
PART I

A CITIZENS' INQUIRY CONCERNING THE LEGALITY OF A
PROSPECTIVE USE OF FORCE BY THE UNITED KINGDOM AGAINST
IRAQ (11 OCTOBER 2002)

1. THE CASE AGAINST WAR: 8 OCTOBER 2002:RABINDER SINGH QC & JANET KENTRIDGE

Inquiry into the Legality of the Use of Force by the United Kingdom against Iraq

Skeleton Argument on behalf of Peacerights

Introduction

1. This inquiry concerns the legality of the use of force by the United Kingdom against Iraq. Peacerights will invite the Inquiry to reach the following conclusion:

‘The Inquiry concludes that it would be unlawful for the United Kingdom to launch or take part in a military attack on Iraq under present circumstances without the express authorisation of a United Nations resolution.’
2. In essence, Peacerights contends that:
 - (1) the right of self-defence would not justify the use of force against Iraq by the United Kingdom;
 - (2) Iraq’s alleged failure to comply with all or any of the existing 23 UN Security Council resolutions would not justify the use of force by the United Kingdom; and
 - (3) a further UN Security Council resolution would be required clearly to authorise such use of force.
3. These contentions are based, in summary, on the following arguments:
 - (1) The use of force against Iraq would not be justified under international law unless:
 - (a) Iraq mounted a direct attack on the United Kingdom or one of its allies and that ally requested the United Kingdom’s assistance; or

- (b) an attack by Iraq on the United Kingdom or one of its allies was imminent and could be averted in no way other than by the use of force; or
 - (c) the United Nations Security Council authorised the use of force in clear terms.
- (2) Iraq has not attacked the United Kingdom or one of its allies, and no evidence is currently available to the public that any attack is imminent.
- (3) Existing Security Council resolutions do not authorise the use of force against Iraq. Such force would require further clear authorisation from the Security Council.
- (4) The United Kingdom is therefore not entitled, in international law, to use force against Iraq.

Factual Background

4. The factual background can be outlined briefly. The United States is publicly considering the use of force against Iraq. This use of force would appear to have the aims of (1) destroying such stores of nuclear, chemical, biological and other weapons of mass destruction as Iraq may have; and (2) bringing about a “regime change.” The United States appears to consider such action to be justified on the basis of the right to carry out a pre-emptive strike in self-defence, the right to respond in self-defence against an armed attack, (in this case the attacks on 11 September 2001), and/or on the basis of current resolutions of the United Nations Security Council.
5. The United Kingdom Government is at present considering whether to support any such action by itself joining in the use of force against Iraq. According to Government statements, no decision has yet been taken. The Prime Minister, on 24 September 2002, released a dossier which is said to set out the evidence against Iraq and the arguments in favour of military intervention. In outline, the dossier is said to demonstrate that Iraq has at present:
 - (1) the capability to produce chemical agents mustard gas, sarin, cyclosarin and VX and biological agents anthrax, botulinum toxin, aflatoxin and ricin;
 - (2) up to 20 al-Hussein missiles, with 650km range, the warheads of which carry chemical and biological agents;
 - (3) at least 50 al-Samoud liquid propellant missiles, the range of which is sought to be extended to 200km;
 - (4) the capacity to deploy some chemical and biological weapons within 45 minutes;

- (5) mobile laboratories for producing biological warfare agents;
- (6) expertise and data to make nuclear weapons.

In addition, Iraq is at present said to be seeking:

- (1) nuclear weapons;
 - (2) longer range ballistic missiles with a reach of 1000km. A new engine testing stand has been built for this purpose;
 - (3) "Front companies in third countries" are seeking propellant chemicals for ballistic missiles, in breach of the UN embargo, as well as uranium from Africa;
 - (4) to modify L-29 remote piloted jet trainer aircraft to deliver chemical and biological agents over a large area.
6. Iraq has persistently failed to co-operate with the UN weapons inspection programme, violating a large number of resolutions of the UN Security Council, so that the weapons inspection team was eventually withdrawn.¹ However, it has recently engaged in negotiations with UN inspection agencies on the terms and conditions upon which the inspection programme could be resumed. After two days of talks with UN inspection agencies held in Vienna, Iraq agreed on 1st October to jettison restrictions on inspections of a large number of sensitive sites. The agreement on practical arrangements did not, however, deal with access to Saddam Hussein's eight presidential compounds. This has led the United States to oppose the return of inspectors to Iraq without a new resolution which fortifies the UN inspections regime and the steps which may be taken upon failure to comply.
 7. Significantly, the United States, supported by the United Kingdom, continues to make strenuous efforts to persuade the UN Security Council to adopt a strongly worded resolution. The terms of the proposed resolution which they have placed before the Security Council, and the significance of this proposal, are considered further below.

The Use of Force in International Law

8. The United Nations Charter provides the framework for the use of force in international law. Almost all States are parties to this Charter, including Iraq, the United Kingdom and the United States. The Charter emphasises that peace is the fundamental aim of the Charter, and is to be preserved if at all possible. The preamble expresses a determination 'to save succeeding generations from the scourge of war', 'to practise tolerance and live together in peace with one another as good neighbours', 'to unite our strength to maintain international peace and security', and to ensure 'that armed force shall not be used, save in the common interest.'

