IRAQ INQUIRY

Submission to the Inquiry on the UK's Legal Justification for the Iraq War and Lord Goldsmith's Legal Advice

by

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Introduction

1. We would like to take this opportunity to respond to the Inquiry's call for submissions from public international lawyers regarding various matters raised during the Inquiry's proceedings. In this submission, we focus on two issues: (i) the validity of the so-called revival argument as a justification for the use of force in Iraq; and (ii) on the justification that Lord Goldsmith gave to the Inquiry for his change of heart in his legal advice to the Government in the advent of the Iraq War. As the Inquiry is well aware, Lord Goldsmith initially advised that United Nations Security Council Resolution (UNSCR) 1441 was insufficient to revive the UNSCR 678 authorization to use force, only to argue the opposite in his final advice immediately before the invasion. Our submission will deal with the legal and logical consistency of Lord Goldsmith's own argument, as given in his testimony before the Inquiry and in his memoranda to the Government.

2. According to Lord Goldsmith, his change of position was the result of his combined discussions with Sir Jeremy Greenstock, Jack Straw, and US legal advisors in Washington, who were all intimately involved in the drafting of UNSCR 1441. Their account of the drafting history, which he took into consideration, was that the United States officials who took part in the drafting of the resolution had a so-called 'red line:' because the US already thought that it had implied UNSC authorization to act and did not need UNSCR 1441 for that purpose, it would have never allowed the adoption of this resolution if its terms held or implied that a further UNSC decision would be needed for the invasion to take place. Because the American negotiators were far too skilled to have allowed such a limitation to be inserted into the resolution, it would have been highly improbable that this would have happened. Hence, Lord Goldsmith now thought that the better view was that the Resolution did not require a further decision, implicitly or otherwise, and that the revival of the prior authorization could properly take place.

3. Several objections to this line of argument immediately become apparent. In his questioning of Lord Goldsmith at the Inquiry, Sir Roderick Lyne rightly pointed out that this argument presumes that the American negotiators could not have failed in their endeavours and that other parties did not have their own 'red lines.' Likewise, as Sir Michael Wood testified before the Inquiry, it is inappropriate to rely so much on essentially private accounts of the drafting history, rather than on the officially recorded public statements made by various state representatives in Council after the adoption of UNSCR 1441. These are all valid criticisms – but in our view there is also a more subtle *non sequitur* here.

The two varieties of the revival argument

4. We fully understand that the Inquiry is not interested in other countries' justification for their use of force. Nonetheless, as we will show, Lord Goldsmith's argument is structured precisely in such a way that a comparison between the UK and the US justifications is logically inevitable. Assessing the consistency of Lord Goldsmith's argument, however, requires nothing more than acknowledging the difference between the US and the UK positions, and accepting his own view that it is the UK, rather than the US position which is the correct statement of the law.

5. To see how Lord Goldsmith's argument is inconsistent we first need to elaborate on the two basic varieties of the so-called revival argument. First, there is the US version: UNSCR 678 authorized the use of force; UNSCR 687 suspended it by a cease-fire, but did not terminate

it. If Iraq is in material breach of the obligations imposed on it by UNSCR 687, UNSCR 678 can be reactivated. Crucially, the US position is that the existence of a material breach is an objective fact: the determination of whether a material breach exists or not, and what the consequences of such a breach should be, is a matter for individual states, and is not exclusive to the Security Council. The United States could determine that Iraq was in material breach, and could engage in hostilities without any further ado.[1]

6. The US argument is highly problematic. It ignores the basic idea of the UN system, which is one of collective security, not one of unilateral decision-making. It relegates the Security Council to nothing more than a passive spectator once it has authorized the use of force, even though more than ten years have passed after that authorization and the war that it brought about ended.

7. The UK variation of the revival argument tries to address some of these concerns by being a bit less blunt. Rather than saying that the existence of a material breach is a question of objective fact capable of determination by any individual state, the UK position was that this determination must be made collectively by the Security Council.[2] However, according to the UK, the Council need not do anything other than that for the authorization to use force to be revived – the finding of a breach is enough, and no explicit reauthorization is necessary.

