UK's Legal Basis for Military Action in Iraq

Submission to the Iraq Inquiry in Response to the Invitation to International Lawyers of 2 June 2010

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1. The Security Council as a Source of Authority

The legal debates surrounding the 2003 Anglo-American invasion of Iraq arose out of disagreement about the nature of the Security Council and its decision-making competence. On the one hand the Security Council can be seen as a collection of states, no different from the Concert of Europe in the 19th Century or the G7/8/20 of more modern times. In these fora governments agree or disagree on strategy or policy and any formal output is just an amalgamation of the views or wills of those governments. On the other hand, the Security Council can be viewed as a 'corporate entity, displaying an emergent will and purpose that can be identified with it as a collective organ …'.[i]

The UK has adopted a pragmatic approach to the Security Council, seeing it as an instrument of governance when necessary, for example when adopting anti-terrorism measures in Resolution 1373 (2001), at other times as a useful vehicle for encouraging settlement, for example when it sponsored Resolution 242 (1967) after the Six Day War. On other occasions a resolution is viewed as being a compromise incorporating the views of member states while reserving the competence of the Council as a whole. Thus, from the UK perspective Resolution 678 (1990), which authorized 'necessary measures' against Iraq, was sufficiently flexible to permit a wide interpretation by states acting under it, but did not prevent the Council from

imposing its own judgment.[ii] The difficulty caused by this view can be seen in the ultimately unconvincing arguments (reviewed below) made by the UK Attorney General who contended, in the face of the consensus underlying Resolution 1441 (2002), that the authority granted by Resolution 678 (1990) still applied in March 2003 to justify the invasion of Iraq.

For present purposes there can be said to be two Councils: a corporate one, especially when adopting decisions under chapter VII; and a conference one, when acting as a forum for negotiations that may be productive but do not necessarily lead to a Security Council decision. The UK approach seems to confuse the two by inferring that a corporate decision is a composite of the varying diplomatic positions of the members of the Security Council, therefore permitting unilateral interpretations in line with the sovereign wills of each member of the Council. In truth, however, a decision under chapter VII has independence from those wills and should be interpreted in accordance with the corporate will of the Security Council.

The UK position not only seems to disregard the legal nature of chapter VII decisions, it also seems to disregard the political nature of the Security Council. In such a body it is inevitable that a member wanting it to act in a certain way must persuade the remaining members to its way of thinking. While the UK, along with the US, won the argument in the case of Resolution 678 (1990), they lost it as regards gaining Security Council authority to invade Iraq in March 2003. The subsequent justifications conveniently forget that consensus on the use of force had not been agreed, irrespective of whether there might be phrases in various resolutions that could be strung together to make a reasonable (or more accurately arguable) case. The UK pointed to phrases in Security Council resolutions that could sustain an arguable legal case for the use of force, but its carefully crafted legal arguments did not hold sway for they ignored the clear political and legal consensus in the Council and in the wider membership – in effect they ignored the will of the Council. Bearing in mind that the Security Council acts on behalf of the whole membership in collective security matters,[iii] in effect the UK was ignoring the will of the UN.

2. Interpretation of Security Council Resolution 1441

Despite the lack of clear authority in Resolution 1441 of November 2002, the UK subsequently interpreted it to justify the use of force against a sovereign state - Iraq.

Such an interpretation of a resolution, which does not explicitly authorize the use of force, may be acceptable if the interpretation reflects the views of the Security Council as a collective body. Subsequent practice can be relied on to re-interpret a resolution when it reflects a shared understanding.[iv] Such practice has to be checked against the limitations contained in the Charter and must be undertaken in fulfilment of the purposes of the UN. Subject to these limitations, if the Council members agree that a resolution's wording amounts to an authority to use force then that is what it means. If they disagree and some view it as granting such authority and others that it does not, this does not signify that it grants authority.

To interpret the words of a resolution in a way that is directly contrary to the consensus (which may be an agreement to disagree) underlying the resolution would undermine the Council as a forum for achieving compromise. Military action undertaken with Security Council authority is only permitted when there is agreement in accordance with the voting rules that such action is being authorized. Agreement to the effect that the Council is authorizing the use of force has been achieved in the past by a formula that combines the phrase 'necessary measures' with an 'authorization' 'under Chapter VII' to use them, following a 'determination' of a 'threat to the peace' or 'breach of the peace'. Due to usage and acceptance in practice, this phraseology by itself would be sufficient to indicate intent, but when other phrases are used the presumption must be that there was no intention to authorize the use of force, unless there is clear consensus to the contrary. In other words, if all the members, especially the P5, agree that a threat of 'serious consequences' in the face of a 'material breach' (the key phrases as found in Resolution 1441, paras. 1, 4 and 13) signify the authorization of the use of force, that is what they mean. But clearly there was no such consensus.