9. Article 1 of the Charter sets out the United Nations' purposes, the first of which is:

‘To maintain international peace and security; and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.’
10. The other provisions of the Charter must be interpreted in accordance with this aim: see the 1969 Vienna Convention on the Law of Treaties, Article 31, which provides that a treaty must be interpreted in accordance with its objects and purposes, including its preamble.
11. The Charter goes on to set out two fundamental principles:

‘2(3) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

2(4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the Purposes of the United Nations.’
12. Article 2(4) has been described by the International Court of Justice (ICJ) as a peremptory norm of international law, from which States cannot derogate (*Nicaragua v United States*, [1986] ICJ Reports 14, at para 190). The effect of Articles 2(3) and 2(4) is that the use of force can *only* be justified as expressly provided under the Charter, and only in situations where it is consistent with the UN's purposes.²
13. The Charter authorises the use of force in the situations set out in Chapter VII. Article 42 states that, if peaceful means have not succeeded in obtaining adherence to Security Council decisions, it ‘may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security.’ In effect, this means that States require a UN Security Council resolution in order to use force against another State (subject to Article 51: see below). Force is only justified where there are no peaceful means available for resolving the dispute. We stress that, in our view, where Members believe that another State has breached a resolution of the Security Council, they do not have a unilateral right under Article 42 to use force to secure adherence to it or to punish that State: what action should be taken is a matter for the Security Council.

14. Article 51 of the Charter reserves States' rights to self-defence. This right is additional to the provisions of Article 42. A State does not require a Security Council resolution in order to defend itself by force but even the right of self-defence is subject to action by the Security Council, as is clear from the terms of Article 51:

'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

15. As exceptions to the fundamental principle of the prohibition on the use of force, Articles 42 and 51 must be interpreted narrowly.
16. According to the Charter, therefore, there are only two situations in which one State can lawfully use force against another:
- (7) In individual or collective self-defence (a right under customary international law, which is expressly preserved by Article 51 of the Charter).
 - (8) Pursuant to a UN Security Council resolution.

Self-Defence

17. This skeleton argument deals with the legality of the use of force by the United Kingdom. It does not traverse the argument concerning the legality of the use of force against Iraq by the United States.
18. The United Kingdom has not been the subject of any direct attack which could even arguably be linked with Iraq. It is clear that the right of self-defence *in response* to an armed attack does not arise. The only possible justification is as an *anticipatory* form of self-defence against a future threat. It is our submission that, to the extent that such a right is known to international law, it exists only in a very narrow and defined set of circumstances which do not apply to the United Kingdom at present.

Anticipatory self-defence in international law

19. Article 51 of the Charter is silent about whether 'self-defence' includes the pre-emptive use of force, in addition to the use of force in response to an attack. In order to answer the question, other conventional sources of international law must be used, including state practice and the works

of learned writers on international law. This follows the approach set out in Article 38(1) of the Statute of the International Court of Justice, which provides that:

‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular establishing rules expressly recognised by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognised by civilised nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.’

20. State practice is ambiguous, but tends to suggest that the anticipatory use of force is not generally considered lawful, or only in very pressing circumstances. There are numerous examples of States claiming to have used force in anticipatory self-defence, and being condemned by the international community. Examples of state practice are given by Professor Antonio Cassese, former President of the International Criminal Tribunal for the Former Yugoslavia, in *International Law*, (Oxford, 2001) at 309-31. One particularly relevant example is the international reaction to an Israeli bombing attack on an Iraqi nuclear reactor:

When the Israeli attack on the Iraqi nuclear reactor was discussed in the [Security Council], the USA was the only State which (implicitly) indicated that it shared the Israeli concept of self-defence. In addition, although it voted for the SC resolution condemning Israel (resolution 487/1991), it pointed out after the vote that its attitude was only motivated by other considerations, namely Israel’s failure to exhaust peaceful means for the resolution of the dispute. All other members of the SC expressed their disagreement with the Israeli view, by unreservedly voting in favour of operative paragraph 1 of the resolution, whereby ‘[the SC] strongly condemns the military attack by Israel in clear violation of the Charter of the UN and the norms of international conduct.’ Egypt and Mexico expressly refuted the doctrine of anticipatory self-defence. It is

apparent from the statements of these States that they were deeply concerned that the interpretation they opposed might lead to abuse. In contrast, Britain, while condemning ‘without equivocation’ the Israeli attack as ‘a grave breach of international law’, noted that the attack was not an act of self-defence. Nor [could] it be justified as a forcible measure of self-protection.’ (p310).

21. Cassese concludes that, ‘[i]f one undertakes a perusal of State practice in the light of Article 31 of the Vienna Convention on the Law of Treaties, it becomes apparent that such practice does not evince agreement among States regarding the interpretation or the application of Article 51 with regard to anticipatory self-defence.’ (*International Law* (Oxford, 2001) at p309).
22. Oppenheim states that:

‘while anticipatory action in self-defence is normally unlawful, it is not necessarily unlawful in all circumstances, the matter depending on the facts of the situation including in particular the seriousness of the threat and the degree to which pre-emptive action is really necessary and is the only way of avoiding that serious threat; the requirements of necessity and proportionality are probably even more pressing in relation to anticipatory self-defence than they are in other circumstances.’ (R Jennings QC and A Watts QC (eds), *Oppenheim’s International Law: Ninth Edition* 1991 pp41-42)³
23. Detter states that, ‘it must be emphasised that anticipatory force falls under the prohibition of force in Article 2(4) of the Charter entailing a presumption that it is illegal. A mere threat of attack thus does not warrant military action...’ (*The Law of War*, Second Edition, (Cambridge, 2000), p86).
24. Cassese considers that, ‘[i]n the case of anticipatory self-defence, it is more judicious to consider such action as *legally prohibited* while admittedly knowing that there may be cases where breaches of the prohibition may be justified on moral and political grounds...’ (*International Law*, (Oxford, 2001), p311).
25. To the extent that international law recognises that States *may* have the right to defend themselves by using force to pre-empt an imminent and serious attack, such use of force would have to be in accordance with the general rules and principles governing self-defence. These are well summarised by Oppenheim:

