The Legal Justification for the Use of Armed Force by the United Kingdom against Iraq in March 2003

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1. The legal regime governing the use of armed force in international law.

It is important to appreciate the full legal context in which the arguments about the legality of the use of force against Iraq were conducted. To attach so much weight to a few words in Security Council resolution 1441 (and the unwritten understandings which some States held about what those words meant) is too narrow an inquiry.

The two provisions in Article 2(3) and 2(4) of the UN Charter, which put on States the obligations to settle their disputes peacefully and not to use armed force in their international relations worked a fundamental change in the nature of the rules which govern the right to use military force. While the rights of States to use military force are substantially reduced, in their place, the Charter establishes a regime of collective security under the authority of the Security Council. Any rights States might have had previously to enforce international law were removed by Article 2(4), an interpretation confirmed by General Assembly resolution 2625. This proscription extends to obligations arising out of decisions of the Security Council, in the absence of authorisation by the Council itself. States retain the right to use force by way of self-defence, the existence of the conditions for which, though there is some argument about this, is initially a matter for the defending State. States may be authorized by the Security Council to use force under Chapter Seven of the Charter. The difference between a claim to act in self-defence and to be acting under Security Council authorisation is that the Council is a body of

[1] Honorary Professor, Birmingham Law School. I am retired and I have disposed of my papers relating to the use of armed force against Iraq. This submission is, in consequence, terse and lacking in full citation. I bother making it because of what I perceive has been a misunderstanding about the legal argument which has resulted in practically entire attention being placed on the interpretation on SC resolution 1441 to the exclusion of more fundamental matters. I do not address the interpretation of resolution 1441, on which you have heard substantial representations and on which, I have no doubt, that you will have received several written submissions. I associate myself with one of those (Akande and Milanovic). I address also a question put by the Inquiry which is not so dependent upon close legal reasoning (see section 4, below).

limited powers and subject to procedural conditions on its decision-making. A State relying on Council authorisation must show that the Council was acting within its powers and procedurally correctly and that the State's use of force fell within the terms of the mandate in the resolution (widely conceived, see below), assuming that the requisite conditions were as a matter of law within the Council's powers. Sometimes, the Council might not speak clearly or there might be differences about which States have been authorized to act or for what purposes. It is unlikely that disputes of this kind would ever be subject to international judicial settlement (though not inconceivable that issues arising from them could come before domestic courts). States must make their arguments but, in choosing between them, any assessment must take into account the principle set out above, that it is for the State claiming the right to have been authorised to use force to show that its position is, the phrase is sometimes used, to be the better "fit" with the scheme of the Charter than contentions to the contrary. This requires not only giving attention to the text of the Charter itself and the obviously relevant resolutions but also the practice of the Council itself over time in exercising its powers. Undoubtedly, there are weaknesses in the system of collective security established by the Charter. The absence of authoritative means of resolving disputes between States about the operation of the Charter system is a consequence of a more general deficiency of the international legal system, the limited availability of judicial settlement. Serious though these faults are, they are not to be remedied by unilateral action of States contrary to the established law.

2. The powers of the Security Council to authorise force.

The arrangements regarding the use of force in the cause of collective security have never operated as envisaged in the Charter. Instead, the practice has developed of the Council authorising States to use armed force (usually by use of the phrase, "to take all necessary means"). This development is of relatively recent origin and Security Council resolution 678, which is the only resolution to use this language with respect to Iraq is one of the earliest examples. The Council had condemned Iraq's invasion of Kuwait and demanded its withdrawal in resolution 660. Resolution 678:

Authorizes Member States co-operating with the Government of Kuwait… to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.

The resolution further requests "the States concerned" to keep the Council informed on the progress of action undertaken pursuant to the authorisation. The delegation of authority by resolution 678 is wide but it is not unlimited or unconditional. First, the States authorized to use force are those "Member States co-operating with the Government of Kuwait". This description cannot be understood to mean either "States at large" or "States which once were co-operating with the Government of Kuwait", for the identification of the authorized States goes to the purposes for which force were authorised. Although the restoration of peace and security in the area is a wider notion than the liberation of Kuwait, since it was to be achieved by States co-operating with Kuwait, Kuwait's interests and capacities need to be directly implicated. If the reach of "restoring peace and security in the area" and the use of force to restore it were simply subject to the appreciation of States at large, the Council would have surrendered its authority rather than conferring or delegating it.[2]

Since resolution 678, Council practice has developed, so that it is usual now for mandates to be closely defined, to be subject to time limits and to reporting obligations by the authorised State to the Security Council, which secure accountability to the Council and thus maintain the legal nature of the delegation of power.[3] In an absence of an international system of judicial review, authoritative challenges to Council authorisations

[2] If the power to use force under resolution 678 remained an extant authority for the purposes of 678, widely construed, it is difficult to understand why a separate justification were provided for the no-fly zones, originally or at any time later. Cf the explanation given by the MOD for the legal basis of the no-fly zones, in "Iraq 'No Fly' Zones", (<www.iraqinquiry.org.uk/media/38010/mod-no-fly-zone-r1.pdf>) paras 30-39.

