5. CLAIM FORM AND GROUNDS FOR THE JUDICIAL REVIEW OF MICHAEL FORDHAM, RABINDER SINGH QC AND CHARLOTTE KILROY

8 November 2002

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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN

on the application of the Campaign for Nuclear Disarmament

Claimant

and

THE PRIME MINISTER

First Defendant

SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Second Defendant

Third Defendant

DETAILED STATEMENT OF GROUNDS

PART I. SUMMARY OF CLAIMANT'S CASE

Introduction

1. By this claim for judicial review the claimant asks the Court to rule on the question, by means of an advisory declaration, whether the United Kingdom Government would be acting within international law were it to take military action against Iraq on the basis of Iraq's non-compliance with United Nations Security Council Resolution 1441 (**SCR 1441**) without a further UN Security Council resolution. The claim is self-evidently both novel and important.

2. On 8 November 2002 the United Nations Security Council adopted SCR1441 **(Bundle B405-408)**. The Resolution imposed a framework of obligations on Iraq, including (paragraph 3) imposing a timetable for compliance, the first significant deadline for which is 8 December 2002.

As to the consequences of non-compliance, the Resolution said this (at paragraph 4)[1]:

> failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below.

The Resolution did not authorise military action.

3. The United Kingdom Government has publicly stated that any military action against Iraq would be taken only having regard to and acting compatibly with international law. On 24 September 2002, asked about the legal position and legal advice as to whether a further UN Resolution would be necessary, the Prime Minister had said this **(B110)**:

of course, we will always act in accordance with international law.

On 7 November 2002, and in the context of Resolution 1441, the Foreign Secretary said **(B246)**:

> we have always made it clear that within international law we have to reserve our right to take military action, if that is required, within the existing charter and the existing body of UN Security Council resolutions, if, for example, a subsequent resolution were to be vetoed.

4. There are essentially two questions:

   (1) The preliminary issue: does the subject-matter of the case render it "inappropriate as a matter of principle" for the Court to rule on the legal merits of the issue of substance?

   (2) The substantive issue: does international law prohibit military action without a further Security Council resolution?

5. The claimant's case on these issues is outlined in this section, and further supplemented in Parts II and III (respectively) of these grounds. The factual position is further described in the Witness Statement of Carol Naughton and in the statement of facts, to which attention is invited.

The preliminary issue

6. In deciding whether the subject-matter renders it inappropriate as a matter of principle for the Court to rule on the legal merits of the substantive issue, three considerations arise to be addressed: (1) justiciability; (2) standing; and (3) prematurity.

7. As to justiciability, the context is that there is a relevant question of law which is in the circumstances cognisable in public law terms and which

properly engages the Court's supervisory jurisdiction:

(1) The claimant accepts that decisions whether to take military action have conventionally been identified as among those functions of prerogative power where judicial restraint is warranted on constitutional grounds.[3] But it does not follow, especially under the now more developed state of the constitutional and administrative law, that there is any absolute or blanket immunity for such exercises of prerogative power. This has been recognised in other related areas, such as the prerogative of mercy (see most recently *Lewis v Attorney-General of Jamaica* [2001] 2 AC 50) or foreign affairs (most recently *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598). As Lord Phillips MR (for the Court of Appeal) said in *Abbasi* at [85]:

the issue of justiciability depends, not on general principle, but on subject matter and suitability in the particular case.

(2) The proper focus is therefore a contextual one. The law asks whether the case engages any justiciable issue, such as a relevant issue of law, engaged in the particular case. Certainly, questions of factual merits will not engage the review function of the Court. But questions of law can. As Laws LJ recently explained in *R (on the application of International Transport Roth GmbH) v Secretary of State for the Home Department* [2002] EWCA Civ 158 [2002] 3 WLR 344 at [85]:

> *It is well settled that executive decisions dealing directly with matters of defence, while* ***not immune from judicial review (that would be repugnant to the rule of law)*** *cannot sensibly be scrutinised by the courts* ***on grounds relating to their factual merits.***