‘The development of the law, particularly in the light of more recent state practice, in the 150 years since the Caroline incident suggests that action, even if it involves the use of

armed force and the violation of another state's territory, can be justified as self defence under international law where:

- (a) an armed attack is launched, *or is immediately threatened*, against a state's territory or forces (and probably its nationals);
- (b) there is an *urgent necessity* for defensive action against that attack;
- (c) there is *no practicable alternative* to action in self-defence, and in particular another state or other authority which has the legal powers to stop or prevent the infringement does not, or cannot, use them to that effect;
- (d) the action taken by way of self-defence is limited to what is necessary to stop or prevent the infringement, ie to the needs of defence...' (p412, emphasis added)

26. These principles would apply to the anticipatory use of force just as to any other use of force in self-defence.

Anticipatory self-defence is not justified in present circumstances

27. To the extent that international law recognises at all the right to use anticipatory force in self-defence, any such right, it only exists in situations of great emergency, as set out by Oppenheim.
28. The burden of proof is on the Government to demonstrate the existence of a pressing and direct threat. It would also need to show that there is no effective alternative to the use of force. Neither of those conditions is established by the dossier released on 24th September. The capacity to attack, combined with an unspecified intention to do so in the future, is not sufficiently pressing to justify the pre-emptive use of force. The threat must at least be imminent. The degree of proximity required must also be proportionate to the severity of the threat. A threat to use very serious weapons - nuclear weapons being the obvious example - *could* justify an earlier use of defensive force than might be justified in the case of a less serious threat. However, the existence of the threat, regardless of how serious that threat may be, must still be supported by credible evidence.
29. Iraq has engaged in negotiations with UN weapons inspectors, and has offered to lift restrictions upon the terms upon which such inspectors may return to Iraq. While the agreement may not be as extensive or complete as that sought by the United States and United Kingdom, its very existence tends to belie claims that there is no effective alternative to force.

Collective self-defence

30. As well as the individual use of force, Article 51 preserves the right of *collective* self-defence. This arises only in certain very narrow conditions. In the *Nicaragua* case, the ICJ stated that:

‘it is the State which has been the subject of an armed attack which must form and declare the view that it has been attacked. There is no rule of customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.’ (para 195)

31. In order to justify the use of force against Iraq on the basis of collective self-defence with the United States, there must first be credible evidence that Iraq has carried out, or intends to carry out, an armed attack on the United States or another of the United Kingdom’s allies. The United Kingdom Government has supplied no evidence to show that Iraq carried out the terrorist attacks on 11 September 2001. It appears that those attacks were carried out by Al-Qa’ida, an international terrorist organisation with support and funds supplied from a number of countries and with particularly close links to the Taliban regime in Afghanistan, which was used as the basis for the military action taken by the United States, the United Kingdom and others in that country.
32. Further, even if it could be shown that Iraq has funded or otherwise assisted Al-Qa’ida, this does not necessarily justify the use of force in self-defence. According to the ICJ in the *Nicaragua* case:

‘In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this ... [T]he Court does not believe that the concept of ‘armed attack’ includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support.’ (para 195)

33. We are not aware of any proof that Iraq has provided ‘weapons or logistical or other support’ to Al-Qa’ida. Such support would not, in any event, amount to an armed attack. Unless Iraqi involvement in the September 11 terrorist attacks could meet the higher standard set out in the *Nicaragua* case, namely something *more* than the provision of weapons, logistical or other support, we do not consider that the attacks of September 11 in themselves justify the use of force against Iraq.

34. The issue of collective self-defence was highlighted by the statement of the North Atlantic Council of NATO, on 12 September 2001, that 'if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty ... the United States' NATO allies stand ready to provide the assistance that may be required as a consequence of these acts of barbarism.' On 2 October 2001, NATO declared that it did, in fact, consider that the attacks came from abroad, and that they would therefore be regarded as falling within the scope of Article 5. Article 5 of the Treaty states that:

'The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.'

35. No force has in fact been used by NATO pursuant to the statement of 12 September. Although it has been determined that the acts of terrorism were 'directed from abroad at the United States', no proven link with Iraq has emerged.
36. Crucially, Article 5 is expressly subject to Article 51 of the Charter of the United Nations. All the restrictions on the use of collective self-defence in international law therefore apply. All that Article 5 does is to state in advance that, if the legal conditions for collective self-defence are met in a particular case, the members of NATO will act. Since one of the requirements for collective self-defence is a request from the attacked State, Article 5 provides a standing request from all NATO states for assistance in the event of an attack. The criteria applying to the use of force under Article 51 would still have to be met. It is our submission that as matters stand, they have not been met.

The Role of the Security Council

Article 42

37. The Security Council can authorise the use of force. In doing so it must comply with the constitutional principles of the United Nations, and with the objects and purposes of the Charter. It must be convinced that Iraq poses a 'threat to the peace', and that this threat cannot be averted in any way other than by the use of force (Article 39 of the Charter).

