3. ADJUDICATION OF PROFESSOR COLIN WARBRICK, 30 OCTOBER 2002

****

Legal Inquiry into a Prospective Use of Force by the United Kingdom against Iraq

1. Introduction

The Legal Inquiry into the legality of the use of force by the United Kingdom against Iraq was held on 11 October 2002. It could only take into account the situation as it was on that date. The British Government had indicated that it was contemplating the use of force against Iraq and had said that any force that was used would be compatible with international law. Even though the government conceded a recall of Parliament, it has been notably unwilling to elaborate in detail on the case in support of the international legality of any proposed action against Iraq.

Because of the constitutional arrangements in the United Kingdom governing the disposition of the armed forces, it is difficult to imagine that a UK court would be prepared to examine the international legality of any action contemplated by the Government. The result is that the Government's claim for the legality of its plans, clearly made for the purpose of persuading people of the legitimacy of any action amounts to no more than an assertion of a proposition which is contested. As an international lawyer, one is glad to see that not only does the Government regard compliance with international law as a component of its policy-making but that it considers international law also to be a consideration of persuasive force with public opinion.

The purpose of this Inquiry is to examine the constraints which international law places on any military action by the government against Iraq. The method which was adopted for the Inquiry was the presentation of the arguments by counsel before me. I was asked to make a report after hearing them. To give a focus to the Inquiry, I was asked by counsel on behalf of "Peacerights" to reach the following conclusion:

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.

It was made clear that "United Nations resolution" meant a resolution of the Security Council clearly authorising the use of force.

The adoption of an adversarial process and the appearance of a judgment at the end of it is apt to mislead. It is important to emphasise that none of

us engaged in the Inquiry regard it as the last word on the matter of the legality of the use of force against Iraq: this was not a trial of the British government. The Inquiry had the advantage of the presentation of argument by experienced counsel for and against the conclusion cited above. It did not have (and could not have had, of course) the benefit of the consideration of these submissions by a judge of like experience. I am not, and I was not pretending to be, a judge. I was not assuming the position of an English judge, with his potential remedial powers but with complex limitations on his jurisdictional authority, especially with regard to the sources of international law. Nor do I presume to the authority of an international judge. While it is true that the International Court of Justice has decided a case involving the use of force in the absence of one of the parties, I know of no instance when an international judge has been expected to reach his decision in the absence of both of them. It is necessary to underline that the proposition which I am asked to consider, though it has the appearance of an asymmetrical request, does in fact implicate the position of two States-the United Kingdom and Iraq.[1] Mr Singh, for Peacerights, did not purport to represent the position of the government of Iraq and Mr Knowles, responding, was not speaking for the British government. Mr Singh put his case against the legality of any action on behalf of Peacerights, a non-governmental organisation. Mr Knowles relied on information in the public domain to argue the contrary but was not instructed by nor privy to any information from the British government not otherwise available.

I express my appreciation of the measured tone of the written arguments of counsel and the clarity of their oral submissions, an appreciation which I am sure is shared by those who heard them. We all recognise that if this had been a real international law case, the resources available to counsel for the elaboration of their cases and the time for their presentation would have been much greater than was possible on this occasion. Furthermore, it is manifestly the case that all the evidence which would be relevant to determining the issues at stake is not available and, if one needed another cause for caution, we are dealing with a prospective use of force: assumptions have to made in considering the question now which might be confounded by events. Even taking these contingencies into account, I am persuaded that the exercise was one that was worth undertaking. To repeat an earlier point, the British government has said that it will act only in conformity with international law. It has put some evidence into the public debate concerning the case that it would have to make if force were used. But it has been reticent to elaborate its case in international law (though nobody should imagine that the matter will not have been extensively canvassed within government). In these circumstances, it seems to me a reasonable thing to do, to see how what we know about the

government's position comports with international law. Nonetheless, I reiterate what was said above - the proceedings were not a trial and this is not a judgment.