8. These are thus the two varieties of the revival argument – the extreme US one, and the more moderate, 'revival plus', of the UK. Though they are similar, the differences between them are quite significant. Crucially, bearing this in mind, *it was the UK*, not the US, which needed UNSCR 1441 in order for the Council to determine a material breach and for the prior authorization to be revived. Within the framework of its own legal position, all the US needed in the negotiations was for the Council *not* to say that further action, subject to a veto, would be needed before force could be used against Iraq. Of course, explicit authorization would have been preferable, but the US did not consider it necessary.

The invalidity of the revival argument

9. The preliminary and most fundamental question is of course whether either the stronger US or the weaker UK revival argument has any validity in international law. It is obviously the UK version which is more acceptable since it takes into at least some account the foundations of the UN regime of collective security. But even the UK version is objectionable since the decision to use force against a sovereign state is so monumental and can lead to such grave consequences for human lives, security and property that it can only be taken explicitly by the Security Council, whose members would thereby assume political responsibility for their actions. Indeed, Lord Goldsmith acknowledged as much, stating that the 'revival argument is controversial, and was not widely accepted among academic commentators.'[3] With regard to revival under UNSCR 1441 in particular, he thought that

[1] See, in that regard, the following two memoranda produced by the Office of Legal Counsel (OLC) within the US Department of Justice, which serves a similar role of the official government legal advisor in the US as the Attorney-General and the Law Officers do in the UK: *Authority of the President under Domestic and International Law to Use Military Force Against Iraq*, 23 October 2002, available at http://www.justice.gov/olc/2002/iraq-opinion-final.pdf; *Effect of a Recent United Nations Security Council Resolution on the Authority of the President under International Law to Use Military Force Against Iraq*, 8 November 2002, available at http://www.justice.gov/olc/2002/iraq-unscr-final.pdf.
[2] See, e.g., Lord Goldsmith's memorandum to the Prime Minister on UNSCR 1441, 7 March 2003, para. 9.
[3] Ibid., para. 10.

though a 'reasonable case' could be made for it, this 'does not mean that if the matter ever came before a court I would be confident that the court would agree with this view.'[4]

10. The revival argument is unacceptable because it assumes that a prior authorization to use force may be used many years after it was given for purposes which were never contemplated at the time when that authorization was given. Moreover, it would be for individual States to determine that a use of force was appropriate to achieve those purposes, even if unrelated to the purposes for which authorization was originally given. Such an interpretation of the UN Charter departs from the object and purposes of that treaty. The purposes of the UN are stated in Article 1 of the Charter where it is made clear that Organization in maintaining international peace and security will "take effective *collective* measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace." The revival argument undermines this collective security system by suggesting that not only may measures be taken on an individual basis, but the measures and their goal can also be individually determined, as long as are somehow related to a prior authorization given by the Council in completely different circumstances.

11. Furthermore, the revival argument is based on an outdated, pre UN Charter, view of the law of armed conflict: the view that a ceasefire or armistice only suspends, but does not terminate, hostilities and that a serious breach of the agreement could lead to resumption of hostilities by the other side. As has been noted by Christopher Greenwood (now Judge at the International Court of Justice):

> "The changes in the law regarding resort to force brought about by the adoption of the UN Charter have had a particular effect on the right of the parties to resume hostilities after the conclusion of an armistice or ceasefire of indefinite duration. Whereas the law once admitted there was a general right to resume hostilities (Article 36 Hague Reg), today it would be a violation of Article 2(4) for a state to resume hostilities unless the behaviour of the other party to the armistice or ceasefire amounted to an armed attack or the threat of an armed attack."[5]

In any event, treating UNSCR 687 as a temporary cessation of hostilities as opposed to a definitive termination is erroneous since that resolution bears all the hallmarks of a general conclusion of a peace and it was UNSCR 686 that was the temporary ceasefire which looked forward to definitive termination achieved in UNSCR 687.

12. Since the revival argument is flawed, even in its weaker variant, the invasion of Iraq would have been unlawful no matter what UNSCR 1441 says when properly interpreted, because it does not on any account provide for an explicit authorization.