38. Iraq has recently engaged in the Vienna talks with the UN weapons inspectorate, and has made certain concessions which could facilitate a resumption of inspections after a four year lapse. It is at present, therefore, inappropriate to conclude that no alternatives to force are available. If it proves impossible to agree to a viable inspections regime, Iraq's continuing violations *may* lead the Security Council to conclude that peaceful means have failed to ensure compliance and peace, and that the use of force is necessary as a last resort. Having reached that conclusion, the Security Council could then pass a resolution under Article 42, clearly authorising the use of force against Iraq in order to ensure compliance.
39. One argument put forward by the United Kingdom in favour of taking action without consulting the Security Council is that the Security Council may decide *not* to authorise the use of force. The Prime Minister, speaking on 3 September 2002, stated that the UN had to be 'a way of dealing with it, not a way of avoiding dealing with it. It has to be done and we have to make sure there are not people who are simply going to turn a blind eye to this.'
40. This argument implies that the decision to use force is to be made by individual States, and that the Security Council need only endorse that decision. This ignores the constitutional position of the United Nations as a forum for collective decision-making, upon which we elaborate below. Two commentators writing in 1999 argue convincingly that:

'If the Security Council is dysfunctional or paralysed by the exercise of the veto, as arguably occurred during the Cold War, the case for implied authorisation might be stronger. However, Council practice since the Cold War simply does not support any greater need for a flexible reinterpretation of the Charter to support the actual behaviour of States. Five times in the past eight years the Security Council has authorised the use of force to address threats to world peace.'⁴ (Jules Lobel and Michael Ratner, 'Bypassing the Security Council: Ambiguous Authorizations to use Force, Cease-fires and the Iraqi Inspection Regime' [1999] AJIL 124, at 127).
41. That the Security Council may decide that the use of force is not currently justified is not an argument for refusing to go through it. Only if the current resolutions themselves authorise the use of force could there be a legal basis for military action by the United Kingdom without a further Security Council resolution. In our submission, elaborated below, the existing resolutions give no such authorisation.

Existing Security Council resolutions do not authorise the use of force

42. The Security Council has not passed a resolution expressly authorising the use of force against Iraq since Resolution 678, passed at the start of the Gulf War. The United Kingdom appears prepared to argue that:
 - (1) The current Security Council resolutions implicitly authorise the use of force by Member States in the event of Iraq's persistent non-compliance;
 - (2) Further or alternatively, Iraq's failure to comply with the cease-fire requirements set out in Resolution 687, which brought to an end military action against Iraq during the Gulf War, and amplified subsequently, justify the renewed use of force under Resolution 678, without further authorisation from the Security Council.
43. Resolution 678, at paragraph 2, authorised Member States 'to use all necessary means to uphold and implement resolution 660 (1990) *and all subsequent relevant resolutions* and to restore international peace and security in the area.' (emphasis added) Resolution 660 had the sole aim of restoring the sovereignty of Kuwait. After that had been achieved, Resolution 687 imposed a formal cease-fire. That cease-fire was conditional on Iraq's acceptance of certain terms. It did accept those terms. The Security Council's current requirements of Iraq are contained in Resolution 687 and subsequent resolutions.
44. Those requirements include the destruction of all chemical and biological weapons and all ballistic missiles with a range greater than one hundred and fifty kilometres, the unconditional agreement not to acquire or develop nuclear weapons (Resolution 687, paras 8(a), 8(b), and 12), and full co-operation with the UN-appointed weapons inspectorate. Such inspections were initially the responsibility of the Special Commission and the International Atomic Energy Agency, and are now to be carried out by the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC), established by Resolution 1284 (1999).
45. Shortly after the cease-fire, Resolution 688 dealt with the humanitarian issues arising from the situation in Iraq. It called upon Iraq to allow access to international humanitarian organisations. It is important to note that this resolution was *not* passed under Chapter VII of the Charter, and did not authorise the use of force to achieve its objectives. However, the United States, the United Kingdom and France used Resolution 688 as authority to establish 'safe havens' for Kurds and Shiites, and then to establish no-fly zones over Iraq. These developments are set out in detail in Christine Gray, *International Law and the Use of Force*, (Oxford, 2000) pp 191-192.

46. The United Kingdom and the United States have argued that Resolution 688 implicitly authorised Member States to respond to Iraq's actions, including by establishing no-fly zones, and thereafter to defend those zones by force. They argued that these zones were essential for humanitarian purposes and to monitor Iraq's compliance with the Security Council's requirements. These arguments are convincingly rejected by one legal commentator in the following terms:

'In fact there did not seem to be any adequate legal basis for the establishment of the safe havens by the coalition forces. Resolution 688, although referred to at the time by the States involved, clearly does not authorise forcible humanitarian intervention. It was not passed under Chapter VII and did not expressly or implicitly authorise the use of force. The USA, UK and France did not expressly rely on a separate customary law right of humanitarian intervention in any Security Council debates or in their communications to the Security Council at the time of the establishment of the safe havens. Such a right is notoriously controversial; since the Second World War it has always been more popular with writers than with States.' (Christine Gray, 'After the Ceasefire: Iraq, the Security Council and the Use of Force' [1994] BYIL 135, at 162.)

47. Iraq's obligations were further amplified in a series of Resolutions passed after Resolution 688. Among these, in Resolution 707, the Security Council noted Iraq's 'flagrant violation' and 'material breaches' of resolution 687. It considered that these constitute a 'material breach of the relevant provisions of that resolution which established a cease-fire and provided the conditions essential to the restoration of peace and security in the region' (para 1).
48. In Resolution 949, it stressed again that 'Iraq's acceptance of resolution 687 (1991) adopted pursuant to Chapter VII of the Charter of the United Nations forms the basis of the cease-fire' and that 'any hostile or provocative action directed against its neighbours by the Government of Iraq constitutes a threat to peace and security in the region', while 'underlining that it will consider Iraq fully responsible for the serious consequences of any failure to fulfil the demands in the present resolution.' These include, at paragraph 5, full co-operation with the Special Commission.
49. This demand was repeated in resolutions 1051, 1060, 1115, 1134, 1137 and 1154. The latter resolution states that the Security Council is 'determined to ensure immediate and full compliance by Iraq without conditions or restrictions with its obligations under resolution 687 (1991) and the other relevant resolutions'. Significantly, the Security

Council also

‘[s]tresses that compliance by the Government of Iraq with its obligations, repeated again in the memorandum of understanding, to accord immediate, unconditional and unrestricted access to the Special Commission and the IAEA in conformity with the relevant resolutions is necessary for the implementation of resolution 687 (1991), but that any violation would have severest consequences for Iraq.’