John Negroponte, the US representative at the crucial meeting when Resolution 1441 was adopted, accepted that the resolution did not contain any 'hidden triggers' and no 'automaticity' with 'respect to the use of force'. He added that 'further Iraqi breach, reported to the Security Council by UNMOVIC, the IAEA, or Member State' will lead to the matter returning to the Council. This shows an acceptance of the interpretation of the Resolution shared by virtually all the other members of the Council. The UK representative, Sir Jeremy Greenstock, made a statement on this point that was virtually the same as his American counterpart, except that he concluded that when the matter was returned to the Council, 'we would expect the

Council to then meet its responsibilities'. Other members spoke about the lack of the automatic right to use force in the resolution (Mexico, Russia, Bulgaria, Syria, Cameroon, China), labelled the 'two stage approach' by the French representative; and the clear assurances about the lack of basis in the resolution for the use of force (Ireland, Columbia); while Norway referred to the Council's responsibility recognized in the resolution to secure international peace. Singapore, Guinea and Mauritius made statements that cannot be said to favour one interpretation over another. The sense of the meeting is best summed up by the representative of Ireland when he thanked the sponsors of the Resolution (the US and UK) for their assurances that the purpose of the 'resolution was to achieve disarmament through inspections, and not to establish the basis for the use of force'.[v]

Admittedly, none of these statements made it crystal clear what the next step would entail when the matter came back to the Security Council. The Resolution in para. 12 spoke only about the Council 'considering' the situation, but to argue subsequently that a meeting of the Security Council without anything else would trigger the use of force ignores, first of all the lack of authority to use force in Resolution 1441 and also seems (since a subsequent Council meeting to discuss the matter was inevitable) to be the sort of 'automatic' use of force the US and UK denied they were proposing.

Subsequently though both the US and the UK consistently engaged in unilateral interpretations of 1441 as permitting them to use force against Iraq. This is based on the fact that the Resolution not only invoked the concept of 'material breach' at several points, but also stated that Iraq failed to take the final opportunity to comply with its disarmament obligations granted in the resolution, and thus must face the 'serious consequences' warned of. This argument built on the previous justifications put forward by the UK for using force against Iraq to enforce its disarmament obligations since 1991 (for example in January 1993 and December 1998). Indeed, it argued that the adoption of Resolution 1441 signified that the Security Council endorsed their position that 'material breach' of the disarmament provisions of Security Council Resolutions, from 687 (1991) to 1441 (2002), suspends the operation of the cease-fire Resolution 687, thus allowing states to use force under the apparently open-ended provisions of Resolution 678 (1990). However, it is clear from the debates following the adoption of Resolution 1441 that it was not the intention of the Council to endorse that argument, and that any response to a material breach of the Resolution would come from the Security Council not

individual member states, in other words that the ‘serious consequences’ were to be determined by the Council.

Furthermore, the whole argument is based on Resolution 678 (1990) being open ended, but this disregards the fact that when 678 speaks of forcing Iraqi compliance with resolution 660 (1990) and all ‘subsequent resolutions’ it meant all resolutions between 660 and 678, not all resolutions that may be adopted against Iraq thereafter. Indeed, in the meeting at which 678 was adopted, UK Foreign Secretary Douglas Hurd reassured the wavering members that the Resolution was only intended to be the basis of pushing Iraq out of Kuwait.[vi] There was no mention of overthrowing Saddam Hussein, certainly not of doing this at some distant point in the future.

It is true that Resolution 1441 came closer to the UK position than previous resolutions dealing with Iraqi breach of Resolution 687, but it did not meet the agreed requirements that for states to take military action under the auspices of chapter VII there must be a clear and unambiguous mandate in the form of an authorization to use force. All other arguments fall short, for the fact is that if the Council wants to authorize the use of force it will do so using clearly accepted terms.

In the parliamentary written answer on 17 March 2003, the Attorney General Lord Goldsmith stated that the basis for force was Resolution 678 (1990) containing the original authority to use force, which was reactivated in the light of material breach of Resolution 687 (1991) and all subsequent disarmament resolutions up to and including Resolution 1441. He concluded that ‘all that resolution 1441 requires is reporting to and discussion by the Security Council of Iraq’s failures, but not an express further decision to authorise force’, since there was original authority in 678. The weakness of this argument has been demonstrated above, but also by the fact that the authority of Resolution 678 (1990) did not extend beyond Resolution 687 (1991), which declared in its final paragraph that the Council decided to ‘remain seized of the matter and to take such further steps as may be required for the implementation of this resolution and to secure peace and security to the area’. The delegation of power by the Security Council to states to take military action in Resolution 678 was effectively revoked by Resolution 687, including the authority in 678 to restore ‘international peace and security to the area’. For the Attorney General to state that ‘material breach of resolution 687 revives the authority to use force under resolution 678’, which is the crucial step in his reasoning back to 678, has no basis in those resolutions and thus no basis in law. Ultimately, it represented an

unconvincing attempt to unlock Resolution 678, which was the only resolution in which the Council authorized 'necessary measures' against Iraq.

