IRAQ INQUIRY: SUBMISSIONS OF PROFESSOR MAURICE MENDELSON QC ON THE UK'S LEGAL BASIS FOR MILITARY ACTION IN IRAQ.

1. I am Emeritus Professor of International Law in the University of London and a Queen's Counsel at Blackstone Chambers London. As well as teaching public international law since 1968, I have practised it as a barrister since 1970. My full curriculum vitae can be found at www.blackstonechambers.com, but I **attach** a copy for ease of reference. I am responding to the Iraq Inquiry's invitation to international lawyers for submissions on the UK's legal basis for military action in Iraq. I comment only on the legal basis for the UK's action in resorting to force in March 2003, not on previous action in Iraq (except incidentally to the main discussion), nor on subsequent conduct.

2. By way of introduction, I wish to state that I agree with the view expressed in the then Attorney-General's Advice of 30 July 2002, paras. 2-6 that the grounds of self-defence and humanitarian intervention were not available as justifications for the use of force in this case. In the circumstances, the only available potential justification was authorisation by the Security Council under Chapter VII of the United Nations Charter.

3. Security Council Resolutions ("SCR"s) are not treaties. However, they are made under a treaty - the UN Charter; and more broadly, they are, like treaties, communications between and by States and are to be construed in accordance with the same general principles. This entails, in particular, that they are to be

interpreted in good faith, in accordance with the ordinary meaning of the words used (unless it is established that those who promulgated the resolution intended a special meaning to be given to the term), in their context and in the light of the resolution's object and purpose. The background to the resolution and what was stated by members of the SC before and after its adoption publicly (but not privately, since the SC is an organ of a wider body, the UN membership as a whole, as well as of the international community in a wider sense) may be relevant if the meaning is unclear.

4. In my opinion, taking these matters into consideration, there was no authority for the use of force by the Coalition without a resolution, subsequent to SCR 1441, specifically or (perhaps) by implication authorising the use of force, which further resolution was not of course forthcoming.[1]

5. My reasons are essentially the same as those set out in the AG's draft advice of 14 January 2003, and for the sake of brevity there is no need to repeat them or elaborate on them at length here. Essentially, SCR 1441 held that Iraq was already in continuing material breach of its obligations under SCR 687 in particular (operative paragraph - "OP" - 1); gave Iraq a final opportunity to comply with its obligations (OP 2), and *warned* of the serious consequences (not excluding the possible use of force) of non-compliance with existing obligations and the further reporting obligations (OP 2, 4, 12 & 13); *but* (a) made it sufficiently clear that the SC retained the authority to decide whether there had been a further material breach and what action to take in relation

[1] It is unnecessary to consider whether a statement made by the President of the SC on its behalf would have been sufficient, because none was made.

thereto and (b) did not formally commit itself to authorising or re-authorising the use of force should it find that Iraq had committed a further material breach (OP 2; 4 - esp. the final clause; 12 - "in order to consider ..." and "the need for full compliance" ; 13 - "serious consequences" not specified; and 14). I do not think that a good faith analysis of these provisions leads to sufficient ambiguity to justify recourse to the drafting history of this resolution.[2] But if recourse were had to the drafting history, it seems clear that there was far from being general agreement amongst the members of the SC that there would be an automatic revival of the authority to use force even if the SC failed to adopt a further resolution. That being so, and bearing in mind also that the general objective of the Charter is to give the SC a monopoly over the use of force (leaving aside questions of self-defence), it would be contrary to principle for alleged ambiguities to be resolved in favour of unilateral action by particular member States.

6. I do not consider that the authorisation in SCR 678 to use force survived the adoption of SCR 1441. The fact that a "revival argument" was relied on after the adoption of SCR 687 on two occasions by the UK Government does not prove that the authority did survive: many other States and qualified commentators disputed it. But in any event, in my submission the terms of SCR 1441 make it sufficiently clear that the SC was retaining (or taking back, if the 678 authority had indeed survived until 2002) its authority to determine whether force could be used. The fact that Iraq was being given a "final

[2] Still less to a result that would be manifestly absurd: cf. Vienna Convention on the Law of Treaties 1969, Art. 32.

opportunity" to mend its ways shows this, as does the overall structure of the resolution and in particular the paragraphs I have cited above.