50. The Security Council also decides ‘to remain actively seized of the matter, in order to ensure implementation of this resolution, and to secure peace and security in the area.’
51. On 5 August 1998, Iraq suspended co-operation with the Special Commission and the IAEA. In resolution 1194, the Security Council stated that this ‘constitutes a totally unacceptable contravention of its obligations under [resolution] 687’ This condemnation was repeated in resolution 1205, which also demands that Iraq co-operate fully with the Special Commission, and in which the Security Council again remains ‘actively seized of the matter.’
52. The key question is whether Resolution 678 still allows Member States to use ‘all necessary means’ to ensure compliance with subsequent resolutions, or alternatively whether the ‘severest consequences’ envisaged by the Security Council in Resolution 1154 (now backed up by the demands in Resolution 1205) include the use of force by Member States. In our submission it does not.
53. The International Court of Justice, in the *Namibia Advisory Opinion* (1971) ICJ Reports 15, 53 stated that ‘The language of a resolution of the Security Council should be carefully analysed ... having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences...’ This has been described as ‘one of the very few authoritative guides to the interpretation of Security Council resolutions’ (Michael Byers, ‘Terrorism, The Use of Force and International Law after 11 September’ (2002) 51 ICLQ 401, at 402).
54. The current resolutions do not, it is submitted, implicitly authorise the use of force. The wording of the Gulf War resolutions shows that, when the Security Council intends to authorise the use of force, it does so in clear terms. Resolution 678 referred to the use of ‘all necessary means’, phrasing which does not appear in any subsequent Resolution relating to Iraq. The phrase ‘all necessary means’ has also been used when the Security Council authorised intervention in Rwanda, Bosnia, Somalia

and Haiti. Significantly, that phrase is used in the draft resolution now placed before the UN Security Council by the United States and the United Kingdom. The very concern of these two countries to secure the passing of a resolution in these terms underlines that the existing resolutions do not at present justify the use of all necessary means, and hence armed force, to enforce compliance by Iraq.

55. Resolution 686, para 4, which marked the provisional cessation of hostilities, expressly preserved the right to use force under Resolution 678. However, Resolution 687, which marked the permanent ceasefire, uses no such terms. This demonstrates a clear recognition that the right to use force requires express terms if it is to be continued. The absence of any clear terms in any resolution after 686 leads to the conclusion that no such use of force was authorised.
56. Further, Resolution 687 states that the Security Council '[d]ecides to remain actively seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region.' This clearly contemplates that the Security Council remains seized of the matter and will *itself* decide what further steps may be required for the implementation of that resolution.
57. The Secretary General of the United Nations has made it clear that Resolution 678 was directed at a unique and specific situation:

‘The Iraqi invasion and occupation of Kuwait was the first instance since the founding of the Organisation in which one Member State sought to completely overpower and annex another. The unique demands presented by this situation have summoned forth innovative measures which have given practical expression to the Charter’s concepts of how international peace and security might be maintained.’ (The United Nations Blue Book Series Vol IX, The United Nations and the Iraq-Kuwait Conflict 1990-1996 (1996), at 3)
58. Those ‘unique demands’ relating to the invasion and occupation are no longer in existence. The Secretary General’s remarks underline how exceptional the United Nations considers the use of force, and how dependent the decision to use force was on the fact that Iraq had actually *invaded* another Member State. No such action has been taken by Iraq since then.
59. Further, shortly after the end of the Gulf War, US officials gave evidence to the House Committee on Foreign Affairs that the military incursions into Iraq were authorised only because they were ‘pursuant to the liberation of Kuwait, which was called for in the UN resolution’,

and the United Kingdom declared that the sole purpose of the operation was to liberate Kuwait (Lobel and Ratner, *op cit*, p140).

60. Much reliance is placed, particularly by the United States but also by the United Kingdom, on Resolution 1154. The warning of 'severest consequences' in Resolution 1154 is a clear reference to the use of force. However, it is addressed to Iraq, not the Member States, and is not worded as an authorisation. At the meeting which led to the adoption of Resolution 1154, the 'automaticity' issue was debated: whether UN members would, without more, have the right to use force if Iraq failed to comply with the Resolution. Niels Blokker, in 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing' (2000) 11 EJIL 541, summarises the debate as follows:

'No agreement was reached on this issue. The US and the UK did not receive support for the view that UN members would have such an automatic right. The other members of the Council, including the other permanent members, emphasized the powers and authority of the Security Council and in some cases explicitly rejected any automatic right for members to use force. Sweden emphasised that "the Security Council's responsibility for international peace and security, as laid down in the Charter of the United Nations, must not be circumvented." Brazil stated that it was "satisfied that nothing in its [the Resolution's] provisions delegates away the authority that belongs to the Security Council under the Charter and in accordance with its own resolutions." And Russia concluded that, "there has been full observance of the legal prerogatives of the Security Council, in accordance with the United Nations Charter. The resolution clearly states that it is precisely the Security Council which will directly ensure its implementation, including the adoption of appropriate decisions. Therefore, **any hint of automaticity with regard to the application of force has been excluded; that would not be acceptable for the majority of the Council's members.**"' (Emphasis added)

61. The intentions of the majority of States which passed Resolution 1154 could hardly be clearer: it gives Member States no authority whatsoever to use force in the event of non-compliance. The United States attempted to persuade the Security Council to include an express authorisation of force. It failed, as the above analysis shows. It cannot now be asserted by any State that, on its correct interpretation, Resolution 1154 does after all authorise the use of force.