2. The factual and legal background

It is not, I think, necessary to elaborate at length the facts on which this Inquiry is founded. In August 1990, Iraq invaded the territory of Kuwait, a State and a member of the United Nations. The attack was condemned by the Security Council which took a number of decisions in response, in the initial phase culminating in Resolution 678, which, so far as relevant here:

> **Authorises Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 [leaves Kuwait and complies with other Resolutions] to use all necessary means [emphasis added] to uphold and implement [Iraq's obligations] and to restore international peace and security in the area.**

A number of States had already come to Kuwait's assistance (the "Coalition") and had been asked by Kuwait to use force in collective self-defence with Kuwait to repel the invasion and restore the authority of the government of Kuwait. It was understood that the emphasised words in Resolution 678 - "all necessary means" included the use of force. The purposes of the Council and the wishes of Kuwait were realised by military action which commenced with air-raids on 16 January 1991, followed by a ground invasion on 24 February 1991 and terminated on 28 February with a cease-fire agreed by Iraq. [Although nothing turns on it, there remains an uncertainty about whether the action of the Coalition was an exercise of collective self-defence or was done under the authorisation of the Council.] The Council first laid down the terms of a temporary cease-fire in Resolution 686 (which specifically continued the authority to use force in Resolution 678) and then set out the terms of a permanent cease-fire in Resolution 687. All the Iraq resolutions were under Chapter VII of the Charter and all were binding on Iraq, whether or not it accepted them. In fact, Iraq did accept the terms of Resolution 687. Certain of the measures in the earlier resolutions, notably the regime of economic sanctions against Iraq, were expressly kept in place by Resolution 687 but the authorisation to the Coalition to use force was not among them. The Resolution covers many matters, some Kuwait-specific, such as the delimitation of the Iraq-Kuwait border; some related to the invasion directly, like the arrangements for securing compensation for those States, individual and companies injured by Iraq's illegal actions; and some of a more general character, affecting Iraq's capacity to engage in various kinds of military activity in the future, against whichever State it were directed. These last, disarmament provisions, were accompanied by a regime of implementation - UN inspectors were to identify weapons,

components and facilities covered by the Resolution and destroy or disable them. Iraq was expected to co-operate with UNSCOM, the UN organ charged with these tasks. Its co-operation was less than whole-hearted and eventually deteriorated into obstruction. The UNSCOM inspectors were withdrawn in 1998, in the face of Iraqi allegations that they were abusing their powers. After a period (in which unilateral military action - aerial bombardment (see below) - was taken against Iraq by the US and the UK), an agreement was reached for the readmission of inspectors to Iraq, a new UN body, UNMOVIC, being set up to carry out the work, under Resolution 1284. Continued disagreements about the terms on which the inspectors would operate and persisting Iraqi dissatisfaction about the prolongation of the sanctions regime have meant that the inspectors have not returned to Iraq. Instead, a somewhat diffuse policy of containment has been pursued, some of it (the sanctions regime) under the authority of the UN, some of it (the no-fly zones) on the basis of claims of unilateral right. The no-fly zones, the legality of which is not an issue relevant to the Inquiry, are areas of Iraq airspace designated by the US and the UK (and initially also by France) as forbidden to Iraqi planes. They are patrolled by allied aircraft, which claim a right of self-defence against attacks from the ground. The only matter of importance is that the "allies" taking this action are not the "Coalition" which went to the aid of Kuwait.

The stasis continued. It was shattered in the wake of the events of 11th September 2001. President Bush included Iraq in an "axis of evil" States, which, he said, maintained or sought weapons of mass destruction and their means of delivery and which supported terrorist movements directed against the US and its allies. Of these States, only Iraq was under an international regime of supervision of its weapons programmes. Its failure to submit fully to the demands of Resolution 687 and Resolution 1284, were held against it, both as breaches of its obligations and as evidence that it was seeking or had obtained weapons of mass destruction, weapons which directly or indirectly by transmission to terrorists would be turned against the US. The US expressed its determination to do something about this situation, using military force if necessary, to secure "regime change" in Iraq if need be. The contemplated use of force which is our present concern is any that the British government would take in support of US action.

