Submission to the Chilcot Inquiry on the UK's Legal Basis for Military Action in Iraq

IRAQ: THE THREAT OF FORCE AND MATERIAL BREACHES OF RESOLUTIONS OF THE SECURITY COUNCIL

By

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A. Introduction

1. In July 1996, in the context of its advisory opinion on the lawfulness of the threat or use of nuclear weapons, the International Court of Justice concluded that "[t]he notions of 'threat' and 'use' of force under Article 2, paragraph 4, of the Charter [of the United Nations] stand together in the sense that if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter."[1] Taken together with other statements of the Court on that occasion, it is clear that any assessment of the lawfulness of the use of force might wish to provide some account of any "signalled intention"—that is, any threat—that has been made to use that force.[2] Additionally, in its analysis, the Court appeared to emphasize the importance of the identification of the actor (or actors) specifically responsible for a given threat or use of force, since the Court made clear that "it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths,"[3] in much the same way that it would be illegal for a State to use force for the sample justifications given by the Court (i.e. the securing of territory or so-called political or ideological interventions).

2. The Court was therefore concerned in its advisory opinion with threats and uses of force undertaken by States; it was not considering threats or uses of force undertaken by an international organization such as the United Nations, still less by States acting pursuant to an authorization provided by any such international organization. (Note: there would have been no question of the illegality of the United States intervention in Haiti in 1994; though this operation bore some of the hallmarks of what is traditionally termed a right of "political" or "ideological" intervention of States, it was conducted with the authorization that the Security Council had provided in Resolution 940 of July 1994).[4] In this submission, we shall find it useful to consider the events that

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[1] (1996) I.C.J. Rep. 226, 246 (§47).

[2] *Ibid.*

[3] *Ibid.* (Emphasis supplied).

[4] According to the fourth operative paragraph of this resolution, the Council invoked its enforcement powers under Chapter VII of the United Nations Charter and authorized "Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the

led up to Operation Iraqi Freedom in March 2003 from the perspective of the threat of force, but we shall also want to give some attention to the underpinning logic of the legal argument concerning the consequences of the "material breach" of resolutions of the Security Council by one of the Member States of the United Nations.

B. Security Council Resolution 1441 (November 2002)

3. It is useful for us to turn to Security Council Resolution 1441 with this framework in mind, for, while it is well-known and universally appreciated that the Security Council did not authorize force against Iraq in November 2002, it is rare for Resolution 1441 to be treated in legal terms as a threat of force. Yet, this is precisely what the Security Council did in that resolution. The Council did so in the second operative paragraph of Resolution 1441 by affording Iraq "a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council," and, equally importantly, in the penultimate operative paragraph, the Council recalled that it has repeatedly warned Iraq of "serious consequences as a result of its continued violations of its obligations."[5] To this end and amongst other things, the Council instituted what it called "an enhanced inspection regime" for Iraq, and required Iraq to provide UNMOVIC, the IAEA as well as the Council, "a currently accurate, full, and complete declaration" of all aspects of its weapons of mass destruction programs, before announcing that the Council would remain "seized of the matter."[6] Indeed, in the fourth operative paragraph of the resolution the Security Council announced that any further material breaches by Iraq of its obligations would be reported to the Council for its "assessment". These representations of the Council, including the prospect of further assessment by the Council, make clear that, while the Council had not authorized the *use* of force against Iraq in Resolution 1441, it had by its words authored a *threat* of force against Iraq.

4. To be sure, it is not unusual for the Security Council to have issued a threat of force against one of the Member States of the United Nations; it did so most

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Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement, on the understanding that the cost of implementing this temporary operation will be borne by the participating Member States." The Court's *dictum* from its advisory opinion does require us to separate the threats of force the United States issued prior to the adoption of Resolution 940. *See*, further, David Adams, "Unease over Mandate as US Troops Sail for Haiti," The Times (London), Oct. 1, 1993, p. 17.

[5] *See* Craig Scott, "Iraq and the Serious Consequences of Word Games: Language, Violence and Responsibility in the Security Council," German Law J. (2002), Vol. 3, pp. 1-16.