62. The potentially serious consequences of ignoring the clear intent expressed by Permanent Members of the Security Council have been highlighted by Dame Rosalyn Higgins, the British Judge on the ICJ. Writing in a different but related context - whether UN resolutions gave NATO the implied authorisation to intervene in Kosovo⁵ - she states that:

‘One must necessarily ask whether [the implied authorisation argument] is not to stretch too far legal flexibility in the cause of good. In the Cold War legal inventiveness allowed peacekeeping instead of collective security enforcement. Then, at the end of the Cold War, we saw enforcement by coalition volunteers instead of UN military action under Article 42 of the Charter. In our unipolar world, does now the very adoption of a resolution under chapter VII of the Charter trigger a legal authorisation to act by NATO when it determines it necessary? If that is so, then we may expect that in the future Russia will again start exercising its veto in the Security Council, to make sure resolutions are not adopted, thus undercutting the possibility of useful political consensus being expressed in those instruments.’ (‘International Law in a Changing Legal System’ [1999] CLJ 78 at 94, based on the text of the Rede Lecture, delivered in the University of Cambridge on 22 October 1998).

63. The issue of implied authorisation was further debated in the Security Council, following *Operation Desert Fox*, a British and American series of air strikes on Iraq in December 1998. The United Kingdom and the United States argued that Resolution 1205 implicitly revived the authorisation of the use of force contained in Resolution 678. The matter was debated at the 3930th meeting of the Security Council on 23 September 1998, when the majority of states speaking in the debate argued that the use of force by the United Kingdom and the United States under the purported authorisation of Resolutions 678, 1154 and 1205 was unlawful.
64. At that debate, Boris Yeltsin, President of the Russian Federation, stated that ‘[t]he UN Security Council resolutions on Iraq do not provide any grounds for such actions. By use of force, the US and Great Britain have flagrantly violated the UN Charter and universally accepted principles of international law, as well as norms and rules of responsible conduct of states in the international arena ... In fact, the entire system of international security with the UN and the Security Council as its centre-piece has been undermined.’ China also expressed the view that the actions violated international law, and France ended its role in

policing the no-fly zones. The French Minister for Foreign Affairs stated that France had ended its participation since the operation changed from surveillance to the use of force: he considered that there was no basis in international law for this type of action. (See Christine Gray, 'From Unity to Polarisation: International Law and the Use of Force against Iraq' (2002) 13 EJIL 1, at 22, and Constantine Antonopoulos, 'The Unilateral Use of Force by States After the End of the Cold War', [1999] JACL 117, at 155).

65. This analysis of the Security Council debates shows that most Member States, including three Permanent Members, do not consider that the Resolutions can bear the meaning argued for by the United Kingdom and the United States, and consider that the proposed interpretation is incompatible with the framework laid down for collective decision-making. The arguments of the United Kingdom and United States have been said by one legal commentator to distort the language of the Security Council's resolutions:

'It is no longer simply a case of interpreting euphemisms such as "all necessary means" to allow the use of force when it is clear from the preceding debate that force is envisaged; the USA, the UK and others have gone far beyond this to distort the words of resolutions and to ignore the preceding debates in order to claim to be acting on behalf of the international community.' (Christine Gray, 'From Unity to Polarization: International Law and the Use of Force against Iraq' (2002) 13 EJIL 1, at 10).

66. The issue of implied authorisation was further debated after the United Kingdom and the United States attacked Iraqi radar installations and command and control centres in and outside the no-fly zones in February 2001. The UN Secretary-General stressed that only the Security Council could determine the legality of actions in the no-fly zones: only the Security Council was competent to determine whether its resolutions were of such a nature and effect as to provide a lawful basis for the no-fly zones and the action taken to enforce them. (Reported in Christine Gray, 'From Unity to Polarization: International Law and the Use of Force against Iraq', (2002) 13 EJIL 1, at 12, and recorded at www.un.org/News/dh/atest/ <<http://www.un.org/News/dh/latest/>page2.html>). Russia, China and France all rejected the legality of the air strikes, and Gray concludes that: 'The enforcement of the unilaterally proclaimed no-fly zones has thus come to be seen as illegitimate, despite UK protestations of humanitarian necessity.' (*Ibid*, at 12)

67. It should however be noted that, in relation to air attacks carried out in January 1993 by the USA, the UK and France, directed at destroying Iraqi missiles in the no-fly zones, the UN Secretary-General stated that:

‘The raid yesterday and the forces that carried out the raid have received a mandate from the Security Council according to Resolution 678, and the cause of the raid was the violation by Iraq of Resolution 687 concerning the ceasefire. So, as Secretary General of the United Nations, I can say that this action was taken and conforms to the resolutions of the Security Council and conforms to the Charter of the United Nations.’ (Ibid, at 167.)

