The legality of the invasion of Iraq

Lord Steyn

The author, the international jurist, served as a Law Lord until his retirement in 2005. This is the full text of his address to the London Common Law and Commercial Bar Association, given at the Inner Temple Parliament Chamber on 1 December 2009. We previously published his landmark statement on rendition and unlawful detention, which was entitled 'Guantanamo Bay: The Legal Black Hole' (Spokesman 81).

The context of the Iraq invasion

I address not the Afghanistan war but only the invasion of Iraq in 2003. Apparently, Donald Rumsfeld was asked by a journalist why he was so sure that there were weapons of mass destruction in Iraq. His answer was straightforward. He said: 'we have the receipts'.

Saddam Hussein was an evil dictator. There are other evil dictators. The reason why Mr. Bush and Mr. Cheney, in pursuit of their Neocon ideology, targeted Iraq for invasion was probably the fact that Iraq was oil rich and, in truth, militarily the weakest of the nations in the so-called Axis of Evil. In March 2003, Mr. Bush and Mr. Cheney, on behalf of the United States, and Mr. Blair and Mr. Brown, on behalf of the United Kingdom, embarked on the calamitous invasion of the sovereign state of Iraq. These men assuredly did not have a Churchillian sense of the history of an ancient civilization. They waged a war not of necessity: it was a war of choice, contrary to the wishes of most nations in the international community. In passing I remind you that the Conservative Party, by and large, supported the war.

Our government joined in inflicting shock and awe on the Iraqi population. The names Abu Ghraib, Fallujah, Haditha, and many others, are part of the annals of infamy of that war. Those names will never be forgotten, least of all in the Muslim world. And our country will be encumbered with the consequences of the invasion for years to come.

The persistent briefing before the invasion that Iraq had weapons of mass destruction was false, and not supported by

a scintilla of evidence. The suggestion that our country could be attacked within 45 minutes was an invention. What became to be known as the dodgy dossier was aptly described. It was a shameful period of deception of the public on both sides of the Atlantic.

In retrospect it may be said that, but for the fact Mr Blair and Mr Brown always stood shoulder to shoulder with Mr Bush and Mr Cheney, the American Neocons may have found it difficult on their own to invade without a second Security Council resolution. The words lapdog and poodle may be given new entries in the Oxford English Dictionary.

The Iraq Inquiry

On 15 June 2009, the Prime Minister announced an inquiry into the Iraq invasion. Such an inquiry was essential and should have started earlier. The Prime Minister tried to arrange a secret enquiry on the spurious ground that it would ensure that the evidence of serving and former ministers will be 'as full and candid as possible'. To that extent the Prime Minister's attempt was blocked by public opposition. He also failed to the extent that he tried to prevent in advance any criticism by the inquiry of the cabinet. As I understand it, the Prime Minister's wishes may prevail in that evidence will not be given on oath. The public will draw its own inference why those who committed us to the Iraq war wish to avoid giving evidence under oath. And the public fully understand the significance of the oath. In the Prime Minister's main objective to arrange matters so that the outcome of the inquiry would not be made public until after the election, he appears, so far, to have been successful.

Contrary to the even-handed procedure adopted in respect of appointments as between political parties in the Falklands Inquiry, the Prime Minister picked the members of the Iraq Inquiry. I have no doubt all five members are persons of independence, competence and integrity. But the method of selection was not calculated to inspire public confidence. The Prime Minister chose not to appoint any military figure to serve as a member on the Iraq Inquiry. Why not? Given that the overwhelming thrust of the evidence concerns military matters, that is odd. Our country greatly respects military men and women. Certainly, military figures have repeatedly demonstrated their commitment to the public interest, as demonstrated in their views on the Prime Minister's failed 42 day detention measure, and indeed the arrangements for the Iraq Inquiry. With due respect, I would say that the public has greater faith in the independence of military personnel than in judges, civil servants or politicians.