[6] On this point, consider Vaughan Lowe, "Iraq: What Now," Int'l & Comp. L.Q. (2003), Vol. 52, pp. 859-871, at pp. 865-866.

famously in Resolution 678 of November 1990 when it decided to "allow Iraq one final opportunity, as a pause of goodwill" to comply fully with Security Council Resolutions—but where it then specifically "[a]uthorized Member States co-operating with the Government of Kuwait, *unless on or before 15 January 1991 fully implements ... [previous] 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."[7] (It will be noticed that, in the same manner that the Security Council has developed its lexicon of "all necessary means" to mean the *use* of force, so it has summoned the notion of a "final opportunity" as its way of making a *threat* of force—Resolutions 678 and 1441 bear testament to this emerging phenomenon). Resolution 678 therefore offers us an important and useful contrast to Resolution 1441 (2002), for, there, the Security Council issued a threat of force against Iraq in the same, immediate moment that it provided relevant and appropriate authorization for that force under the Charter.[8] Patently, this was not the model adopted for Resolution 1441.[9]

5. If it is understood that the Security Council issued a *threat* to Iraq in November 2002, then it becomes important to evaluate the lawfulness of any threats made by the United Kingdom against Iraq before as well as after the adoption of Resolution 1441. What would and could have been the legal basis of these threats? Could it be that, after 8 November 2002, the United Kingdom was simply repeating the threat of force made by the Security Council in Resolution 1441? If so, what, then, of any threats of force made by the United Kingdom against Iraq <u>before</u> this date? According to the reasoning of the International Court of Justice in July 1996, the legal position regarding the use of force *by any State* would need to be known in advance of the making of any threat of force *by that same State* in order to determine whether that threat (or set of threats) would be permissible under international law. Arguably, as the *dictum* of the Court seems to suggest, this thinking is confined to the action of

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[7] Second operative paragraph. Emphasis supplied.

[8] Subsequent, that is, to the legal basis of the right of collective self-defence: cf. Christopher Greenwood "New World Order or Old? The Invasion of Kuwait and the Rule of Law," Modern L. Rev. (1992), Vol. 55, pp. 153-178 and Eugene V. Rostow, "Until What? Enforcement Action or Collective Self-Defence?" Am. J. Int'l L. (1991), Vol. 85, pp. 506-516. Importantly, the Security Council had, in Resolution 678, defined the extent of "all necessary means" by reference to the restoration of international peace and security in the area—entailing something more than the mere restoration of the sovereignty of Kuwait.

[9] It ought to be noted *en passant*, again by contrast to Resolution 1441, that following its authorization in Resolution 678, the Council requested "the States concerned to keep the Security Council regularly informed on the progress of its actions undertaken pursuant to [the authorization]": while the Council would "remain seized of the matter" in the final operative paragraph of Resolution 678, it was not envisaged from this earlier operative paragraph that any further substantive intervention by the Council was necessary as a matter of international law for any force that would occur against Iraq after 15 January 1991.

States; it would not apply to the Security Council who could, conceivably, issue a threat of force independent of any authorization for the use of force (which could be taken, as so clearly seems to be the case with the terms of Resolution 1441 as detailed above, at an unspecified date in the future).[10] In other words, it need not be the case that all "threats" of and authorizations for force by the Security Council follow the format adopted in Resolution 678.

C. The Enforcement of Security Council Resolutions

6. The existence and implications of the threat of force in Resolution 1441 aside, it is necessary to observe that the Security Council considered that its efforts in Resolution 1441 were designed to uphold the resolutions of the Security Council—as well as international law more generally—for the Council expressed its determination in the preamble to that resolution "to ensure full and immediate compliance by Iraq without conditions or restrictions with its obligations under Resolution 687 (1991) and other relevant resolutions." The Council also recalled in that preamble "that the resolutions of the Council constitute the governing standard of Iraqi compliance."

7. We have already indicated how the Security Council authorized force in November 1990 for the implementation of its own resolutions, but Resolution 678 is itself exemplary of the approach taken by the Council in providing for authorization of force for the enforcement of its own resolutions subsequent to the non-forcible measures that the Council has or may have taken elsewhere (e.g. under Article 41 of the Charter, such as its demand, in Resolution 660 of August 1990, that Iraq withdraw immediately and unconditionally all of its forces from Kuwait to their positions as held on 1 August 1990). As further examples of this approach, we should consider:

- Security Council Resolution 221 (1966), adopted further to the sanctions on arms, equipment and military material imposed on Southern Rhodesia in Resolution 217 (1965), called upon "the Government of the United Kingdom of Great Britain and Northern Ireland to prevent, by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia, and empowers the United Kingdom to arrest and detain the tanker known as *Joanna V* upon her departure from Beira in the event her oil cargo is discharged there";

[10] Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press) (3rd ed., 2008), pp. 356-357.