Similarly, in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47 [2001] 3 WLR 877 Lord Hoffmann recognised at [54] (in discussing *Chandler v DPP* and SIAC national security appeals) that there could be relevant:

> *issues which at no point lie within the exclusive province of the executive.*

(3) Thus, even a decision as to military action can be justiciable if it engages a relevant question of law. That would include,for example, human rights questions (*Rehman* at [54]), as by reference to the Human Rights Act (see *R (on the application of Marchiori) v Environment Agency* [2002] EWCA Civ 03

[2002] EuLR 225 at [38], [40]). It would also include questions of legality, whether or not relating to human rights, arising by reference to any relevant statutory source[4]. But justiciability is not limited to a prohibition arising by domestic statute. As the Court of Appeal said in *Abbasi* at [57]:

> *this court **does not need the statutory context** in order to be free to express a view in relation to what it conceives to be **a clear breach of international law**...*

As this observation indicates, it is by no means fatal to the claim that, in the present case, the critical issue is one arising out of international law.

(4) The question whether action would be compatible with international law is a question of law, not foreign policy (cf. *Rehman* at [53]). Whether that is cognisable will depend in particular on one or both of two key things: (a) the approach taken by the Government itself and (b) the nature and status of the international law standard said to be breached.

(5) As regards the approach taken by the Government, here it was specifically stated that regard would be had to international law, and indeed that action must be compatible with international law: see paragraph 3 above.

(a) The effect of that approach is that a source of law, even if it might otherwise be cognisable only on the international law plane, becomes a source which the Court can properly address on judicial review. That is because, having chosen to act according to a legal standard, the Court can consider whether the Government has directed itself correctly as to what that legal standard requires.

(b) This was the approach where, prior to the Human Rights Act, the Secretary of State chose to take into account the European Convention on Human Rights, prior to its incorporation into domestic law. The Court on judicial review had a proper role in asking whether the Secretary of State had misdirected himself as to the requirements of that (international law) instrument: see *R v Secretary of State for the Home Department, ex p Launder* [1997] 1 WLR 839 per Lord Hope at 867C-F; endorsed by Lord Steyn in *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326 at 367E-H.

(6) Further, as to the nature and status of the international law standard, the issue of international law incompatibility in this case engages a fundamental rule of customary international law, namely the prohibition on the use of force contained in Article 2(4) of the United Nations Charter (paragraph 14(1) below).

(a) That principle is recognised as a principle of customary international law having the status of *ius cogens*: see paragraph 14(2) below.

(b) A legal principle of this fundamental status thereby readily informs and engages municipal law (cf. *Abbasi* at [28], [68]-[69]); Oppenheim's International Law, Ninth Edition, at 56-57.).

8. The suggestion as set out in the Defendants' response to the Claimant's letter before action (B359Q-R) that the Government should be entitled to keep silent the entire country in the dark as to its view of the true meaning and effect of international instruments because any view taken might have a bearing upon its conduct and its relations with other countries is unsustainable and in any event is nothing to the point. Neither *Abbasi*, nor *Everett* nor *CCSU* provide support for this proposition, and nor do they support an argument that the court should be prevented from considering questions of international law. In *Abbasi*, the court recognized the appropriateness of reaching and stating its conclusion on the international law issue.

9. The Government has said it will always act in accordance with international law. That assurance is meaningless if it is unwilling to state what its understanding of international law is, and this in any event serves to emphasise the appropriateness of the Court ensuring that the correct understanding is judicially expressed.

