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International Law Submission to the Iraq Inquiry

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A. Introduction

1. This document was prepared by Oxford Pro Bono Publico (OPBP) in response to the call for submissions from international lawyers issued by the Iraq Inquiry on 2 June 2010.

2. This submission answers the question whether by virtue of United Nations Security Council (UNSC) Resolutions (SCRs) 678, 687, and 1441 the elements were in place for a properly authorised use of force in respect of the invasion of Iraq by coalition forces in 2003.

3. In answering this question, this submission will also address the correct approach to the interpretation of these SCRs and the legal effect of Operative Paragraphs (OPs) 1, 4, 11, and 12 of SCR 1441.

4. The analysis of this submission will follow the structure set out by the Attorney General (AG) in his advice of 7 March 2003.[1] First, it will demonstrate that the revival theory has no sound legal basis (Section B). Thereafter, for the sake of the argument, it will submit that in any event SCR 1441 could not have revived the authorisation to use force in SCR 678 (Section C).

B. Does the Revival Theory have a Sound Legal Basis?

5. The revival theory as put forward by the UK rests on the proposition that the prior authorisation to use force against Iraq under SCR 678 could be revived without an express authorisation by the UNSC. This proposition, in turn, rests on two further claims.

6. First, the authorisation to use force in SCR 678 was suspended, not terminated, by SCR 687.[2] That is, the authorisation to use force in SCR 678 was not definitively 'repealed';[3] rather, it lay dormant.[4]

7. Second, the authorisation to use force in SCR 678 was revived by the following factors: (1) the UNSC determination that a material breach of SCR 687 had occurred;[5] (2) the 'further material breach' of SCR 687's ceasefire conditions arising from the continued failure of Iraq to respond to the 'final opportunity' afforded to it by SCR 1441 to comply

[1] See Attorney General, 'Iraq: Resolution 1441' (7 March 2003) (AG Advice).

[2] See AG Advice (n1) para 7; Hansard HL vol 646 cols WA2–WA3 (17 March 2003) (HL Response) para 2; Foreign and Commonwealth Office, 'Iraq: Legal Basis for the Use of Force' (17 March 2003) (FCO Memorandum) para 1.

[3] FCO Memorandum (n2) paras 5 and 9.

[4] See also HL Response (n2) para 8 ('… and so continues today').

[5] See HL Response (n2) paras 3, 7–8; FCO Memorandum (n2) paras 5, 9.

with the disarmament obligations imposed by previous SCRs;[6] and (3) the further consideration and discussion of Iraqi non-compliance by the UNSC[7] irrespective of whether that discussion culminated in a UNSC final decision on further measures.[8] The revival theory holds that these factors revived the authorisation to use force contained in SCR 678, rendering it unnecessary for the UNSC to have authorised the use of force anew.

8. OPBP submits that the reasoning underpinning the claims set out in paragraphs 6–7 should be rejected. The second claim is discussed first, since it is advanced as a general proposition, independently of the specific language of the SCRs under consideration.

9. The second claim fails properly to consider the UN collective security scheme as a whole. The basic premise of the collective security system established by the UN Charter is the prohibition on the use of military force (Article 2(4)) without UNSC authorisation; exceptions[9] are not relevant here. The UNSC discharges its responsibilities within the collective security process under Chapter VII of the Charter. Collective decisions are taken through voting (Article 27(3)). Voting constitutes the final stage of the process that is preceded by discussions.[10] Discussions alone do not exhaust the collective security process set out in the UN Charter.

10. After the UNSC determines whether a threat to the peace exists (Article 39), it must, *in addition,*[11] decide whether non-forcible or forcible measures should be taken to deal with this threat. The UNSC, having primary responsibility for the maintenance of peace and security, has wide discretion in this matter.[12] It also has wide discretion in the choice of Member States operating under its delegated authority (Article 48). The delegation of UNSC authority under Chapter VII must not be presumed lightly.[13]

11. SCR 678 was a collective measure enacted under the aforementioned procedures. It was intended to facilitate the removal of a threat to the peace, by measures including the use force where necessary. Similarly, a clear and specific UNSC authorisation was necessary for the use of force against Iraq in 2003. For the UNSC to reaffirm in SCR

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[6] SCR 1441 (8 November 2002) UN Doc S/RES/1441, OP2, 4. This point is advanced in AG Advice (n1) para 15(c) and FCO Memorandum (n2) para 12.

[7] SCR 1441 (n6) OP12.

[8] AG Advice (n1) paras 15(d), 22 (see also FCO Memorandum (n2) para 11). The US version of the argument is that the occurrence of a 'material breach' could be determined by UN Members objectively, independently of the UNSC (see AG Advice (n1) paras 9, 22).

