**International Law Submission**

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I have recently published a book that addresses many of the legal issues considered by the Inquiry. The book has been made available to the Inquiry in case it is of interest (*International Law and the Use of Force against Iraq, Oxford University Press*, 2010). This short submission summarizes some of the key conclusions in the more condensed format suggested by the Inquiry in its call for submissions on international law issues. In view of the detailed review of the facts and the law in the book, including testimony and documents made available by the Inquiry thus far, references have been omitted here.

## I. Lack of Legal Authority for the Use of Force

1. International law precludes the use of force unless justified by self-defence, a UN Chapter VII mandate or arguably the doctrine of forcible humanitarian action to avert or terminate a grave and overwhelming humanitarian emergency. It is universally acknowledged that the invasion of Iraq was not justified by self-defence or forcible humanitarian action.
2. No mandate was adopted by the UN Security Council relating to the 2003 invasion of Iraq. However, it is true that Resolution 1441 (2002) re-consecrated the operation of the revival argument relating to Iraq. That argument had in fact been generated by the UN Secretariat in 1991-3. It operated as an informal means of rendering lawful coalition action aiming to enforce Iraqi compliance with the obligations contained in Resolution 687 (1991).
3. The revival argument required a finding from the Security Council, in a resolution or possibly a mere Presidential statement, that Iraq had breached the disarmament obligations contained in resolution 687 (1991), that this breach was a material one (i.e., capable of suspending the obligation not to use force that had been restored by the resolution in relation to Iraq), and that serious consequences would flow.
4. The revival argument itself was not based on sound legal reasoning and would ordinarily be rejected. However, in the early part of the 1990's it facilitated action in conformity with an informal understanding in the Security Council. At the time, it was impossible to obtain a fresh formal mandate for the limited use of force that was envisaged. On the other hand, Council members accepted that Iraq had to be brought into compliance, possibly through the use of limited force.
5. This informal consensus collapsed when uses of force against Iraq became more frequent, and took place outside of Security Council control, during the latter half of the 1990s. The revival argument was formally disowned by a majority of members of the Council by 1997, and more clearly in the wake of the US/UK operation Desert Fox at the end of 1998. In that latter instance, the US/UK invoked resolution 1205 as informal authority for the use of force. However, that resolution had been drafted with great care, avoiding the technical terms 'material breach', precisely in order to avoid the possibility that the resolution might be invoked as authority for the use of force. Testimony before the Inquiry has rightly described the revival doctrine as being discredited at that time.
6. The UK nevertheless worked hard to obtain the necessary findings for the operation of the revival argument in 2002, in the drafting that resulted in Resolution 1441 (2002). However, it was clear, even then, that there was no sufficiently widespread support for the use of force

against Iraq in the Council. Hence, the clear invocation of the revival argument, and of its necessary ingredients (finding of a breach, determination of its material nature, and threat of serious consequences) was balanced by the process requirements in the resolution.

7. That process requirement consisted of the submission of reports on eventual failures by Iraq to comply with the terms of Resolution 1441 (2002) for assessment by the Council. In view of most Council members, this related to reports from the UN arms inspectors (rather than individual governments) and included the expectation that the Council would consider or discuss these. The UK government itself argued that only serious or substantial violations by Iraq of its disarmament obligations would activate Iraq's material breach of resolution 1441 (2002), requiring a substantive finding by the Council. In view of the categorical assurances on non-automaticity and 'no hidden triggers' given by the sponsors of Resolution 1441 (2002) and the formally memorialized positions of other delegations on this point, the FCO Legal Advisers and, initially, the Attorney General, were right to conclude that no fresh authority for the use of force had been given in the resolution itself. The argument that these assurances merely meant that force would not be used immediately is not credible. Automaticity and hidden triggers was clearly seen as an assurance on the procedural requirements of Resolution 1441 (2002), rather than a mere delay in the operation of an authorization to use force.
8. The UK merely asserted that it expected the Council to meet its responsibilities in case of further material breaches. This was seen at the time as a possible reserve in case further action might be blocked due to a veto in the Council, assuming that there existed overall agreement of all or most other Council members on the use of force. The argument of an 'unreasonable' veto was later abandoned by HMG. This however left the UK in a position that it had agreed to a resolution that did not in itself offer the fresh authorization for the use of force that was rightly believed necessary. The US, on the other hand, reserved its claim that it could act to enforce the cease fire terms without the need of any additional authority from the Council, either expressed in Resolution 1441 (2002) or in a subsequent resolution. However, a state cannot reserve a right it does not have. There is no support for the proposition that the revival argument can operate outside of decisions of the Council.
9. In forming his final view on the lawfulness of military action according to Resolution 1441 (2002), the UK Attorney General indicated that he had been much impressed by the consistency and strength with which this latter argument had been maintained. In his view, the US would not likely have abandoned its position in the negotiations—a fact of which other delegations were fully aware. He therefore judged it reasonably arguable that Resolution 1441 (2002) did, after all, authorize the use of force. This reasoning is defective, as the US position did not concern the interpretation of Resolution 1441 (2002). Rather, that position holds that that the resolution is not relevant, or legally necessary when justifying further uses of force. However, even the UK did not support that extreme view. The UK position required an interpretation of Resolution 1441 (2002) finding renewed authority to use force according to the revival doctrine. But, as the Attorney General had previously maintained, and the FCO Legal Advisers had argued consistently, no such fresh authority had been granted in the resolution.
10. Even if the revival argument could be somehow made to operate, it would not authorize the wholesale invasion of Iraq. Instead, force could only be used to meet the limited aim of addressing Iraq's infractions of the arms inspection regime.