[3] See especially, D Sarooshi, *The United Nations and the Development of Collective Security. The Delegation by the Security Council of its Chapter Seven Powers* (OUP, 1999); and N Blokker, "Is the Authorization Authorized…" (2000) 11 *European Journal of International Law* 541. "Mandate" is used to indicate the purposes for which the use of force has been authorized. The other elements in this sentence are the conditions which attach to the exercise of the mandate. "Mandate" is sometimes used to embrace both purposes and conditions.

or State action relying on what the Council is alleged to have allowed, are unlikely to be subject to authoritative international judicial determination but the core ideas of limited powers and the proper delegation of authority have clearly influenced Council practice and were applicable to any action contemplated by the UK in 2003 (see below, section 3). Further, of course, the Council had asserted its own responsibility for the post-war management of the situation in Iraq through resolution 687. The UK had sidestepped any perceived limitations on its right to use force, substantive or procedural, in 1993 and 1998. Its contentions for the legality of its operations were little more than assertions and were strongly contested by other States and by writers.[4] What the Council was requiring for "fit" (in the sense used above) was undergoing development and the clock could not be turned back to 1990, save by the Council itself. While the decision of the Council whether or not and, if so, on what conditions was mainly influenced by political factors, in the light of this evolution in Council practice, it should not have been a surprise that members of the Council would have had reservations about a claim that the almost unconstrained power to use force in resolution 678 "revived" or should be expressly brought to life in those terms by the Council several years later.[5]

3. Resolution 1441 and the "second resolution

I do not enter into the detail of the debate about what resolution 1441 might have meant. I just observe the following: if the Government's understanding of resolution 1441 were correct, then if the Council had met and considered the situation in Iraq and concluded that Iraq was not delinquent (but not by any binding decision, exactly as the UK imagined might have happened in its favour), then the UK would still have been free to use force on, I guess, some revival theory. What, then, was the point of going back to the Council?

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[4] United Kingdom Materials on International Law 1998, [1998] 69 *British Yearbook of International Law*, pp.590-591 for statements by an FCO minister and the UK representative in the Security Council.

[5] That the UK sought an effectively untrammelled right to use force was confirmed by events. The decisions of the US and the UK to use force and the force used in implementing those unilateral decisions was not subjected to Security Council scrutiny in the way that force authorised by the Council should have been. In his advice affirming the right to use force, the Attorney-General noted that any use of force should be necessary for and proportionate to the objectives set out by the Government, Attorney-General's Draft advice to the Prime Minister, 12 February 2003, www.iraqinquiry.org.uk/media/46490/Goldsmith.pdf, para 15. There is no indication that these tests were ever brought bear on the actual or planned uses of force by the UK.

None, because if it had reached a conclusion contrary to the UK's political position, its (the UK's) legal case would not be affected in one iota.[6] It is a common provision that, in the interpretation of texts, a meaning which has substance is to be preferred to one which has not. I have not done any research on this question but I should be fairly confident that it would show that this was a general principle of law: how could it be otherwise? For the present, I simply say that Council practice and proper "fit" required a specific authorisation for the use by States of force against Iraq, especially where the asserted purpose was to uphold the Council's own resolutions at a time when the Council was actively engaged with the situation in and about Iraq. As I understand it from the evidence presented to you about the position of the FCO legal advisers and, until the bitter end, the Attorney-General, they were of this view, though expressed only in relation to the particulars of resolution 1441, whereas I should stress the importance of the wider considerations set out above.[7]

It seemed to me at the time, an impression reinforced by listening to and reading the evidence presented to the Inquiry, that the legal debate was far too narrow. Everything seemed to turn on the mere existence (or not) of the "second resolution", without any regard to what that resolution might say.[8] I accept the importance of Council practice and put great weight on the ideas of proper delegation of authority and of scrutiny of the use to which any authority is put by a delegate. The text of the draft resolution proposed by

[6] Iraq Inquiry: [Written] Statement by Elizabeth Wilmshurst, 18 January 2010, para 5. The anomaly is given further point by the Attorney-General's observation that, "… I do not believe that the revival argument would be defensible if, in a particular case, the Council has made clear [note: **not '**has decided'] either that action short of the use of force should be taken to ensure compliance with the terms of the cease-fire or that it intends to decide subsequently what action is required to ensure compliance."