7. However, following his curious change of opinion, the AG essentially took the view that the previous authorisation for the use of force could revive if the SC merely "considered" the implications of a further or continuing breach by Iraq, even if it did not actually decide to authorise the use of force, contrary to the correct view he had previously taken of such an argument.[3] Apart from the fact that, as submitted above, this view flies in the face of the plain meaning of SCR 1441, I would like to point out that a somewhat analogous argument was considered and decisively rejected by the International Court of Justice in 1950, in its Advisory Opinion on *Competence of the General Assembly for the Admission of a State to the United Nations.*[4] Article 4(2) of the UN Charter provides that "The admission of [candidates for] membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council". At the time, the admission of a significant number of candidates had been blocked, mainly by Soviet vetos. The General Assembly was persuaded to ask the ICJ for its opinion on whether it was permissible for the GA to vote in favour of admission without an SCR. In the course of decisively rejecting such a proposition,[5] the ICJ said: "The Court cannot accept the suggestion made in one of the written statements submitted to the Court, that the General Assembly, in order to try to meet the requirement of Article 4, paragraph 2, could treat the absence of a recommendation as equivalent to what is described in that statement as an

[3] See his Written Answer in the House of Lords on 17 March 2003, para. 9.
[4] *ICJ Reports* 1950, p.4.
[5] By 12 votes to 2.

'unfavourable recommendation' upon which the General Assembly could base a decision to admit a State to membership."[6] Although the Court was not dealing with the point presently under consideration, I submit that the analogy is telling. To suggest that mere consideration by the SC, without its having come to a decision to authorise the use of force, would have been sufficient authority would be a formalistic interpretation inconsistent the language of SCR 1441 in its context and in the light of its object and purpose. Although it is usually possible to concoct an argument *of some sort* to justify action that one wishes to take for political reasons, there is a world of difference between something that is "arguable" in the literal sense, and something that is reasonably arguable in good faith. It grieves me to say that in my opinion, the legal justification ultimately proffered by HMG did not fall into the second category.

8. I do not consider it necessary, or indeed possible within the 3,000 words allocated for submissions to this Inquiry, to engage in a detailed further refutation of the arguments of the AG in his Written Answer or in his Advice to the Prime Minister of 7 March 2003. I wish only to make the following further points.

9. References to previous resolutions in SCR 1441, and in particular to SCR 678, is not sufficient to revive the authority given by the latter resolution. It is standard practice for SCRs to allude to their predecessors on the same subject. Furthermore, references in SCR 1441 to Iraq's being in "material breach" of

[6] At p. 9.

SCR 687 (the cease-fire resolution) in particular do not logically or necessarily indicate that the SC had thereby turned the clock back, so to speak, to the position following the adoption of SCR 678. As I have stated, the clear implication of SCR 1441 is that the SC was itself taking control, not handing it back or giving *carte blanche* to the 1990 coalition. Furthermore, although the potential "serious consequences" of continuing or adding to the "material breach" certainly *included* the potential use of force, the language was clearly devised to leave the SC's options open as to what action should be taken - which further weaken's the AG's arguments.

10. Whatever value my own opinion on the illegality of the coalition action in 2003 may or may not have, I think it is important to note that the UN Secretary-General also took the same view. His opinion is not, of course, binding on the Member States. However, it is significant that the S-G does not usually take a public position on the compatibility of the action of permanent members of the SC with the Charter and SCRs; and it is also of course the case that he was in a very good position to interpret "UN speak" and to know what the resolution meant.

11. Furthermore, since 2002, I have had the opportunity (though without seeking it out) to discuss the question with many international lawyers of repute from around the world. I can report that the overwhelming view was and is that it was illegal; and this even extends to most international lawyers in the UK and

the USA.[7] Of course, sheer weight of numbers does not of itself make an opinion right; but it is in my submission a fact worth noting.

