Legalizing War

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The debate triggered once again, this time at the Chilcot inquiry in London, on whether Security Council resolution 1441 of 8 November 2002 authorized military action against Iraq, is not without significance for the current consultations for other Security Council resolutions including on Iran. As already clear from the inquiry, the Foreign Office legal advisers told the Foreign Secretary that military action was not authorized under Security Council resolution 1441 and that such action would be unlawful unless another resolution expressly authorized the use of force. According to the inquiry, the Foreign Secretary turned down this advice and followed the opinion of the Attorney-General that another resolution was not necessary and that the use of force against Iraq was lawful under resolution 1441 together with other resolutions referred to in its text.

Elizabeth Willmshurst, the Deputy Director of legal affairs at the Foreign Office, and the one reportedly most acclaimed by the audience in the Chilcot inquiry, submitted her resignation in protest hardly two days before the armed attack was launched on Iraq. Her advice, together with the law officers at the Foreign Office as well as several experts and scholars throughout the United Kingdom, might have been shared by no less an authority than Lord Bingham, former Master of the

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Rolls, Lord Chief Justice and Senior Law Lord. In spite of the debate, the use of force took place and, more importantly, the experience of Security Council resolution 1441 does not seem to be the last. Why?

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There are two answers. One is found in the text of resolution 1441 which, as it stands, is indicative of some critical factors leading to the war. In some paragraphs, the resolution asks Iraq to comply with the requirements imposed by the Security Council on the elimination of its reported weapons of mass destruction and related matters. The resolution further decides to *convene* a meeting of the Security Council *if* Iraq did not fulfill the requirements of the resolution. This paragraph is a clear indication that military action could not be authorized without the convening of such meeting. According to those paragraphs, and other paragraphs in that resolution going in the same direction, the war against Iraq could not have been legalized. But it is striking that the same resolution includes other paragraphs which amount to counter-argumenting those just mentioned. It refers to a previous Security Council resolution *authorizing Member States to use all necessary means* to implement its resolutions. It decides that Iraq *has been and remains in material breach of its obligations.* It also warns Iraq once again against the *serious consequences it will face as a result of its continued violation of its obligations.* For some readers, this language seems to be suggestive of the use of force, even without another resolution.

These two different sets of provisions, each going in an opposite direction - in so far as the issue of the need for another resolution was concerned - have made

conflicting interpretations possible. Since the resolution was written in such a manner which would appear to satisfy *both* those who believed that a subsequent resolution authorizing the use of force against Iraq was needed *and* those who thought that such a resolution was not necessary, could not be an outcome of a genuine consensus but it disguised an agreement to disagree. This *a la carte* or two menus approach incorporated in the resolution were more apparent than real because once military action is initiated, the paragraphs upon which the necessity of another resolution were thought to be invoked, would themselves be rendered unnecessary. And, from the stand point of international humanitarian law, it matters little, if at all, whether the victims of an armed conflict were killed or injured upon one resolution or thanks to a second resolution. Yet, nothing suggests that Security Council resolutions, particularly in similar or comparable circumstances, shall always be written without implying different interpretations, and that is one reason why the experience of 1441 is not unlikely to reoccur.

The second reason for the experience of 1441 to reoccur is related to the interpretation of the Charter of the United Nations. The legal advisers of the Foreign Office were quite right to believe that Article 51 of the Charter does not authorize any country, with or without resolution 1441, to take military action against another country unless the latter did wage an *armed attack* against it, and that the United Kingdom could not accordingly be authorized to carry out military action against Iraq. Whether that very Article 51 of the United Nations Charter may be invoked in case of an "eminent"

threat, such as would have been *if* the intelligence estimate that Iraq could have mobilized weapons of mass destruction in 48 hours was proven to be true, remained controversial. Agreeing with the "eminent threat" theory would have brought self-defense to the concept of resolution 1441. Another opinion, more established, is that Article 51 of the UN Charter do not authorize pre-emptive attack by Member States. That was the point in going to the United Nations to get a Security Council resolution.

In the circumstances, resolution 1441 could only be based on article 42 of the UN Charter which authorizes the Security Council to take military action once economic sanctions and the like were considered inadequate or proven inadequate. But the wording of this Article entails two interpretations. One is that authorization is given to *the* Security Council and the force involved should be that of the *United Nations*. Accordingly, resolution 1441 could not have authorized the United Kingdom, or in fact any other country, to take military action against Iraq. The second interpretation, broader, is that Article 42 of the UN Charter does not preclude the possibility of the Security Council authorizing Member States to carry out military action (in its behalf), though that Article does not provide for this explicitly. Many of the *Armada* of Security Council resolutions adopted since the end of the Cold War were made in line with the second interpretation. They do not prescribe the use of force *by* the United Nations as much as they do provide umbrellas for the use of force by Members of the United Nations under the now more common title

"Multinational Forces". Such practice for about two decades, however debatable, cannot be ignored and, in fact, resolution 1441 was not the first to come under this umbrella. When a broad interpretation is allowed, a boarder interpretation would follow eventually breeding a trend of broad interpretations and, thus, the debate on whether another resolution for the use of force was necessary, was possible to override. This ambiance is another reason why the experience of resolution 1441 is not unlikely to reoccur.

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Since the implications of the Chilcot inquiry should go beyond the United Kingdom and extend to UN Members both those who believed that military action according to resolution 1441 was unlawful and those who thought that it was lawful, two actions may be envisaged for the future. One is to ask the International Court of Justice to give an Advisory Opinion on whether resolution 1441 authorized military action or not and whether another resolution was necessary or not. Whatever the limitations of the International Court of Justice and its advisory opinions are, it remains the principal legal body of the United Nations and its opinion would signally contribute to the development of international law on such a critical issue. The other solution is simply to encourage diplomats to trim resolutions rather carefully so that no controversy should arise after adoption.