

Submission of Anthony Aust

1. I retired as FCO Deputy Legal Adviser in March 2002 after 35 years service. I had no role in advising whether the decision of the United Kingdom to support the further use of force against Iraq in 2003 was in accordance with international law.

Nevertheless, I followed developments in UK foreign policy, and have written two books on public international law.¹ I have also published various articles in international law journals, both here and abroad. I have always taught and written about international law from a *practical* perspective, being only too aware that law is a most practical subject. The purpose of this submission is to state *how* resolution 1441(2002) ('the resolution') came to be adopted on 8 November 2002, and how this bears on its interpretation.

2. I was Legal Adviser to the UK Mission to the United Nations from 1988 to 1991. This coincided with the end of the Cold War and, with it, a more active United Nations, especially the Security Council (the Council). When I returned to London, I was legal adviser to, inter alia, the UN Department and so continued to follow closely what went on in the Council, and, in particular, its informal consultations.

3. When I was posted to the UK Mission, I attended many meetings of the Council, and, in particular, the much more numerous informal meetings (known as 'consultations of the whole')² of Members of the Council. In the 1970s, a room was constructed near to the Council Chamber for such informal consultations. It is small and has fewer chairs for the members of delegations, but there is simultaneous translation into all UN languages. At these informal meetings, draft resolutions are negotiated and the Members (or certain of them) then decide whether to table a draft resolution to be voted on in the Council proper, or to drop it. It is vitally important to

¹ *Modern Treaty Law and Practice*, 2nd edn, Cambridge University Press, 2007 and *Handbook of International Law*, 2nd edn, CUP, 2010. I have also been a visiting lecturer on international law at University College London, the School of Oriental and African Studies London, the London School of Economics and the University of Notre Dame at London. I have also lectured and held mock UN Security Council meetings at some of those colleges and Oxford University.

² See *Handbook of International Law*, pp. 192-199.

note that most of the work of Members of the Council is done in such informal consultations, of which *no* record is published or circulated.³ Like treaties, all draft resolutions reflect international politics. This applies both to resolutions of the General Assembly or the Council, whether or not they are legally binding.

4. I have therefore approached the interpretation of resolution from that perspective. I have not discussed the resolution with any former colleagues (legal or otherwise) in the FCO or at the Attorney General's Department, or with Lord Goldsmith or Sir Christopher Greenwood.

5. With my US colleague (now dead), I was the draftsman of most of the earlier Iraq resolutions starting with 660 of 2 August 1990 and ending with 707 of 15 August 1991. When I went back to London, for the next two years or so I saw, and commented on, the various drafts of subsequent Council resolutions. Even when I no longer advised the UN Department, I saw drafts of Council resolutions, and naturally kept a particular interest in those dealing with Iraq, Libya and former Yugoslavia.

6. I have taken part in various debates/mock trials with international lawyers on the issue of whether the resolution authorised the use of force against Iraq in 2003. In particular, on 19 December 2002, and at very short notice, I argued against Professor Nick Grief at a moot in the Inner Temple whether the resolution authorised the use of force against Iraq. I argued that it did, but the sole 'judge', Professor Lowe, found against me.

7. As I have said, I have always taken a practical line when talking about the resolution, emphasising how it was negotiated. I therefore based my legal arguments on the text of the resolution and my knowledge of how the Council works in practice.

8. The resolution took some seven weeks to negotiate in (informal) consultations of the whole. This may have been a record, but it illustrates the difficulties facing the

³ That most of the work of the Council was done informally, came as a great surprise to professors of international law, who had written extensively about the Council and attended a workshop in 1992 at the Hague Academy on the Council: see A. Aust, 'The Procedure and Practice of the Security Council Today', in R. -J. Dupuy (ed.), *The Development of the Role of the Security Council Workshop*, Hague Academy of International Law Publications, 1992, pp. 365–74.

negotiators. During these weeks, there was only one formal meeting of the Council on 16 and 17 October to discuss Iraq. The resolution was adopted unanimously on 8 November 2002. Unfortunately, we really have only that resolution to assess whether the second use of force was authorised by the Council. Statements (even in the Council after the resolution was adopted), or to the Press or national parliaments, are no substitute for the words of the resolution, which were crafted most carefully. Speculation *ex post facto* as to the meaning of the resolution therefore needs to be treated carefully.

9. I will now deal with the interpretation of the resolution. Although many of the Members of the Council are lawyers, or advised by lawyers, the negotiation of any resolution is essentially a political process. Council resolutions need to be read as a whole, including the preamble. Although it is not part of the operative part, it sets the scene, but is often overlooked. Furthermore, such resolutions, like other legal documents, should be seen and understood as the result of often intense negotiations between Members of the Council.

10. I will therefore begin with the preamble, which has 18 paragraphs compared with the 14 operative paragraphs. It contains much that is relevant to the interpretation of the operative part.

11. It should be noted that at the end of the first preambular paragraph there is a reference to ‘all the relevant statements of [the Council’s] President’.⁴ This can easily be overlooked, often being seen as not really germane. But, it is a reference to statements by the President of the Council which warned Iraq that unless it cooperated with the weapons inspectors there would be ‘serious consequences’. Such presidential statements also employed terms drawn from the law of treaties, such as ‘material breach’. The use to which the statements would be put was very well-known by all the Members of the Council.