68. This may appear to offer some support for the United Kingdom’s position. However, the Secretary General has condemned the unilateral use of force before and since that statement. His statement to the press cannot be determinative of the legality of the action, and never again has the Secretary General given such support to unilateral military action against Iraq. In the light of the willingness of the Secretary General publicly to support such action in 1993, the fact that no support was given for the later attacks strongly suggests that the 1993 incident was an isolated one. The Secretary General’s statement also runs contrary to the views of the UN Legal Department. In relation to the attacks in January 1993, it stated that ‘the Security Council made no provision for enforcing the bans on Iraqi warplanes.’ (Quoted in Lobel and Ratner, *op cit*, at p133).
69. Given the objects of the Charter, one of which is to preserve peace as far as possible, clear terms must be required to authorise the use of force. Bearing in mind that ambiguities in interpretation should be resolved in compliance with the Charter’s objectives, it is submitted that the use of force is not justified until the Security Council says so in clear terms, and does so in terms directed at the current situation. The Charter’s overriding commitment to the use of force only as a last resort entails that explicit authorisation be required, rather than seeking to make resolutions bear meanings clearly at odds with the intentions of large numbers of the States which drafted them, including Permanent Members of the Security Council.
70. The constitutional importance of the United Nations, and the constraints this places on interpretations of the relevant resolutions, is well expressed by Lobel and Ratner:

‘To resolve these issues [whether the current Resolutions implicitly authorise the use of force], two interrelated principles underlying the Charter should be considered. The first is that force be used in the interest of the international community, not

individual states. That community interest is furthered by the centrality accorded to the Security Council's control over the offensive use of force. This centrality is compromised by sundering the authorisation process from the enforcement mechanism, by which enforcement is delegated to individual states or a coalition of states. Such separation results in a strong potential for powerful states to use UN authorisations to serve their own national interests rather than the interests of the international community as defined by the United Nations.' (Jules Lobel and Michael Ratner, 'Bypassing the Security Council: Ambiguous Authorizations to use Force, Cease-fires and the Iraqi Inspection Regime' [1999] AJIL 124, at 127.

71. Further, the Gulf War ended with a Security Council commitment to remain 'actively seized' of the situation. This strongly implies that they will apply their judgment *afresh* to any new proposals for the use of force. As Lobel and Ratner express it,

'It should not be presumed that the Security Council has authorised the greatest amount of violence that might be inferred from a broad authorisation. For example, Resolution 678 clearly authorised force to oust Iraq from Kuwait, but the broad provision on restoring international peace and security ought to be read in the context of that purpose. It should not be interpreted to authorise an escalation of the fighting that would remove the Government or enforce weapons inspections.' (129).
72. Thus far it has been argued that the terms of the relevant resolutions, their natural meaning and the intentions behind them offer no support to the argument that the wording of the Security Council resolutions implicitly authorises the use of force.
73. There is a further, more specific argument relied upon by the United Kingdom. This argument involves the interpretation to be placed on cease-fire agreements specifically, rather than Security Council Resolutions more generally. The United Kingdom appears to consider that breach of the terms accepted by Iraq in the ceasefire resolution (Resolution 687) entitles Member States without more to use force to end those violations.
74. Assuming that Iraq has in fact significantly breached the Security Council's requirements, this raises two questions of law: (1) whether material breach of requirements contained in a ceasefire agreement allows the use of force in response; (2) whether Member States are entitled unilaterally to determine the existence of such a breach and to use force without Security Council authorisation.

75. Resolution 687 is an agreement between Iraq and the United Nations. It does two things. First, it brings the Gulf War to a permanent end. Secondly, it sets out a series of requirements for Iraq. The cease-fire was conditional on Iraq's *acceptance of* those terms. It did accept those terms. From the moment of ceasing hostilities, there exists a situation of peace, in which the obligation under Article 2(4) not to use force applies again in full. Lobel and Ratner give an example: 'no one would seriously claim that member states of the UN command would have the authority to bomb North Korea pursuant to the 1950 authorisation to use force if in 1999 North Korea flagrantly violated the 1953 armistice.' (*Op cit*, p145)
76. It would be contrary to the Charter's objectives if, once the Security Council authorises the use of force, that authorisation constitutes a permanent mandate to Member States to use force as and how they determine it to be necessary. Statements made at the time of other cease-fires directly contradict the United Kingdom's argument. When the Security Council imposed a cease-fire on the parties to the conflict between Israel and various Arab governments in 1948, Count Bernadotte, the UN mediator, instructed that the UN cease-fire resolution was to mean that: '(1) No party may unilaterally put an end to the truce. (2) No party may take the law into its own hands and decree that it is relieved of its obligations under the resolution of the Security Council because in its opinion the other party has violated the truce.' The Security Council then reiterated that 'no party is permitted to violate the truce on the ground that it is undertaking reprisals or retaliations against the other party.' (Lobel and Ratner, *op cit*, p146).
77. The objections to the United Kingdom's argument were powerfully stated by Professor Thomas Franck at proceedings of the American Society of International Law in 1998:

'[B]y any normal construction drawn from the administrative law of any legal system, what the Security Council has done is occupy the field, in the absence of a direct attack on a member state by Iraq. The Security Council has authorised a combined military operation; has terminated a combined military operation; has established the terms under which various UN agency actions will occur to supervise the cease-fire, to establish the standards with which Iraq must comply; has established the means by which it may be determined whether those standards have been met (and this has been done by a flock of reports by the inspection system); and has engaged in negotiations to secure compliance. After all these actions, to now state that the United Nations has not in fact occupied the

field, that there remains under Article 51 or under Resolution 678, which authorised the use of force, which authorisation was terminated in Resolution 687, a collateral total freedom on the part of any UN member to use military force against Iraq at any point that any member considers there to have been a violation of the conditions set forth in Resolution 678, is to make a complete mockery of the entire system.’ (ASIL Proceedings, 1998, ‘Legal Authority for the Possible Use of Force Against Iraq’, at 139).