[9] See also AG Advice (n1) para 2.

[10] Rüdiger Wolfrum, 'Article 27' in Bruno Simma *et al*, *The Charter of the United Nations* (OUP, Oxford 2002) vol 1, 508–09 para 94.

[11] See Jochen Frowein, Nico Krisch 'Introduction to Chapter VII' in Simma (n10) vol 1, 713–14 para 36.

[12] Charter of the United Nations (opened for signature 26 June 1945; entered into force 24 October 1945) 3 Bevans 1153, arts 41 ('The Security Council *may* decide') and 42 ('*Should* the Security Council *consider* … it *may* take') (emphasis added). See also Pierre D'Argent *et al*, 'Article 39' in Jean-Pierre Cot, Alain Pellet, Mathias Forteau, *La Charte des Nations Unies: Commentaire Article par Article* (3rd edn, Economica, Paris 2007) vol 1, 1165, 1169; Frowein and Krisch (n11) vol 1, 714 para 36.

[13] Frowein and Krisch (n11) vol 1, 713 para 33.

1441 its own competence to make such determinations[14] or decide '… what happens next'[15] if Iraq failed to comply would have been redundant. Silence or lack of clarity in SCR 1441 or in statements of UNSC Members cannot detract from the premise of the Charter: the default position established by the Charter and its collective security system is that military force in such situations is not to be employed absent explicit authorisation. In accordance with the Charter's collective security process, UN Members cannot substitute their own judgment for that of the UNSC on Iraq's continued non-compliance with SCR 1441.

12. The instances of the use of force against Iraq by Member States in the years 1993, 1998, and 2001 relied on by the UK[16] were opposed by UN Members and were never approved by the UN itself as lawful uses of force.[17] These are not instances of subsequent practice establishing agreement of the parties regarding treaty interpretation in the sense of Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT).[18] Consequently, this practice does not detract from the conclusion that clear and specific UNSC authorisation was necessary.

13. The discussion will now turn to consider the other claim underpinning the revival theory: that the authorisation to use force in SCR 678 was suspended, not terminated, by SCR 687.

14. SCR 687 imposed a cease-fire.[19] The authorisation to use force ceased. This decision, taken under Chapter VII, was binding on UN members.[20] Any revival of SCR 678 would set aside the legal effects of SCR 687. This could not occur without UNSC involvement in accordance with the UN collective security process.

15. Even if the authorisation in SCR 678 lay dormant, nothing contained in the text of SCR 687 or in subsequent resolutions suggests the UNSC intended to waive its competence in these matters. That competence includes the prescription of forcible and non-forcible measures. This being the case, it would be unnecessary for the UNSC to reaffirm that a further authorisation to use force was needed against Iraq.[21] It is insufficient for these purposes that the UNSC found Iraq to be in 'material breach' of SCR 687.

16. On the basis of the foregoing considerations, the revival theory should be rejected. It is contrary to the object and purpose of the collective security processes established by the

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[14] Cf. the inference drawn from absence of the word 'decide' in SCR 1441 in AG Advice (n1) para 15(d); FCO Memorandum (n2) para 11.

[15] AG Advice (n1) para 13.

[16] See on this FCO Memorandum (n2) paras 6–8; AG Advice (n1) para 8.

[17] See the account in Christine Gray, *International Law and the Use of Force* (2nd edn OUP, Oxford 2004) 264–67.

[18] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969; entered into force 27 January 1980) 1155 UNTS 331.

[19] SCR 687 (3 April 1991) UN Doc S/RES/687, OP 33 ('… a formal cease-fire').

[20] See UN Charter (n12) art 25.

[21] AG Advice (n1) para 21.

UN Charter and usurps the competence of the UNSC. The revival theory does not have a sound international legal basis.

C. Does SCR 1441 Revive the Authorisation of SCR 678?

17. Although Section B concludes that the revival theory has no sound legal basis, the following analysis nevertheless assumes, *arguendo*, the conceptual viability of the revival theory and considers the correct approach under international law to the interpretation of SCR 1441.

18. The UNSC decided that Iraq '… has been and remains in material breach' of its obligations under, *inter alia*, OPs 8–13 of SCR 687.[22] It nonetheless decided to '… afford Iraq, by this resolution, a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council'.[23]

19. The AG argued that the determination in OP1 of SCR 1441 of a 'material breach' by Iraq revived the authorisation to use force in SCR 678,[24] and that OP2 had the effect of suspending the legal consequences of a determination of material breach in OP1, which would have otherwise revived the use of force.[25] Under the VCLT,[26] a material breach of a treaty by one party entitles the other party to invoke it as a ground for terminating the treaty or suspending its operation in whole or in part. 'Material breaches' are more 'serious' than 'ordinary' ones and 'destroy'[27] the basis for further compliance with the relevant treaty.