10. If the matter <u>is</u> justiciable (paragraph 7 above), it should not fail on grounds of sufficient interest or timing. The claimant's standing to raise the issue should be recognised by the Court, in particular for these reasons:

(1) The claimant has a sincere and well-founded interest in the subject-matter to which the claim relates, reflected in its coordinating role as to the public debate (including a march in September 2002) and in the exchange of correspondence with the Government. Cf. *R v Secretary of State for Foreign & Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552;

(2) If the matter is non-justiciable the claim will fail for that reason. But if it is justiciable, it would be unjust and contrary

to the public interest for the claim to fail for want of standing. That would indeed be a grave lacuna, in circumstances where justiciability reflects the need to uphold "the rule of law" (paragraph 7(2) above).[5]

11. As to prematurity:

(1) The claimant accepts that the Government has not yet decided (or at least publicly announced) to take military action, and has not unambiguously said that it considers that action to enforce against a breach of SCR 1441 without a further UN Resolution would be permissible under international law. However, the matter is plainly imminent and is under direct consideration, as the Foreign Secretary Jack Straw MP's statement and responses to questions in the debate in the House of Commons on 25 November 2002 demonstrate (B260-278). The matter has also been raised in pre-action correspondence (B359A-359L).

(2) There is nevertheless no doubt that nothing in relation to the timing of this matter robs the Court of the jurisdiction to entertain the claim for judicial review. The Administrative Court is equipped with jurisdiction[6] to give an "advisory" declaration in an appropriate case.

(3) The claimant submits that the hallmark of an appropriate case for the exercise of this jurisdiction will be a case where (a) the issues are important and the case serves a useful purpose in the public interest (London Borough of Islington v Camp 20th July 1999 unrep.) or (b) there is a pressing reason why it would not be satisfactory to await and consider the issues after the event and why from a practical point of view clarification at the start is to be preferred.[7]

(4) Here, both factors are present. The issues are undoubtedly important. Moreover, if the Court is to rule on the matter, it is plain that for that ruling to inform the Government's approach it would necessarily need to precede the taking of military action. If the matter is justiciable, there is and should be no bar relating to timing

12. The analysis on the points relating to the preliminary issue is further developed in Part II of these Grounds, below.

The substantive issue

13. The position in international law is as follows: military action taken by the United Kingdom to enforce the terms of Security Council Resolution 1441 would indeed require a further Resolution.

14. That is so for the following main reasons.

(1) Article 2(4) of the United Nations Charter contains the following general prohibition **(Legislative Provisions Bundle p 2)**:

All Member States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state...

(2) The prohibition on the use of force contained in Article 2(4) is a principle of customary international law, having the status of ius cogens (a peremptory international law norm from which no derogation is permissible): see *Nicaragua v United States* [1986] ICJ Reports 14 at [190].

(3) There are two exceptions, reflected in the Charter itself, to the prohibition on the use of force. The first is the recognition of the function of the Security Council in taking such action. Article 24(1) and (by Art 24(2)) Chapter VII of the Charter confer and govern the responsibility of the Security Council to decide on action in order to maintain or restore international peace. Article 24(1) provides:

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

(4) The second exception is the direct right of self-defence. The Charter does permit use of force by a Member State acting without reference to the Security Council, but only by recognising a right arising in deliberately narrowly-formulated circumstances. Article 51 provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member State of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

The terms of this provision are incompatible with the existence of any general entitlement to take military action, beyond circumstances of self-defence or absence of Security Council measures.

(5) Accordingly, military action to enforce against breach of Security Council resolutions could only fall outside the

prohibition contained in Article 2(4) if and to the extent that the action has been sanctioned by the Security Council (Article 24 and Chapter VII). Unless it be said that SCR 1441 already sanctions military action for non-compliance with its terms, no Security Council authority exists for such action and such authority would need to be sought.

(6) That Resolution 1441 does not authorise military action for breach of its terms is clear. The Resolution does not on its face provide for military action, in the case of non-compliance. It could and would easily have done so, were this its intention. Moreover, the Resolution does deal with consequences, but does so by providing expressly for that matter to be referred to the Security Council: paragraph 2 above.

(7) Indeed, the `travaux preparatoires' of the Resolution included draft Resolutions which would have authorised military action in circumstances of non-compliance. Such a provision was conspicuously and deliberately absent from the final text of the Resolution. That, moreover, was because Security Council permanent members (Russia, China and France) were opposed to such inclusion.

