Iraq Inquiry: Submissions on the UK's Legal Basis for Military Action in Iraq.

Memorandum on the Legality of the War and on the Interpretation of United Nations Security Council Resolution 1441.

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I. Background

1. In 1991, the Security Council, in UNSCR 678, authorised collective force to expel the Iraqi army from Kuwait and to restore peace and security in the area. A coalition of (largely) Western powers, acting in combination with the Government of Kuwait, launched a war against Iraq. This was the Charter's paradigm case of Chapter VII collective security action: perhaps its only one. The Charter had, after all, been structured around the idea that there would be no repeat of the inaction of the League of Nations in the face of intrusions by middle powers into the territory of weaker states (in the inter-war period these included Italy's invasion of Abyssinia and Japan's creation of a puppet state in Manchuria). It was this inaction that was thought to

have emboldened Hitler (this explains, for example, the talk of "appeasement" in relation to Iraq). Saddam's Iraq precisely was a middle power: weak enough to be overborne in a brief war but powerful (and reckless) enough to be deemed a plausible threat to international peace and security.

2. The 1991 Gulf War, then, can be understood as a model of the sort of United Nations peace-enforcement that the drafters of the Charter at San Francisco might have anticipated occurring on a regular basis (albeit through a standing army of some sort). It ended a period in which the use of the veto had stymied collective security under Chapter VII (the exceptions (the Korean War, for example) were anomalies) but it heralded a phase in which Security Council action would become less orthodox (e.g. humanitarian intervention in Somalia, the establishment of criminal tribunals in The Hague, the formation of anti-terrorism committees in New York) and the whole question of what constituted authorisation to use force would become a matter of contention. The 2003 war and, for different reasons, the 1999 NATO air attack on Serbia should be understood as examples of this final sub-genre.

3. It is worth pausing here to remember that most disputes arising out of the legality of a particular use of force revolve around either the *existence* of a particular doctrine (the debate over whether there is a right of humanitarian intervention or a "responsibility to protect") or the *content* or scope of an established doctrine (the extent of the right to "pre-emptive" self defence is an example of this), or the *configuration* of a relevant fact-pattern (e.g. has there been an "armed attack" capable of enlivening the right to exercise force in self-defence? Do these human rights violations rise to the level required to engage a right to humanitarian intervention?).

4. The 2003 and 1999 wars raised an awkward set of questions around the *interpretation* of Security Council resolutions. Until the Iraq and Kosovo wars, most international lawyers and UN diplomats, if asked whether a UNSC resolution had authorised a use of force, would have examined the relevant resolution to determine whether it had been adopted under Chapter VII and whether it contained the important

phrase, "all necessary means" or, less commonly, "all necessary force".[1]

5. After the Kosovo war, though, statesmen and lawyers challenged this mechanical approach arguing that a tranche of UNSC resolutions (e.g. UNSCRs 1160, 1199) passed under Chapter VII – but none containing the phrase "all necessary means" – might be read together as an implied authorisation to use force. I do not believe this to be a credible or defensible reading of these resolutions.[2] Nevertheless, the idea of "implied authorisation" may have contributed to the appeal of the later "revival" theory as applied to Iraq.[3]

1 See e.g. UNSCR 678, authorising the use of "all necessary means" to liberate Kuwait; UNSCR 794, authorising "all necessary means…in Somalia"; UNSCR 940, authorising "all necessary means to facilitate the departure from Haiti of the military leadership"; UNSCR 929, authorising France to use "all necessary means" to protect civilians in Rwanda; UNSCR 770, authorising states to take "all measures necessary" to enforce no-fly zones in Bosnia.

2 Indeed reading these resolutions in this manner (and acting upon such a reading) may endanger the integrity of Council decision-making. In any event, doctrines built around "implication" can only support opportunism of the kind that Chapter VII was designed to prevent.

3 In both cases, some politicians advanced a further argument that states were somehow entitled to "enforce" those UNSC resolutions that did not on their face authorise force. This argument sounds rhetorically plausible but, as law, it is a sleight of hand.