## II. The Legal Advisory Process

11. The FCO Legal Advisers contributed to a relaxation of the appreciation of standards on the use of force, in particular when accepting the operation of the revival doctrine in the early practice of the Council. A somewhat lax attitude was also evident in the discussions about the legal authority to continue the operation of the no-fly zones relating to Northern and Southern Iraq (and, indeed, the expansion of the Southern Zone in 1996). There was also a relaxation of standards for self-defence in maintaining the zones. Moreover, the humanitarian motives of that operation became occasionally intertwined with the wish to diminish and degrade Iraq's overall military capability, or at least its air defences. However, it is noteworthy that the Attorney-General considered many of these issues seriously and on a continuous basis, asking searching questions in relation to the factual bases of claims to the threat or use of force.
12. Having accepted the revival argument as a reasonable or even respectable basis of argument in 1998 (when it was in fact widely rejected in the Council), the FCO Legal Advisers did not question the application of this doctrine when it was proposed as the only possible legal basis for forcible action against Iraq in 2002. The UN Mission in New York appears to have been given the instruction to replicate the conditions for the operation of the revival argument when negotiating Resolution 1441 (2002). In that sense, the UK diplomatic effort was surprisingly successful. However, the revival argument was restored to its good graces at the price of the process requirement imposed in the resolution. It appears that the UK mission did not receive at a sufficiently early point in time authoritative guidance that the resolution as drafted would accordingly not in itself furnish a legal basis for the use of force. This point was in fact made very clearly, both before the adoption of the resolution, and afterwards, by the FCO Legal Adviser and the Attorney General. That advice was directed at the Secretary of State for Foreign and Commonwealth Affairs and at the Prime Minister's office and apparently not passed on.
13. At least in London, the legal position was widely understood. Nevertheless, this does not seem to have had a significant impact on planning for the war. Presumably, there was at that time an expectation that a second resolution would be obtained. It is not clear what such optimism would have been based upon.
14. The failure to seek a formal, authoritative interpretation of the resolution from the Attorney General at that point is difficult to explain by reasons other than those of political convenience. Indeed, the Attorney General's own initiatives at this time seem to have been rebuffed, and there were suggestions that he should not put his adverse view on paper. The Attorney General exercised commendable initiative when insisting that his views be made known to the Prime Minister, at least informally.
15. When the Attorney General was finally requested to offer legal advice, this request was conditioned by the fact that such advice would not be required just yet. Moreover, the FCO Legal Adviser had been instructed to submit a balanced or neutral view in briefing the Attorney General, rather than his own analysis and conclusion on the matter. The way in which the advice was generated is also somewhat surprising. The Attorney General generated various drafts which were discussed with his 'client', the Prime Minister or his officials. This gives the appearance of his advice being subject to negotiation with high officials. Indeed, the Secretary of State for Foreign and Commonwealth Affairs took it upon

himself to try and negotiate the advice with the Attorney General. This severely undermines the assumption that the Attorney General exercises his constitutional function in this respect independently.

