
2. THE CASE FOR WAR: JULIAN KNOWLES

9 October 2002

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

Skeleton Argument on behalf of Legal Inquiries Support Group (LISG)

A. INTRODUCTION

1. The terms of reference for this Inquiry are as follows:
"To examine whether in the light of present circumstances any decision by the UK Government to use force in the war against terror, and specifically Iraq, would be consistent with the rules of *jus ad bellum*"
2. However, the real issue as crystallised in the Skeleton Argument filed by 'Peacerrights' is whether an armed attack on Iraq would be compatible with international law, rather than the legality of the use of force in the 'war against terror'. There can be no doubt that the military operations in Afghanistan following 9/11 are lawful under international law. Accordingly, this Skeleton Argument will address the issue of an attack on Iraq.
3. This Inquiry, in order to be meaningful, has to assume that an attack is to take place without the benefit of a UN Security Council Resolution, which (it is common ground) would render lawful military action in accordance with its terms.
4. The LISG will invite the inquiry to conclude:
 - a. That an attack on Iraq would not be unlawful under international law if the evidence in the possession of the relevant governments, when scrutinised by an appropriate international body or tribunal, were to demonstrate the necessity of destroying Iraq's capability to develop or deploy weapons of mass destruction (WMD) in order to preserve international peace and security.
 - b. The proper interpretation of post-Gulf War Resolutions allows force to be used a further specific Resolution.

B. SUMMARY OF SUBMISSIONS

5. In summary, LISG will contend:
 - a. It is not possible for this Tribunal to determine the hard-edged question of whether or not an attack on Iraq would or would not be unlawful under the doctrine of anticipatory self-defence.

That is because this question is essentially one of fact. This Tribunal is not, does not purport to be, and cannot be, a fact-finding tribunal. Nevertheless, the following matters support the view that the requirements of this doctrine are satisfied here.

- b. Article 51 of the UN Charter preserves the inherent right of state self-defence;
- c. This right includes the right to take pre-emptive action where the evidence suggests that an armed attack is anticipated;
- d. It is sufficient if the attack is on a UN member state.
- e. The concept of 'imminence' must be judged by reference to the form of armed attack that is contemplated. In the case of ballistic missiles equipped with nuclear, chemical or biological warheads capable of being fired at short notice, imminence must be given a flexible interpretation. This view is supported by examples of state practice in the form of attacks on Iraqi nuclear facilities by US forces which have not been condemned by the UN Security Council as being unlawful despite there being no overt evidence of any imminent attack.
- f. The document 'Iraq's Weapons of Mass Destruction: The Assessment of the British Government' ('the Dossier') demonstrates inter alia that Saddam Hussein is a homicidal and genocidal dictator of the utmost ruthlessness who has not hesitated (i) to begin aggressive wars, and (ii) to use WMD against real and perceived enemies without provocation in the past.
- g. The view of the attacking government as to whether sufficient evidence exists must be given significant weight in determining whether sufficient evidence does exist.
- h. The Secretary-General of the UN has stated that Resolution 687 permits military force without further Resolutions.

C. THE DOSSIER

- 6. The evidence contained in the Dossier demonstrates the following:
 - a. The threat from Iraq does not depend solely on its weapons capabilities, described below. It arises also because of the violent, unpredictable, and aggressive nature of Saddam Hussein's regime. The UK Government's informed judgment is that Saddam's record of internal repression and external aggression gives rise to unique concerns about the threat he poses.

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- b. Part 3 of the Dossier charts Saddam's rise to power; the nature of his regime and his history of regional aggression; his human rights abuses; his record of torture, mass arrests and summary executions. These include:
 - i. 4000 prisoners executed at Abu Ghraib Prison in 1984.
 - ii. 3000 prisoners executed at the Mahjar Prison between 1993 and 1998.
 - iii. About 2500 prisoners executed between 1997 and 1999 in a "prison cleansing " campaign.
 - iv. 122 male prisoners executed at Abu Ghraib prison in February/March 2000. A further 23 political prisoners were executed there in October 2001.
 - v. In October 2000 dozens of women accused of prostitution were beheaded without any judicial process. Some were accused for political reasons. Women prisoners at Mahja are routinely raped by their guards.
 - c. Saddam Hussein utilises the most perverted forms of cruelty to enforce his will. His regime has demonstrated genuine creativity in devising methods of inflicting pain and death on real and perceived opponents. These include: using electric drills to mutilate prisoners' limbs; prolonged suspension by the arms and legs; beatings on the soles of the feet; electric shocks to the genitals; pulling out of fingernails; mutilation with knives; sexual attacks; and official rape. Prisoners at the Qurtiyya Prison in Baghdad and elsewhere are kept in metal boxes the size of tea chests. If they do not confess they are left to die.
 - d. Under Saddam Hussein, Iraq developed chemical and biological weapons, acquired missiles allowing it to attack neighbouring countries with these weapons and persistently tried to develop a nuclear bomb. Saddam has used chemical weapons, both against Iran and against his own people. Following the Gulf War, Iraq admitted all of this.
 - e. In the ceasefire of 1991 Saddam agreed unconditionally to give up his weapons of mass destruction.
 - f. Evidence in the public domain points to Iraq's continuing possession, after 1991, of chemical and biological agents and weapons produced before the Gulf War. Iraq has refurbished sites formerly associated with the production of chemical and biological agents. Iraq remains able to manufacture these