II. Revival

6. This theory, articulated by the UK Attorney-General, Lord Goldsmith, and forming the basis for Joint Memorandum from the Commonwealth Attorney-General's Office and the Department of Foreign Affairs and Trade in Australia, turns on the existence of a resolution (UNSCR 678) expressly authorising war but adopted in 1991 and allegedly revived by a later resolution (UNSCR 1441) adopted in October 2002.[4] The UK Attorney argued that since this later resolution had afforded Iraq "a final opportunity" to comply with earlier resolutions and thus avoid a serious breach of its obligations, and since Iraq had failed to take the opportunity and had continued to be in serious breach, the UK had been authorised by the Council, *prospectively*, to take the action it took on 20th March, 2003. Put in different terms, the original authority contained in UNSCR 678 had been revived by the failure to comply with UNSCR 1441 (and UNSCR 687).

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[4] See Bill Campbell et al, 'Memorandum of Advice to the Commonwealth Government on the Use of Force Against Iraq' (2003) 4 *Melbourne Journal of International Law* 177, available at http://mjil.law.unimelb.edu.au/go/issues/issue-archive/volume-4-1

7. The French position (shared by many states on the Council and by a majority of international lawyers) was that UNSCR 1441 contained no 'automaticity' (in either the weak sense of an immediately exercisable authorisation to use force or in the strong sense of a prospective authorisation) and, indeed, required the Council to reconvene *and decide on a course of action*. This, and the UN's repeated reference to its prerogatives on the question of Iraq, made any unilateral action by a small group of Council members acting without a specific, explicit and contemporaneous resolution, unlawful.

8. This latter view is, I believe, and notwithstanding the ingenuity of the revival argument, the correct one in law. There are three reasons why I take this to be the case. The first is a textual reason, the second is contextual and the third reason we might call historical or purposive.

9. Before I say something about this, though, I want to reject the notion that there is a single "correct" (*Iraq Inquiry Invitation # 5*) approach to interpreting Security Council resolutions. Disagreements about the

meaning of law are a product of disagreements about the correct approach to interpreting legal texts. Some lawyers (and judges) emphasise textual reasoning, others point to the purposes of the rules and so on. Another way to put this is to say that many approaches or combinations of approaches might allow us to arrive at the better (or more plausible) answer to a question about law. On the other hand, this does not mean that anything goes. Some methods of interpretation clearly are inappropriate or ineligible (e.g. because they disregard text altogether or because they rely on text with no legal force; such arguments fail what Professor Thomas Franck, the distinguished Canadian international lawyer, called the "laughter test") and some answers are wrong.[5]

10. The Attorney-General's advice of March 7th 2003 clearly passes Professor Franck's test and, in some parts, it is methodologically sound. However, taking together the textual formulations used in the Security Council resolutions, the context in which they were drafted and adopted, the structuring principles of the UN system and the foundational norms of the international legal order, its conclusion is, I

5 Thomas Franck, *The Power of Legitimacy Among Nations* (1990) 55.

believe, erroneous. The written answer of 17th March compounds this error by removing all trace of the ambivalence and sophistication found in the earlier advice.

11. The former Foreign Secretary, Jack Straw, has said that "…in international law…the range of reasonable interpretations is almost always greater than in respect of domestic law" (*Letter from Jack Straw to the Attorney-General*, 6th February, 2003). There is no doubt that some international law treaties and resolutions are the textual articulation of serious disagreement (though this can be often true also of domestic legislative enactments and executive directives). But this is not always the case. Lord Bingham, who died as I was completing this memorandum, regarded the Iraq War as a clear violation of international law and "…one of the very few matters on which he was 'entirely free from legal doubt'" (Obituary, *The Guardian*, September 11th, 2010).

