The Road to Basra

1. Introduction

The involvement of British service personnel in the invasion of Iraq in 2003 took place against a background of division both domestically and internationally. The legal basis, revolving principally around the meaning of Security Council resolutions, was hotly disputed and has led to continuing political ramifications as the British and American military presence in Iraq continues. At the domestic level the role of legal advice in the process of executive decision-making and its presentation to parliament became particularly apparent. Moreover, the whole process of executive decision-making, at both the international and domestic levels requires reconsideration in the light of both Kosovo and Iraq. The inability of the Security Council to achieve consensus on how to tackle either crisis, calls into question its continued role as the fulcrum of collective security. At the domestic level the executive appeared to be effective in sending troops without clear UN authority, and although parliament seemed to play an increased role there are still questions as to whether it was an adequate democratic counterweight to the executive. The desperate search, especially by the British government, for a second UN resolution early in 2003, and the inability to stop the growing momentum towards war in March are realities that are often hidden in international legal literature by the dry arguments of whether the war was justified by existing UN resolutions. This chapter opens out the legal and political debate to discern both the legality and legitimacy of the military operation to topple Saddam, and the subsequent occupation and attempted rebuilding of Iraq.

2. The Security Council: More Than a Meeting Place

The legal fog surrounding the 2003 Anglo-American invasion of Iraq arises out of a disagreement about the nature of the Security Council and its decision-making competence. On the one hand the Security Council can be seen simply as a collection of states, no different from the Concert of Europe in the nineteenth century or the G7/8 of more modern times. In these fora governments simply
agree or disagree on strategy or policy and any decision 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’!

Britain has generally adopted a pragmatic approach to the Security Council, seeing it as an instrument of governance when necessary, for example when adopting wide ranging anti-terrorism measures after 9/11, at other times as a useful vehicle for encouraging settlement, for example when it sponsored Resolution 242 after the Six Day War of 1967, a resolution which is still viewed as the basis for settlement of the Israeli/Palestinian conflict. 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 British perspective Resolution 678 of 1990 which authorized ‘necessary measures’ against Iraq was sufficiently flexible to permit fairly wide interpretation by those acting under it, such as Britain, but did not prevent the Council from imposing its own judgment. The difficulty caused by this view will be seen in this chapter as the British government argued that the authority granted by Resolution 678 of 1990 still applied in March 2003 to justify the invasion of Iraq.

With the odd historical aberration such as the Korean War in the 1950s the Cold War prevented the Security Council from developing a separate will through executive action. This though did not prevent the Council from functioning. As Inis Claude noted, the requirement of consensus among the five permanent members of the Council (P5) meant that the Council was intended to perform both an executive and a diplomatic function. ‘The Council was designed to serve as an instrument of action whenever a unanimous vote of the great powers revealed the existence of a consensus, and a forum for negotiation whenever the use of the veto revealed the absence of a consensus.’ In other words there can be said to be two Councils: a corporate one, especially when adopting decisions under chapter VII; and a traditional conference one, when acting as a forum for negotiations that may be productive but do not lead to a Security Council decision.

Organizations without separate will (known in international law as legal personality)—the G8 for instance—can be said to have a separate existence but not separate will at least in a legal sense. True, the G8’s communiqués reflect the collective view of eight states but, without separate will, such communiqués do not have legal status as G8 decisions per se. Without separate will the G8 has

---

no law-making power. Regular G8 meetings indicate its separate existence, but states have not transferred any of their will to the G8, or given it the elements that would enable it to develop a will of its own. Thus ‘for an international entity to be regarded as existing separately from its Member States, the entity must have a decision making organ that is able to produce a “corporate” will, as opposed to a mere “aggregate” of the wills of the Member States’. Nevertheless, the impact of certain fora lacking formal personality should not be underestimated. As Niels Blokker notes ‘G8 consensus was crucial in the spring of 1999 to ‘solve’ the Kosovo crisis’.7

Contrast the output of the G8 with a decision of the Security Council adopted in accordance with its voting rules.8 Such a decision is a reflection of the will of the Security Council not the combined view or even combined wills of the members of that body. The separate personality of the UN, recognized as early as 1949 by the International Court,9 establishes the autonomy of the organization as a whole, though in the case of the Security Council there is a concentration of will, enabling it, for example, to take mandatory decisions imposing non-military measures binding on the whole membership,10 a power it has utilized significantly since the end of the Cold War. As well as powers expressly granted by the UN Charter, there are those said to be granted implicitly, although the reality is that they have been developed in practice, and often with controversy, by the Council itself. The competence to legislate to create international criminal tribunals for Rwanda and the former Yugoslavia in the 1990s or to legislate to combat terrorism as it has done after 9/11, for instance, can hardly be said to have been the intention of the founding states, in reality they are a creation of the Security Council itself, a product of its separate will.

That the Council has significant separate will was evident in 1945. Indeed, what occurred then was a collective action of states imbuing the Security Council with unique powers that individual states did not possess thereafter. Even if states had a collective police power before 1945, at that point they embodied it for better or for worse (though the intention was to improve the ambiguous and selective nature of collective interventions) in the Security Council.11 It would be accurate to state that the parameters, even existence, of such a collective power before the advent of the UN Charter was legally highly doubtful. It was by establishing the UN that the vast majority of states decided to create

---

8 Art 27 of the UN Charter.
10 Arts 25 and 41 of the UN Charter.
a body with novel competence. Thus the adoption of the UN Charter in 1945
was a defining moment, not in the sense of codifying an already existing legal
regime, though one was arguably emerging during the course of the Second
World War with the idea of the United Nations,¹² but in the sense of creating
a new world order with the Charter assuming the position as the foundational
constitutional document. Thereafter the UN possessed powers which states did
not, and arguably never did, possess. The decision to impose economic sanc-
tions or authorize military action to deal with threats to the peace as well as acts
of aggression belongs to the Security Council, though subsidiary responsibil-
ity arguably falls to the General Assembly. Even some modern-day advocates
of anticipatory self-defence accept that while the Security Council can take
action against threats that are not imminent, states cannot, thus recognizing
the uniqueness of the Council.¹³

Once the Cold War ended and the Security Council started taking copious
amounts of action expressing its ‘corporate will’ there was potentially more dan-
ter to the UN Charter scheme than when the Council was deadlocked. Powerful
states have realized the potential of the Security Council given the huge range of
its powers and the limited forms of accountability for their exercise. In general
terms of legality and legitimacy Security Council approval is the key powerful
states seek to unlock coercive non-defensive action. All those doubts that remain
about whether a state can undertake humanitarian intervention, or anticipatory
action, are swept away if the Security Council authorizes it as a response to a
threat to the peace. Whatever the weaknesses of the Council, recent conflicts
in Kosovo and Iraq, even Afghanistan, show the unique authority of that organ
in collective security matters, as the states using force attempted to justify their
actions as coming under Security Council resolutions. If powerful states manage
to persuade the Council to adopt resolutions tackling threats to or breaches
of the peace within the meaning and purposes of the Charter as developed by
practice then the international community generally accepts the legitimacy of
such actions and will support the Council. Witness the support for the coalition
in the Gulf Conflict of 1991.¹⁴

But the Security Council is a political body; this is not only reflected in its
chequered history in the realm of collective security, but also by its make-up and
the wide discretion given to it in the UN Charter. In such a body it is inevitable
that a member or group of members wanting it to act in a certain way must per-
suade the remaining members to its way of thinking. While the United States
with British support won the argument in the case of Resolution 678 which

¹² See ‘Declaration by the United Nations’, 1 Jan. 1942. For text see R.B. Russell and
¹³ C. Greenwood, ‘International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida,
authorized necessary measures against Iraq in 1991, they lost it as regards gaining Security Council authority to invade Iraq in March 2003.

3. The Security Council and the Invasion of Iraq

Consensus amongst the five permanent members (P5) is clearly crucial for the effectiveness of the Council. Each with a veto power, a permanent member can block a decision of the Council by casting a negative vote. But also each permanent member will look to the Council to endorse a course of action it wants legalized and legitimated. Britain and the US will often combine, sometimes with France, to push for a decision, while Russia and China are cast as the sceptics that have to be convinced by dint of diplomacy and persuasion. While the US and the UK (and to a lesser extent France) are liberal interventionists, Russia and China are seen as non-interventionists, though the reality is these are only positions taken when it protects each state’s own interests. So, for example, Russia is prepared to intervene in its own backyard (shown recently by its intervention in Georgia in September 2008), just as the United States historically has.