- agents, and to use bombs, shells, artillery rockets and ballistic missiles to deliver them.
- g. An independent review of this public evidence was provided by the International Institute for Strategic Studies (IISS) on 9th September. The IISS report also suggested that Iraq could assemble nuclear weapons within months of obtaining fissile material from foreign sources.
 - h. Significant additional information is available to the Government from secret intelligence sources. This intelligence provides a fuller picture of Iraqi plans and capabilities. It shows that Saddam Hussein attaches great importance to possessing weapons of mass destruction which he regards as the basis for Iraq 's regional power. It also shows that he does not regard them only as weapons of last resort. He is ready to use them, including against his own population, and is determined to retain them, in breach of Security Council Resolutions.
 - i. Intelligence also shows that Iraq is preparing plans to conceal evidence of these weapons, including incriminating documents, from renewed inspections. And it confirms that despite sanctions and the policy of containment, Saddam has continued to make progress with his illicit weapons programmes.
 - j. Iraq 's weapons of mass destruction are in breach of international law. Under a series of Security Council Resolutions Iraq is obliged to destroy its holdings of these weapons under the supervision of UN inspectors. Part 2 of the Dossier sets out the key UN Security Council Resolutions. It also summarises the history of the UN inspection regime and Iraq 's history of deception, intimidation and concealment in its dealings with the UN inspectors.

D. DISCUSSION

7. It is common ground between the parties that article 51 of the Charter preserves states' rights to self-defence. By referring to 'inherent rights', it plainly recognises the continued existence of the right in customary international law for states to defend themselves. It states:

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.'

8. Therefore states may take military action:
 - a. In individual or collective self-defence (which is a right under customary international law preserved by article 51).
 - b. Pursuant to a UN Security Council resolution, in accordance with article 2(4).
 - (i) *Anticipatory self-defence*
9. The right to self - defence includes the right of a state to take action in anticipation of an attack either on itself or a third party UN member. This is known as 'anticipatory self-defence' and has been recognised as a principle of customary international law:

... 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*)
10. The extracts from *Detter* and *Cassese*, relied on by Peacerights at para. 23 *et seq.*, which appear to deny the existence of this doctrine, represent an extreme view not borne out by examples of state practice where anticipatory self-defence has been utilised without condemnation by the international community: see Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, p3. Importantly, *Oppenheim* goes on to state, in a passage not included in Peacerights' Skeleton Argument:

In conditions of modern hostilities it is unreasonable for a state always to have to wait until an armed attack has begun before taking defensive action. States have in practice invoked the plea of self-defence to justify action begun to forestall what they regard as an imminent threatened attack.
11. These extracts from *Oppenheim* make good:
 - a. The proposition that anticipatory self-defence exists as a recognised exception to the prohibition on the use of force;

- b. The proposition set out above at para. 5(a), namely, that this Inquiry is not equipped to make the necessary factual findings in order to answer in terms the question posed by its terms of reference. No disrespect is meant by this observation; it is merely intended to point out the difficulty involved in assessing the degree of risk in the absence of an opportunity to make factual findings.