(8) In these circumstances, there is no authorisation (whether express or "implied"). Absent authority conferred by the Security Council military action to enforce the terms of SCR 1441 would not be compatible with international law and the Court should so rule.

15. It is important to emphasise that an examination of whether the UK government can rely on SCR 1441 as authorizing the use of military action in the event of its breach is a pure question of interpretation of that resolution. This does not in any way address or pre-empt the question of whether the Government would be justified under the self-defence exception contained in Article 51 of the Charter in taking military action based on circumstances which may arise in the future. That is a separate question. This case is about action based on non-compliance with SCR 1441 which is not the subject of this application (c.f. Mr Jack Straw's statement in the House of Commons debate of 25 November 2002 at Col 60 (B274-276).

16. The analysis on the substantive issue is further developed in Part III of these Grounds, below.

Conclusion

17. The Court is asked to grant permission for judicial review, or direct a rolled-up hearing so that the issues in this case can be properly

ventilated and the Court assisted with argument on both sides, and subsequently the declaratory relief sought.

18. The claimant does not seek an order to injunct military action. However, if the United Kingdom Government were to decide to proceed with such action when that would be in contravention of international law, it should face up squarely to that fact[8]. The Court has a legitimate and important role in ruling on whether action would constitute such a contravention. This is a proper case for the Court to be being asked to consider making an advisory declaration.

PART II: THE PRELIMINARY ISSUE

FURTHER DISCUSSION

JUSTICIABILITY

The Law

The prerogative

19 In *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department* [2002] EWCA Civ 1598 , the Court of Appeal considered the question of whether the response of the Secretary of State for Foreign and Commonwealth Affairs to a request for diplomatic assistance was justiciable. It was argued before the court that decisions taken by the executive in its dealings with foreign states regarding the protection of British nationals abroad are non-justiciable.

20. The court reviewed the authorities on the question of whether the mere fact that a power derived from the Royal Prerogative excludes it from the scope of judicial review. After citing extracts from *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 the court stated (at paragraph 18) that the issue of justiciability depends, not on general principle but on subject matter and suitability in the particular case.

21. The court summarised the propositions established by the authorities as follows:

(i) *"It is not an answer to a claim for judicial review to say that the source of the power of the Foreign Office is the prerogative."..*

(iii) *…there is no reason why its decision or inaction should not be reviewable if it can be shown that the same were irrational or contrary to legitimate expectation; but the court cannot enter the forbidden areas, including decisions affecting foreign policy.*

22. In *R v Secretary of State for the Home Department ex parte Bentley* [1994] QB 349 (see also the Privy Council in *Lewis v Attorney-General of Jamaica* [2001] 2 AC 50) the court considered the prerogative of mercy which had, along with other prerogative powers prior to the *CCSU* case [1985] AC 374, been considered immune to judicial review. It accepted the applicant's argument that it 'would be surprising and regrettable if the decision of the Home Secretary were immune from legal challenge irrespective of the gravity of the legal errors which infected such a decision'. The court stated (at 363A)

"*The CCSU case [1985] AC 374 made it clear that the powers of the court cannot be ousted merely by invoking the word "prerogative". The question is simply whether the nature and subject matter of the decision is amenable to the judicial process. Are the courts qualified to deal with the matter or does the decision involve such questions of policy that they should not intrude because they are ill-equipped to do so*."

23. The court concluded that some aspects of the exercise of the Royal Prerogative were amenable to the judicial process. The court also stated that it was not precluded from reaching this conclusion by the fact that Lord Roskill in *CCSU* had listed the prerogative of mercy as among the prerogative powers which he did not think could properly be subject to review; this passing reference was obiter.

24. Lord Roskill's list included (at 418) making treaties, and the defence of the realm. He stated "*the courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner…*".

25. Lord Roskill's list was considered in a number of subsequent decisions, including *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Everett* [1989] QB 811 at 820 where Taylor LJ stated "*At the top of the scale of executive functions under the prerogative are matters of high policy…making treaties, making war...mobilising the armed forces. Clearly those matters and no doubt a number of others are not justiciable….*" This extract from the decision was cited in *Abbasi*.