12. With this in mind, let me turn first, then, to the texts of the relevant resolutions. UNSCR 678, upon which great reliance is placed by the Attorney, authorised all necessary means to implement UNSCR 660

which, in turn, authorised only the expulsion of Iraq from Kuwait, and not the removal of the Baathist regime from power (the "breach of peace and security" to which that resolution referred was the invasion of Kuwait).

13. The argument that Resolution 1441 is a prospective authorisation for force is undermined by the language used in the resolution. If the Council had intended to authorise a use of force (on the occurrence of some future state of affairs), it could have signalled this with the phrase "all necessary means" (in accordance with Security Council custom) instead of "serious consequences" ("consequences" that would, in any case, be determined by the Council itself). It did not use this language. The fact that there was no provision for a further resolution authorising force is beside the point. At no point in UNSCR 1441, judged by the plain language of the text, does the Council authorise a use of force in the future by several of its members acting independently of the Council.

14. UNSCR 1441, of course, sets out a procedure for evaluating Iraq's compliance with the relevant Security Council resolutions. In

particular, and now famously, OP. 12 states that the Council, upon receiving a report on compliance, will: "…convene immediately…in order to consider the situation and the need for full compliance with all the relevant Council resolutions in order to secure international peace and security". What UNSCR 1441 does not make clear is the procedure to be followed if the Council meets and then fails to agree on any further steps.

15. At least part of the answer to this question can be found in the context out of which this material was generated. In treaty interpretation at least (and it must be recognised that UNSCR 1441 is not a treaty), the VCLT (Vienna Convention on the Law of Treaties) at Article 32 informs us that statements made at the time of the drafting and adoption of a treaty (the "preparatory work…and circumstances of its conclusion" (or *travaux preparatoires*)) are relevant to the interpretation of the treaty). Furthermore, the International Court of Justice, in the *Namibia Advisory Opinion* (1971) (ICJ Reports 15, 53) stated that: "[T]he language of resolution of the Security Council should be carefully analysed… having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter

provisions invoked and, in general, all circumstances that might assist in determining the legal consequences…".

16. So, in understanding what meaning we might give to the term "serious consequences", recourse to statements made at the Council might be of relevance, and, indeed, the public record of the Council meetings makes clear that the phrase "serious consequences" was not intended to be an authorisation to use force.[6]

17. It seems clear, too, that the primary actors in 1991 did not take UNSCR 678 to be an authorisation to remove Saddam Hussein as part of a wider project to "restore international peace and security". For example, former United States Secretary of State, Colin Powell, stated in his biography, *My American Journey*, that he did not believe UNSCR 678 authorised regime change.[7]

18. Third, and finally, there are the wider purposes or aims of the UN Charter or the underlying principles of the international juridical order. The UN system was designed to eliminate the "scourge of war" (United Nations Charter Preamble). The International Military

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6 *The situation between Iraq and Kuwait*, 4644th mtg, UN Doc S/PV.4644 (2002) available at http://www.globalissues.org/external/1441Speeches.pdf

7 Colin Powell, *My American Journey* (1995) 490.

Tribunal at Nuremberg, giving its verdict a year after the San Francisco Conference, stated that war was the supreme international crime differing from other crimes in that it contained "the accumulated evil of the whole".[8] The United Nations Organisation was designed to accomplish many ends but the first of its purposes is to maintain international peace and security "…and to that end; to take effective collective measures for the prevention and removal of threats to the peace".

19. The emphasis, then, was on replacing unilateral uses of force with a collective mechanism. The presumption in favour of collective action is a strong one. The same actions unlawful when carried out by states acting without authorisation become lawful with Council authorisation (humanitarian intervention might be an example of this). The grave implications of using armed force encouraged the drafters of the UN Charter to do two things. First, they made unilateral non-defensive force unlawful for the first time in history.[9] Second, they created a tightly constrained collective enforcement

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8 *Judgment of the International Military Tribunal for the Trial of German Major War Criminals* (Nuremberg 30 September and 1st October 1946), 186.

9 Arguments can be made for the Pact of Paris (Kellogg-Briand) but there is no need to rehearse these here.

mechanism. A resolution authorising the use of force must be adopted under Chapter VII and the practice has been to use the phrase "all necessary means" when authorising force.