The charges against Iraq provided three kinds of claim for justification for employing military force:

1. Self-defence, including collective self-defence, as a further element in the war against terrorism, Iraq being implicated in future incidents in the campaign of terrorism against the US of which "11th September" events were the most prominent example;

2. Self-defence, including collective self-defence, to meet a threat from Iraq to use weapons of mass destruction against the US or its allies sometime in the future;
3. Enforcement of Iraq's obligations under various Security Council resolutions, the claim being made that existing resolutions contained sufficient authority for the use of force by States on their own initiative.[2]

3. The Legal Background

Starting in earnest with the Covenant of the League of Nations, international law has sought to impose limitations on the use of force by States. The Kellogg-Briand Pact of 1928 aimed at eliminating force as a means of achieving political goals. The lessons of the Great War which prompted these steps were reinforced by the experiences of World War II. The United Nations Charter is much more than a treaty, a political compact for world order in which the preservation of peace was seen as the priority. Besides setting up the UN and its organs, the Charter also lays down some fundamental rules for States. High among them are the obligations to settle disputes peacefully and not to resort to force, Articles 2(3) and 2(4) of the Charter. The proscription against the use of force is extensive. It is subject only to two exceptions - the right to use force in Article 51 and the right to use force under the authority of the Security Council (see below). The Charter puts the prohibition of force above considerations of justice and of law - while States have surrendered their own power to use force to secure compliance with international law, there is no power in the Charter of forcible implementation of international law (General Assembly Resolution 2625). What there is and what is the other part of the compact, is the vesting of authority in the Security Council to maintain international peace and security by a system of collective security. The Council has the power to take binding decisions, subject to a nine-from-fifteen majority and the absence of opposition from any of the five permanent members of the Council, if the Council determines that a situation threatens international peace (Article 39). These decisions not only bind the members of the UN but take precedence over other treaty obligations of those States (Article 103). The Council, at anyone time only fifteen members of the UN, possesses, therefore, an exceptional authority. It may require States to take non-forcible action under Article 41, such as economic sanctions. The Charter envisaged that the Council could deploy UN forces under Article 42, a power which was dependent upon agreements between States and the UN to provide these forces. This power in the Charter has never been available for want of any agreements. Instead, there has developed a practice of the Council authorising willing

States to use their national forces or the forces of inter-national organisations to secure the implementation of mandates conferred by the Council (N Blokker, "Is the Authorisation Authorised?... (2000) 11 EJIL 541). The authorisation given to the "states co-operating with Kuwait" under Resolution 678 was the first occasion the Council did this after the end of the Cold War.[3] The authorisation is notable for its breadth of purpose (including, as mentioned, action to restore international peace and security in the area), for its time-unlimited character and for the lack of accountability obligations of the States to the UN. As the practice has developed during the 1990s, it has been the case that the mandates have been more tightly defined and subject to temporal limits and that the overall authority of the UN has been affirmed. These elements of control, it is argued, are not merely desirable politically but necessary legally to constitute a valid delegation of authority from the Council to the participating States. This is not quite the Charter scheme as it was envisaged but one which has been crafted in practice and accepted by States as the most feasible and functionally effective option available.

The right of States to use force in self-defence is specifically recognised by the Charter (Article 51). Even if the collective security arrangements under Chapter VII had worked impeccably from the very beginning, a right of self-defence would still have been necessary in those instances in which one State attacked another but before the collective security forces could be put in the field. The language of the Charter is not entirely clear and its ambiguities were much relied upon because of the imperfections of the collective security response following the divisions in the Council as a consequence of the Cold War. Much is often made of the use of the word "inherent" - "Nothing in the Charter shall impair the **inherent** right to... self-defence...". Although it is not without controversy, I accept that this refers to a right of self-defence in customary international law, as it was in 1945 and as it may have developed since (Nicaragua (Merits) case, (1986) ICJ Rep 14). For the moment, though, I want to draw a further implication from the word. "Inherent" suggests that the right is an incident of Statehood, a right which a State or States might choose to limit but as to which limitations should not readily be presumed. The legal basis for each limitation will, in each case, have to be demonstrated. This is not to say that the right of self-defence is a non-justiciable prerogative of a State which can never be subject to external scrutiny. In particular, a State claiming to act in self-defence is obliged to report the matter to the Security Council. The ICJ has said that a failure to do so may be taken into account in assessing the legality of a State's claim of self-defence. If a situation is reported to the Council, it is hardly conceivable that the defending State would not explain its case. Quite apart from any legal complexity, which may be beyond resolving in the Council, the need to

bring plausible evidence in support of a State's case will expose a significant part of its argument to scrutiny. Because self-defence is not equivalent to state necessity, it has both inherent and specific limitations upon it.