But powerful states do not always get what they want from the Council. In such conditions there has been a trend towards powerful states interpreting previously adopted Council decisions in ways that breach the understanding underlying the resolution. In these cases other member states while not necessarily accepting the interpretations given to the decision will view the Council warily since it appears that action is being taken in its name. This must affect the authority of the Council. If it appears that resolutions can be pulled this way and that, or can be resurrected after a number of years, or can be enforced even though there is no provision in them for coercion, then the wider UN membership will rightly view resolutions with a great deal of scepticism. If such a trend continues then member states will no longer respect the authority of the Council. Its unique position in the international system as the primary body for collective security will be undermined. The point is that it is not the effectiveness or not of the Security Council that calls into question the Charter scheme, but the authority the Council has when it takes action and the effect on its authority when action is taken under its name. If it takes action that the majority do not accept as clearly within its powers then its authority is diminished; and if action is being taken under its name that the majority do not accept as legitimate then its authority is being abused and diminished. The latter in particular threatens the Charter scheme for collective security as it has led to states threatening or using force in the name of the UN, thus eroding the prohibition on the threat and the use of force.

However, the Iraq crisis of 2003 does seem to suggest that the majority of the Council and member states are not prepared to acquiesce in unilateral interpretations of Council resolutions. In one sense the failure of the Security Council in
its diplomatic function to solve the Iraq crisis in early 2003 did not undermine
the authority of the Security Council. This was because the Council had agreed
on the executive action to be taken in the shape of a lengthier inspection pro-
cess, and it was the American and British rupture of this consensus that was not
accepted by the membership. The Americans and British pointed to Security
Council decisions that could sustain a legal case for the use of force, but their
cleverly constructed legal arguments did not hold sway for they ignored the
clear political and legal consensus in the Council and in the wider membership.
Bearing in mind that the Security Council acts on behalf of the whole member-
ship in collective security matters,¹⁵ in effect the US and the UK were ignoring
the will of the UN.

In a legal sense the invasion of Iraq in 2003 was the culmination of a decade
of pressure and bullying tactics by the US and the UK directed at changing
the legal framework governing the use of force contained in the UN Charter
in a concerted effort to widen both exceptions to the ban on the threat or use
of force in article 2(4), namely the right of self-defence contained in article 51,
and military action taken under the authority of the Security Council derived
from article 42. After the adoption of Resolution 1441 on 8 November 2002,
the US and the UK brought the above mentioned pressures to bear by making
claims that the resolution was sufficient when read alongside earlier resolutions
stretching back to 1990 to justify the use of force against Iraq even though it did
not contain clear authorizing language. Furthermore, the US claimed that even
if the resolution did not authorize force, and in the absence of a further clearer
resolution, it still had the right to use force in self-defence against the threat
posed by Iraq. According to these views the use of force against Iraq was justi-
fied under either or both exceptions to the ban on the use of force, despite the
fact that Resolution 1441 did not authorize measures necessary against Iraq (the
accepted mode of delegation under article 42) and the fact there had been no
armed attack against the US by Iraq within the meaning of article 51.

The desire to bring actions under the authority of the UN reflects an accept-
ance of this as a mechanism for lawfully using force, but it also inevitably results
in spurious claims by some states to be acting under UN authority. It is also tell-
ing that despite the invocation of the Bush Doctrine of pre-emptive self-defence
in September 2002,¹⁶ the US was persuaded at least temporarily not to invade
Iraq on the basis of a claim to self-defence but on the basis of a Security Council
resolution. The negotiation of Resolution 1441 took many weeks, and even then
the result was not a clear authorization to use force. Nevertheless, the fact that the
United States in the build-up to conflict was prepared to proceed on the basis of
a not completely satisfactory resolution was telling. It showed doubts about the

¹⁵ Art 24(1) of the UN Charter.
Bush Doctrine’s claim to the existence of a wide right of pre-emptive defence. The pressure put on the US by the UK, its chief ally, to go to the Security Council is reflective of the lack of belief in pre-emptive self-defence within the UK government as well.

Despite the lack of clear authority in Resolution 1441 the UK in particular subsequently interpreted it to justify the use of force against Iraq. Wide interpretations of Security Council resolutions may be acceptable if the interpretation reflects the views of the Security Council as a body. In the context of an organ such as the Security Council the ‘interpretive task is to ascertain what the text means to the parties collectively rather than to each individually’.¹⁷ Subsequent practice can be relied on to re-interpret a resolution when it reflects a shared understanding.¹⁸ 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.¹⁹ 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 while others do not, this does not signify that it grants authority, at least in attributing meaning to the Security Council as a whole.

Interpreting a resolution of a body like the Security Council requires careful consideration of the text and the discussions that led up to it.²⁰ 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’ to use them.²¹ However, there is no need to stick to this formula if all the members especially the P5 agree that a threat of ‘serious consequences’ in the face of a ‘material breach’ as found in Resolution 1441 signifies the authorization of necessary measures or the use of force. But clearly there was no such

consensus.²² As Johnstone correctly observes ‘[i]n any communicative enterprise, the participants tend to operate according to a set of conventions, practices and shared understandings’.²³ The shared understanding of 1441 was that it did not amount to an authority to use force against Iraq.

John Negroponte, the US representative at the crucial meeting when Resolution 1441 was adopted, clearly 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, Richard Ryan, 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’.

Thus the resolution did not authorize the use of force. This is made clear by the US representative, John Negroponte, when he stated ‘if the Security Council fails to act decisively in the event of further Iraqi violations, this resolution does not constrain any Member State from acting to defend itself against the threat posed by Iraq or to enforce relevant United Nations resolutions to protect world peace and security’. By this statement the US is making it clear that despite the lack of authority in the Resolution itself, the United States claims the right to defend itself against threats as outlined in the Bush Doctrine, as well as the right to enforce UN resolutions. The latter seems superfluous but follows from practice in Kosovo and against Iraq where the American argument has not been so much as to interpret the relevant Security Council resolutions as authorizing the use of force, but more the claim to be able to enforce Security Council resolutions that have been breached.

The consensus at the meeting at which Resolution 1441 was adopted was that it did not authorize the use of force if Iraq was in material breach of its disarmament provisions. Indeed, the US and the UK assured the other members in the meeting that no ‘automaticity’ or ‘hidden triggers’ were contained in the resolution,24 but then outside the meeting repeatedly stated that there was no legal need for another resolution on the basis that Resolution 1441 was sufficient by itself. Prime Minister Tony Blair warned Saddam, ‘defy the UN’s will and we will disarm you by force. Be in no doubt whatever about that’, while President George Bush declared that the ‘outcome of this crisis is already determined. The full disarmament of weapons of mass destruction will occur. The only question for the Iraqi regime is to decide how. His cooperation must be unconditional or he will face the severest consequences’.25

Clearly the US and the UK were speaking to different audiences in making these contradictory statements. 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 US and the UK for using force against Iraq to enforce its disarmament obligations since 1991 (for example in January 1993 and December 1998). Indeed, they could argue 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 of 3 April 1991 to 1441 of 2002,²⁶ suspends the operation of the cease-fire Resolution 687, thus allowing states to use force under the open-ended provisions of Resolution 678 of 29 November 1990. However, it is clear from the debates preceding 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. Apparently the final version of Resolution 1441 left out the words of the original US and UK draft authorizing member states ‘to use all necessary means to restore international peace and security in the area’, reinforcing the underlying consensus in the Council against force.²⁷

Further it is also clear from the meeting at which 1441 was adopted as well as the history of Security Council diplomacy that a combination of ‘material breach’ and ‘serious consequences’ in the resolution is not understood by the

