be bound by use of force law as a general matter that its actions could legitimately be judged according to this rubric as a matter of law. According to this positivist line of thinking, the United Kingdom, having expressed its will as sovereign in becoming a State party to the Charter of the United Nations (Charter), had agreed to comply with its general prohibition on the threat or use of force,[2] the only exceptions to this being in cases of self-defence[3] and when the United Nations Security Council has authorised 'such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.'[4]

Sir Michael, Ms. Wilmshurst, and Lord Goldsmith also took for granted that the self-defence exception did not apply on the facts of Iraq, and thus, their

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[1] In announcing the establishment of the Inquiry in the House of Commons on 15 June 2009, then Prime Minister Gordon Brown set out the Inquiry's jurisdiction *ratione materiae* and jurisdiction *ratione temporae*, covering the events preceding the actual invasion of Iraq in March 2003 through to the invasion itself and the ensuing occupation and reconstruction efforts and ending in late-July 2009. See Hansard HC vol 494 cols 23-24 (15 June 2009).

[2] See UN Charter, art 2(4).

[3] See ibid art 51.

[4] Ibid art 42. This, of course, leaves to the side the parallel operation of the customary international law regime related to the use of force. On this, see *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States*) (Merits) [1986] ICJ Rep 14, 92-97.

testimonies turned to whether it could be said that the Security Council had somehow authorised the invasion. Here, language became key, the shared position that the United Kingdom had voluntarily agreed to be bound by use of force law having essentially, and simply, made possible a landscape upon which could be painted one's particular natural law preference. Primarily at issue in this regard was the interpretation that *should* be given to the following paragraph in Security Council Resolution 1441, particularly to its 'to consider' language:

> *The Security Council*,
> [. . .]
> 12. *Decides* 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.[5]

While none of the witnesses formally argued that the express language in Resolution 1441 acted as anything but *the* controlling law on the facts of Iraq, the way in which they engaged with paragraph 12's 'to consider' language was remarkable for what it revealed about the way in which international actors actually engage with the law in this area. For example, despite the fact that former Legal Adviser in the Foreign and Commonwealth Office (FCO) Sir Michael clearly knew that Resolution 1441's paragraph 12 had settled on 'to *consider'* language, he testified before the Inquiry that the actual use of force in Iraq would not have been authorised 'without a further *decision* of the Security Council;'[6] that 'it was for the Security Council, when the matter went back to it in accordance with paragraphs 4, 11 and 12, to take a *decision* on whether there had been a material breach that was sufficiently grave to justify the use of force;'[7] that 'it was for the Council to take the *decision* on whether

[5] SC Res 1441 (UN Doc S/RES/1441, 2002), para 12.
[6] Sir Michael Wood, Oral Evidence, Iraq Inquiry, 26 Jan 2010, http://www.iraqinquiry.org.uk/media/44205/20100126am-wood-final.pdf, 21 (emphasis added).
[7] Ibid 22 (emphasis added).

force could be used;'[8] and that 'you needed the material breach, a report to the Council and a *decision* by the Council that this was a sufficiently serious breach to merit the resumption of the use of force.'[9] Earlier, in a 15 January statement to the Inquiry, Sir Michael had concluded that a proper legal interpretation of Resolution 1441 led to the view that the 'purpose of Council *consideration* and *assessment* was for the Council to *decide* what measures were needed in the light of the circumstances at the time.'[10] Former Deputy Legal Adviser in the FCO Ms. Wilmshurst was of a similar mind as Sir Michael on the *jus ad bellum* issue, and like him, she also 'mixed and matched' as to the 'to consider' language: 'No, I really do think the difference was whether -- was that, in 2002, the Council had said any *decision* on material breach will be for the Council to *consider* and *assess*, and that was the major difference.'[11] Clearly, then, although recognising the primacy as such of the language that was chosen in Resolution 1441, these perspectives seemed to be less concerned with the *express* language that was used (i.e., 'to consider') than with the *meaning* that they wished to attach to it (i.e., 'to decide').

In his testimony before the Inquiry on 27 January, Lord Goldsmith, who at the time of the invasion had been Attorney General, expounded upon the 'revival' justification for the use of force in March 2003.[12] He also grappled with the 'to consider' language in paragraph 12, but unlike his colleagues, he did not feel himself at liberty to infuse the express language that was used (i.e., 'to consider') with a

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[8] Ibid 26 (emphasis added).
[9] Ibid 57-58 (emphasis added).
[10] Sir Michael Wood, Statement, Iraq Inquiry, 15 Jan 2010, http://www.iraqinquiry.org.uk/media/43477/wood-statement.pdf, 7 (emphasis added).
[11] Elizabeth Wilmshurst, Oral Evidence, Iraq Inquiry, 26 Jan 2010, http://www.iraqinquiry.org.uk/media/44211/20100126pm-wilmshurst-final.pdf, 30 (emphasis added).
[12] On this, see 'A Case for War: Lord Goldsmith's Published Advice on the Legal Basis for the Use of Force Against Iraq' *Guardian* 17 Mar 2003; Lord Goldsmith's 'Secret Memo' 7 Mar 2003. Compare Lord Goldsmith's 'revival theory' with the Dutch government's 'corpus theory.' See *Rapport Commissie Van Onderzoek Bestluitvorming Irak* (2010), http://download.onderzoekscommissie-irak.nl/rapport_commissie_irak.pdf, 524.