(ii) *Justification*

12. It is entirely accepted that the burden of proof will be on the Government to justify by reference to evidence that the situation is such that an anticipatory attack is justified. However, support for the view that the necessary conditions are in place is to be found in the Dossier and the other publicly available material. These are: (i) that Iraq has the capacity to attack with WMD; (ii) it has attacked with WMD before, killing tens of thousands; (iii) it is ruled by a tyrant whose behaviour is unconstrained by any recognisable notions of morality and whose political strategy has included waging two aggressive wars in the last 22 years.
13. Whilst the classical formulation of the doctrine of anticipatory self-defence refers to an 'imminent attack', the degree of proximity required must obviously be proportionate to the severity of the threat and the speed with which an attack could be launched. Threats to use WMD are capable of justifying the earlier use of defensive force than might be justified in the case of a less serious threat. The doctrine as enunciated in the *Caroline* was laid down in the age of the musket and the horse, whereas the present danger arises in the age of the thermonuclear ballistic missile. Moreover, Saddam Hussein is unlikely to publish his intentions in advance.
14. As an example, in 1981 Israel attacked Iraqi nuclear facilities, fearing that they were to be used to make nuclear weapons. It was condemned by *inter alia* the British Government and the Security Council for doing so. A telegram to the Security Council from the International Atomic Energy Agency recited: "Mindful of the fact that Iraq fully subscribes to the Agency's safeguards system and is a party to the Treaty on the Non-proliferation of nuclear weapons... Noting the statement of the Director-General to the effect that Iraq has fulfilled its obligations under Agency safeguards, pursuant to the non-proliferation Treaty". Sir Anthony Parsons, the British Ambassador, emphasised in his speech how Iraq had cooperated with weapons inspections.
15. In 1981, of course, Saddam Hussein was fighting the Iran-Iraq war and was the friend of the West. He had not yet invaded Kuwait, and had not yet committed genocide against the Kurdish people. He had not yet used

chemical and biological weapons to kill thousands of Iranian soldiers. The full extent of his tyranny had not yet been established.

16. The situation now is very different to 1981. This has been reflected in the different reaction to US attacks on Iraq's nuclear facilities during the 1990s, which did not meet with international condemnation: see O'Connell, *Evidence of Terror*, Journal of Conflict and Security Law, p26; *The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-Defence in International Law* (1996) 45 I.C.L.Q. 162.
17. Given this acceptance by the international community of the US's 1993 attack as a legitimate act of self-defence, that self - defence being an *ex post facto* attack following the Iraqi sponsorship of an assassination attempt on former President Bush, the present factual scenario lends strong support for the view that a proportionate attack to remove WMDs and prevent their rebuilding would fall within accepted parameters. As a result of its intelligence gathering, the Government's Joint Intelligence Committee's judgment is that Saddam has:
 - a. continued to produce chemical and biological agents;
 - b. military plans for the use of chemical and biological weapons, including against its own Shia population. Some of these weapons are deployable within 45 minutes of an order to use them. There are command and control arrangements in place to use chemical and biological weapons. Authority to use these weapons resides with Saddam Hussein personally, save where he has delegated his power to family members.
 - c. developed mobile laboratories for military use, corroborating earlier reports about the mobile production of biological warfare agents;
 - d. pursued illegal programmes to procure controlled materials of potential use in the production of chemical and biological weapons programmes;
 - e. tried covertly to acquire technology and materials which could be used in the production of nuclear weapons;
 - f. sought significant quantities of uranium from Africa, despite having no active civil nuclear power programme that could require it;
 - g. recalled specialists to work on its nuclear programme;
 - h. illegally retained up to 20 al-Hussein missiles, with a range of 650km, capable of carrying chemical or biological warheads;
 - i. started deploying its al-Samoud liquid propellant missile, and has used the absence of weapons inspectors to work on

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- extending its range to at least 200km, which is beyond the limit of 150km imposed by the United Nations in Resolution 687;
 - j. started producing the solid-propellant Ababil-100, and is making efforts to extend its range to at least 200km, which is beyond the limit of 150km imposed by the United Nations;
 - k. constructed a new engine test stand for the development of missiles capable of reaching the UK Sovereign Base Areas in Cyprus and NATO members (Greece and Turkey), as well as all Iraq's Gulf neighbours and Israel;
 - l. pursued illegal programmes to procure materials for use in its illegal development of long range missiles;
 - m. learnt lessons from previous UN weapons inspections and has already begun to conceal sensitive equipment and documentation in advance of the return of inspectors.
18. The argument that because Iraq has engaged in negotiations with UN weapons inspectors, and has offered to lift restrictions upon terms whereby the inspectors may return to Iraq, there is an effective alternative to force, is naive in the extreme and refuted by the evidence in the Dossier.
19. In summary, there is clear support for the view that conditions for an anticipatory attack on Iraq to remove WMD, and to remove the capability of making them again (which may extend to removing the people responsible for their creation and deployment) are met in this case.
- (iii) Existing Security Council resolutions*
20. Resolution 678, passed at the start of the Gulf War, authorised the use of force against Iraq. There have been many others, discussed below. The position taken by the UK Government is that:
- a. Existing Resolutions implicitly authorise the use of force by Member States in the event of Iraq's continued and persistent non-compliance;
 - b. 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.
21. The existing Resolutions can be summarised as follows:
- a. Paragraph 2 of Resolution 678 authorises 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).
- b. Resolution 660 aimed to restore the sovereignty of Kuwait. After that had been achieved, Resolution 687 imposed a formal cease-fire. The cease-fire was conditional on Iraq’s acceptance of terms which it did not accept.
 - c. The Security Council’s current requirements of Iraq are contained in Resolution 687 (dubbed ‘the Mother of All Resolutions’) as well as subsequent Resolutions. These require the destruction of all chemical and biological weapons and all ballistic missiles with a range greater than 150km, 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).
22. Iraq’s obligations were spelt out in a series of Resolutions after Resolution 688. 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).
 23. In Resolution 1154 the Security Council said it was ‘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’. The Security Council also said that any violation by Iraq with its obligations 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.’ The Security Council also decided ‘to remain actively seized of the matter, in order to ensure implementation of this resolution, and to secure peace and security in the area.’
 24. On 5th 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...’ In resolution 1205 the Security Council demanded that Iraq co-operate fully with the Special Commission, and said that it again remained ‘actively seized of the matter.’