20. Material breaches of treaty provisions do not *automatically* terminate or suspend treaties or provisions thereof. Rather, they may be invoked as a ground for such a suspension or termination.[28] An additional decision as to suspension or termination would have to be made. Under the Charter this decision would fall on the Security Council, especially if the suspension or termination of SCR 687 would result in the use of force. The UNSC did not do so explicitly in either OP1 or elsewhere in SCR 1441, despite its previous warning (in OP13) that non-compliance by Iraq may lead to 'serious consequences'.

21. Furthermore, in 1991 Iraq was found to be in 'material breach' of its disarmament obligations under SCR 687[29] but no use of force was inferred by Member States from

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[22] SCR 1441 (n6) OP1.

[23] SCR 1441 (n6) OP2.

[24] HL Response (n2) paras 3, 7–8.

[25] AG Advice (n1) para 12.

[26] VCLT (n18) art 60.

[27] Cf. *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, 47 para 95; AG Advice (n1) paras 7 ('undermine'), 12, 15(a), 17, 26.

[28] Mohammed M Gomaa, *Suspension or Termination of Treaties on Grounds of Breach* (Nijhoff, The Hague 1996) 95; Bruno Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its Background in General International Law' (1970) 20 *ÖZöR* 5, 26 (fn 77 and associated text). See also Arnold DM McNair, *The Law of Treaties* (Clarendon Press, Oxford 1961) 553.

[29] SCR 707 (15 August 1991) UN Doc S/RES/707, OP1.

this determination.[30] The original authorisation to use force and decision to impose a ceasefire was made by the UNSC in SCRs 678 and 687. It was for this body collectively, not for Member States individually, to decide to terminate or suspend the cease-fire. The UNSC did not do so in SCR 1441.

22. In addition, the text of SCR 1441 makes clear that the UNSC remained engaged with the matter. It decided (in OP4) that false statements, omissions, non-compliance, and non-cooperation with SCR 1441 '… shall constitute a further material breach.' It directed the Executive Chairman of UNMOVIC and the Director-General of the IAEA to report such Iraqi actions to the UNSC for assessment (in OP11). It decided (in OP12) to 'convene immediately upon receipt of a report' to consider the situation. The process thus consists of report, assessment, and consideration. It was within the UNSC's power to take any measures that it deemed appropriate, not only forcible measures. It did not do so.

23. Both the US and UK interpretations of SCR 1441 are premised on the idea that a further UNSC decision was not necessary to authorise force. The US interpretation allows independent determination of Iraq's further non-compliance on receipt by the US of the UNMOVIC/IAEA report. This interpretation is implausible: a draft of SCR 1441 circulated on 25 September 2002 which provided that in the event of a further material breach '… that such breach authorises Member States to use all necessary means to restore international peace and security'[31] was rejected by the UNSC. The paragraph containing this passage was identical to OP4 in SCR 1441 except for this authorisation to use 'all necessary means.' It is significant that this phrase disappeared when officially presented to the UNSC a month later.[32]

24. The UK's interpretation is more nuanced, and is premised on the use of the word 'consider' in OP12. This interpretation suggests that although SCR 1441 required further UNSC *discussion*, there was no requirement for another resolution since OP4 had already pre-determined the legal consequences ('further material breach'). On this view, the UNSC discussion could be considered 'a procedural formality': a meeting in which all members were under an obligation to participate in good faith. Following the meeting, Member States could use force even if an overwhelming majority of Council members were opposed to it.[33]

25. This more nuanced interpretation must also be dismissed. Any interpretation that an inconclusive discussion authorises the use of force undermines the UN Charter's collective security processes.[34] Such an interpretation is incompatible with the very purpose of the centralisation of decision-making on the use of force and would gravely

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[30] Cf. analysis of UNSC practice regarding 'material breaches' of SCR 687 in AG Advice (n1) para 10; FCO Memorandum (n2) para 9.

[31] 'Latest US-Britain Draft of Resolution in the UN', *New York Times*, 2 October 2002 (<http://www.nytimes.com/2002/10/02/international/middleeast/02RTEX html?pagewanted=1> accessed 10 July 2010.

[32] UNSC Draft Resolution (7 November 2002) UN Doc S/2002/1198 <http://www.un.org/News/dh/iraq/iraq-blue-e-110702-1198.pdf> accessed 10 July 2010, OP4.

[33] AG Advice (n1) paras 15, 24(iii).