meaning that approximated, as he understood the phrase, 'to decide,' and his testimony was very clear on this. As he put it, '[i]n one sense, the wording is crystal clear, because these members of the Security Council, who know the difference between the word "decide" and "consider the situation", chose, I believe quite deliberately to use the words "consider the situation", and they could have said "decide" if that's what they meant.'[13] The fifteen States in the Security Council, furthermore, 'knew very well the difference between "consider" and "decide" [. . .] a deliberate choice [. . .] you draw the conclusion that it was intended that there should not be a decision.'[14] Obviously, for Lord Goldsmith, the distinction between 'to consider' and 'to decide' was key: it was, in effect, the difference between lawfulness and unlawfulness, a difference of substance, a difference of kind.

Since Sir Michael, Ms. Wilmshurst, and Lord Goldsmith had reached such diametrically-opposed legal conclusions on the applicability or otherwise of one of the two recognised exceptions to article 2(4) of the Charter, can it be said that one of them had 'incorrectly' applied the 'correct' rubric for interpreting the law in this area? This begs the question of how Security Council Resolutions are to be interpreted. The International Court of Justice (ICJ) provided some guidance on this in its 1971 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* Advisory Opinion (*Namibia*).[15] In that case, it had to determine how to interpret the binding nature of Security Council Resolutions. It adopted a case-specific approach to language that focussed on the words used in the Resolution at issue, the discussions

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[13] Rt Hon Lord Goldsmith QC, Oral Evidence, Iraq Inquiry, 27 Jan 2010, http://www.iraqinquiry.org.uk/media/45317/20100127goldsmith-final.pdf, 49.
[14] Ibid 155. See ibid 77-80.
[15] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (*Advisory Opinion*) [1971] ICJ Rep 16.

that lead up to its adoption, which Charter provisions were referred to in the Resolution, and any other considerations that could potentially be regarded as being of use.[16] Ironically, Sir Michael made a similar point about the interpretation of Security Council Resolutions in his 15 January statement to the Inquiry,[17] and Lord Goldsmith expressly referred to the *Namibia* precedent in his testimony.[18] Obviously, though, their conclusions could not have been more different.[19]

What must surely be acknowledged, or, to phrase the matter more appropriately for the ideologues on either side in the debate, conceded, is that the witnesses had each invoked the interpretive indicia referred to in *Namibia* with an undeniable degree of rigour in their testimonies before the Inquiry. It was not a matter of any of them having not 'known the law,' much less having 'incorrectly' interpreted and applied it to the facts of Iraq.[20] Each of them sincerely *believed* that their interpretation of the *jus ad bellum* that the United Kingdom had consented to under international law was 'correct' on the facts of Iraq. There was no question of Sir Michael, Ms. Wilmshurst, or Lord Goldsmith having not scrupulously combed the record, as even the most cursory review of the transcripts of their testimonies reveals.

Ms. Wilmshurst, reflecting upon the fact that international law often operates as a 'court-less' legal system, argued in her testimony that 'simply because there aren't courts, it ought to make one more cautious about trying to keep within the law,

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[16] See ibid 53.

[17] See Sir Michael (n 10) 5. See also Sir Michael (n 6) 25 (stating that '[t]he degree of weight, it is quite a subtle thing obviously. The principal thing is the language of the resolution, but the extent to which you can pray in aid other statements made to the side depends very much on the circumstances.').

[18] See Lord Goldsmith (n 13) 120-22.

[19] It should be noted that *Kosovo* gave a nuanced rubric for interpreting Security Council Resolutions that combined elements of *Namibia* and the VCLT. See *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (*Advisory Opinion*) [2010], para 94, http://www.icj-cij.org/docket/files/141/15987.pdf. The ICJ delivered *Kosovo* on 22 July 2010, several months after the testimonies at issue.

[20] Likewise, it was not a matter, as the Dutch Committee of Inquiry on Iraq put it in the Dutch context, of the Dutch Ministry of Foreign Affairs' interpretation of international law on the invasion of Iraq 'not [having been] based on a thorough, up-to-date legal analysis.' *Rapport* (n 12) 531.

not less.'[21] Another way of phrasing this in the present context would be to say that in grappling with international law's general prohibition on the threat or use of force, the *lex generalis,* and its two exceptions, self-defence and when the Security Council has authorised force, the *lex specialis,* particular care should be taken to maintain the default posture of the prohibition and to only exceptionally contemplate the possibility of a legal case for force.