- Security Council Resolution 665 (1990), adopted further to the comprehensive economic sanctions regime of Resolution 661 (1990), where the Council called upon "those Member States cooperating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in Resolution 661 (1990)";

- Security Council Resolution 781 (1992) imposed a ban on all military flights in the air space of Bosnia and Herzegovina, which was expanded to cover all fixed-wing and rotary-wing aircraft. This occurred in Resolution 816 (1993)—the same resolution that authorized Member States of the United Nations to take "under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures" to ensure compliance with Resolution 816;

- Security Council Resolution 836 (1994), adopted further to the creation of safe areas of Sarajevo, Tuzla, Zepa, Gorazde, Bihac and Srebrenica in Resolution 824 (1993), in which the Security Council:

  > [d]ecide[d] to extend to that end the mandate of UNPROFOR in order to enable it, in the safe areas referred to in resolution 824 (1993), to deter attacks against the safe areas, to monitor the cease-fire, to promote the withdrawal of military or paramilitary units other than those of the Government of the Republic of Bosnia and Herzegovina and to occupy some key points on the ground, in addition to participating in the delivery of humanitarian relief to the population as provided for in Resolution 776 (1992) of 14 September 1992.

This is not to suggest that the Security Council might never elect to authorize force for the enforcement of its own resolutions in the very resolution that announces non-forcible measures against a State—indeed, Resolution 816 (1993), mentioned above, would also be a good example of this approach[11]—but the intimations made by the Security Council in Resolution 1441 were very much of an order to suggest that the Council had issued a threat of force against Iraq in November 2002, with a view *to the Council* taking additional measures—including an authorization of force—if the recalcitrance of Iraq

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[11] See, however, Rosalyn Higgins, who has argued that the examples of Southern Rhodesia and Iraq, carried the "implication" that "force could be authorized to implement economic sanctions without the use of force being viewed as military sanctions under Article 42": *Problems and Process: International Law and How We Use It* (Clarendon Press: Oxford) (1994), p. 258.

with its international law obligations continued. It is for this reason, we can confidently presume, that the Security Council spoke of its intended "assessment" of Iraq's behaviour post-Resolution 1441 in the fourth operative paragraph of that resolution, which would be taken in accordance with the specifications of the eleventh and twelfth operative paragraphs of that resolution.

D. Resolution 687 (1991): The "Cease-Fire Resolution"

8. Of course, the matter is somewhat complicated by the fact that the United Kingdom (amongst other States) argued that the authorization contained in Resolution 678 could be reactivated by any material breach committed by Iraq of its obligations in Resolution 687—the so-called "cease-fire resolution" that drew to a close the hostilities of Operation Desert Storm in March 1991[12]—an argument that the United Kingdom had used previously, *e.g.* in respect of Operation Desert Fox (1998).[13] The effect of this argument would be to relocate us from the paradigm of the *jus ad bellum* (which governs the technicalities of the entitlements of States to threaten or use force under international law) and place us squarely within the *lex specialis* on ceasefires where, it has been argued, the language of "material breach" simply serves as the modern equivalent for "serious violations" of ceasefires as envisaged in the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land.[14]

9. Be this as it may, what emerges from the legal justification advanced by the United Kingdom for its intervention in Iraq in March 2003 is the following:

   9.1. If there is any validity at all to the legal justification of the United Kingdom, there would have been no legal necessity whatsoever for the Security Council to adopt Resolution 1441—or, indeed, any other resolution—on Iraq; the logic of the position of the United Kingdom dictates that all that would have been necessary for a permissible intervention to have occurred in March 2003 or before would have been a

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[12] Christine Gray, "After the Ceasefire: Iraq, the Security Council and the Use of Force," British Yrbk. Int'l L. (1994), Vol. 65, pp. 135-174. *See*, also, Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge: Cambridge University Press) (4th ed., 2005), p. 53.

[13] Ruth Wedgwood, "The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction," Am. J. Int'l L. (1998), Vol. 92, pp. 724-728.

[14] Dinstein, p. 57. According to Art. 40 of the Hague Regulations, "[a]ny serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately." *See*, further, the remarks of Yoram Dinstein, "Debate: Adjudicating Operation Iraqi Freedom," Proceedings of the Am. Soc. Int'l L. (2006), Vol. 100, pp. 179-202, at p. 193.