24 SC 4644th mtg, 8 Nov. 2002.  
25 The Independent, 9 Nov. 2002, 1 and 5.  
Security Council to include the use of armed force,²⁸ though that may be the subsequent interpretation put on the phrase by the US and UK. ‘Serious consequences’ and ‘material breach’ were clearly put in the resolution by the US and the UK to enable them to make these arguments as was the recollection of previous resolutions including Resolution 678, but the non-acceptance of this position by the rest of the Council signified that the use of force had not been authorized by the Security Council as a reflection of its will. In reality, in the absence of a further mandating resolution, the US and UK relied on a combination of alleged Security Council authority and the Bush Doctrine of pre-emptive self-defence as justifications to use force against Iraq. It is true that Resolution 1441 came closer to the US and UK position than previous resolutions dealing with Iraqi breach of Resolution 687,²⁹ 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.³⁰ All other arguments—unilateral interpretations and claims to a right of enforcement—fall short, for the simple fact is that if the Council wants to authorize the use of force it will do so using clearly accepted language. It has not done so in the case of Iraq since the end of the conflict in 1991.³¹

While maintaining the position subsequently adopted outside the Council that force was legally justified against Iraq without a further Council resolution, in January and February 2003 the UK in particular moved towards the position that a further resolution was politically desirable, though an ‘unreasonable veto’ (by France, Russia, or China) in the Prime Minister’s words would not deter the UK from using force.³² Even then, the resolution being mooted in early February by the UK still did not envisage a clear authorization to use force, because in the absence of evidence of Iraqi armaments this was thought by the UK to be unachievable though it contained a further determination of a ‘material breach’. British officials insisted that this would constitute authority to use force.³³ The contradiction in this argument is manifest, unless the members of the Security Council indicated that they had changed their minds and that such language did indeed signify authorization to use force.

There was unconvincing evidence of WMD in Iraq in the period leading up to the invasion, apparent from the critical but not damning reports from the Heads of the UN Monitoring, Verification and Inspection Commission

³² A. Grice, ‘Defiant Blair says UN has no veto on war’, The Independent, 14 Jan. 2003, 1.
Democracy Goes to War

(UNMOVIC) (Dr Hans Blix) and the IAEA (Dr Mohamed ElBaradei) of 27 January, 14 February, 28 February, and 7 March 2003. In his report to the Security Council of 27 January, Dr Blix concluded that there were serious gaps in knowledge about Iraq’s chemical and bacteriological weapons programmes, and that Iraq was not fully cooperating with the inspectors. He noted that UNMOVIC’s capability had increased over a short period of time, inferring that more time was needed. Dr ElBaradei concluded by saying that ‘we have to date found no evidence that Iraq has revived its nuclear weapons programme since the elimination of the programme in 1990’, but that a more definite conclusion could be provided in the next few months if the inspection process had been allowed to continue.

In his report of 28 February Dr Blix was critical of Iraq, stating that it should show greater credible evidence of disarmament. On 28 February, Iraq started destroying missiles that exceeded the 150 km permitted range. UNMOVIC’s Chairman Dr Blix stated this was a ‘very significant piece of real disarmament’. Before the Security Council Dr Blix made it clear that he thought the disarmament process was working by famously describing the destruction of missiles: ‘we are not watching the breaking of toothpicks. Lethal weapons are being destroyed’. In addition, the evidence presented by US Secretary of State, Colin Powell, to the Security Council on 5 February was limited and failed to persuade most members of the Council to change their view that the use of force was not yet justified. On 14 February, Colin Powell declared that it was not UNMOVIC’s job to produce evidence of Iraqi breach rather it was the responsibility of Iraq to disarm, which it clearly had not done. According to the US this was a further ‘material breach’ and a failure by Iraq to take the final opportunity afforded to them in Resolution 1441 and should have led to the ‘serious consequences’ called for in that Resolution.

The UK made it clear that it would support the US military action even without a further resolution. On 17 February, the UK Foreign Secretary, Jack Straw, stated that ‘in terms of mandate resolution 1441 gives us the authority we need, but in terms of political desirability we have always said that we would prefer a second resolution’. Further, on 21 February he stated that ‘diplomatic parlance is notoriously ambiguous, but in this case the terminology had one meaning: disarmament by force’.

On 24 February the US and the UK introduced a draft second resolution into the Council, though they made it clear that it was for discussion and would not be voted on until after further reports from the weapons inspectors.

36 SC 4692nd mtg, 27 Jan. 2003, 8, 12.
Legally it seemed to add little to 1441. There was no explicit authorization to use necessary measures. After invoking chapter VII, the initial draft had one operative paragraph where it ‘decides that Iraq has failed to take the final opportunity afforded to it in Resolution 1441’. The preamble recalled 1441’s reference to ‘material breach’ and its warning of ‘serious consequences’. In effect it found that Iraq had breached that Resolution by ‘noting that Iraq has submitted a declaration . . . containing false statements and omissions and has failed to comply with, and to cooperate fully in the implementation of’ Resolution 1441.\footnote{\url{http://news.bbc.co.uk/1/hi/world/europe/2795747.stm} (accessed 12 Feb. 2009).} In last ditch attempts to make this draft acceptable and thus to avoid the threatened vetoes of Russia and France as well as other probable negative votes, the UK amended the draft to provide for a further short deadline for Iraqi compliance of 17 March, and finally to list the various actions Iraq must undertake to demonstrate compliance.\footnote{UN Doc. S/2003/215, 7 March 2003.} This did not persuade Russia and France who insisted that the inspection process was working and should therefore be given several months to work through.\footnote{See D. Usborne, ‘On the Brink of War’, \textit{The Independent}, 8 March 2003, 1.} Furthermore, they were probably concerned that the second resolution had become of such symbolic significance for world opinion that its adoption would be seen as giving a green light for war despite the fact that it was not viewed as so doing by the Council as a whole. More importantly for the US and the UK a second resolution would have served domestic purposes particularly in the UK where the public was much more willing to support the use of force if a second resolution could have been adopted.

The failed efforts to obtain a second iconic resolution in the Council meant that when full-scale conflict was engaged in Iraq on 20 March, American rhetoric had moved towards claiming that the legal basis was self-defence, by reiterating its reliance on pre-emptive action. When debates were going against the draft on 7 March 2003 President Bush stated that ‘we don’t really need the United Nations’ approval to act . . . When it comes to our security, we do not need anyone’s permission’.\footnote{R. Cornwell, ‘The Quiet Man’, \textit{The Independent}, 8 March 2003, 3.} Further, on 18 March he outlined the nature of the threat. ‘The danger is clear. Using chemical, biological or, one day, nuclear weapons obtained with the help of Iraq, the terrorists could fulfil their stated ambitions and kill thousands or hundreds of thousands of innocent people in our country or any other’.\footnote{\url{http://news.bbc.co.uk/1/hi/world/middle_east/2858965.stm} (accessed 26 Jan. 2009).}

However, in its letter to the Council reporting its initiation of hostilities against Iraq, the US relied on Security Council resolutions.\footnote{UN’ Doc. S/2003/351, 21 March 2003. See further W.H. Taft and T.F. Buchwald, ‘Pre-emption, Iraq and International Law’ (2003) 97 AJIL 557.} The UK preferred to argue solely on the basis that the war was legally justified on the basis of existing Security Council resolutions. In a parliamentary written answer on 17 March 2003, the
Attorney General Lord Goldsmith stated that the basis for force was Resolution 678 of 1990 containing the original authority to use force, which was reactivated in the light of material breach of Resolution 687 of 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 by the fact that it had not been accepted by other members of the Council shown above, but also by the fact that the authority of Resolution 678 of 1990 does not extend beyond Resolution 687 of 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 to take military action that occurred 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.

It is interesting to see that in the year after the invasion of Iraq, with the occupation by the US and the UK continuing, attention was turned in both the US and the UK to the issue of whether there was convincing evidence prior to the invasion that Iraq posed a sufficient threat to those countries. The main issue in the UK was the suspect evidence presented to parliament at various points, by Prime Minister Blair in particular, before the outbreak of hostilities on 20 March 2003 to the effect that Iraq could deploy WMD under an hour of the order being given. Though the political discourse in these countries seemed to be turning to debate self-defence, it must be remembered that the arguments that the US and the UK were enforcing/applying Council resolutions on disarmament in the end relied on WMD being found in Iraq. Hence the issue of whether Iraq had WMD at the time of the conflict was germane to both the self-defence argument (where their presence can be evaluated in terms of the threat posed by them), and to the enforcement/application of Council resolutions (where their presence would be a violation of those resolutions). The Iraq Survey Group sent by the US into Iraq after the overthrow of Saddam to find evidence of WMD failed to find any in its report of 30 September 2004. After it became clear in 2004 that Iraq had no WMD, Tony Blair was adamant

48 SC Res. 678, 29 Nov. 1990.
that the war was still justified, saying in a speech that ‘everyone thought he [Saddam] had them. That was the basis of Resolution 1441’.\textsuperscript{50} But as has been seen Resolution 1441 did not provide a basis for the war; in fact it provided the basis for an enhanced inspections regime that was meant to find out if Saddam had continued to breach Security Council resolutions on WMD.