12. Presidential Statements are not provided for by the UN Charter or in the Council’s Rules of Procedure. Presidential statements were originally used to express

⁴ Unfortunately, such presidential statements are sometimes confused statements by the US President.

opposition to the proposed or actual execution of dissidents by the apartheid Government of South Africa. Subsequently, they were used for many other purposes, and have now become a routine method by which the Council expresses itself on various matters. Because they are made on behalf of *all* the Members of the Council, the text has to be agreed in advance by all the Members, albeit in informal consultations.⁵

13. The preable of the resolution then goes on at length to list Iraq's non-compliance with many previous resolutions of the Council.

14. I need not repeat what is said in all the operative paragraphs of the resolution. But, one needs to remember certain things. A resolution retains its legal effectiveness however long it remains in effect.⁶ Paragraphs 12 and 13 of the resolution need to be considered in the light of what was stated in the preamble to, and the operative paragraphs of, the resolution.

15. As to whether the express references in the resolution to resolutions 678(1990) or 687(1991) authorised the use of force against Iraq in 2003, I would point out that the authority to use force had in no way been abrogated. In fact, the authority given by resolutions 678(1990) and 687(1991) was recalled in preambular paragraphs 1 and 2 to the resolution. Furthermore, operative paragraph 1 stated that Iraq remained in 'material breach' of its obligations under the relevant resolutions, including resolution 687(1991), through its failure to cooperate with the inspectors, etc. Operative paragraph 2 acknowledged operative paragraph 1 and afforded Iraq a final opportunity to comply with its disarmament obligations. Operative paragraph 4

⁵ For an example of a Presidential Statement, see the one of 3 January 1993 (S/25081) in *The Iraq-Kuwait Conflict, 1990-1996*, United Nations, New York. See also, S. Talmon, 'Statements by the Presidents of the Security Council, (2003) *Chinese Yearbook of International Law*, pp. 419-65.

⁶ Sometimes even Queen's Counsel who are not that familiar with international law have argued that earlier Iraq resolutions, such as 678 (1990), are no longer valid because they are 'old'. Such an argument seeks to distinguish Council resolutions from national legislation. Furthermore, one needs to remember that in resolution 678 (1990), paragraph 2 authorised not only the use of force against Iraq in order to liberate Kuwait, but also 'to restore peace and security in the area'. (A point originally overlooked by Professor Lowe.) Obviously, this was not accomplished merely by the liberation of Kuwait, and so was the purpose of resolution 1441 (2002).

decided that failure of Iraq to comply fully in the implementation of the resolution constituted a further material breach of Iraq's obligations and would be reported to the Council for assessment in accordance with operative paragraphs 11 and 12. So, despite the wording of operative paragraphs 1 and 2, what the Council authorised in the resolution depends on the interpretation of operative paragraphs 12 and 13.

16. As to what is meant in paragraph 12 by the word 'consider', one has only the word itself to go on. Unfortunately, and as is the custom for all that goes on in the informal consultations, *no record of them is circulated or published*. This is so that the Members are free to say what they wish, in strict privacy and reasonable comfort. It is obviously difficult to speak frankly at a public meeting in the Council Chamber with not only other UN Members present but also the television and radio recording everything. So we have no way of knowing authoritatively what the word 'consider' means. Anything said by a Member of the Council (or by his Government) to the Press or otherwise may be politically self-serving or otherwise unreliable when it comes to interpretation of the resolution.

17. One also should have regard to paragraph 13, which recalled, in the context of such consideration, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of continued violations of its obligations.

18. Therefore, one should not be influenced by statements made by Iraq when it was invaded in 2003 by a force led by the United States and comprising over forty other States. Nor should one be influenced by the failure to find firm evidence that weapons were hidden from inspectors; nor by the claims that a 'second resolution' was required to authorise the use of force against Iraq.

19. As to the evidence of the Attorney-General, Lord Goldsmith, on the legal basis for the use of force against Iraq in 2003, I note that he justified the use of force because Iraq had failed to comply with the Council's previous requirements, and all that the resolution provided for was reporting to the Council and discussion by it of Iraq's failures. This was done, the Council met to discuss Iraq on 14 and 18/19 February 2003. There was no change in the situation facing the Council: Iraq remained in

violation of numerous resolutions. So no new express decision (i.e. the s o-called second resolution) was necessary.

20. The British position was indeed much better than that relating to Suez in 1956 when the Cabinet endorsed the wish of the then Prime Minister to go to war against Egypt. He and the Cabinet received only legal advice from the Lord Chancellor, the Attorney General not being asked to advise. Although a lawyer, the Lord Chancellor was (and still is) not the person who advises the Cabinet on the applicable law. The Cabinet does need legal guidance from a pre-designated person, and it did get in the case of the resolution now under consideration.

21. If t he Inquiry w ere to r ecommend that someone else should supply the legal advice, presumably this should still be a distinguished lawyer. But who should it to be: a member of the Government or an outsider?

22. Perhaps t he real que stion is w hether in t he future it s hould be P arliament w ho should decide w hether or not w e s hould go to war. But, that r aises other questions which goes beyond this submission. So, I will not comment on them. I will note only that the Bill under which most decisions that this country should go to war was not put before Parliament before it rose before the last election.

Anthony Aust

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