Bearing in mind the critical question of the legality of the invasion, the

fact that no former judge or academic lawyer of standing was appointed to serve as a member of the inquiry is surprising. Or perhaps it is not surprising. For the inquiry to consult a lawyer is hardly the same. Lord Butler, in his powerful speech in the House of Lords on 18 June 2004, said eloquently that the Prime Minister's arrangements had been dictated more by political interest than by the national interest. He warned that it may not achieve the purpose of purging the mistrust which so many people hope from it.

The overriding issue is the legality of the war. It is a pure question of law. In my speech in the House of Lords on 18 June 2009 I said:

> 'Why cannot this issue be explored in public, and before the next election?'

I repeat that question. It is a narrow issue of construction. It could easily be explored and decided in public within three or four days, at an early stage of the Iraq Inquiry. Good sense and convenience points to it being the very first question to be addressed. I have noted that Sir John Chilcot (the Chairman of the Iraq Inquiry) has observed that he does not exclude an interim report, but that it is not likely. Rhetorically, I ask why this fundamental issue of the legality of the war cannot be faced now? For my part, there is no reason grounded in the public interest to avoid considering and ruling on the legality of the Iraq war now or very soon. The Government wishes to avoid a decision about the legality of the Iraq war before the next election. What is the justification? The Iraq Inquiry must adopt the procedure dictated by the public interest. And the public interest favours transparency now, ignoring a kick into long grass for party political reasons until after the election.

Before I leave the terms upon which the Prime Minister set up the Iraq Inquiry, I point out that nowhere in his statement to the House of Commons is there any explicit recognition that, arguably, the Government may have acted contrary to established international law. But the Prime Minister did say in his announcement of 15 June 2009 about Iraq

> '… thanks to our efforts and those of our allies over six difficult years … a young democracy has replaced a vicious 30 year dictatorship.'

This gets close to our country congratulating itself on our greatest foreign policy débâcle.

The arguments on legality

I hope I can put flesh on the bones of the legal question by explaining how I see the issues. In doing so I accept that there are contrary views. There

were constantly shifting arguments for war, and great confusion. It seems to me that in law overwhelmingly the view among international lawyers has prevailed that the invasion was illegal. In my view the best discussions are to be found in the lecture of Lord Alexander of Weedon QC entitled 'Iraq : The pax Americana and the law', delivered on 14 October 2003; and Professor Vaughan Lowe, 'The Iraq Crisis, What Now?', *International and Comparative Law Quarterly*, vol. 52, October 2003 pp 859-871; and Professor Phillipe Sands, *Lawless World*, Penguin, 2006, Chapter 8, p. 174. I propose however, to summarise the position as concisely as possible. I address in turn the various justifications for the war which were put forward by the United States and the United Kingdom.

Self defence

The 45 minutes claim gave rise to the idea that it might be possible to rely on self defence against Iraq. Article 2(4) of the Charter of the United Nations provides in clear terms:

> 'All members shall refrain in their relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

There are only two exceptions. The first is collective action authorized by the Security Council under Chapter VII. The second is the inherent right of individual or collective self defence against an armed attack under Article 51. There is no plausible argument that the United States and the United Kingdom were acting in self defence in invading Iraq. While the United Kingdom flayed around at various times for arguments to justify an attack on Iraq, it did not ultimately rely on self defence under Article 51 by way of justification of the war.

Regime change

In a court of morals there was a strong case for replacing the barbarous regime of Saddam Hussein with a more benign one. Sadly, the best the international community can do is to organise its affairs in accordance with the Charter of the United Nations, so carefully crafted with the crucial aid of the United States and Britain under enlightened leaders after the end of the Second World War. Regime change has no place in the scheme of the Charter. The United Kingdom could not rely on regime change as a justification for invading Iraq, and did not attempt to do so. But 18 months after inception of the Iraq war, it was revealed that the Prime Minister supported regime change.