12. I also note that the statements and evidence given to the Inquiry by the then Legal Adviser of the FCO, Michael Wood, and his former Deputy Elizabeth Wilmshurst, shows that both firmly advised that the action contemplated would be illegal, substantially for the reasons I have indicated above. Given the function that they performed, let alone their personal reputations, those views deserve to be taken very seriously indeed in now assessing the legality of the action taken. There is also a further aspect of this to which I wish to draw attention because of its legal and constitutional importance.

13. Under our constitution, the convention is that legal advice to the Government is given, if the importance of the subject requires it, by the Law Officers. However, AGs (and Solicitors-General) are not normally expert in public international law, which is why senior FCO lawyers are regularly seconded or attached to the AG's department. Leaving aside any wider controversy about the role of the AG in general, I submit that it is undesirable that, in a matter concerning essentially public international law and matters of war and peace, an AG (a political appointee) should be able to tender advice to the Government, and specifically the Cabinet, contrary to that of the official international law advisers of the Government, without at least making it clear to the Cabinet (a) that the opinion of the FCO Legal Adviser is different and (b) why the AG disagrees with that advice. I am not suggesting that failing to

[7] A fact confirmed, at the time, by the then President of the American Society of International Law, so far as concerned US lawyers.

make such a disclosure was a breach of the existing convention in that case: I am suggesting that there should be a new convention for the future.[8] [9]

14. Amongst other things, a convention of the sort I propose would obviate the wholly unsatisfactory way in which legal advice appears to have been tendered to the Cabinet. Though I am aware that there are many occasions when what the client requires is a lawyer's conclusions, not his/her reasoning, I do not believe that a responsible lawyer should (or normally would) give advice to a client, be it a private client or the Government, in which a bald conclusion is stated without a caveat that the opposite is strongly arguable, if such be the case. This is particularly so if grave consequences for the client would follow if the advice turns out to be wrong. The AG himself recognised that grave consequences could follow if he was wrong; and he could hardly argue that the opposite of his eventual conclusions was not strongly arguable, bearing in mind the advice that he had received from the specialist officials and indeed his own previously expressed views. It would not be a sufficient answer to this to observe that the Prime Minister, the Foreign Secretary and a

[8] Constitutional conventions do not, of course, need to emerge gradually: they can be deliberately changed, as several instances show.

[9] Whilst on the subject of constitutional conventions, I feel that it is important to dispel a misleading impression that was conveyed by Ministers and other Government apologists before and after the coalition action of 2003 and following, to the effect that the advice of the Law Officers is *never* disclosed. Sir Gus O'Donnell's letter of 25 June 2010 to Sir John Chilcot, says: "It is a long-standing convention, referenced in section 2.13 of the Ministerial Code, that neither the advice of the Law Officers nor the fact that they have been consulted is disclosed outside Government." He goes on to say that this is part of the wider legal professional privilege that legal advice is not disclosed *without the consent of the client.* But where the Government is the client, that consent has on occasion been forthcoming. For instance, in 1971 the Attorney-General presented to Parliament a White Paper (Cmnd. 4589) setting out the views of the Law Officers of England and Wales concerning the legal obligations of HMG arising out of the Simonstown Agreements with South Africa. Accordingly, the correct version of the convention is that the advice is not disclosed *unless the Government consents,* and not that the advice can *never* be disclosed. Without entering into a wider argument about the pros and cons of a more open system of government, and whilst fully aware of the arguments in favour of treating advice given to the Government as confidential, it does seem to me important that the convention is not misrepresented.

few others already know of the contrary arguments and views; what he communicated to the Cabinet was profoundly misleading because of the absence of any qualification, whether or not it was intended to mislead. If the whole Cabinet (and not just a few selected members) is asked to approve so serious a decision as going to war, it is important that the legal advice given to it is not tendentious or misleading, in particular by downplaying serious counter-arguments and the consequences if those counter-arguments are correct.

15. I hope that these submissions will be of some assistance.

Professor Maurice Mendelson QC

Temple, EC4. 13 July 2010.