In contrast to self-defence, authorisation by the Council to a State to use force requires a two-fold justification: the authorisation must be within the substantive power of the Council, taken according to the procedural mechanisms identified in the Charter; and the authorisation to the State must be clear - if it is not express, the necessity of any implication must be strong, otherwise States could usurp the power of the Council and, with the support of a permanent member veto, could then thwart any attempt by the Council to retrieve its authority.[4]

4. The Legal Argument

The Inquiry took the form of a challenge to any prospective UK military action. Accordingly, Mr Singh had to anticipate arguments which the Government might make and to consider whether they could be sustained by any evidence publicly available and then whether they were legally defensible. Mr Knowles took Mr Singh's arguments at each level and sought to refute them. He did not put any claim not proposed by Mr Singh.

I begin by noting that Mr Singh did not suggest that the British government would put forward an argument falling within category 1 above, viz that an attack against Iraq could be justified as an exercise of collective self-defence within the continuing campaign of the war on terrorism, a claim which would necessitate the demonstration that Iraq has or immediately will facilitate terrorist attacks by Al Qaeda against the UK or its allies. I consider this no further.

Mr Singh made arguments within the broad categories 2 and 3 above. He said that the Government would contend that it could use force against Iraq, because it had a right of self-defence against an attack by Iraq on its (Iraq's) own behalf against the UK (or against a State which would seek UK assistance as collective self-defence) - the "self-defence" argument. Alternatively, the Government would say that it was authorised by existing Security Council Resolutions to use force because of Iraq's failure to comply with its disarmament obligations under Resolution 687 - the "Security Council" argument. It is important to disentangle two aspects of the situation with respect to Iraq's undoubted delinquency under Resolution 687. On the one hand, it is put forward as a source of a right to use force against Iraq - this is the "Security Council" argument. On the other, it is regarded as a source of evidence as to Iraq's capacity (and even intention) to use its weaponry held in contravention of Resolution 687 against the UK or one of its allies - the "self-defence" argument. Its evidential value is not enhanced simply by reason that Iraq is in breach of its obligations to the UN.

The Self-defence Argument

I take the argument from self-defence first and I start with the question of evidence. Mr Knowles suggested that the inquiry had no option but to defer to the Government's contention that it had adequate evidence of a threatened attack by Iraq of such magnitude and immediacy as to justify a military response. I have some sympathy with this position. However, the Government's enlistment of international law on its side and its engagement in the debate about the facts of the situation in Iraq invite consideration of its position, of course on the understanding that an authoritative conclusion about the legality of its plans cannot be arrived at. That is the basis on which this Inquiry is undertaken. I am asked to consider the question "in the present circumstances" and I have indicated that I take that to include the evidential circumstances - that which is in the public domain on the 11th October 2002. I do not rule it out, indeed I think it most likely, that the government has evidence that it has not revealed by reason of the sensitivity of its sources but which would reinforce the case the Government seeks to make. Equally, more evidence might become available or events might show that that which is presently tentative or speculative does in fact have some forensic value. What I do here is rely on the evidence used by counsel, derived from public sources, and apply it to the arguments based on self-defence as I understand them. Any conclusions I reach are, of course, vulnerable to the production of other evidence in the future.

