



The Case against War

The Essential Legal
Inquiries, Opinions
and Judgments
concerning War in Iraq

The Legal Inquiry
Steering Group

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FOREWORD

by Lord Murray

(Former Lord Advocate of Scotland and High Court Judge)

The "Case, against the War" is the absorbing contemporary record of a valiant - if predictably unavailing - endeavour of people-power to bring to account the U.K. Government's conduct as a matter of law in its proposed support of the U.S. in its intention to use force to compel Iraq to change its ways. The calm logic and rigour of legal reasoning of the highest calibre is brought to bear in presenting the case for and against the legality at international law of the impending intervention, purportedly in support of the authority of the U.N. Security Council. The bare bones are laid forth without spin, or comment, giving this legal material austere authority.

The focus from High Court judge to BBC documentary is exclusively on international law. This is a strength and perhaps also a weakness for international law is only one dimension of a problem which encompasses morality and political justification as well as legality. These aspects are fully canvassed along with law in the House of Lords' debate on the legality of the proposed Iraq war on 17 March 2003 (H.o.L. Hansard. vol.646, cols.68-96 and 106-124*) which was a debate of the highest quality but without a vote. The present legal discussion with its judgements is a fitting complement.

On this occasion the attempt to stop a resort to force, of highly dubious legality, did not succeed. Unhappily other occasions may well arise; and, of course, the U.K.- and U.S. - may yet be called to account before a competent international court or tribunal for their incursion into Iraq. It is too early to conclude that twentieth century efforts to outlaw war in the Treaty of Paris 1928 and the U.N.Charter 1945 have ended in failure on the threshold of the twenty-first century. Instead we must redouble our efforts to build for the peoples of the world a just and secure international order in which war can be effectively outlawed without allowing oppression and injustice to flourish.

PREFACE

**By Dr Mark Levene, Department of History
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& Dr Nick Kollerstrom STS Department at University College, London.

"We're being told a lot about the doctrine of pre-emptive strikes... Given that our defence secretary Geoff Hoon explicitly threatened to use 'our' nuclear weapons system, Trident, against the Iraqi civilians in the defence committee of the House of Commons on 20 March would it not be essential in a democracy, given the fundamental commitment we have to the rule of law... for a UK citizen to challenge that decision if it was in breach of international humanitarian law? As a lawyer, I say it is."

Phil Shiner, 'the Future of Democracy,' Imperial College, November 2, 2002

This dossier is a weighty legal document, full of intricate, and detailed considerations as one might expect from learned lawyers and QCs' examining a complex issue of law. But it grew out of a very simple issue that should matter to everyone who lives in Britain and which we can all grasp. We hear a great deal, especially from government, about the value of our much-vaunted British democracy and how our democratic parliamentary-based system of governance is founded on the rule of law. We are all supposedly participants in this system and the notion of good citizenship has even become part of our school curriculum.

So, how is it that when a decision as fundamental as going to war is taken, law, Parliament, citizenship and democracy all seem to be thrown out of the window? The government has repeatedly stated since the events of 11th September 2001 that any military action it undertook would be in compliance with international law. However, there was no judicial review in the High Court with regard to its participation in the war in Afghanistan, nor was one ever offered with regard to further proposed military action against Iraq. Equally, there was no parliamentary vote until the troops were actually deployed.

In high parlance, this is what is known as a democratic deficit. For those at the grass-roots who would wish to establish a democratic credit, some mechanism has to be found to challenge the government's impunity and not least its face-value assumption that pre-emptive military action against Iraq was lawful.

In the summer of 2002 an ad-hoc group of legal experts and peace activists came together to form *The Legal Inquiry Steering Group* (LISG), believing that the issue should not go untried. A key component of this group was Peacerights, the Birmingham-based legal service that specifically deals with issues of international human rights and humanitarian law. It is primarily through the actions of Peacerights that this corpus of legal arguments has

been developed. The High Court of Justice in The Strand, London, refused to accept CND's argument - presented here in Part II - by declining to express an opinion on whether it would be legal for Britain to initiate war. As a matter of International law, the judges argued it was not within their remit. Then Britain's Attorney-General, Lord Peter Goldsmith, expressed the view that three UN Security-Council resolutions taken together warranted a legal justification for the war. This work argues against that view.

These 2002 UK debates synchronised with the setting up of the UN-sponsored International Criminal Court in The Hague. The ICC reaffirmed the Nuremberg Principles of 1948 concerning the personal moral responsibility of politicians and soldiers, and the concept of crimes against humanity: "The International Criminal Court will be able to prosecute individuals charged with genocide, crimes against humanity and war crimes. There is no immunity against the jurisdiction of the Court"¹.

However, the ICC is not presently empowered to deal with the crime of aggression, as expressed in the 6th Nuremberg Principle: a 'Crime against Peace' is the 'Planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements or assurances.' The attack upon Iraq is a clear instance of transgression of this 6th Nuremberg principle. The letters sent by Public Interest Lawyers (see Appendix) to the Prime Minister and Defence Secretary give one hope for the recognition of international law principles by politicians in the future.

