The invasion of Iraq:
Is this the right way to take decisions?

A partial observation: David Wardrop

Lord Goldsmith's Opinion shows the difficulty all governments face when preparing resolutions to present to the UN Security Council. How might other member states react? What agendas do they have? How might the UN Secretariat respond? Unlike the Darfur crisis, over one hundred thousand troops had already been deployed along the Kuwait/Iraq border and the imminence of inclement 'fighting weather' added an extra dimension. As the fog or war descended, a dysfunctional sequence of decisions was followed, each party, player and spectator alike seemingly trapped by circumstance. Is this the right way to take decisions? Here are five partial observations on different aspects of the invasion of Iraq and how the UN Security Council might approach future similar challenges. They play a very small part in the work in progress called UN Reform.

A] Lord Goldsmith considers how other UN members might react

Lord Goldsmith's Opinion on the legality of armed invasion of Iraq is now in the public domain. UNA members will be particularly interested in Paragraph 32, reproduced below verbatim The italics are mine.

Possible consequences of acting without a second resolution

In assessing the risks of acting on the basis of a reasonably arguable case, you will wish to take account of the ways in which the matter might be brought before a court. There are a number of possibilities. *First, the General Assembly could request an advisory opinion on the legality of the military action from the International Court of Justice (ICJ). A request for such an opinion could be made at the request of a simple majority of the States within the GA, so the UK and US could not block such action. Second, given that the United Kingdom has accepted the compulsory jurisdiction of the ICJ, it is possible that another State which has also accepted the Court's jurisdiction might seek to bring a case against us.* This, however, seems a less likely option since Iraq itself could not bring a case and it is not easy to see on what basis any other State could establish that it had a dispute with the UK. But we cannot absolutely rule out that some State strongly opposed to military action might try to bring such a case. If it did, an application for interim measures to stop the campaign could be brought quite quickly (as it was in the case of Kosovo).

B] What precedence is there for referring the matter to the ICJ?

In 1999 Serbia and Montenegro filed applications instituting proceedings against Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, United Kingdom and United States of America "for violation of the obligation not to use force". It pointed out that the above-mentioned States had committed "acts . . . by which they have violated their international obligations banning the use of force against another State, not to intervene in the internal affairs of that State". At the request of Serbia and Montenegro, the Court

extended that time-limit eventually to 7 April 2003. Why was this extended so long after the end of that war? Public hearings on the preliminary objections raised by each of the respondent States were held in April 2004, long after the war. At the conclusion of those hearings, the parties presented final submissions to the Court and the most recent Annual Report of the ICJ (2004) indicates the matter is not yet closed.
Notwithstanding that the modern states of Serbia & Montenegro and Iraq would surely see no benefit in pursuing such cases, the precedent for such application to the ICJ has been set.

C] How does the UN Security Council ensure it is well-advised?

Hans Correll, UN Legal Counsel, gave the inaugural International Law Lecture in 2003. He said "Let me say the following: it is not for me to pass judgment on what happened. Others can do that, but not the Legal Counsel of the United Nations. My task is to assist the Secretary-General, who in turn makes every effort to assist the members of the Security Council in finding solutions in difficult situations.
We should note, however, that in spite of publicly stated misgivings, twice the powers of the world came to the Security Council in the last few months. Even when a new resolution was not forthcoming for the armed intervention in Iraq, the intervention itself was justified by the so-called Coalition by reference to existing Security Council resolutions and international law. Further, when the invasion was a fact, the Coalition declared to the Security Council that it assumed the responsibilities as occupying powers under existing international humanitarian law. (Doc. S/2003/538)
And later, although many members of the Security Council did not approve of what had happened, they nevertheless recognized the facts and the obligation of the Council to act. They came together on 22 May to adopt resolution 1483 (2003), which can certainly be discussed, in particular since its language is not entirely clear. Nevertheless, the resolution contains a legal basis for the present efforts. An important effect is that it opens the door for States that are not occupying States and for the United Nations itself to assist in activities that go far beyond what is permitted for occupying powers under international law: the reconstruction of Iraq, including the establishment of an internationally recognized, representative government of Iraq.
Basically, the Security Council has functioned in the way it was meant to do under the Charter only since the Berlin Wall came down in 1989. Seen in a long-term perspective, this is a very short time. What we must hope for is that the members of the Council learn from their experiences. What we should do is to repeat with conviction and the strength of our argument that respect for international law, including in particular the system of collective security laid down in the Charter, is in the interest of all States – also the strong and powerful.
And if the argument is contested: point to the national level. See what happens there, when the rule of law is absent!
And if the argument is that national law is one thing and international law something completely different ("Our constitution is superior to all that!"): point to the development over the centuries. Whenever the law of a particular society has become insufficient because of development and the growth of that society, the law had to be adjusted. So, what does this mean in an era of globalization? We even talk about "the global village"! The conclusion should be obvious.

D] How might the Security Council more easily reach agreement?

Lord Goldsmith [A] fairly assesses the chances of success of a second Security Council resolution. Despite Hans Correll's claim that the Security Council has "functioned in the way it was meant to do under the Charter only since the Berlin Wall came down in 1989", its five Permanent Members, the P5, interpreted precedent differently. To assist here, the High Level Panel's recommendations (December 2004) suggest that "whether to authorize or endorse the use of military force, the Security Council should always address - whatever other considerations it may take into account - at least the following five basic criteria of legitimacy:

(a) ***Seriousness of threat.*** Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?

(b) ***Proper purpose.*** Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?

(c) ***Last resort.*** Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?

(d) ***Proportional means.*** Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?

(e) ***Balance of consequences.*** Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?

The above guidelines for authorizing the use of force should be embodied in declaratory resolutions of the Security Council and General Assembly. We also believe it would be valuable if individual Member States, whether or not they are members of the Security Council, subscribed to them."

E] What if it all goes wrong - again?

By agreeing to the Statutes of the International Court of Justice (ICJ), UN Member States recognize as compulsory *ipso facto*, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.

So, clearly, the ICJ is empowered to consider such applications and rule on them. It may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

I cannot find any reference to the supremacy of the Security Council over the ICJ in such matters but we should note that the High Level Panel is also seeking to ensure that all Member States accede to the decisions of the Security Council. Thus, they appear to be seeking to avoid applications to the ICJ following decisions agreed by the Security Council.

F] Conclusion

In the Iraq crisis, the legendary 'fog of war' managed to obfuscate decision-making in the UN Security Council and British Cabinet Room alike. Lawyers in the UK and worldwide continue to debate the authority of Security Council Resolution 1441 as a legitimate trigger to the invasion of Iraq. The former UN Legal Counsel saw no role for his office in ruling on such issues. The High Level Panel has proposed that the Security Council -and all Member States bind themselves to basic criteria of legitimacy for intervention and that the ICJ remains a legitimate last resort for appeal but not on Security Council rulings.

I welcome opinion on who are the winners or losers. Can you detect more clarity in the High Level Panel's proposals? Should the UN Legal Counsel have more clout? Are there glaring errors in the above document? Over to you!

David Wardrop: 28 April 2005