So, I turn now to the law of self-defence. On one point, at least, there was agreement between counsel: there is no present "armed attack" against the UK or any other relevant State by Iraq or any other state or group with which Iraq is associated. In other words, a claim of self-defence could be made out now only if the law allowed some action in anticipation of an actual "attack". However, even then there were immediate difficulties. Counsel had some problem in determining when "attacks" started: neither of them were able to say quite when, at the earliest, Kuwait (or its allies) would have been permitted to respond to Iraq's undoubted armed attack in 1990. Yet, it seems clear that an "attack" cannot be confined to the actual passage of the first hostile tank, aircraft or missile across the international boundary. Equally, once an "attack", even if it were so narrowly circumscribed, has started, the defending State is entitled to respond, within the parameters of immediacy and necessity, if the attack is part of a continuing campaign against it. None of this would avail the UK at present.

The British government needs to rely on a wider notion of anticipation. Any such right must find its source in the "inherent" right because other

the language of the Charter - "if an armed attack occurs" - inclines against it. Equally, it seems to me, if some notion of anticipatory defensive action is permissible, it must be related to something more than a situation of concern or, especially, mere capacity on the part of the alleged putative attacker. Although it was not a juridical determination and although Mr Knowles tried to limit the analysis to the precise facts of the situation, the Council did condemn the raid by Israel on the Osirak reactor in 1981 (Resolution 487), with some members of the Council regarding it precisely in terms of an excessive (that is to say, wholly precautionary) notion of anticipation. It is the nearest example we have to what is claimed in the present case. The writers are divided about what was the state of customary international law in 1945 (such as might be embraced by the "inherent" right in Article 51) but I accept the view of Dr Gray that any uncertainty about what the position was has been increasingly narrowed by practice since then, a practice marked by a reluctance of even those States which assert a right in the abstract to rely on it in particular situations (Gray, above, pp.111-115). To extend self-defence so far in anticipation excludes from it the essential element of immediacy. Mr Knowles argued that the idea had to be considered in its context, taking into account both the seriousness of any threat (here the use of weapons of mass destruction) and the practical possibility of responding. He maintained that the prospect of widespread damage from the clandestine delivery of a weapon of mass destruction created an immediate need to destroy any possibility of an eventual attack. On this basis, of course, there would be no need even to show that the other State presently had the capacity to attack (that is, that it actually had any weapons), only that it was seeking to get them and, if it did, it had the intention to use them against the defending State. Mr Knowles's analysis would put all the weight on intention (though he did not concede that there was no evidence of a present capability of Iraq to deliver a biological or chemical weapons attack). There are principled and pragmatic reasons why the practice has developed against this proposition - in principle and subject to any international obligations that it has accepted or any decision of the Council to the contrary, a State is entitled to develop, obtain and deploy any weapons as an exercise of its sovereignty. Even if a State develops weapons in breach of a treaty, say the Nuclear Non-proliferation Treaty, there is no right in international law for a State to use forcible counter-measures against the wrong-doing State by reason of the illegality alone. The pragmatic reason runs directly contrary to Mr Knowles's case: the very danger on which he places so much weight is increased if an attack by one State, assertedly in self-defence to pre-empt the other's use of weapons of mass destruction, precipitates an exchange of these weapons. On such is the whole theory of deterrence based.

Mr Singh was able to concede that Iraq might have weapons of mass destruction, might even have the means to use them for an attack beyond its immediate neighbours but, in the absence of any evidence that Iraq intended to use its capacity in this way, it was not possible to claim that there was any right of self-defence. That being the case, considerations of the necessity and proportionality of any response were beside the point, indeed impossible to calculate, for neither the threat (which remained putative) nor the response (which was at present in the future) could be identified. To the extent that he thought these were questions within the competence of the Inquiry, Mr Knowles relied mainly on the Government's "Dossier" - "Iraq's Weapons of Mass Destruction". However, much of the evidence which seeks to go beyond establishing Iraq's capacity to use weapons of mass destruction against targets which would give rise to a right of self-defence in the UK, does little more than point to Saddam Hussein's propensity to use force, including chemical weapons, against domestic opponents and an external enemy without the capacity to respond in kind (Iran during the first Gulf War). That Hussein is a very bad man with aggressive tendencies is beyond doubt: that there is evidence here that he has taken steps towards instituting an armed attack against the UK such as to give rise to a right of self-defence is unconvincing. Indeed, the thrust of this opinion is that such threat as Hussein's capacities and propensities pose is a threat to which "the international community" has to "stand up" and against which it should act. Self-defence, even collective self-defence being a unilateral act, does not appear to be the appropriate answer to the concerns of the "international community".