How does UNSCR 1441 fit in with the UK's revival argument?

13. However, even if the UK's version of the revival argument were valid, UNSCR 1441 would not have provided a basis for the invasion of Iraq. For the purposes of the analysis to follow, we accept *arguendo* the UK's weaker version of the revival argument as the correct statement of the *jus ad bellum* and then ask whether the terms of UNSCR 1441 satisfy it.

14. If all the resolution did was to say that Iraq was in material breach, and that serious consequences will follow from that, as it did in op. paras. 1 & 13 , then the resolution would

[4] Ibid., para. 30.
[5] Chapter 2, in Fleck (ed.), *The Handbook of International Humanitarian Law*, (2nd ed., 2008), p. 68.

indeed satisfy the logic of the UK's revival argument. But this of course is *not* all that UNSCR 1441 said, since op. para. 2 gave Iraq 'one final opportunity' to comply; op. para 4 stated that Iraq's further material breaches 'will be reported to the Council for assessment;' while in op. para. 12 the Council decided '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.'

15. What is to be made of these provisions, particularly op. paras. 2, 4 and 12, and the official statements by several Council members that the Resolution allows for 'no automaticity'?[6] Lord Goldsmith himself acknowledged that the Council created a two-stage process – UNSCR 1441 would not have revived the prior authorization immediately, but only once Iraq failed to take advantage of the final opportunity given to it for compliance. The question is what the second stage of this process should be, and only two answers are possible: (1) either the Council should have done no more than meet, discuss and 'consider' (but not 'decide' on) Iraq's non-compliance without taking any further action, and the authorization would thereby have been revived; or (2) the Council needed to adopt a decision which would have stated the consequences of Iraq's non-compliance.[7]

16. The FCO legal advisors and Lord Goldsmith up until his 7 March opinion both thought that the right answer to this question was (2).[8] But then Lord Goldsmith changed his mind. The reason he gave for doing so was that the UK and US negotiators during the drafting of Resolution 1441 persuaded him that the Resolution did not in any way cross the US 'red line', i.e. that it did not implicitly or explicitly require further authorization for the use of force against Iraq. Thus he stated in his opinion that

> having regard to the information on the negotiating history which I have been given and to the arguments of the US Administration which I heard in Washington, I accept that a reasonable case can be made that resolution 1441 is capable in principle of reviving the authorisation in 678 without a further resolution.'[9]

17. At the Inquiry he likewise stated that he

> was told by the State Department legal adviser, the only red line that the negotiators had was that they must not concede a further decision of the Security Council because they took the view they could move in any event. … if they had agreed a decision which said the Security Council must decide, they would have then lost that freedom.'[10]

and that '[t]hey were all very, very clear that was the most important point to them and that they hadn't conceded that.'[11]

The structure of Lord Goldsmith's argument, and the non sequitur within

18. Lord Goldsmith's argument thus works like this: (1) the text of UNSCR 1441 is ambiguous and supports both readings (i.e. that all the Council had to do was to meet and 'consider'

[6] See UN Doc. S/PV.4644, 8 November 2002.
[7] See Lord Goldsmith's memorandum of 7 March 2003, paras. 13-14.
[8] See Lord Goldsmith's draft advice to the Prime Minister of 14 January and 12 February 2003.
[9] Ibid., para. 28.
[10] Iraq Inquiry hearing transcript, 27 January 2010, p. 87.
[11] Ibid., p. 111; see also pp. 128, 241, 242.

Iraq's non-compliance, or that it had to adopt a further decision); (2) the US had a red line – that UNSCR 1441 could not impose a requirement for a further decision that would modify the authority they already thought they had; (3) the US negotiators were very capable and smart, and it is unlikely in the extreme that they conceded their red line; (4) therefore, UNSCR 1441 imposed no requirement for a further decision, and the prior authorization was revived. In our view, greater issues of law aside, this argument is logically flawed and based on a *non sequitur*. Points (1)-(2) are certainly true; (3) is probably, but not necessarily, true; however, (4) does not follow from (3).