Humanitarian intervention

A concept of humanitarian intervention in cases of 'overwhelming humanitarian catastrophe' may be in the process of developing. But if such an international law right is evolving, it must be under the aegis of the United Nations and not dependent on the judgment of individual states. In any event, in March 2003 the position in Iraq did not amount to 'an overwhelming humanitarian catastrophe'. The position in Iraq, awful as it was, was not worse than in other tyrannical regimes. Not surprisingly, the United Kingdom did not argue as a justification for war the existence of an overwhelming humanitarian catastrophe.

Unreasonable Security Council veto

Mr Blair suggested before the invasion that an unreasonable use of the veto by blocking a new resolution would leave members of the United Nations free to act without express authorization. This is pure heresy, and Mr Blair must have known it. It has no basis in international law. The right of veto is enshrined in the Charter. The United Kingdom has itself exercised the right of veto 32 times. This bogus argument of a right under the Charter to ignore an unreasonable veto casts some doubt on Mr. Blair's judgment on matters of international affairs and international law.

The Attorney-General's advice based on UN Resolutions dating from 1990

So far the justifications for the invasion of Iraq are objectively hopeless. What is left? It is an argument based largely on UN Resolutions dating from the 12 years before, at the time of the first Gulf War when Iraq invaded Kuwait. In a parliamentary answer on 17 March 2003, immediately before the invasion, Lord Goldsmith QC, the Attorney-General, published his advice to the Government. It was to the following effect:

> Authority to use force against Iraq exists from the combined effect of Resolutions 678, 687 and 1441. All of these resolutions were adopted under Chapter VII of the UN Charter which allows the use of force for the express purpose of restoring international peace and security.
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> 1. In Resolution 678 the Security Council authorised force against Iraq, to eject it from Kuwait and to restore peace and security in the area.
> 2. In Resolution 687, which set out the ceasefire conditions after Operation Desert Storm, the Security Council imposed continuing obligations on Iraq to eliminate its weapons of mass destruction in order to restore international peace and security in the area. Resolution 687 suspended but did not terminate the authority to use force under Resolution 678.

3. A material breach of Resolution 687 revives the authority to use force under Resolution 678.
4. In Resolution 1441 the Security Council determined that Iraq has been and remains in material breach of Resolution 687, because it has not fully complied with its obligations to disarm under that resolution.
5. The Security Council in Resolution 1441 gave Iraq 'a final opportunity to comply with its disarmament obligations', and warned Iraq of the 'serious consequences' if it did not.
6. The Security Council also decided in Resolution 1441 that, if Iraq failed at any time to comply with and cooperate fully in the implementation of Resolution 1441, that would constitute a further material breach.
7. It is plain that Iraq has failed so to comply and therefore Iraq was at the time of Resolution 1441 and continues to be in material breach.
8. Thus, the authority to use force under Resolution 678 has revived and so continues today.
9. Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, 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.

The question is whether this advice was correct. As a question of law it needs to be approached with cold neutrality. On the other hand, the contextual scene of the development of the United Nations Charter, and rule of law perspective, is of vital importance.

The revival argument

Professor Vaughan Lowe has summarized a trenchant critique of the revival theory: pages 865-866. I cannot improve on it. It reads as follows:

> The only possible basis for a legal justification for the invasion of Iraq is the supposed 'revival' of the authorisation to 'Member States co-operating with the Government of Kuwait … to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent resolutions and to restore international peace and security in the areas.' That is said to have been 'revived' by the determination in Resolution 1441 that Iraq was in material breach of its disarmament obligations under Resolution 687. This was, indeed, the basis upon which the United Kingdom rested its claim that the actions against Iraq were lawful.
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> The main flaws in the 'revival' argument are well known. There is the fact that Resolution 1441, on its face, quite patently does not authorize the use of force against Iraq and does not indicate that the authorization to the 1991 States acting in coalition with Kuwait could possibly be revived. There is the fact that