The Security Council Argument

Now, reference to the "International Community", at least in a legal context, often gives one cause for pause. However, where the use of force is involved, the "International Community" has a legal manifestation - it is the Security Council which acts for the international community in these matters. The Council has acted with respect to Iraq: a catalogue of 16 Resolutions was brought to my attention (there are 29 in all). There is no question that the Council has dealt and is dealing with the situation in Iraq. It is exercising the powers of the "International Community". The Security Council may authorise the use of force by member States willing to discharge the mandate proposed by the Council and, since the Council may respond to "situations" which threaten international peace and security, its powers clearly go beyond circumstances which would justify a state from resorting to self-defence. It is usually the case these days that the Secretary-General assembles his "coalition of the able and the willing" before the Security Council formally approves the mandate and other details for which the forces may act. We have seen that the Council did

authorise the use of force ("all necessary measures") by the "States co-operating with Kuwait") in Resolution 678. This mandate included the power to act "for the restoration of peace and security in the area". We should recognise that if the Coalition had been willing to proceed to Baghdad in 1991 and overthrow Hussein's regime, the language of Resolution 678 is apposite to have permitted it to have done so. It is also the case that, in the Preamble to Resolution 687, the Council recalls all previous Resolutions relating to Iraq's invasion of Kuwait and, since Resolution 687 refers to "the objective of restoring international peace and security in the area" and refers to Chapter VII, the argument goes that States may use the authorisation in Resolution 678 to achieve the objective in Resolution 687. The contention could be strengthened by noting that the Council has found Iraq to be in breach of its obligations under 687 and has warned Iraq of "the severest consequences" if it failed to remedy them (Resolution 1154).

However, a close scrutiny of Council practice since Resolution 687 shows an alternative line of argument. First is the distinction between Resolutions 686 and 687 on the reference back to the power to use force under 678, present in the former but not in the latter. Indeed, in Resolution 687, para 6, the Council noted that the deployment of the UN force on the Kuwait-Iraq border would allow the Coalition to withdraw from Iraq, according to the terms of Resolutions 678 and 686. Furthermore, Resolution 687 declares that a formal cease-fire will arise between Iraq on the one hand and Kuwait and the Coalition on the other on "official notification by Iraq..." of its acceptance of the provisions of the Resolution and decides that the Council will remained seized of the matter and it will "take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region" (para 34). This pattern of language has continued through the subsequent resolutions on the situation in Iraq. Even Resolution 1154, which threatens Iraq with the "severest consequences" in the event of violations,

Decides, in accordance with its responsibilities under the Charter, to remain actively seized of the matter, in order to ensure its implementation of this resolution , and to secure peace and security in the area.

This is language which clearly refers to the power of the Council and not of member states. Any unilateral right to use force must be based on something other than these resolutions. The argument that the power in Resolution 678 both survives and is adequate to justify unilateral State action will not stand up to examination. This authorisation is to "the States co-operating with the government of Kuwait" to take action effectively to restore the authority of the government of Kuwait (no longer an issue) and

to restore international peace and security in the area (potentially a wider authority) - but the Coalition is no longer in existence and the power being sought is related to the implementation of resolutions subsequent to Resolution 678, not obviously intended when Resolutions 686 and 687 are compared and when the language of those subsequent resolutions is considered. (See Lobel (below), Gray (above)). In particular, Resolution 1154 is an assertion of plenary authority by the Council over the situation in Iraq insofar as it is covered by Council Resolutions. The argument that Resolution 678 is a residuary right to use force fails to take into account the original reassertion of authority over the situation by the Council in Resolution 687. There are no longer "States co-operating with the Government of Kuwait" to restore its authority. It might even be argued that Resolution 678 is no longer a "relevant" resolution in the terms of Resolution 1154.