26. Nonetheless the court has recently accepted that "*No matter how grave the policy issues involved, the courts will be alert to see that no use of power exceeds its proper constitutional bounds.*" (Laws LJ in *R (on the application of Marchiori) v Environment Agency* [2002] EWCA Civ 03 at [40]. That is why a statute such as the Human Rights Act 1998 could for example require the court to review even high policy decisions (*Marchiori* at [40]).

Submissions

27. The Claimant is requesting the court to consider whether at international

law a breach of SCR 1441 by Iraq would entitle the UK to take military action without a further UN Security Council resolution. This is a question of pure law which the court is eminently able to decide. It is not in any sense a request that the court decide on the issue of whether troops should be deployed or not, and it does not involve the court going into any of the forbidden areas of high policy. If the issue came before an international court, there would be no doubt that it would be capable of judicial determination.

28. The question arises before the domestic courts because the UK government has clearly stated to a domestic audience that whatever action it takes will be in accordance with international law. It has directed itself that it will act in accordance with international law and in particular as to the legal effect of Resolution 1441. It is therefore appropriate for a domestic court to review any misdirection in law on which the government relies in making its decision to go to war.

29. In *R. v Secretary of State for the Home Department Ex p. Launder* (No.2). [1997] 1 W.L.R. 839 the House of Lords held that although the European Convention on Human Rights (**ECHR**) had not been incorporated into UK law, since the Secretary of State stated that he had taken into account the respondent's representations that his extradition would be in breach of the ECHR, it was right to examine whether he had done so correctly. In *R. v DPP Ex p. Kebilene* [2000] 2 AC 326 at 341Lord Bingham CJ confirmed that where a decision-maker had made it clear that he had relied on advice regarding the ECHR, it was appropriate to review the correctness of that advice. He stated:

"*It is, therefore, as it seems to me, appropriate for this court to review the soundness of the legal advice on which the Director has made clear, publicly, that he relied; for if the legal advice he relied on was unsound he should, in the public interest, have the opportunity to reconsider the confirmation of his consent on a sound legal basis*."

30. Furthermore in *Abbasi* the court accepted (paragraphs 68-69) the applicant's proposition that customary international law was part of the common law. Customary international law includes the prohibition on the use of force against another state save in recognised circumstances such as self-defence.

31. The Defendants' reliance on *R v Lyons* [2002] UKHL 44 in their response to the Claimant's letter before action (B359Q-359R.) is therefore misplaced. In that case the House of Lords simply repeated the finding in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 that a domestic court could not enforce the United Kingdom's obligations under international treaties (per Lord Hutton at [69]). The case concerned rights under the ECHR before it

was incorporated which had been precluded by statute.[9] There had been no statement from the Government that it intended to act in accordance with the ECHR, and furthermore the terms of the domestic statute were clear.

32. The case of *Bentley* makes it clear that the crucial question in deciding the justiciability of the exercise of the prerogative is whether the courts are qualified to deal with the matter. There is no automatic bar on the review of any prerogative; this was established by *CCSU*. The lists which appear in that case and in *Everett* of types of prerogative which are considered to be non-justiciable, simply reflect a view on the suitability of reviewing the subject matter which would normally be at issue in the exercise of that particular prerogative, namely matters of high policy. The content of the lists in *CCSU*, *Everett* and *Abbasi* are obiter, as *Bentley* demonstrates, and the court is not precluded from addressing the question of whether on the subject matter of the particular case review is appropriate.

33. As the court in *Abbasi* makes clear as long as the court's review does not impinge on any forbidden area, the decision is reviewable. Decisions dealing with matters of defence and high policy cannot be scrutinised on grounds relating to their factual merits; this does not mean that they are immune from judicial scrutiny (see *R (on the application of International Transport Roth GmbH) v Secretary of State for the Home Department* [2002] EWCA Civ 158 [2002] 3 WLR 344 at [85], above). It is important '*neither to blur nor to exaggerate the area of responsibility entrusted to the executive'* (see Lord Hoffman in *Rehman* at [54]).