The critical reaction of many states and other actors to the decision of the US and the UK to use force without Security Council authority is significant in evaluating the legality of that action, as well as the legitimacy of their interpretations of Security Council resolutions. On 10 March 2003, before the outbreak of war, the UN Secretary General, Kofi Annan, was clearly of the opinion that it would be unlawful when he warned that 'if the US and others were to go outside the Council and take military action it would not be in conformity with the Charter'. Criticisms of the impending war and warnings of illegality were voiced by the majority of members of the Council when meeting on the eve of the war.[vii] After full scale force was unleashed on 20 March 2003, there were immediate statements condemning it as a violation of international law by China, Russia, France, Iran, Pakistan, India, Indonesia, and Malaysia, while support was given by Australia, the Philippines, Japan, and South Korea.[viii]

The Security Council debates on Iraq and the reactions of states to the unauthorized use of force of 20 March 2003 show that to argue that a new interpretative rule has been accepted that allows individual states to unilaterally interpret and enforce Security Council Resolutions does not reflect the consensus in the body or more broadly. The fact that the same minority of states that seek to justify the above interventions argue for the emergence of a new rule of interpretation is sufficient to show that such arguments are self-serving and are not reflective of new developments in international law.

3. An Arguable Case?

The full legal advice given by the Attorney on 7 March 2003, but not realised until 28 April 2005 contains much more nuanced arguments. In considering whether Resolution 1441 constituted an authorization to use force, the Attorney supported the 'revival' argument, namely that a material breach of Resolution 687 (1991) could revive the authorization to use force granted in Resolution 678 (1990). The Attorney opined that Resolution 1441 (2002), whose lineage is traced back to 687, did not immediately revive Resolution 678 (1990), but gave Iraq a final opportunity to comply by cooperating with the enhanced inspection regime established by Resolution 1441.

The issue then was whether Iraq co-operated and, if not, what was the next step before 678 was revived - the matter returning to the Council for discussions that did not produce a conclusion, or discussions that needed to produce an authorizing resolution. It is really only at this point that his opinion differs from the one presented to Parliament later in March 2003, but the difference is crucial. Instead of stating that there was clearly only a need for the issue to return to the Council before the terms of Resolution 1441 revived the authorization to use force in Resolution 678 as he stated before Parliament, the Attorney was more equivocal, concluding that only a 'reasonable case' could be made out for such a position, and 'if the matter ever came before a court' it 'may well' conclude that Resolution 1441 did require 'a further Council decision in order to revive the authorisation in resolution 678'. Even the reasonably arguable case that Resolution 1441 'alone has revived the authorisation to use force … will only be sustainable if there are strong factual grounds for concluding that Iraq has failed to take the final opportunity'. There is a question of whether there were such strong 'factual' grounds, as opposed to questionable intelligence reports.

It is relevant to note that in the weeks leading up to the war in 2003, the Attorney's legal opinion changed from stating in a letter to the Prime Minister on 30 January that a meeting of the Security Council was not enough by itself to trigger the use of force, rather a further decision of the Council was necessary.[ix] Even in his modified advice of 12 February 2003, the Attorney was clearly sceptical of an interpretation of para.12 of Resolution 1441, which would reduce a subsequent meeting of the Council to a 'procedural formality', given that it was 'not clear that the Council was agreed on this'.[x] In the end, without a second resolution, the Attorney put forward to Parliament on 17 March 2003 the best case that can be made in the circumstances, but that opinion is drawn from the fuller and equivocal opinion of 7 March.

In essence the Attorney's advice of 7 March shows that there is an arguable case that can be made, but it is one that would not survive independent mechanisms of scrutiny and accountability. In a previous era, it was possible to hide behind an arguable case in international law knowing that there would be little independent scrutiny. However, that approach, which viewed international law on the use of force as an instrument of diplomacy was not a view shared universally even in the Cold War, and is now difficult to sustain in an era of unparalleled scrutiny and accountability at both international and national levels.

Notes

[*] This submission is based on material in chapter 10 of Nigel D. White, *Democracy Goes to War: British Military Deployments under International Law* (2009).

[i] I. Claude, 'The Security Council', in E. Luard (ed), *The Evolution of International Organizations* (1966) 68 at 88.

[ii] F. Berman, 'The Authorization Model: Resolution 678 and Its Effects', in D.M. Malone (ed), *The UN Security Council: From the Cold War to the 21st Century* (London: Lynne Rienner, 2004) 153 at 158.

[iii] Art. 24(1) of the UN Charter.

[iv] S. Rosenne, *Developments in the Law of Treaties* (1989) 244.

[v] SC 4644th mtg, 8 Nov. 2002.

[vi] SC 2963rd mtg, 29 Nov. 1990.

[vii] SC 4721st mtg, 19 March 2003. Statements by Germany, France, Russia, Syria, Pakistan, Mexico, Chile, Angola, China. See also the open meeting of Security Council SC 4717th mtg, 12 March 2003, when 51 states spoke.

[viii] http://news.bbc.co.uk/1/hi/world/middle_east/2867027.stm.

[ix] http://www.iraqinquiry.org.uk/media/46496/Goldsmith-note-to-PM-30January2003.pdf

[x] http://www.iraqinquiry.org.uk/media/46490/Goldsmith-draft-advice-12February2003.pdf