"material breach" by Iraq of its obligations under Resolution 687, as determined by the United Kingdom and/or the United States, and, presumably, by any other Member State "co-operating with the Government of Kuwait" in accordance with the second operation paragraph of Resolution 678—for it is to this constituency of States that the authorization contained in Resolution 678 was actually addressed;[15]

9.2. Once the Security Council adopted Resolution 1441, we can presume that, according to the strict logic of the position of the United Kingdom, it *would have been fully within its rights under international law as it had claimed them* to intervene in Iraq the very moment that Resolution 1441 was adopted. This is because the Council had confirmed therein—in the first operative paragraph of that resolution—that "Iraq *has been and remains in material breach* of its obligations under relevant resolutions, including Resolution 687 (1991)."[16] For the Council, Iraq *remained* in material breach of its various obligations under international law, and, in so doing, the Council introduced the concept of an ongoing material breach (or set of material breaches) into the legal analysis—one that could best be accommodated by the setting out of a clear timetable for action and counteraction which, as we have argued here, is what the Council had fully sought to do in Resolution 1441. Yet, from the position of the United Kingdom as understood and as set out in 9.1. above,[17] the United Kingdom could quite conceivably have invoked the concept of an ongoing material breach for the purpose of reactivating the authorization from Resolution 678 the split second after the unanimous vote for Resolution 1441 had been cast.[18]

9.3. Finally, it is not at all clear why former British Prime Minister Tony Blair admitted in December 2009, prior to his appearance before the Chilcot Inquiry in January of this year, that the absence of weapons of mass destruction in Iraq would not have affected his position that it was "right to remove [Saddam Hussein]" from power in Iraq—but then, as he went on

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[15] On this point, consider Gray, p. 357.

[16] Emphasis supplied.

[17] *See*, further, the official position of the United Kingdom at UN Doc. S/2003/350.

[18] As it happened, the United Kingdom announced in January 2003 that a "material breach" by Iraq had occurred: James Blitz, Guy Dinmore & Mark Turner, "U.K. Declares 'Material Breach' By Iraq," Financial Times (New York), Jan. 29, 2003, p. 5. Importantly, the United States had reached its decision on the matter in Dec. 2002: David E. Sanger & Julia Preston, "U.S. Weighs How Serious An Arms-Violation Charge to Make Against Baghdad," N.Y. Times, Dec. 19, 2002, p. A14.

to claim, "you would have had to use and deploy different arguments about the nature of the threat."[19] If the legal justification of the United Kingdom is to be accepted in all of its complexity and ramifications, why would this have been so? And why would the former Prime Minister have thought it to be so?[20] Again, assuming the validity of the legal justification put forward by the United Kingdom, it presumably was the position that any material breach by Iraq of its obligations would have been sufficient to revive the authorization contained in Resolution 678—and not solely those material breaches pertaining to Iraq's disarmament obligations and its possession (or otherwise) of weapons of mass destruction. After all, Resolution 1441 had connected Iraq's material breaches to its "failure to co-operate with United Nations inspectors and the IAEA," but, in the same breath, the Council also mentioned Iraq's failure "to complete the actions required under paragraphs 8 to 13 of Resolution 687." Furthermore, in the fourth operative paragraph of Resolution 1441, the Council envisaged the possibility of material breach by Iraq of its reporting obligations under that resolution. In other words, the presence or absence of weapons of mass destruction was only one possibility for a material breach to occur if the legal arguments of the United Kingdom are developed to their fullest capacity,[21] which, in turn, would reactivate the authorization contained in Resolution 678. A material breach could equally have been found by Iraq's failure to co-operate with weapons inspectors or in the falsification of statements—neither of which would have required "different arguments," certainly different legal arguments, to be made by the United Kingdom if its legal justification is to be accepted or rendered as valid.

E. Conclusion

10. In this submission, we have argued in favour of seeing the legal justification of the United Kingdom in the broader set of facts of which it formed so crucial a part. We have done so with a view to exploring the implications of interpreting Resolution 1441 for what it truly was—a threat of force *by the Security Council* and no more or no less than that. This was by way of preface to treating the

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[19] *See* Riazat Butt & Richard Norton-Taylor, "Blair: I Would Have Invaded Iraq Anyway," The Guardian (London), Dec. 12, 2009, p. 1.

[20] On his representations to the Inquiry itself, consider Patrick Wintour & Richard Norton-Taylor, "Righteous, Responsible but No Regrets: Tony Blair's Day in the Dock," The Guardian (London), Jan. 30, 2010, p. 1.

[21] As I have argued elsewhere, again holding this justification up to its own full logic and completeness: Dino Kritsiotis, "Arguments of Mass Confusion," European J. Int'l L. (2004), Vol. 15, pp. 233-278, at pp. 265-266.

fuller implications of the legal justification advanced by the United Kingdom for Operation Iraqi Freedom in March 2003, and, in the penultimate section of this submission, we have analysed more fully what this justification might well have meant through the operation of the concept of "material breach," and have done so on the basis that this justification is valid in principle and accepted as such under international law.