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 of course significant in evaluating the legality of that action, as well as the legitimacy of their interpretations of Security Council resolutions. On 10 March, before the outbreak of war, the 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’.\textsuperscript{51} 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.\textsuperscript{52} After full scale force was unleashed by the US and UK 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.\textsuperscript{53}

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 purposive interpretative rule has been accepted that allows individual states to unilaterally interpret and enforce Security Council Resolutions and even the UN Charter, does not reflect the consensus of the international community.\textsuperscript{54} 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 accepted by the majority of states. In reality a Security Council resolution is not to be pulled this way and that over many years, it is a document of an executive body charged with taking action within its competence to fulfil the purposes of the UN Charter. As a piece of subsequent practice adopted under the auspices of a treaty, each resolution exists primarily as a reflection of the will of the Security Council.\textsuperscript{55}

\textsuperscript{50} (2004) UKMIL Part Sixteen.II. B.I item 16/14.
\textsuperscript{52} SC 4721st mtg, 19 March 2003. Statements by Germany, France, Russia, Syria, Pakistan, Mexico, Chile, Angola, China. See also open meeting of the Security Council SC 4717th mtg, 12 March 2003, when fifty-one states spoke.
\textsuperscript{53} <http://news.bbc.co.uk/1/hi/world/middle_east/2867027.stm> (accessed 26 Jan. 2009). Thirty-four countries contributed militarily to the 1991 campaign, while four countries contributed to the 2003 campaign (US—200,000; UK—45,000; Australia—200; Poland—200).
4. Political Debate over the Legality of the Invasion

In the British government’s intelligence dossier of September 2002 on Iraq’s weapons of mass destruction the case for war is made.\(^5^6\) In the introduction to the document, the Prime Minister, Tony Blair, explained that the report was the work of the Joint Intelligence Committee (JIC), which is the ‘heart of the British intelligence machinery’ made up of the heads of the UK’s intelligence agencies (MI5, MI6 and Government Communications Headquarters (GCHQ)), the Chief of Defence Intelligence, and senior officials from key Government departments. ‘For over 60 years the JIC has provided regular assessments to successive Prime Ministers and senior colleagues on a wide range of foreign policy and international security issues’. The Prime Minister then explained why the report had been made public:

[The JIC’s] work, like the material it analyses, is largely secret. It is unprecedented for the Government to publish this kind of document. But in the light of the debate on Weapons of Mass Destruction (WMD), I wanted to share with the British public the reasons why I believe this issue to be a current and serious threat to the UK national interest.

The Prime Minister also took the opportunity in introducing the document to set the context and provide his view of the evidence.

In recent months, I have become increasingly alarmed by the evidence from inside Iraq that despite sanctions, despite the damage done to his capability in the past, despite the UN Security Council Resolutions expressly outlawing it, and despite his denials, Saddam Hussein is continuing to develop WMD, and with them the ability to inflict real damage upon the region, and the stability of the world.

What I believe the assessed intelligence has established beyond doubt is that Saddam has continued to produce chemical and biological weapons, and he continues in his efforts to develop nuclear weapons, and that he has been able to extend the range of his ballistic missile programme. I also believe that, as stated in the document, Saddam will do his utmost to try to conceal his weapons from UN inspectors.

I am in no doubt that the threat is serious and current, that he has made progress on WMD, and that he has to be stopped.

Saddam has used chemical weapons, not only against an enemy state, but against his own people. Intelligence reports make clear that he sees the building up of his WMD capability, and the belief overseas that he would use these weapons, as vital to his strategic interests, and in particular his goal of regional domination. And the document discloses that his military planning allows for some of the WMD to be ready within 45 minutes of an order to use them.\(^5^7\)

The report largely supports the Prime Minister’s assertions, though on the 45 minute deployment issue the executive summary states that Iraq has ‘military


\(^5^7\) Ibid., 2–4.
plans for the use of chemical and biological weapons, including against its Shia population. Some of the weapons are deployable within 45 minutes of an order to use them, which suggests a limited range for these weapons. However, in the bulk of the report the JIC states in successive bullet points that ‘Iraq possesses extended-range versions of the SCUD ballistic missile in breach of UNSCR 687 which are capable of reaching Cyprus, Eastern Turkey, Tehran and Israel’; then that Iraq’s military planning specifically foresees the use of chemical and biological weapons; and then that Iraq’s military forces ‘are able to use chemical and biological weapons, with command, control and logistical arrangements in place. The Iraqi military are able to deploy these weapons within 45 minutes of a decision to do so’. This tends to suggest that these weapons were deliverable by missile to other countries including UK bases in Cyprus. As well as judging that the intelligence revealed that Iraq had ‘continued to produce chemical and biological weapons’ and had ‘military plans for the use of chemical and biological weapons’ (some of which were deployable within 45 minutes of an order to use them); the dossier stated that the Iraqi regime had ‘tried covertly to acquire technology and materials which could be used in the production of nuclear weapons’ (including seeking ‘significant quantities of uranium from Africa’).

The Prime Minister introduced the dossier to the House of Commons on the day of its publication, 24 September 2002. Tony Blair explained to the House why Saddam had not let the weapons inspectors back in since 1998, when they were withdrawn prior to an Anglo-American air and missile strike on Iraq:

The dossier that we publish gives the answer. The reason is that his chemical, biological and nuclear programme is not a historic left over from 1998. The inspectors are not needed to clean up the old remains. His weapons of mass destruction programme is active, detailed and growing. The policy of containment is not working. The weapons of mass destruction programme is not shut down; it is up and running now.

The intelligence, he stated, ‘is extensive, detailed and authoritative’. ‘It concludes that Iraq has chemical and biological weapons, that Saddam has continued to produce them, that he has existing and active military plans for the use of chemical and biological weapons, which could be activated within 45 minutes, including against his own Shia population, and that he is actively trying to acquire nuclear weapons capability’. This justified, according to the Prime Minister, the use of force if necessary; ‘not that we take military action come what may, but that the case for ensuring Iraqi disarmament, as the UN itself has stipulated, is overwhelming’. His speech also revealed that the British government had gone far beyond just anticipating the return of inspectors to Iraq:

We have no quarrel with the Iraqi people. Indeed, liberated from Saddam, they could make Iraq prosperous and a force for good in the middle east. So the ending of this

---

58 Ibid., 5.
59 Ibid., 17.
60 Ibid., 5–6.
62 Ibid.
63 Ibid., col 5.
regime would be the cause of regret for no one other than Saddam. But our purpose
is disarmament. No one wants military force... Disarmament of all weapons of mass
destruction is the demand. One way or another it must be acceded to.⁶⁴

The opposition leader, Iain Duncan Smith, agreed with the evidence presented
and the conclusions drawn saying ‘the only question remaining is whether Saddam
has the motive to strike against Britain, and I believe that it is fair to assume that
he has’, given Britain’s military actions against it in the past. He also reminded
the House that ‘there are more than 3,000 British service men and women in
Cyprus, 200 in Turkey, 300 in Saudi Arabia and 400 in Kuwait, all of whom are
in range of the missiles that Saddam possesses today’, those missiles being capable
of ‘carrying the various warheads that he needs’.⁶⁵ Criticism did come from the
leader of the Liberal Democrats, Charles Kennedy, who demanded an opportu-

nity for the ‘House to vote on any proposal involving the possible use of British
forces’, warned against any unilateral approach, and the idea of regime change
in Iraq ‘if Saddam’s regime falls, what kind of government system is envisaged
as a replacement?’.⁶⁶ When pushed further about whether the UK would take
unilateral action with the United States, the Prime Minister did not answer in
clear terms, but spoke of action being taken in the ‘event of the UN’s will not
being complied with’, and further ‘if we cannot get the UN resolution—I believe
that we can—we have to find a way of dealing with this’.⁶⁷