The British government's explanation for the legality of Operation Desert Fox, the US/UK bombing operation after the withdrawal of UNSCOM in 1998 was characterised by its opacity. Take for instance the statement of Foreign Office Minister Baroness Symmonds:

It is important to remember that we are considering a highly complex network of United Nations Security Council Resolutions. Perhaps I may remind your Lordships that there is Resolution 678 demanding that Iraq left Kuwait. There is Resolution 687, which set out the ceasefire arrangements, the position of UNSCOM and the necessity for Iraq to comply with it on an unconditional basis. There is also Resolution 1154, which concerns the memorandum of understanding with the United Nations Secretary General and which speaks of the severest consequences if that memorandum was broken. There is Resolution 1205, which speaks of the flagrant violation which the Security Council believes has been committed by Iraq.

I believe I have been very clear that Her Majesty's Government were not in any doubt that there was a clear legal basis for the planned military action at the weekend ((1998) British Yearbook of International Law 590)**.**

Perhaps the most important feature of her statement are the words, "... there is Resolution 678 demanding that Iraq left Kuwait...". Iraq has, of course done that (or been made to do it). None of the other resolutions cited by the Minister authorise the unilateral use of force, indeed to the contrary, they assert the authority of the Council. Her belief that "I have been very clear... that there was a clear legal basis for the planned military action" is unfounded. Nor is much further assistance to be gained from the statement of the British representative to the Security Council when he referred to three Council resolutions - 1154, 1205, and 687 - and said "by

that resolution" the Council implicitly revived the authorisation to use force" in 678 (id, 591). It is not clear which resolution "that" one is or how breach of any of them could have, even implicitly, the effect maintained. Certainly, it was an interpretation rejected by other members of the Council [C Gray, "From Unity to Polarisation... (2002) 13 EJIL 1]. Indeed, one feels that the very lack of a clear statement of its case counts against the Government. One need not expect that it could be made succinctly but it must be made persuasively.

The strongest single item of evidence in favour of Mr Knowles's proposition is the Secretary General's statement of January 1993 saying that air raids carried out by the US, the UK and France directed against Iraqi missiles in the no-fly zones was justified under Resolution 678 in answer to Iraq's breach of the cease-fire Resolution 687. To that Mr Singh said that it was an isolated remark, given in a press statement, which had not been repeated and which had been contradicted since by the UN Legal Department (referring to J Lobel and M Ratner, "Bypassing the Security Council... (1999) 93 AJIL 124, 133). I should add that the Secretary General's comment does not reflect the British justification for use of force to protect planes in the no-fly ones and that what is contemplated at present seems to be for a wholly different purpose and of a wholly different order.

This isolated statement apart, there is a dispute between members of the Council about what the resolutions mean. An authoritative interpretation from a tribunal is scarcely conceivable; an interpretation by the Council is unlikely because of the capacity of either side to veto an unfavourable conclusion. The present Legal Adviser to the Foreign & Commonwealth Office has indicated how troublesome the interpretation of Security Council resolutions can be (M Wood, "The Interpretation of Security Council Resolutions", 2 Max Planck Yearbook of United Nations Law 73). Taking too formal an approach may miss the point but, unless the language is held to disguise the absence of agreement, the words of the resolutions in their Charter context must be taken to represent the political compromise reached by the Members of the Council. The mere fact that a State takes (or, indeed, has taken) a different view ought not to avail it against the resolution. Any conclusion of mine is, of course, far from authoritative but, based on the structure of the Charter as well as on the language of the resolutions, the Charter requiring a State claiming authorisation to use force to make its case, the resolutions demonstrating an intention of the Council to take control of affairs after Resolution 687, and the absence of "States co-operating with Kuwait" (the ones authorised to use force by Resolution 678, as an identifiable category), my position is that the use of unilateral force to secure the implementation of Resolution 687 and subsequent resolutions requires a new mandate from the Council,

a mandate which could take account of the post-Kuwait practice of the Council in establishing clear mandates and setting time-limits for any authorisation actually given.