[7] It is a matter worth emphasizing that the FCO legal advisers consistently and the Attorney-General until the eve of the attack took the same view, that a second resolution were required, a resolution which would have given explicit authorization to use force and have set down the terms which the Security Council thought were appropriate to any authorisation. They all knew of the "understandings" of the Foreign Secretary and officials in New York but were, presumably, not persuaded that their interpretations provided the better "fit" in the whole legal context of collective security.

[8] The Prime Minister did say, "All we are asking for in the second resolution is the clear ultimatum that if Saddam continues to fail to co-operate, force should be used.", HC Hansard, 18 March 2003 Vol 401. c767, a resolution which would not "fit" with Council practice as it had developed since 1990. The Foreign Secretary said, "My personal preference would be for a Resolution which at a minimum declared a further material breach (OP4) and the consequential serious consequences (OP13) of this further material breach, but we might have to settle on material breach alone)." Iraq Inquiry: Letter from Foreign Secretary to Attorney-General, 6 February 2003, Document 137, suggesting that it was envisaged that there would be no reference to a right to use force (still less, of course, that any conditions might be attached to it).

the US, the UK and Spain of 7 March 2003 was quite inadequate to satisfy these limitations established by practice and, besides, would have authorized different States than the ones mentioned in resolution 678, so would not have "revived" the earlier authorization, even if had been satisfactory in other respects.[9] Of course, it turned out not to be acceptable to a majority of the Council (quite regardless of any matter of a veto). It might have been that the objection of the majority of the Council was utterly politically driven, that is to say, those States were determined to deny the US, the UK and Spain a second resolution whatever it said. Equally, it might have been that some of these States had legally based objections to a thoroughly deficient resolution which took no account of the practice of the Council as it had developed – a resolution which did not "fit" with the established understanding of the meaning of the Charter.[10] Indeed, I should have gone further and said that a resolution which did not satisfy the emerging criteria – a specific mandate to identified States, a time-limited authorization and clear and binding reporting obligations on any States acting on the authorization to use force – would have lacked legal effect; it would have been beyond the powers conferred by States on the Council. So, my conclusion is that "fit" required a second resolution, given the absence of a clear indication to the contrary in resolution 1441, and that that resolution would have had to comply with the detailed conditions which I have set out. The Attorney-General's emphasis on the exegesis of resolution 1441 was largely beside the point (although I concede that the Council could have authorized expressly the use force in the unqualified terms of resolution 678 – but it did not. The issue was not whether or not resolution 1441 required a further decision of the Council as a pre-condition for the use of force against Iraq (a procedural matter) but the requirements of a proper "fit" required of any resolution which indicated which States were authorized to take what action, for what purpose and under what conditions (a substantive matter). This is what the UK did not achieve. This was the only way in which the use of force could have been authorized. Its absence is what made the action taken against Iraq unlawful.

[9] At the time, I heard the draft being described as saying, "This is the second resolution." The words captured its vacuity rather well.

[10] There is no need to resolve these speculations because, in the absence of a resolution in the appropriate terms, there was no authorization to use force, whatever the reason, and so no "fit" between the force used by the UK and the applicable law.

4. The role of the Attorney-General[11]

The Attorney-General's role was described to the Constitution Committee (by a former Attorney) as being like that of a "family solicitor" to the Government, an inadequate analogy which understates the importance of the Attorney's role (for which reason the homely analogy was rejected by Lord Goldsmith) and which misstates certain aspects of his function when he exercises has the quasi-judicial function of providing objective legal advice to the Government. If we must have the comparison, the "family solicitors" to the Government are surely the legal sections of the several Departments of State. Excluding those occasions when the Attorney-General acts for the Government as an advocate, his obligation, however difficult it might be to conceive, is to provide his best considered statement of the law, not to facilitate any particular policy. That it was not demonstrably the case that Lord Goldsmith did take this view of his duty is one of the reasons why his ultimate advice to Government has been so unfavourably received. Since there was nothing by way of changes of circumstances nor no new legal arguments were canvassed in the period between his two opinions of 7 and 17 of March 2003, the impression (however unfairly) arose that his change of position was influenced by the exigencies of policy rather than by the demands of international law. It is ironic that he was kept out of the process of negotiation of any second resolution for so long, even being told that his advice was not wanted at a crucial stage.[12] You have had ample evidence on this and some change in the relationship between the Attorney-General and the Prime Minister is clearly warranted (and, I should add, with Parliament if the decision to deploy force abroad is reformed, as I think it should be). I had always understood the position to be that in situations like the decision to attack Iraq, the Attorney was formally asked for his legal opinion by a Department, with proper documentation and an account of the evidence, to which he responded as though the request had come to him in the ordinary