True, the war on Iraq is now over with the victors effectively demanding that because they won, it must be legal. Nothing however could be further from the truth. A multitude of questions remains unanswered not least about Saddam's increasingly invisible weapons of mass destruction - that is, the avowed pretext for the assault in the first place. The Coalition partners, that is most specifically those who planned, organised and executed this war, cannot and must not be allowed to remain above the law, or to assume that they can act with such impunity again. Peace, and indeed the continuance of civilised life as we know it could now well hinge upon the culprits being brought to justice.

¹. *Glen Rangwala, The Promise of Justice - first Steps towards an International Criminal Court, 2002, (INLAP publication).*

SUMMARY OF CITIZENS' LEGAL ACTIONS

A Citizens' Legal Inquiry into the Legality of use of force against Iraq on October 11 2002 at Gray's Inn, London was chaired by Professor Colin Warbrick, Professor of Law at Durham University. Rabinder Singh QC of Matrix Chambers argued the case for illegality, and Julian Knowles, also of Matrix, put the case of the UK Government. Professor Warbrick concluded that the use of armed force against Iraq, in the absence of a clear UN Security Council mandate, would be in breach of international law. The Legal Inquiry Steering Group raised £8,000 from ordinary activists to help pay for the Legal Inquiry.

A Legal Challenge to the Government took place on 19 November 2002 when lawyers for the Campaign for Nuclear Disarmament (CND) sent a letter to the Prime Minister, Defence Secretary Geoff Hoon and Foreign Secretary Jack Straw. This warned that they would face a legal challenge unless they gave a written guarantee within 7 days that the UK would not use armed force against Iraq without a further United Nations Security Council Resolution. There was no satisfactory response and on 28 November the High Court was asked for a judicial review to decide the matter. However, the court did not allow the case to come to trial. On 17 December Lord Justice Simon Brown ruled that in order to decide whether war would be unlawful, the courts would have to interpret UN Resolution 1441. Normally, he said, "English courts will not rule upon the true meaning and effect of international instruments which apply only at the level of international law."

A Shadow Judicial Review by the BBC programme "Today". This took place on 19 December at the Inner Temple, London and investigated whether British involvement in any war against Iraq, without further specific UN endorsement, would be legal under international law. The programme makers expressly acknowledged that it was directly inspired by LISG-initiated Citizens' Legal Inquiry at Grays Inn. Professor Nicholas Grief, Head of the School of Finance & Law at Bournemouth University, argued that a war under these conditions would be illegal. Professor Anthony Aust, Deputy Director of the British Institute of International and Comparative Law, and formerly Deputy Legal Adviser of the Foreign and Commonwealth Office, made the case that a strike could be legal. Professor Vaughan Lowe, Fellow of All Souls College, and a barrister practising from Essex Court Chambers, acting as judge, was persuaded by Professor Grief's argument and BBC listeners had a rare opportunity to hear a legal analysis of the Iraq crisis.

Further Opinions

On 23 January and 3 March 2003 Rabinder Singh QC & Charlotte Kilroy provided CND with further opinions on the potential use of armed force by the UK against Iraq relating to Resolutions 678 and 1441. With the outbreak of hostilities imminent the Attorney General issued a written Parliamentary answer to outline his view on the legality of military action. The following day this was contested by a letter from lawyers acting for CND.

On 6 June 2003 Rabinder Singh & Charlotte Kilroy provided an opinion for CND and Peacerights on the implications of the absence to date of the discovery of weapons of mass destruction in Iraq since its invasion on 20 March 2003 and strongly recommended a judicial inquiry to examine the issue. On 23 July 2003 they provided a further opinion on the legality of the occupation of Iraq by UK armed forces.

A War Crimes Project. Legal actions prior to March 2003 concerned the legality of initiating war. With the outbreak of war a new question arose - the legality of how it was actually conducted. On 22 January 2003 Public Interest Lawyers wrote to the Prime Minister, the Foreign Secretary and the Secretary of State for Defence informing them that their conduct of any attack on Iraq would be carefully monitored.

A high quality team of international law professors will meet over the weekend of 8-9 November 2003. If the panel finds that there have been breaches of International Humanitarian Law it will present a report to the Prosecutor of the International Criminal Court (ICC) on the basis that individual members of the UK Government are responsible, at the highest level, for decisions on how force was used against Iraq and its civilian population. Such a report would comprise a reasoned analysis of the relevant legal principles applicable to hi-tech warfare and the best evidence available from eye witnesses and weapons experts as to what weapons were used, what the effects of those weapons were and, therefore, whether the weapons or methods of attack used in the war came within the definition of war crimes so that the Prosecutor is duty bound to investigate.

SOME ABBREVIATIONS USED IN THE TEXT

AC	Appeal Cases
AJIL	American Journal of International Law
ASIL	American Society of International Law
BYIL	British Yearbook of International Law
CCSU	Council of Civil Service Unions
CLJ	Cambridge Law Journal
CPAG	Child Poverty Action Group
EuLR	European Law Reports
EWCA	England and Wales Court of Appeal
FLR	Family Law Reports
ICLQ	International and Comparative Law Quarterly
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
JACL	Journal of Armed Conflict Law
PNICC	Preparatory Commission for the International Criminal Court
QB	Queen's Bench
SIAC	Special Immigration Appeals Commission
UKHL	United Kingdom House of Lords
WLR	Weekly Law Reports