This discussion led to Tam Dalyell, Labour MP for Linlithgow, proposing that
a motion be adopted ‘that this House declines to support a war against Iraq using
the royal prerogative unless it has been authorised by both the United Nations
Security Council and a motion carried by this House’.⁶⁸ Jack Straw, the Foreign
Secretary, deflected such criticisms by telling the House that a new resolution,
‘setting out the case for a tough and intrusive weapons inspection regime’ was
being discussed by the P5 in New York.⁶⁹ Criticism still followed, for example
from Alan Simpson, Labour MP for Nottingham South, who stated that ‘if the
world is being asked to move away from a doctrine of containment and deter-
rence and towards a doctrine of pre-emptive strikes, regime change, attacks and
displacements of potential enemies or unsympathetic regimes, the implications
for the planet are enormous’.⁷⁰

In a House of Commons debate in October 2002 Glenda Jackson Labour MP
for Hampstead and Highgate asked of the Defence Minister ‘on the issue of a
strike against Saddam Hussein, it would seem that the international commu-
nity has reduced to two sovereign states, namely the United Kingdom and the

⁶⁴ Ibid., col 6. ⁶⁵ Ibid., col 8. ⁶⁶ Ibid., col 11.
⁶⁷ Ibid., cols 15, 20. ⁶⁸ Ibid., col 24. See also the questions raised in vol 391, col 683, 29 Oct. 2002 (Dalyell), where
he made the point that President Bush had obtained authority to use force against Iraq from
Congress, while the British government had not done so. See further vol 397, col 173, 8 Jan. 2003
requesting a substantive vote before any more troops were committed.
⁶⁹ Ibid., col 34. ⁷⁰ Ibid., col 81.
United States. Is he saying that this now constitutes the international community and that we will engage against Iraq if the rest of what I understood to be the international community stays where it is, firmly saying no to a pre-emptive strike?’. In response Geoff Hoon referred to efforts being made to obtain a new Security Council resolution.⁷¹ As negotiations on what was to become Resolution 1441 proceeded, Menzies Campbell, Foreign Affairs spokesman for the Liberal Democrats, asked the Foreign Secretary to ‘assure the House that any resolution supported by the United Kingdom will not bestow on any member of the Security Council an automatic right to take military action if that state alone considers Iraq to be in breach of its obligations? Will he also give the House an assurance that if military action is considered necessary as a last resort, it is for the Security Council as a whole to make that decision? Will he resist any attempt to put any military action on a hair trigger to be pulled by any state that so chooses?’ Jack Straw’s response was somewhat equivocal stating that there was no suggestion that the ‘resolutions should permit a hair trigger’, but he went on to say that ‘we reserve the right to take military action against Saddam Hussein’s defiance of international law, but within international law, if the United Nations fails to meet its clear responsibilities’.⁷²

On the eve of the adoption of Resolution 1441, Jack Straw went through the draft in the House, but was not clear on the issue of when military force would be used. He pointed to history to ‘tell us that if diplomacy is to succeed it must be combined with the credible threat of force’, which led to the prospect of Saddam readmitting the inspectors. He then said ominously that the ‘choice for Saddam Hussein is to comply with the UN or face the serious consequences’ indicated at the end of the Resolution. He followed this up by saying that while ‘we would prefer to stay with the UN Security Council route’, ‘we reserve the right, within our obligations under international law’, which is based on the ‘UN Charter, Security Council resolutions and customary international law’, ‘to take military action if we deem that necessary, outwith a specific Security Council resolution being passed in the future’, but he did indicate that there would be the opportunity to have a substantive vote in the House.⁷³

Thus at the point of the adoption of Resolution 1441, the government was not convinced that, by itself, it was sufficient to warrant the use of force, and hinted at a legal basis that was not derived from Security Council authority, but on wider customary international law. This was certainly different to the legal argument that the government ultimately relied upon to invade Iraq in March 2003. The debate about the meaning of 1441 rumbled on in the House of Commons through the winter of 2002–3. In one debate Alan Simpson MP stated that ‘a large number of members of NATO and the international community regard

---

UN Resolution 1441 as carrying no specific mandate for a war against Iraq, and then asked the Prime Minister to 'give the House an assurance that before he commits any troops or supports such a war, he will seek, first, a specific mandate for a war through the UN, and secondly, a specific vote in advance from the House of Commons?'. Tony Blair answered that the Resolution was 'predicated on the basis that if there is a breach, there is an agreement to act'.⁷⁴ At this juncture Jack Straw introduced a substantive motion that the House 'supports UNSCR 1441 as unanimously adopted by the UN Security Council; agrees that the Government of Iraq must comply fully with all provisions of the Resolution; and agrees that, if it fails to do so, the Security Council should meet in order to consider the situation and the need for full compliance'.⁷⁵ The motion deliberately left unsaid the next step after consideration by the Security Council. There was considerable disquiet in the House of Commons over this omission and whether this meant that a further resolution was required or not; nevertheless a proposed amendment to the motion was defeated by 452 votes to 85, with the main question being agreed to.⁷⁶

Debates were held in the Commons on the progress being made by the weapons inspectors of UNMOVIC and the IAEA. During these the government also kept the House updated about the 'contingency preparations' being made to keep open military options, while stressing its 'preference' for a second Security Council resolution in the event of Iraqi non-compliance.⁷⁷ On 20 January 2003, the Secretary of State for Defence announced that the government had 'reached a view on composition and deployment of a land force package to provide military capabilities for potential operations against Iraq', consisting of 26,000 troops plus equipment. In further stating that 'we will now begin to deploy the combat equipment and personnel of the formations comprising the land force package',⁷⁸ Mr Hoon was making it clear that force was going to be used whether a second resolution was secured or not, though he added that any final decision to use force had not been made yet. While noting that this deployment amounted to a quarter of the British Army, the opposition spokesman left no doubt about its support for deployment.⁷⁹ When questioned on the legal basis of any use of force, Mr Hoon reminded the House (inaccurately) 'that the UN Charter does allow for self-defence, and pre-emptive action is no more than modern jargon to deal with the ancient right of self-defence'.⁸⁰

The government built its case for war in January and February 2003 by referring to material breaches by virtue of the Iraqi regime failing to co-operate with the inspectors. On 3 February 2003, Prime Minister Blair declared that 'should Dr. Blix continue to report Iraqi non-compliance, a second resolution should be passed confirming such a breach'. Further he stated that if Saddam 'rejects

the peaceful route, he must be disarmed by force'.⁸¹ The opposition agreed, Iain Duncan Smith saying of a second resolution, ‘although it is not a prerequisite for future action, it is highly desirable’.⁸² With the chances of a second resolution slipping away from its grasp, the government resorted to a reinterpretation of Resolution 1441. When asked about the ambiguity in the resolution and whether ‘serious consequences’ ‘could only mean disarmament by force?’, the Foreign Secretary Jack Straw stated (inaccurately) that ‘in diplomatic speak the choice was between “all necessary means” and “serious consequences”, and that ‘everybody in the diplomatic community knows that “serious consequences” means the use of force’.⁸³ Government support though was slipping shown by a House of Commons vote on 26 February, held on a substantive government motion effectively giving Iraq one last chance to comply. The government won the vote by 434 votes to 124, after defeating an amendment by 393 votes to 199.⁸⁴

It became clear to the government and to the House of Commons on 17 March that no second resolution on Iraq was going to be adopted by the Security Council. Jack Straw made the point that no country in the Security Council ‘has claimed that Iraq is in full compliance with the obligations placed upon it’, but he blamed France for putting a ‘Security Council consensus beyond reach’, given that President Chirac had made it clear that France would veto any proposed second resolution.⁸⁵ Dissent amongst some senior Labour politicians was shown by the resignation of the Leader of the House of Commons, Robin Cook on 17 March 2003. In his resignation speech the former Foreign Secretary distinguished the case for war over Kosovo (when he was in office) and that made for war against Iraq, and further undermined the government’s claim that Saddam was a threat:

The legal basis for our action in Kosovo was the need to respond to an urgent and compelling humanitarian crisis. Our difficulty in getting support this time is that neither the international community nor the British public is persuaded that there is an urgent and compelling reason for this military action in Iraq… We cannot base our military strategy on the assumption that Saddam is weak and at the same time justify pre-emptive action on the claim that he is a threat…. Iraq probably has no weapons of mass destruction in the commonly understood sense of the term… Nor is our credibility helped by the appearance that our partners in Washington are less interested in disarmament than they are in regime change in Iraq…. It has been a favourite theme of commentators that this House no longer occupies a central role in British politics. Nothing could better demonstrate that they are wrong than for this House to stop the commitment of troops in a war that has neither international agreement nor domestic support. I intend to join those tomorrow night who will vote against military action now.⁸⁶