The argument that the *lex specialis derogat generali* principle somehow 'settles' the *jus ad bellum* issue on the facts of Iraq, or the related implication that it necessarily makes the legal case for force 'less tenable,' is, however, ultimately unconvincing, because of its inherent circularity. The *lex generalis* and *lex specialis* are not 'out there,' 'in the sky.' It is not a matter of 'carrying out orders,' much less communing with that 'brooding omnipresence.'[22] The law in this context is created by women and men on the ground, and it is modified through the acts and omissions of State and non-State actors alike. The *lex generalis* and *lex specialis* are constantly evolving, though, to be sure, there is a jurisprudence and 'accepted wisdom' upon which they draw. Neither Lord Goldsmith nor those who found against the lawfulness of the 2003 invasion of Iraq denied the exceptional nature of the use of force under international law. Indeed, both sides in the debate acknowledged it and could not plausibly have articulated their arguments without having done so. Indeed, both sides were sincerely convinced that they were waving *the* 'mantle of law,' that they had kept, to use Ms. Wilmshurst's phrase, *'within the law.'*

[21] Wilmshurst (n 11) 9.
[22] To use United States Supreme Court Justice Oliver Wendell Holmes' description of the common law as not being a 'brooding omnipresence in the sky.' *Southern Pacific Company v Jensen,* 244 US 205, 222 (1917) (Justice Holmes, dissenting).

Ultimately, the lawyerly longing for *terra firma*, that seemingly insatiable desire, in other words, to 'look[] at a text objectively,'[23] to insist upon the 'objective view,'[24] the 'true legal position,'[25] is akin to the quest for the holy grail. As Ago, writing in 1957, put it, 'words have no meaning of their own, endowed with an objective existence which one has only to specify in order to ensure exact understanding; [. . .] they only have the meaning which is conferred on them by use; and [. . .] therefore one must use them with the greatest care if the meaning one wishes to convey is to be correctly understood.'[26] Recourse to 'objectivity' and 'truth,' here as elsewhere in the law, too often obscures a 'hegemony of neutrality' that seeks to position itself 'above' politics even though it is necessarily 'of' politics.[27]

Recognising the 'mushiness' of law in this context does not absolve the lawyer from having to 'take a stand' for his or her cause or client. As Lord Goldsmith put it in his testimony before the Inquiry, 'at the end of the day you can't throw up your hands and say, "I don't really know what this means."'[28] Whether one views this as freedom or as debilitation reflects one's view of the role of law in international affairs and the efficacy of legal argument. It mirrors Meursault's sardonic realisation in Camus' *L'Étranger,* 'J'ai pensé à ce moment qu'on pouvait tirer ou ne pas tirer.'[29] 'Tirer ou ne pas tirer,' arguing the legal case for or against the March 2003 invasion of Iraq, is an 'exercise in choice.'[30] Ultimately, it is also a matter of preference. As

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[23] Sir Michael (n 6) 23.
[24] Wilmshurst (n 11) 17.
[25] Sir Michael (n 6) 47.
[26] R Ago, 'Positive Law and International Law' (1957) 51 AJIL 691, 691-92.
[27] Compare BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 Int'l Comm L Rev 3, 15-16.
[28] Lord Goldsmith (n 13) 44.
[29] A Camus, *L'Étranger* (Gallimard, Paris, 1953) 84.
[30] *Armed Activities on the Territory of the Congo* (*New Application: 2002*) (*Jurisdiction and Admissibility*) (*Democratic Republic of the Congo v. Rwanda*) (Judgment) [2006] ICJ Rep 6, 89 (Judge Dugard, separate) (asserting that, '[w]here authorities are divided, or different general principles

Lord Goldsmith candidly put it in his testimony before the Inquiry, it is a matter of asking oneself: '"Which side of the argument would you prefer to be on?"'[31] And lawyers, much less *international* lawyers, have nothing particularly special to say on matters of 'right' and 'wrong.'[32]

To conclude, in assessing the proper application of the *jus ad bellum* to the invasion of Iraq, it will be important for the Inquiry to avoid committing the great cardinal sin of international law: idolising law and obfuscating politics for the sake of partisan advantage.

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compete for priority, or different rules of interpretation lead to different conclusions, or State practices conflict, the judge is required to make a choice. In exercising this choice, the judge will be guided by principles (propositions that describe rights) and policies (propositions that describe goals) in order to arrive at a coherent conclusion that most effectively furthers the integrity of the international legal order.').

[31] Lord Goldsmith (n 13) 118.

[32] In her testimony before the Inquiry, Ms. Wilmshurst famously dismissed the legal opinion of Rt. Hon. Jack Straw MP, Secretary of State for Foreign and Commonwealth Affairs between 2001 and 2006: 'He is not an *international* lawyer.' Wilmshurst (n 11) 8 (emphasis added).