[11] I write with caution here. I was not a constitutional scholar, still less was I an expert of the office of the Attorney-General. I was, though, adviser to the House of Lords Constitutional Committee on the power to deploy armed force abroad and so have had some exposure to debates about the Attorney's role in this matter. Their deliberations emerged as "Waging war: Parliament's role and responsibility, (2005-2006) HL Paper 236 – I and II. See Volume II, pp.107-120 for the evidence of the Attorneys-General, past and present. I should say that I write entirely on my own behalf and rely only on material on the public record.

[12] Declassified paper, Attorney-General to Prime Minister, www.iraqinquiry.org.uk/media/46490/Goldsmith-note-to-PM-30January2003.pdf.

way of practice. He might do more – a summary, say, for Cabinet – but he ought not to do less. The brief reply to the parliamentary question on 17 March 2003 does not satisfy this minimum responsibility (it was a surprise when it was later said that this was all there was), nor does his rather longer advice of 7 March 2003 really fit the bill because it is divorced from the instructions he had received.[13] More clarity about the way the Attorney-General should provide his advice would be desirable and this might be an element in your general consideration of his position.

4. The "reasonable" argument[14]

When faced with litigation, international or domestic, which will usually involve executed decisions rather than prospective ones, the Government, like any litigant, is entitled to put the best arguments it can in support of its case. It is for the judge to determine which of the competing versions is the one supported by the law. The Government may be forced to concede the illegality of its action and pre-empt a hearing by reaching a settlement with the other party. Otherwise, its legal representatives, commensurate with their professional obligations, must do the best they can. These considerations apply to the Attorney-General when he acts as advocate. The position is different in the face of contemplated action or the adoption of policy. Of course, the imminent threat of litigation may blur this simple distinction but, though that is a matter to be taken into account (as Lord Goldsmith recognized), it ought not to be the determinative element in deciding what to do. Where the use of force is contemplated, it should be the best legal argument which prevails, not a mere plausibility which counsel could put up without embarrassment in litigation or (more likely) that could be relied on by Ministers in the political sphere, safe in the knowledge that litigation were unlikely.[15]

[13] And the rather longer note from the Foreign Secretary to the FAC was not a substitute for an opinion from the Attorney-General (though it was compatible with his parliamentary answer), United Kingdom Materials on International Law 2003, [2003] 74 *British Yearbook of International Law* pp.791-796.
[14] This is a policy question and a lawyer's opinion carries no great weight.
[15] There was effectively no prospect of the UK being a defendant in the ICJ, given the terms of its Optional Clause acceptance of the Court's jurisdiction and the even more restrictive (or even non-existent) declarations by those States which might have instituted proceedings against the UK. The Government did, however, alter its declaration under the UNCLOS with the apparent objective of thwarting any action against the UK there. For UK domestic legal action, see below, ns.17 and 18..

Indeed, Sir Michael Wood suggested that the very unlikeliness of an authoritative judgment of an international court put a special burden on all those advising the Government about international law to protect the integrity of the international legal system by settling on the best legal argument and not merely a defensible, plausible or reasonable one.[16] The bite of this position has especial salience where the action contemplated is to use military force against another State, with the inevitably large costs in life and other human values, in money and material and in reputation. If this were the approach of the FCO legal advisers, then a fortiori, the same considerations ought to have informed the Attorney-General's conclusion. To this one can add the national arrangements for policing the legality of deployments of troops abroad. There are no domestic legal standards applicable to the lawfulness of an overseas deployment of military force. The courts have made it clear that they have no jurisdiction to decide a public law application based on any international law which might apply[17], nor is there a crime cognizable by national courts which replicates the international crime of planning etc a war of aggression[18]. It is true that in the case of the action against Iraq, there was a debate on a substantive motion in the House of Commons immediately preceding the operations, on which the Government obtained a majority. It did so, though, on the basis of legal advice which was flawed and incomplete (quite apart from the fallibility of any other of the information put to the Commons, about which I make no comment). In any event, on the eve of the commencement of operations, a debate seeking support for decisions manifestly already taken and extremely difficult to retreat from did have a certain artificiality to it. If the debates of this kind cannot be made earlier in the piece (and they are not inevitable under present arrangements), the consequent dilution of the political accountability of a Government makes even stronger the case for resorting to force only on the basis on the best legal argument. The final argument in favour of the best argument is this – illegal resort to the use of force is a crime against international law, the crime of planning, preparing and waging a war of aggression, a measure of the special seriousness with which breaches of States obligations are regarded and a matter of personal responsibility for political leaders and the senior military. It might be one