78. It is far from clear that material breaches of a cease-fire agreement authorise the use of force in response. *If* such use of force can ever be justified, this is clearly a decision to be taken by the Security Council. The constitutional arguments considered above apply with equal force in this context. Given the purpose of the system of collective decision-making, the emphasis on peaceful resolution wherever possible, and the Security Council’s active management of the Iraqi situation to date, neither breaches of the cease-fire agreement nor breaches of any other resolution authorise the unilateral use of force. Such use of force by the United Kingdom would therefore violate international law.

The proposed UN resolution

79. As matters stand, the United States and the United Kingdom are attempting to persuade the UN Security Council to adopt a strongly worded resolution giving the UNMOVIC and the International Atomic Energy Agency (IAEA) extensive powers of inspection of an unlimited range of sites in Iraq. The draft resolution would empower any permanent member of the Security Council to recommend to UNMOVIC and IAEA the sites to be inspected, persons to be interviewed, the conditions of such interviews and the data to be collected, and then to receive a report on the results. The proposed resolution also casts upon Iraq the obligation to make full disclosure ‘an acceptable and currently accurate, full and complete declaration of all aspects of its programmes to develop chemical, biological and nuclear weapons, ballistic missiles, and unmanned aerial vehicles.’
80. The final clause of the proposed resolution states:
‘...false statements or omissions in the declaration submitted by Iraq to the council and failure by Iraq at any time to comply and cooperate fully in accordance with the provisions laid out in this resolution, shall constitute a further material breach of Iraq’s obligations, and that such breach authorises member states to use all necessary means to restore international peace and security in the area.’ (clause 10 - emphasis added)

81. The very fact that the United States and the United Kingdom are making strenuous efforts to secure the adoption of the proposed resolution; and the wording of the resolution, in particular clause 10, illustrates that the proponents of the view that the existing resolutions authorise the use of force in present circumstances, or that the use of force is justified as a means of pre-emptive self-defence, themselves recognise that another resolution is needed which clearly authorises the use of force by the words “all necessary means.” It would be an astonishing legal proposition if they failed to persuade the Security Council to pass a resolution in such terms and *still* contended later that they had authority to launch a unilateral attack on Iraq.

Necessity and Proportionality

82. It is clear that the laws of war also set limits to any force which may ultimately be used. If used in self-defence, force is limited to that which is strictly *necessary and proportionate* to repelling any attack. If used pursuant to a UN Security Council Resolution, the force could only be used in a manner, and for purposes, consistent with the United Nations Charter.
83. Force cannot be considered *necessary* to achieve compliance with the Security Council’s requirements, and to secure peace, until (1) Iraq’s current offer in relation to weapons inspections has been taken up and shown to be made in bad faith or otherwise ineffective; and (2) Iraq has been demonstrated to pose a pressing and immediate threat to another Member State or States.

A full invasion of Iraq with the aim of changing the government would not be proportionate to the aims of self-defence, or to the Charter’s aim of maintaining peace and security. Iraq is a sovereign State: while the Security Council can demand that Iraq achieve certain results, it cannot dictate its choice of government. The Security Council Resolutions require Iraq to meet a long list of requirements. These *could* be met by Saddam Hussein’s government. While the Security Council, or certain members of it, may not like that government, a change of regime cannot be considered absolutely necessary to achieving the Security Council’s legitimate aims.⁶

Conclusion

84. It is submitted therefore that the Inquiry should conclude as follows:
- ‘The Inquiry concludes that it would be unlawful for the United Kingdom to launch or take part in a military attack on Iraq under present circumstances without the express authorisation of a United Nations resolution.’

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8th October 2002

INQUIRY INTO THE LEGALITY OF THE USE OF FORCE
BY THE UNITED KINGDOM AGAINST IRAQ

FOOTNOTES

1. This is the position recorded by UNSCOM in its 'Chronology of Main Events', which states '16 December 1998: The Special Commission withdraws its staff from Iraq.' (Available at: www.un.org/Depts/unscom/Chronology/chronologyframe.htm). This followed the report submitted by Richard Butler, Executive Chairman of UNSCOM, to the Security Council on 15 December 1998, in which he reported that on that inspection, 'Iraq did not provide the full co-operation it promised on 14 November 1998.' (UN reference: S/1998/1172, 15 December 1998).
2. See also the 1987 *Declaration on the Non-Use of Force* GA Res 42/22 (1988) and Christine Gray *International Law and the Use of Force* (2000, Oxford) pp 4-6.
3. It should be noted that Sir Robert Jennings was the British Judge on the ICJ and was its President.
4. Those occasions were: SC Res 678, authorising the use of 'all necessary means' to liberate Kuwait; SC Res 794, authorising 'all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia', SC Res 940, authorising 'all necessary means to facilitate the departure from Haiti of the military leadership', SC Res 929, authorising France to use 'all necessary means' to protect civilians in Rwanda, SC Res 770, authorising states to take 'all measures necessary' to facilitate humanitarian assistance and enforce the no-fly zone in Bosnia.
5. It should be noted that, in the case of Kosovo, it is arguable that the use of force was justified in international law on another ground – the doctrine of humanitarian intervention – but, for present purposes, it is only the suggestion that the use of force against Serbia was justified by the doctrine of implied authorisation by Security Council Resolutions which we need consider.
6. The *Financial Times* on Monday 7th October 2002 reported that the Government had received legal advice from the Attorney General and the Solicitor General to the effect that the use of force against Iraq in order to achieve a change of regime would be contrary to international law. A similar report appeared in *The Guardian* of Tuesday 8th October 2002, p 12.

Editors' Note: this Chapter augments and updates the *Opinion on the Use of Force Against Iraq* provided by Rabinder Singh QC and Alison MacDonald on September 10 2002 for the Legal Inquiry Steering Group.