there is no known doctrine of the revival of authorisations in Security Council resolution, on which some implied revival could be based. There is the wording of later resolutions, such as the much-overlooked Resolution 686, and Resolution 687, which suggest that the authorisation to use force was given only for the duration of the military operation to expel Iraq from Kuwait and that it is for the Security Council to decide what, if any, further action is to be taken against Iraq. There is the fact that, far from having abandoned or lost interest in the matter, the Security Council was itself actively seised of the matter at all critical times. And there are the express views of Security Council Members set out in the debate on Resolution 1441 which make it clear that, in contrast to the view of the United States, some Members required a second resolution explicitly granting an authorisation to use force, before force could be used against Iraq.

Furthermore, for the 'revival' argument to succeed it would have to be explained what the limits were upon the 1991 authorisation to States acting in coalition with Kuwait (not, it will be noted, *all* Member States of the UN). It cannot be argued, and was not explicitly argued, that Resolution 678 gave each or all the others, the right to take any action, anytime, anywhere, that it considers it necessary or desirable in pursuit of the aim of restoring peace and security in the area (whatever the scope of 'the area' was). Equally it surely cannot be argued that on 'revival' any 1991 coalition member could take whatever steps it thought expedient to 'restore international peace and security in the area' regardless of what other coalition members (such as France, Germany, and Syria), and the Security Council itself, thought. The United Kingdom was quite right to press hard for a second resolution from the Security Council explicitly authorising the use of force against Iraq; and having failed to secure one, the invasion lacked legal justification in my view.

It is said the Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required, if that had been intended. That raises a more basic point. It is simply unacceptable that a step as serious and important as a massive military attack upon a State should be launched on the basis of a legal argument dependent upon dubious inferences drawn from the silences in Resolution 1441 and the muffled echoes of earlier resolutions, unsupported by any contemporary authorisation to use force. No domestic court or authority in the United States or the United Kingdom would tolerate governmental action based upon such flimsy arguments.

I think the invasion lacked any legal justification.

I commend this analysis as entirely correct. The invasion of Iraq in 2003 was illegal. In respectful agreement with Kofi Annan, the Secretary General of the United Nations, I conclude that, in the absence of a second resolution by the United Nations unequivocally authorizing the invasion, it was plainly illegal.

Conclusion

If contrary to my view, the Iraq Inquiry were to conclude that the invasion of Iraq was legal in accordance with established international law, it remains one of the greatest foreign policy disasters in our history, exceeding in the gravity of its consequences the Suez affair. The invasion of Iraq has had, and will continue to have, grave consequences for the peace and security of the region and the world. It weakened international institutions. It fractured the international rule of law. It encouraged disrespect for the law by authoritarian regimes who copied the words and examples of Mr. Bush and Mr. Blair. Torture became ever more widespread. Rendition, a fancy word for kidnapping, became institutionalized as a form of torture by proxy in odious regimes. No protest by the United Kingdom government is recorded. After all, Mr Blair proclaimed that the rules of the game have changed, by which he meant the international rule of law. This is the aspect of the war on terror that the Government does not want us to know about. But history will not be neutered. Slowly the facts are emerging. No doubt the Iraq Inquiry will want to examine critically, so far as it is able to do so, the legacy of Iraq in accordance with its revised terms of reference as enunciated by the Chairman, and allocate responsibility where it is appropriate without fear or favour. But the jury is out on the processes of the Iraq Inquiry.

Finally, we have heard in recent times from the Prime Minister again, again and again the words that, under his leadership, we have led the world. Tentatively, I would suggest that this grand role does not extend to what our government has done and is doing in regard to the maintenance of the rule of law. Possibly a little modesty about the havoc the Government helped to create in Iraq is now in order.

**Matthew Nicholson, Research Student at UCL, greatly assisted me in the preparation of this lecture.*