19. We think it reasonably clear that the US managed to avoid any limitation in the resolution on its supposed pre-existing authority. Nothing in UNSCR 1441 is like, say, op. para. 8 of UNSCR 1696 ('Expresses its intention, in the event that Iran has not by that date complied with this resolution, then to adopt appropriate measures under Article 41 of Chapter VII of the Charter of the United Nations to persuade Iran to comply with this resolution and the requirements of the IAEA, and underlines that further decisions will be required should such additional measures be necessary') or op. para. 16 of UNSCR 1718 with regard to North Korea ('Underlines that further decisions will be required, should additional measures be necessary'). It can be quite reasonably said that UNSCR 1441 is essentially neutral on any pre-existing authority to use force.

20. However, the fact that the Americans were successful in achieving their objectives does not mean that on the UK's version of the revival argument, which based itself on UNSCR 1441, there was no further requirement for the Council to make a decision on Iraqi non-compliance.

21. The determination by the Council in operative paragraph 1 of UNSCR 1441 that Iraq was in material breach of its obligations under relevant SC resolutions would, on its own, under the UK's revival argument, have provided a sufficient basis for the use of force against Iraq. However, the Council immediately in paragraph 2 made it clear that Iraq was to be given a final opportunity to comply with its obligations.

22. On the US view of the revival argument the commission of a material breach is an objective fact determinable by any State. On the UK view a material breach does not in and of itself provide authorization to use force. It is a Council determination that such a breach has occurred which provides that authorization. And because paragraph 2 effectively cancelled-out the determination made in paragraph 1, the success of the UK revival argument was to be determined solely by the relationship between paragraphs 4 and 12 of the resolution.

23. By relying so heavily on the views of the US negotiators in interpreting UNSCR 1441, Lord Goldsmith shifted his perspective from the UK revival argument to the US one. The fact that paragraph 12 of UNSCR 1441 is neutral on any authorization to use force that was supposedly already revived only worked for the US, but did not satisfy the demands of the UK's revival argument. The US negotiators may have been successful in achieving their red line. However, this tell us nothing about whether *action pursuant to UNSCR 1441 itself* required a further Council decision. This is because on the US view it *already* had the authority to use force regardless of UNSCR 1441. However, *Lord Goldsmith himself actually does not believe so*, and neither does anybody else.

24. Lord Goldsmith was fully aware of this fundamental difference between the US and the UK revival arguments and of its implications. In his 7 March opinion he says that he has

> considered whether this difference in the underlying legal view means that the effect of the resolution might be different for the US than for the UK, but I have concluded that it does not affect the position. If OP12 of the resolution, properly interpreted, were to mean that a further Council decision was required before force was authorised, this would constrain the US just as much as the UK. It was therefore an essential negotiating point for the US that the resolution should not concede the need for a second resolution. They are convinced that they succeeded.[12]

25. The reasoning that US success is necessarily success for the UK is in our view false. Let us assume that instead of being vague as it was, op. para. 12 explicitly said that a further Council decision was necessary for action pursuant to op. para. 4 of UNSCR 1441. This would undoubtedly have failed to satisfy the UK's revival argument. But even this very explicit formulation would not have been incompatible with the US revival argument, because it would not have affected the authority that the US thought it had *independently* of UNSCR 1441. There is nothing contradictory in saying that the resolution did not affect the authority that the US already had before it was adopted, and in saying that action pursuant to UNSCR 1441 itself and its finding of a material breach would indeed require a further decision by the Council. *US success simply does not equal a UK one*, as unlike the UK, the US did not need the resolution to revive anything – all it wanted was for the resolution not to *prohibit* the use of force against Iraq, which it admittedly did not do.

Conclusion

26. Our analysis has shown that (i) the revival argument relied on by the UK is an untenable interpretation of the UN Charter which would have destabilising effects for the UN collective security system; and (ii) even assuming that the UK's revival argument was valid, UNSCR 1441 would fail to satisfy that argument and accordingly Lord Goldsmith's change of position was unjustified.

[12] Lord Goldsmith's memorandum of 7 March 2003, para. 22.