20. I believe that all of this points to a need to interpret Security Council resolutions restrictively. Authorisations to use force ought to be explicit and contemporaneous. The presumption, in cases that are said to be uncertain, has to be in favour of collective action. In the present case, resolutions emphasising, at various points, the continuing involvement of the United Nations Security Council (in remaining "seized of the matter" and resolving to "take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area." (UNSCR 687) or in deciding to "consider" Iraq's future behaviour (OP. 12 UNSCR 1441)) powerfully point in favour of further Council decision-making prior to any use of force.

21. As Professor Franck has stated: "[B]y any normal construction drawn from the administrative law of any legal system, what the Security Council has done is occupy the field…..to now state that the United

Nations has not in fact occupied the field, that there remains under Article 51 or under Resolution 678, which authorised the use of force, which authorisation was terminated in Resolution 687, a collateral total freedom on the part of any UN member to use military force against Iraq at any point that any member considers there to have been a violation of the conditions set forth in Resolution 678, is to make a complete mockery of the entire system." (*Proceedings of the American Society of International Law* (1998)).

22. Indeed, the whole tenor of the key resolution, UNSCR 1441, is collective. To take one example, failures by Iraq to comply and cooperate under OP.4 are to be "reported to the Council for assessment in accordance with paragraphs 11 and 12 below". As Lord Goldsmith stated in his meeting with Jonathan Powell and others on December 19th, 2002:

> "What could the phrase "for assessment" mean if it did not mean an assessment as to whether the breach was sufficiently material to justify resort to the use of force?" ("Iraq: Note of Meeting at No 10 Downing St", para. 8).

III. A "reasonable case"?

23. Whether there was "a reasonable case" is both a political and a legal question. Something depends on the institution to which the reasonable case is presented. In the past half century or so, Her Majesty's Government has taken the UK to war in cases where the legal grounds variously were exceedingly weak (Kosovo, 1999), debatable (*Operation Desert Fox*, 1998), non-existent (Suez) and persuasive but not inarguable (Afghanistan). From the point of view of Government – and given the non-justiciability of this matter in UK courts (*CND v Blair*[10]) – a reasonable case might well be regarded as a sufficient basis for going to war. Certainly in politically compelling cases, it's hard to see a government desisting from war on the grounds that the legal case is *merely* reasonable. On the other hand, when it comes to the overseas projection of armed force, a degree of clarity is highly desirable given the seriousness of the venture.

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10 *The Campaign for Nuclear Disarmament v The Prime Minster of the United Kingdom* [2002] EWHC 2777).

24. Before an international court (either a "civil" court such as the International Court of Justice exercising jurisdiction over the illegal uses of force under the United Nations Charter, or customary international law (*Corfu Channel*, *Nicaragua*), or a criminal court such as the International Criminal Court with jurisdiction over, at least from 2017, crimes of aggression) a reasonable case would have to take its chances. There is no guarantee of success.

25. So, I would put it like this. A reasonable case might be judged (and has been judged) sufficient by HMG but this judgement of sufficiency, of course, is independent of any objective judicial determination on the legality or otherwise of the war itself. And interventions are either lawful or unlawful; there is no separate legal category of "reasonable lawfulness". A government embarking on a war for which there is a "reasonable case" might well commit an illegal, or even criminal, act (though the apprehension of the "reasonableness" of the case might go to the question of guilt in a criminal trial involving the crime of aggression).

IV. Conclusion

26. To return to the larger question and putting all of the above slightly differently, there are three ways to interpret a document i.e. according to the text, according to the intentions of the drafters of the text and according to the aims and objects of the text or its constituent instrument (e.g. the Charter).[11] None of these methods of interpretation support the former Attorney-General's unpersuasive reading(s) of the combined effects and meaning of Resolutions 660, 678, 687 and 1441.

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11 Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 *British Yearbook of International Law* 1.