---

⁸² Ibid., col 23.  
⁸⁶ Ibid., col 726.
The government-promised substantive vote on the war occurred the next day following a lengthy debate. The government’s motion, introduced by the Prime Minister, was a lengthy one but in essence recognized that Iraq’s weapons of mass destruction and long range missiles, as well as its continuing non-compliance with Security Council resolutions (including material breach of 1441), were a threat to international peace and security; that Iraq had failed to take the last opportunity given to it by Resolution 1441; this meant, following the Attorney General’s advice published on the previous day that the ‘authority to use force under Resolution 678 has revived’; so that the House ‘believes that the United Kingdom must uphold the authority of the United Nations as set out in Resolution 1441 and many Resolutions preceding it, and therefore supports the decision of Her Majesty’s Government that the United Kingdom should use all means necessary to ensure the disarmament of Iraq’s weapons of mass destruction’. The motion also asked the House to ‘endorse an appropriate post-conflict administration for Iraq, leading to a representative Government which upholds human rights and the rule of law for all Iraqis’. Thus the House was clear that the government intended to use force for regime change and not just to remove the threat of Iraq’s weapons of mass destruction. The Prime Minister’s speech was premised on the fact that ‘the only persuasive power’ to which Saddam ‘responds is 250,000 allied troops on his doorstep’, but the logic of relying on the threat of force (itself unlawful under international law) is that force will have to be used if the threat does not work. It is for this reason that the UN Charter prohibits both the threat and use of force. Once the US and UK had deployed troops and threatened force against Iraq if it did not comply then inevitably, if there was any remaining doubt about Iraq’s compliance, force must be used.

The opposition leader supported the government’s motion while Charles Kennedy, the leader of the Liberal Democrats, remained ‘unpersuaded as to the case at this time for war’, and questioned ‘whether British forces should be sent into a war without a further UN mandate having been achieved’, pointing out the reassurances given in the Security Council by the US and UK at the time of the adoption of Resolution 1441 that there was no automatic right to use force; while giving ‘full moral support to our forces’, who had no part ‘in the civilian political decision in relation to what they are being asked to do, but they must carry out that task in all our names’. He also pointed to ‘the huge public anxiety in Britain’, with many people not ‘persuaded that the case for war has been adequately made at this point’. Having survived a Liberal Democrat inspired proposed amendment to the motion by 319 votes to 217 the government won support for its motion by 412 votes to 149.

5. Post-Invasion Political Debate and Inquiry

Along with the failure to discover any evidence of chemical or biological weapons after the invasion in March 2003, it was also shown that Iraq had no nuclear weapons programme and had not tried to acquire uranium from Africa. The Hutton Report discussed below found that there was no proof that the September 2002 dossier on Iraq’s weapons had been changed before it was published at the request of the Prime Minister or those working for him, so the conclusion must be that the intelligence was seriously flawed. In reality Iraq did not represent a threat to the UK; the government, along with its ally, had lost patience with Saddam and hence had invaded a weak country. The realization that this was the case led to parliament being more critical of the invasion after the fact than before it, especially with regards to the 45 minute claim made by the government back in September 2002 and upon which the momentum towards war was built. Parliament’s attention was thus still on the decision to invade when it should have been concerned with addressing the disintegrating situation in Iraq.

The Foreign Affairs Committee of the House of Commons produced a report on the decision to go to war in July 2003, several months after the invasion.⁹¹ The Committee introduced its report by stating that ‘unlike previous conflicts, the war in Iraq took place only after a substantive vote in parliament, a development which we welcome’.⁹² However, given that the government had claimed that the prime objective of the military campaign was to ‘rid Iraq of its weapons of mass destruction’, it was important to assess the evidence presented by the government that Iraq still had WMD despite the inspection process put in place by Security Council Resolution 687 adopted in 1991. The question was then whether Parliament had been misled by the government in presenting the case for war based on an assessment of Iraq’s WMD.⁹³

After the invasion and with no WMD yet to be found in Iraq,⁹⁴ the Foreign Affairs Committee concluded that ‘it was too soon to tell whether the Government’s assertions on Iraq’s chemical and biological weapons will be borne out. However, we have no doubt that the threat posed to United Kingdom forces was genuinely perceived as a real and present danger and that the steps taken to protect British troops from attack by chemical and biological weapons ‘were justified by the information available at the time’.⁹⁵ However, it also concluded that the ‘45 minutes claim did not warrant the prominence given to it in the [September 2002] dossier, because it was based on intelligence from a single, uncorroborated source’.⁹⁶ The Committee also tellingly pointed to the fact that

---

⁹¹ Foreign Affairs Committee: The Decision to go to War in Iraq, 9th Report of Session 2002–3, 7 July 2003 (HC 813-I).
⁹² Ibid., para 1.
⁹³ Ibid., paras 3–4.
⁹⁴ Ibid., para 170.
⁹⁵ Ibid., para 41.
⁹⁶ Ibid., para 70.
the US had made no such claim. The Committee had not received a satisfactory answer to the questions: ‘why the 45 minute claim was highlighted by the Prime Minister when he presented the dossier to the House, and why was it given such prominence in the dossier itself, being mentioned no fewer than four times, including in the Prime Minister’s foreword and in the executive summary’. It further concluded that ‘continuing disquiet and unease about the claims made in the September dossier are unlikely to be dispelled unless more evidence of Iraq’s weapons of mass destruction comes to light’. The Committee was also dismissive of the later dossier of what the Prime Minister had called ‘further intelligence’ on Iraqi concealment published on 3 February 2003 (known as the ‘dodgy dossier’), parts of which were plagiarized from an article published in 2002 in the *Middle East Review of International Affairs*, which undermined the credibility of the government’s case for war. The Committee concluded that the Prime Minister had misrepresented the status of the February dossier by stating it constituted ‘further intelligence’, although he had done this inadvertantly.

In the government’s response to the Report of the Foreign Affairs Committee, the Foreign Secretary, Jack Straw, refuted most of the critical findings of the Committee, and left the issue of the 45 minute claim to Lord Hutton’s Report, which was finally published in January 2004.

The government set the terms of Lord Hutton’s inquiry narrowly. It was not an inquest into the reasons given for invading Iraq, but one into the circumstances surrounding the death of Dr David Kelly.

Dr Kelly was a weapons expert with considerable experience in Iraq who was named as the possible source of a BBC story of 29 May 2003 on the government’s September 2002 dossier, in which BBC reporter Andrew Gilligan stated that the government knew the claim that Iraq could launch WMD in 45 minutes was wrong. Cruelly exposed and having been subject to close questioning before the Foreign Affairs Committee on 15 July, Dr Kelly committed suicide on 17 July 2003.

Though great expectations were had of the Report, in particular that it would consider the justifications for going to war, Lord Hutton (a retired Law Lord) was not prepared to go beyond the narrow terms given to him by the government. The
terms of reference were that Lord Hutton was ‘urgently to conduct an investigation into the circumstances surrounding the death of Dr. Kelly’. According to Lord Hutton:

In my opinion these terms of reference required me to consider the circumstances preceding and leading up to the death of Dr Kelly insofar as (1) they might have an effect on his state of mind and influenced his actions preceding and leading up to his death or (2) they might have influenced the actions of others which affected Dr Kelly preceding and leading up to his death. There has been a great deal of controversy and debate whether the intelligence in relation to weapons of mass destruction set out in the dossier published by the Government on 24 September 2002 was of sufficient strength and reliability to justify the Government in deciding that Iraq under Saddam Hussein posed such a threat to the safety and interests of the United Kingdom that military action should be taken against that country. This controversy and debate has continued because of the failure, up to the time of the writing of this report, to find weapons of mass destruction in Iraq. I gave careful consideration to the view expressed by a number of public figures and commentators that my terms of reference required or, at least, entitled me to consider this issue. However I concluded that a question of such wide import, which would involve the consideration of a wide range of evidence, is not one which falls within my terms of reference.¹⁰⁶