I do not attach much weight to the fact that the US and UK are actively seeking a new Security Council resolution which would expressly authorise the use of force against Iraq. Those States are entitled to argue that the resolution is legally superfluous, though it might be politically significant in engendering support from those States who doubt or even reject the argument that the US and UK may act in any event against Iraq.

There is no right of States to use force to secure the implementation of international law. Iraq's obligations under Resolution 687 are obligations under international law. Something more, then, is required to allow the use force than the mere fact of Iraq's non-compliance (even if it is described as a "material breach"). In my view the burden of showing this "something more", viz Security Council authorisation, rests on the States claiming to use force, a claim that the UK has not made out. I am particularly sceptical of claims that the failure of diplomacy justifies resort to force "as a last resort". The whole process of the development of international law from the Kellogg-Briand Pact through the Charter and General Assembly Resolution 2625 demonstrates a trend to the contrary, a trend confirmed by the ICJ in the Nicaragua case. Nor do I find convincing in legal terms the claim that if a new resolution authorising the use of force fails to be passed by the Security Council (whether or not because of the veto), some residual right of individual States to secure Iraq's compliance with its obligations then emerges.

5. Conclusion:

On the above view of the law of self-defence, even if weight is given to the "inherent" quality of the right of self-defence, such that a State is entitled to respect for its decision to act (at least until such time as the Security Council has considered the matter) and, perhaps, even if some notion of anticipatory self-defence is accepted, the British government has not produced evidence necessary to establish a plausible case that there is a threat of armed attack by Iraq against the UK commensurate with a right of self-defence. This is not to say that there might not be such evidence which the Government would be able to reveal later if it actually needed to use force rather than simply contemplate using it or that circumstances could soon change so as to make the claim a plausible one.

There is no explicit authority of the Council to the UK to use force for the implementation of Council resolutions, notably 687 or 1154. Resolution 678, which does contain an explicit authorisation, refers to the "States co-operating with Kuwait". The case cannot be sensibly made that any forcible action against Iraq now of the kind contemplated by the US and

the UK has anything to do with Iraq's attack on Kuwait or that the two States see themselves as acting in assistance to Kuwait. In the absence of explicit authorisation, one should be wary of claims that there is implicit authority to use force, given that the powers of the Council are limited and that its practice has been developing to condition any authorisations it does make in order to secure at least a degree of accountability of the authorised States to the Council. An implicit power, in the nature of things, cannot be circumscribed in this way. Furthermore, the language of 687 and all subsequent resolutions asserts the power of the Council to secure implementation of whatever obligations of Iraq are under consideration. Although the US and the UK claimed that there was a unilateral right to use the force applied against Iraq in 1998, these claims were weakly explained as to their legal justification and the legality of the bombings was strongly contested by a number of members of the Council. The interpretation of Council resolutions is not to be definitively determined by a majority of its members (any more than it is by a minority), so one must do the best one can. The conclusion against authorisation seems to me to fit best the structure of authority in the UN and the pattern of language of the resolutions.

Colin Warbrick, 30.10.02

FOOTNOTES

1. Realistically, if it does use force, the position of the UK is likely to be associated with the use of force by the US. We did not assume that the UK would necessarily support the US and so would necessarily take any argument for legality put forward by the US.
2. I have not addressed the objective of "regime change," since the case for this as a legitimate objective was not put to me. It is enough, perhaps to note that Security Council Resolution 687 affirms "the commitment of all Member States to the sovereignty, territorial integrity and political independence ofIraq."
3. For recent accounts of the law and practice, see C Gray, "International Law and the Use of Force" (2000), chs. 4 and 5; Y Dinstein, "War, Aggression and Self-Defence" (3rd ed, 2001), chs. 7-9).
4. The Croatia Subpoena case before the International Criminal Court for Yugoslavia shows that Tribunal taking a wide view of the powers of the Council (following the Tadic case on the setting up of the Tribunal) but a narrow view of the powers of organs so established, here no coercive powers against States for the Tribunal in the absence of an express conferring of the power by the Council. The analogy with the position of States claiming implied powers to use force against other states seems wrong.