[16] Iraq Inquiry: [Written] Statement by Sir Michael Wood, 15 January 2010, para 37.
[17] *Campaign for Nuclear Disarmament v Prime Minister & Ors* [2002] EWHC 2777 (Admin).
[18] *Jones, R v.* [2006] UKHL 16, (in my view, an unfortunate and unnecessary outcome).

thing to act on a reasonable argument about a remediable wrong, say, to arrest on the high seas a ship suspected of trafficking persons, where, if the argument does not prevail, the wrong may be remediable. It is another to risk criminal responsibility for an action which will produce consequences beyond the remedial devices of international law to repair.

5. Conclusion

Why bother to make a submission on the legal basis for the attack on Iraq to the Inquiry, given the Inquiry's statement that it did not intend to reach a conclusion on the merits of the legality of the attack on Iraq? Even further, if the arguments about the illegality of the attack on Iraq (with the consequence of individual criminality for the planning etc of a war of aggression) were to obtain the Inquiry's endorsement, there is no prospect of any UK official appearing before a criminal court to answer such a charge, nor will the UK have to answer for the state responsibility which followed upon its wrongful action. However, what is at stake is the coherence of the international legal system, including its arrangements for collective security, to which the UK has (properly) attached so much importance. The last thing I want to do is to claim too much for international law – its possibilities are limited, not least by its institutional deficiencies – but one only has to contemplate those areas of the world or those particular topics where international law has little or no effective impact to see (and, I hope, recoil from) the alternative to not supporting the system we have. The legal story of the attack against Iraq from the perspective of the UK authorities was one of trying to evade the constraints which international law imposed upon the unilateral use of force – reliance on implied authorisations, on contested interpretations, recourse to untenable propositions such as the "unreasonable" veto. It is too soon to tell quite how the atmosphere of disregard for international legal considerations about the attack on Iraq might have infected its execution and its aftermath but the signs so far are not encouraging.

Sir Michael Wood and Elizabeth Wilmshurst might not have expressed themselves so rhetorically but I endorse their concern for respect for the disciplinary methods of

international law[19]. The Inquiry should consider how they may be given better effect in the administrative arrangements which attend the contemplation of foreign wars by the UK in the future. I found the presumption of the Foreign Secretary that he was competent to reject on its merits, the legal advice of his Legal Adviser breath-taking[20] – it would have been one thing to have said, "I hear what you say but I intend to go ahead whatever the legal consequences.": it was quite another to say, "I intend to go ahead because I have decided that you are wrong on the question of international law." His unsupported recollections about his triumphs at the Home Office are not persuasive without further and betters of the instances to which he referred.

It is worth rehearsing the arguments about the international legality of the attack against Iraq because the absence of a sound legal basis for the action shows that under our existing political and administrative arrangements, things can go badly awry. This is not a matter which may be confined to this single instance. The UK has both a tradition and a continuing national interest in support for the system of international law, a commitment which will mean in some cases, subjecting its own policy to the constraints which international law imposes. Whatever else your Inquiry has established, it has shown that in this matter, the machinery of government is in need of change.

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[19] See Sir Michael Wood, oral evidence to the inquiry, www.iraqinquiry.org.uk/media/44205/20100126am=wood-final.pdf, pp.33-34; and Elizabeth Wilmshurst, oral evidence to the inquiry, www.iraqinquiry.org.uk/media/44211/201000126pm-wilmshusrt-final.pdf, pp.9-11.
[20] Note from Foreign Secretary to FCO Legal Adviser, www.iraqinquiry.org.uk/media/43511/doc_2010_01_26_11_04_18_456.pdf. I am sure that there is little need to remind you of Ms Wilmshurst's comment on this presumption, above, n.19, p.8.