16. The Secretary of State for Foreign and Commonwealth Affairs famously rejected the consistent advice on the interpretation of Resolution 1441 (2002) offered by the FCO Legal Adviser. This brings into question the performance of the Minister according to the Ministerial Code. If he is required to act in conformity with international law, one would presume that he must be guided by the determination of the law by his own expert officials. One might argue that the issue of legality was still open at that point, given the absence of an authoritative determination by the Attorney General. However, as the Secretary of State for Foreign and Commonwealth Affairs himself instructed his legal advisors as to how to present the brief to the Attorney General, and as he then engaged in a very vigorous campaign to overturn the view of the Attorney General, this question remains a significant one.
17. The final advice offered by the Attorney General concluded that a reasonable argument could be made, in particular in view of the US position. As was noted above, this reasoning was not sound. Moreover, as he noted in his memorandum, in view of the principles of legal interpretation that are also routinely applied to UN Security Council resolutions, the heavy reliance on the US view, and on the position of the UK mission in New York, was questionable. The fact that both would have been unlikely to have accepted a text that was not in accordance with their instructions is not decisive, if the agreed text, and the context of its adoption, leads to a different conclusion. The Attorney General expressly referred to this difficulty in his formal advice.
18. It is unfortunate that the possibility of making a reasonably arguable case in favour of the use of force was equated with a decision in favour of the lawfulness of the use of force. One would have thought that the Attorney General would have had to side with the 'safer' interpretation of Resolution 1441 (2002), as he himself put it. When advising on the issues of great import, such as the use of force in this instance, the previous practice of insisting on a 'respectable' legal case would seems more appropriate. Respectable, in this instance, would mean a legal case that is, on balance, persuasive and likely to persuade others. This was not the case here.
19. When pressed to offer a clear 'yes or no' decision in relation to the lawfulness or otherwise of the use of force, the nuanced advice given by the Attorney General was converted into a clear determination in favour of the use of force. The view that was previously considered merely arguable was now held out as the dominant one. Moreover, while it was felt necessary to offer such a categorical assurance to the armed forces and UK officials, this clear finding was also reflected in the materials prepared for submission to Cabinet and Parliament when deciding upon peace and war. It has been acknowledged that these materials were in fact written as advocacy documents, defending a position that had already been taken. This will not however have been apparent to Cabinet and Parliament, who would have legitimately regarded them as a full and fair reflection of the advice offered by the Attorney General. While it is true that such advice was not previously made available, the decision to offer the view of the Attorney General was taken by the Government. If it does so, it must be expected that this view fully accords with the final advice given.

20. The Attorney General left it to the Prime Minister alone to determine whether or not the circumstances triggering the activation of the supposed mandate to use force in Resolution 1441 (2002) were present. In opposition to previous practice, the Attorney General did not himself question whether the claimed facts or circumstances actually existed. Indeed, it later transpired that they did not.

## III. Suggestions

21. The Inquiry might consider how the legal advisory process in matters concerning peace and war can be strengthened in consequence of its findings. In particular:
    a. The obligation of Ministers to comply with international law might be entrenched. The question arises whether a Minister should have the authority to disregard the unambiguous and unanimous expert advice given by his own Legal Advisers in an instance such as this. If he or she can freely do so, then the obligation in the Ministerial Code is rendered devoid of much substance, as the Minister would him or herself proclaim the legal standard that applies to him or her. At least, the Minister (or Prime Minister) should be required in such an instance to seek the authoritative view of the Attorney General the very moment such a conflict arises.
    b. In general, one might require the Minister or Prime Minister to obtain an authoritative view from the Attorney General when operational decisions are taken in preparation of a possible use of force, or potentially leading to a use of force.
    c. One might also consider whether the Ministerial Code should not perhaps be recast into a more solid legal form, and perhaps one that carries sanctions.
    d. The Code requires that summary legal advice be accompanied by the full version of the legal advice when submitted to Cabinet. It was argued that this does not apply when the Attorney General is present in Cabinet on the occasion of the submission of the summary advice. While there is no basis for this claim, it might be clarified that the requirement to append the full version applies under all circumstances.
    e. One might also require the Attorney General to append the legal advice from the relevant lead Ministry (in this case the FCO), if his advice substantively differs from it in its conclusion.
    f. The practice of discussing the advice in draft with Ministers or the Prime Minister should be reviewed.
    g. The substantive standard concerning the use of force (a strong, a robust, a respectable case) should be clarified.
    h. Where the UK is engaged in negotiations concerning possible mandates relating to the use of force, the advice of the Attorney General should be sought on a rolling basis, and be made available to the negotiators, to ensure that the negotiating outcome or UK statements concerning it are in accordance with the definite interpretation of the legal position by the Attorney General.
    i. The Inquiry might offer suggestions on how the availability of legal advice to Parliament can be assured, either in form of the full advice of the Attorney General, or through other means. If Parliament is to have a role in decisions on peace and war, it is no longer appropriate the claim that the legal advice on which such as decision must be based, at least in part, should remain privileged.