25. It is submitted that these series of Resolutions implicitly justify the use of force in order to implement the terms of Resolution 687 because that allows Member States to use ‘all necessary means’ to ensure compliance with it and with subsequent resolutions. Furthermore, the ‘severest consequences’ envisaged by the Security Council in Resolution 1154 (now backed up by the demands in Resolution 1205) obviously includes the use of force by Member States.
26. Before offering justification for this position, it should be noted that the point taken by Peacerights, namely, that the current proposed Resolution demonstrates in clear terms the lack of any current authority, is manifestly bad. It ignores the fact that the UN Security Council is a political and not a judicial body and that proposals for Resolutions may be motivated by a number of considerations quite apart from jurisprudential ones.
27. Clear and unambiguous support for the proposition that military action prompted (as it would be) by Iraqi violations of Resolution 687 would be authorised by Resolution 678 comes from no lesser figure than the then Secretary-General of the UN himself. He said, in relation to the 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 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’, quoted in Christine Gray, *From Unity to Polarization: International Law and the Use of Force against Iraq*, ’ (2002) 13 EJIL ¹
28. In relation to this statement, the LISG submits as follows:
 - a. The best guide to the proper meaning and interpretation of UN Security Council Resolutions is the Secretary-General of the UN;
 - b. However, equally obviously, this statement cannot be taken as a mandate for any and all forms of attack against Iraq. The factual context here, as in anticipatory self-defence, is everything.
 - c. Therefore, the fact that other forms of unilateral action may have been condemned by the Secretary-General in no way diminishes the highly authoritative status of this interpretation of the Resolutions.

- d. However, it should be borne in mind that the putative military action in this case is aimed directly at enforcing the terms of the ceasefire. Action to make Iraq give up its WMD and allow inspections was one of the primary goals of Resolution 687. The statement of the Secretary-General (presumably considered, presumably issued with the benefit of legal advice) must therefore be regarded as reflecting the UN's own view that the Resolutions have continuing effect and the proposed military action falls within the continuing mandate given to Member States
29. This statement by the Secretary-General also meets the argument that the statement in Resolution 687 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' requires the Security Council itself to decide when to further authorise the use of force is unsound.
30. The Secretary-General's interpretation of Resolution 687 is reinforced by the reference in Resolution 1154 to 'severest consequences'. This is an obvious reference to the use of force. Whilst Resolution 1154 is addressed to Iraq, once it is accepted that force continues to be authorised by Resolution 687, 'severest consequences' can be read perfectly properly as a warning to Iraq of the possible consequences of continued [non-compliance]. The fact that in subsequent debates, the Security-Council has not agreed on the proper interpretation does not undermine this interpretation.
31. Such an interpretation is in no way inconsistent with the object of the UN Charter, namely, the preservation of peace. By framing the ceasefire conditions in the form which it did, the Security-Council must be taken to have decided that the preservation of peace required a continuing threat of military force in order to secure compliance by Iraq of terms deemed necessary for a greater and more lasting peace in the region, and the world.

D. CONCLUSION

32. For these reasons, the Inquiry is respectfully invited to reach the conclusions set out above at para. 4.

JULIAN B. KNOWLES

Matrix Chambers

Gray's Inn

9th October 2002

**IN THE MATTER OF AN INQUIRY INTO THE LEGALITY OF THE
USE OF FORCE BY THE UNITED KINGDOM AGAINST IRAQ**

**SKELETON ARGUMENT ON BEHALF OF
LEGAL INQUIRIES SUPPORT GROUP (LISG)**

**Silks Solicitors
368 High Street
Smethwick
West Midlands
B66 3PG**