[34] As discussed in para 9, above, a decision by the UNSC requires a vote, not a mere discussion.

undermine the collective security process established by the Charter. No Member State threatened by another with an illegal use of force should fear that bringing this matter to the attention of the UNSC for redress could be interpreted as a green light for an aggressor.

26. A further consideration against such an interpretation is that a draft resolution aimed at procuring an authorisation to use of force was circulated on 24 February 2003 by Spain, the US and the UK,[35] but was withdrawn owing to insufficient support.[36] This episode supports a different interpretation, advanced by other Member States, that following UNSC assessment and consideration of the report(s), the UNSC had to adopt a further resolution explicitly authorising the use of force.[37]

27. Another important point is that the legislative history of SCR 687 does not clearly link weapons of mass destruction with SCR 678. Obligations concerning weapons of mass destruction do not feature in SCR 678. The same is true of the resolutions that preceded SCR 687 and which feature in its preamble. None of these resolutions dealt with weapons of mass destruction. Instead, they condemned the invasion of Kuwait;[38] decided to take forcible[39] and non-forcible[40] measures against Iraq and measures to protect the civilian population;[41] demanded the release of hostage diplomats and foreign nationals;[42] condemned the destruction of Kuwaiti civil records;[43] and provided relief for UN Members under Article 50 of the Charter,[44] amongst other measures.[45] Consequently, the specific connection that the UK made in 2003 between the finding of material breaches of SCR 687 and the original authorisation in SCR 678 is by no means self-evident.

28. Finally, it should be noted that SCR 1441 includes neither language *requiring* further UNSC authorisation nor language *granting* such authorisation. The resolution should thus be interpreted in accordance with the core principles underlying Chapter VII of the Charter, namely that decisions addressing threats to international peace and security are made collectively and that a UNSC deadlock does not imply that States are free to use

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[35] UNSC Draft Resolution (24 February 2003) UN Doc S/2003/215 < http://www.un.org/News/dh/iraq/res-iraq-24feb03-en.pdf> accessed 7 July 2010. OP1 would have provided that the UNSC '... *Decides* that Iraq has failed to take the final opportunity afforded to it by resolution 1441 (2002)'.

[36] Sean Murphy, 'Assessing the Legality of Invading Iraq' (2004) 92 *Georgetown LJ* 173, 224 (fn 233 and associated text).

[37] See in this sense Ministry of Foreign Affairs of the Russian Federation, 'Legal Assessment of the Use of Force against Iraq' (2003) 52 *ICLQ* 1059, 1061–63.

[38] SCR 660 (2 August 1990) UN Doc S/RES/660.

[39] SCR 665 (25 August 1990) UN Doc S/RES/665, OP 1.

[40] SCR 661 (6 August 1990) UN Doc S/RES/661; SCR 662 (9 August 1990) UN Doc S/RES/662; SCR 670 (25 September 1990) UN Doc S/RES/670.

[41] SCR 666 (13 September 1990) UN Doc S/RES/666.

[42] SCR 667 (16 September 1990) UN Doc S/RES/667. See also SCR 674 (29 October 1990) UN Doc S/RES/674.

[43] SCR 677 (28 November 1990) UN Doc S/RES/677.

[44] SCR 669 (24 September 1990) UN Doc S/RES/669.

[45] SCR 686 (2 March 1991) UN Doc S/RES/686 confirmed many of these measures.

military force without UNSC authorisation.[46] The International Court of Justice, in its *Corfu Channel* judgment, held that contemporary legal restraints on the unilateral use of force do not dissipate where there might be defects in international organisation.[47] This consideration applies when a deadlock in the UNSC results from inability to accumulate sufficient votes for a resolution supporting the use of force and from the exercise of veto power. Were this otherwise, little would be left of the collective security system.

29. Article 42 provides that the UNSC has to determine that non-forcible measures 'would be inadequate or have proved to be inadequate' before it authorises the use of force. Absent such determination, there is a rebuttable presumption that the initial Charter preference for non-forcible measures persists. This is consistent with the fundamental prohibition on the use of force in Article 2(4). Indeed, deadlock is not always deadlock; in this case, it reflected opposition to the invasion.

D. Conclusion

30. For the reasons set out in Sections B and C, the Government's arguments regarding the legal basis for use of force against Iraq are insufficiently supported by international law. Accordingly, OPBP questions the legal soundness of the grounds used by the UK as legal basis for the military action in Iraq beginning in March 2003. The UN Charter grants the UNSC primary responsibility for decisions to use military force for the maintenance of international peace and security. This constitutes the very basis of the UN collective security framework. The fundamental principle in Article 2(4) should be honoured failing clear and unequivocal authorisation to the contrary.

[46] See para 9, above.

[47] (*UK v Albania*) [1949] ICJ Rep 4, 35.