Lord Hutton did however consider aspects of the 45 minute claim since it was alleged that Dr Kelly was the source of Andrew Gilligan’s story in which he stated that the government probably knew the 45 minute claim put in the September dossier was false, even before it was published.¹⁰⁷ After looking at the intelligence upon which this claim was made Lord Hutton concluded that ‘whether or not at some time in the future the report on which the 45 minutes claim was based is shown to be unreliable, the allegation reported on 29 May 2003 that the government probably knew that the 45 minute claim was wrong before the government decided to put it into the dossier was unfounded’.¹⁰⁸ However, while not in the conclusions of his report, Lord Hutton did refer to the evidence which strongly suggested that intelligence pointed to Iraqi battlefield chemical and biological weapons being deployable at 45 minutes notice, not strategic longer range weapons which might be used against British targets beyond an Iraqi battlefield. While most of the evidence presented to the Inquiry in this regard indicated that the dossier should have made it clear that the 45 minute claim related to battlefield weapons only,¹⁰⁹ Lord Hutton refused to make this part of his conclusion by declaring that a consideration of this issue does not fall within my terms of reference relating to the circumstances surrounding the death of Dr. Kelly’.¹¹⁰

Lord Hutton did concede in his conclusions though that the Prime Minister’s desire was to ‘have a dossier which, whilst consistent with the available intelligence, was as strong’ as possible ‘in relation to the threat posed by Saddam

Hussein’s WMD’, and this may have ‘subconsciously influenced’ John Scarlett (Chair of the JIC) ‘to make the wording of the dossier somewhat stronger than it would have been if it had been contained in a normal JIC assessment’, though still consistent with the intelligence available. This meant that Andrew Gilligan’s allegations on the 29 May were unfounded. Lord Hutton also found that the information given by Dr Kelly to Andrew Gilligan did not support the latter’s allegation that the government knew that the 45 minute claim was false. The blame was thus placed on the BBC, leading not only to Andrew Gilligan’s resignation, but also that of the BBC’s Director General Greg Dyke.

The government was largely exonerated of responsibility for Dr Kelly’s death by the Hutton report, and only mildly criticized for its presentation of the evidence against Iraq. The Hutton Report was debated in the House of Commons on the day of its release (28 January 2004). The Prime Minister felt completely vindicated by the report, which refuted allegations against him that he lied ‘over the intelligence that formed part of the Government’s case in respect of Iraq and weapons of mass destruction’; Despite the fact that the opposition leader, Michael Howard, asked the government to establish an independent inquiry into the wider questions of whether weapons of mass destruction existed and what ‘the Government told the country in the run-up to the war’, issues which were beyond the remit of Lord Hutton, the government ordered no such inquiry.

However, the Hutton Report was not the end of the government’s difficulties over the invasion of Iraq, as there were still many doubts about the intelligence on WMD as well as the legal basis of the invasion. A report into the former issued by Lord Butler, a former senior civil servant, concluded that the intelligence behind the September 2002 dossier on Iraqi production of WMD was ‘seriously flawed’; and that the 45 minute claim was ‘unsubstantiated’. Despite this the Prime Minister defended his decision to go to war on the basis that he relied on the intelligence given to him by the JIC, but he also stated ‘it was absolutely clear that he [Saddam] had every intention of carrying on developing those weapons, that he was procuring materials to do so’.

On the issue of the legal basis, political pressure finally led to the release of the full advice given by the Attorney General on the legality of the war with Iraq on 28 April 2005. The document was marked ‘secret’ and dated 7 March

111 Ibid., para 467.
113 Ibid., col 443. See further vol 417, cols 767–83, 4 Feb. 2004, where the Prime Minister defended himself from accusations about misleading on the 45 minute claim, especially in the foreword to the September 2002 dossier.
114 Lord Butler’s report: Review of Intelligence on Weapons of Mass Destruction: Report of a Committee of Privy Counsellors, 14 July 2004 (HC 898), para 436. Para 511 concludes that the JIC should not have included the 45 minute [claim] in its assessment and in the Government’s dossier without stating what it believed it referred to ‘ie battlefield weapons (see also para 507).
116 Full text of the advice about the legality of the war with Iraq given by the Attorney General, Lord Goldsmith, to Prime Minister Blair, on 7 March 2003, released on 28 April 2005.
2003 and was obviously not intended for general release. It contains much more nuanced advice than released to MPs later on 17 March 2003 immediately prior to the invasion which was a very definite statement about the legality of the invasion.¹¹⁷ As regards the earlier (full) version of the advice, the Attorney had been asked about the legality of military action against Iraq without a further resolution of the Security Council. The Attorney General had discussed the background to Resolution 1441 with Sir Jeremy Greenstock, the UK representative on the Security Council, and had heard the views of the US, who were co-sponsors of the Resolution. Sir Jeremy’s advice contains some insights into the negotiations leading up to 1441. The Attorney outlined the possible legal basis for any use of force. First, the use of force in self-defence in the face of an ‘actual or imminent threat of an armed attack’, which was inapplicable in the case of Iraq as the Attorney General rejected the doctrine of pre-emption put forward by the US. Secondly, the use of force to avert overwhelming humanitarian catastrophe (as argued during the Kosovo campaign), which again was not applicable in the case of Iraq. The final possibility was the use of force authorized by the Security Council and taken under chapter VII of the UN Charter.

In considering whether Resolution 1441 constituted an authorization to use force, the Attorney made it clear that he rejected the views of most academic commentators ‘who assert that nothing less than an explicit authorisation to use force in a Security Council resolution will be sufficient’. He supported the revival argument namely that a material breach of Resolution 687 could revive the authorization to use force granted in November 1990 in Resolution 678. On this basis the Attorney opined that Resolution 1441 did not immediately revive Resolution 678, but gave Iraq a final opportunity to comply by co-operating 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 much more nuanced, concluding that

¹¹⁷ For some explanation of the change in advice between that given to the Prime Minister on 7 March 2003 and that released to Parliament on 17 March, see statement to the House of Lords by Lord Goldsmith (Hansard HL vol 682, col 71w, 5 June 2006) referring to a disclosure document, annex 6 of which referred to the legality of military action in Iraq, para 16 of which stated that in this period ‘the Attorney had reached the clear conclusion that the better view was that there was a lawful basis for the use of force without a second resolution’; <http://www.attorneygeneral.gov.uk/sub_disclosure_log_2006.html> in (2006) UKMIL Part Sixteen: II.B.I item 16/18.
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’.

Lord Goldsmith also warned that ‘it must be recognised that on previous occasions when military action was taken on the basis of a reasonably arguable case, the degree of public and Parliamentary scrutiny of the legal issue was nothing like as great as today’. It may well be because of this fear of accountability for launching a war whose legality was only reasonably arguable, that the Attorney General’s full advice was not released until 2005 when the issue was forced (ironically) during the middle of an election campaign. Although the Labour administration of Tony Blair was damaged by Iraq and the revelation that the legal basis on which it had taken action was flawed, it was still re-elected in May 2005, though with a reduced majority.

### 6. The Security Council and Post-Invasion Iraq

Though the invasion was successful, with Baghdad falling on 9 April 2003, and President Bush declaring the end of major combat hostilities on 1 May 2003, the post-conflict stage quickly became the post-invasion stage, with a brutal conflict developing between occupying forces and insurgents (Saddam supporters, Sunni and Shia militias, and later al-Qaeda members), as well as between the different armed groups in Iraq. The capture of Saddam in December 2003 did little to reduce the level of violence. The bloody battles of Fallujah between the US forces and Iraqi insurgents in both the spring and winter of 2004 were an alarming symbol of the despair into which the country had descended.

The dominant desire in the international community for the UN to play the leading role in post-conflict Iraq reflects the unique authority and legitimacy of the UN, developed by its practice in Kosovo and East Timor. The Security Council’s endorsement of a post-conflict coalition of the willing in Iraq in Resolution 1483 adopted on 22 May 2003 was a positive development in the sense that it at least shows recognition of the legitimacy that such authority confers especially by those states previously questioning the relevance of the Council. It was a less appealing development given that the role of the UN in the post-conflict stage was much reduced, though Afghanistan also manifested a downplaying of the UN’s role in post-conflict administration. Any chance of a UN administration of Iraq was removed when the UN headquarters were destroyed by a bomb on 19 August 2003, with significant loss of life including that of Sergio Vieira de Mello, the Special Representative of the UN Secretary General.
Resolution 1483 did make it clear that the US and UK must act consistently with the Charter and other principles of international law in post-invasion Iraq, though its terms seem to be deliberately ambiguous. Resolution 1483 was adopted under chapter VII in response to the continuing threat to international peace and security caused by the situation in Iraq. It recognized the ‘specific authorities, responsibilities, and obligations under applicable international laws’ of the US and the UK as ‘occupying powers under unified command’ called ‘the Authority’.¹¹⁸ It further called upon ‘the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future’.¹¹⁹ The resolution and subsequent resolutions, especially Resolution 1546 of 8 June 2004, indicate that the process by which the Iraqi people should realize their internal right of self-determination was by free and fair elections.

From May 2003 to June 2004 Iraq was subject to a Security Council endorsed military occupation in which US and UK military forces strove to retain order and security in Iraq against a growing tide of violence. The Solicitor-General in the UK stated to the House of Commons that Resolution 1483 ‘together with the relevant provisions of humanitarian law’ on occupation governed UK and US conduct.¹²⁰ The Coalition Provisional Authority (CPA) was headed by President Bush’s envoy, L. Paul Bremer III, while the UK was initially represented by Major General Tim Cross. On 16 May Bremer announced the CPA’s first regulation which declared that the CPA would exercise ‘powers of government temporarily in order to provide for the effective administration of Iraq’, and stated that the CPA was ‘vested with all executive, legislative and judicial authority necessary to achieve its objectives to be exercised under UN Security Council resolutions …and the laws and usages of war’.¹²¹

On 13 July 2003 the CPA appointed an advisory Iraqi Governing Council (IGC) consisting of representatives of the various ethnic and religious groups, though it contained no members of the former ruling Baath party as a reflection of the CPA’s policy of de-Baathification of Iraq (which was based on the de-Nazification of post-Second World War Germany). The Security Council saw the IGC as embodying the sovereignty of the Iraqi people during ‘the

¹¹⁹ See statement by the Foreign Secretary Jack Straw to the House of Commons: Hansard HC vol 411, col 8, 14 Oct. 2003 (‘the multinational force needs to be authorised by the United Nations’).
transitional period'. With the guidance of the CPA, the IGC adopted the ‘Law of Administration for the State of Iraq for the Transitional Period’, as the interim constitution of Iraq, on 8 March 2004. On 28 May 2004, Dr Ayad Allawi, formerly an Iraqi exile, was named Interim Prime Minister of Iraq, and an interim (unelected) government emerged by the end of June. The Security Council fixed a timetable for establishing a constitutionally elected government of Iraq, and established that the legal basis of the US-led multinational force was to be at the invitation of the interim government reflected in letters of invitation and acceptance from Dr Allawi and Secretary of State Powell annexed to the Resolution. As Jack Straw, the British Foreign Secretary said, after the occupation ended 'the relationship will be, as it were, between two sovereign governments', and as the Defence Secretary said it was 'no longer simply a question of the Americans deciding and doing, but a matter for the Iraqi Interim Government'. Elections were held on 30 January 2005 in which sixty per cent of the Iraqi population voted for the election of a national assembly. This assembly drafted a new constitution which was ratified in a referendum on 15 October 2005. This in turn led to elections held under the new constitution on 15 December 2005, which produced an elected coalition government under the leadership of Prime Minister Nouri al-Maliki.

While the insurgency continued unabated in 2004–7, the legal components for a new Iraq had been put in place. The international legal base of the US and Security Council’s actions were problematic, especially the wide-ranging powers exercised by the CPA when the law of occupation calls for minimal change; and the ability of the interim government to ‘invite’ in the US/UK forces seemed doubtful, given that it was neither democratic nor effective. Nonetheless, the end result was an elected government, whose forces in 2008 were slowly taking on the burden of security from the invited British and American forces. Though British troop numbers were down to 4,100 by July 2008, there were still over 140,000 American troops in the country. Anything up to three quarters of a

---

124 SC Res. 1546, 8 June 2004.
125 Foreign Affairs Committee Seventh Report, Foreign Affairs Aspects of the War against Terrorism, Oral Evidence, 30 March 2004, qu.103 (HC 441-II).
127 The Foreign Office’s view was that the law of occupation had been lawfully altered by SC Res. 1483, allowing the occupiers to carry out more extensive reforms to Iraq than otherwise would have been permitted: Foreign Affairs Committee Tenth Report, Foreign Policy Aspects of the War Against Terrorism, Written Evidence, Memorandum from the Foreign Office, 13 and 22 May 2003, para 28 (HC 405).
128 A government minister stated that ‘the multinational force is in Iraq with the agreement of the Iraqi Government, who may terminate their presence at any time or request their continued presence. The UK therefore will continue to provide troops for as long as the Iraqi Government wants us to remain. We have no desire to stay a moment longer than necessary, but we will not leave the job before it is done’: Hansard HC vol 434, col 162, 18 May 2005 (Alexander).
million Iraqis have died in the conflict between May 2003 and September 2008, with 4,300 coalition soldiers losing their lives, 4,000 of them being American, 175 being British. Other troop-contributing countries sustaining significant loss of life were Italy, Poland, Ukraine, Bulgaria, and Spain.

7. Conclusion

Far from witnessing new rules of interpretation we are witnessing breaches of international law by powerful democratic liberal states. Following the maxim that is applicable to international law that old law has to be broken in order to make new law these breaches also constitute a very concerted attempt to change the legal order governing the use of force in international relations. While some flexibility is necessary for developing a legal order that is capable of dealing with terrorist violence as well as upholding human rights, we must be careful not to remove the legal brakes on the use of force in international relations. If accepted, purposive and unilateral interpretations of Security Council resolutions will lead to the collapse of the legal order contained in the UN Charter.

While the Security Council seems to have survived the decision of the US and UK of 20 March 2003 to use force against Iraq outside of the UN framework, the danger is that the unwillingness of powerful states to put their coercive power in the hands of the Council except on their terms, will contribute not only to a weaker collective security system, but also more fundamentally to an erosion of the rules governing the use of force that are the foundation of such a system. Although the immediate result of this military action seems to be that a genuine collective security system is even further from our grasp, the critical reaction of state and public opinion to the decision to use force against Iraq is indicative that the majority of the world will not necessarily accept this weakening and erosion.

Did the Iraq crisis of 2003 leave the Council hanging onto its role by a thread? Although it seemed to be business as usual after the adoption of Resolution 1483 and subsequent resolutions in post-conflict Iraq, it may be doubted whether the Council’s authority could survive another crisis of the type witnessed in Kosovo and Iraq, when it successfully fulfilled neither its executive nor its diplomatic functions. Without change that thread may break and the Council’s relevance will be much reduced. With change—which has to be driven by the permanent members limiting their right of veto, recognizing their responsibilities for peace wherever it is ruptured, and proposing resolutions and measures that accord with the Charter and fundamental principles of international law—it stands a chance of performing a central role in maintaining peace and securing justice.

The British government’s attitude to the UN and its actions within the Security Council on Iraq were cynical and duplicitous. The government spent a great deal of effort building up the threat of WMD from Iraq from something that in reality
was quite remote into something that was imminent and capable of striking at British targets. This evidence was primarily directed at convincing parliament to support the war: a parliament that became much more critical of the invasion after the event once it realized that it had might have been misled into voting for the war. It is doubtful whether the government would have lost the vote if the intelligence had been presented in a more balanced way, but the longer-term consequences of such behaviour have been corrosive.

Britain had clearly committed its forces to war against Iraq by the winter of 2002–3, and at this stage by threatening force without clear UN authority the British government was in breach of international law. It compounded its unlawful actions by going to war without clear authority, and compromised its legitimacy by indicating to Council members that it was not going to automatically use force. By misleading both the international community and its own polity, the government struggled to convince that its role in post-invasion Iraq was legitimate. Despite the fact that it had secured authority from the Security Council for post-conflict occupation, this did not serve to cure the illegality of the initial invasion and in a sense the government never overcame this obstacle. The domestic and international debate about the legality of the invasion burgeoned after the invasion, with the government facing a number of individually weak but nonetheless difficult instances of political accountability distracting it from dealing with the growing brutality in Iraq. In fact British influence (as well as presence) in post-invasion Iraq dwindled and all the major decisions were made by the United States. If there is going to be a peaceful Iraq, it will be an American-made one.