34. As stated above the question of whether the government is misdirecting itself on international law is not a question which in any way impinges on the matters of high policy which the government undoubtedly has to address in deciding whether to go to war. The review simply ensures that the government does not make that high policy decision against the background of a misconceived and erroneous view of the law.

35. In the final paragraph of their response to the Claimant's letter before action (B359Q-359R) the Defendants state that a decision to issue a reasoned statement concerning the true meaning and effect of international instruments which apply not just to the United Kingdom but also to other states is a matter bearing upon the substantive conduct of this country's international affairs and affecting its relations with other countries. The Defendants suggest therefore that this decision is non-justiciable on the authority of *Everett*, *Abbasi* and *CCSU*. Insofar as the Defendants are suggesting that the interpretation of international law is a matter of high policy, this argument is unsustainable.

36. The question of whether an action is lawful or not is clearly one over which the courts have jurisdiction (see *Marchiori* at [40]). This applies as much to international law as to domestic law (see the *Expenses* case ICJ Reports (1962), 151; *Abbasi* at [57] and at [64]; *R v Home Secretary ex parte Adan* [2001] 2 WLR 143). In *Adan* the House of Lords rejected a similar argument put forward in relation to the Refugee Convention 1951: the risk that a UK ruling on the interpretation of the Convention might contain an implicit criticism of the interpretation put on it by other state parties could not prevent the court from applying its own concluded view of the Convention (see Lord Steyn at 155-6).

37. The Government has given an assurance to the British public that it will act in accordance with international law. That assurance is meaningless if the Government is unwilling to state its view on what its international law obligations require it to do, and only emphasises the appropriateness of the Court ensuring that the correct understanding is judicially expressed.

STANDING

38. CND has sufficient interest to bring this application both in the public interest and as an organisation which has been engaged in correspondence with the Government about the legal issues involved.

39. It is self-evident that the legality of the government's decision to go to war with Iraq is a matter of the highest public interest. Not only does the decision involve the commitment of UK troops and resources but such a war could by its nature have serious and unforeseen consequences for the peace and security of the UK. Public disquiet about the potential war with Iraq has been intense, with the Stop the War March in London on 28 September 2002 illustrating the extent of the unease.

40. Given that the UK has obligations under international treaties and under customary international law which determine the legality of its decision to go to war and given that the UK government has expressly declared to the British public its intention to comply with those obligations, it is clearly in the public interest for a court to assess whether the course of action the government is considering is indeed compatible with the UK's obligations under international law. Further, the UK Government assured CND by a letter of 24 May 2002 that "in the context of Iraq.. any action will continue to be justified under international law". (B374)

41. Carol Naughton, the Chair of the Campaign for Nuclear Disarmament (**CND**), sets out in her witness statement (**CNWS**) (B360-364) the history of CND. She explains that the focus of CND's campaigns have evolved so that they are now concerned with the global abolition of nuclear weapons and the overall defence policies of nuclear weapon states.

42. CND's concerns about a potential war with Iraq began in December 2001 and were intensified when Secretary of State for Defence, Mr Geoff Hoon, stated to the House of Commons Defence Committee on 20 March 2002 that in the right conditions nuclear weapons would be used against Iraq. CND's subsequent activities in campaigning against a war with Iraq are set out in CNWS at paragraphs 4-9 and included a detailed letter to Mr Geoff Hoon (B366-373) dated 25 March 2002 questioning the legality of any attack on Iraq and the co-organisation of the Stop the War March in London on 28 September 2002.

43. There can be no doubt therefore about the sincerity of CND's concern about the issue of the legality of a war against Iraq (see *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Rees-Mogg* [1994] 2 WLR 115 at 119) and the sufficiency of their expertise and interest in this area (*R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement Ltd* [1995] 1 WLR 386 at 395H-396A, followed in *R v Somerset County Council ex p. Dixon* [1998] Env LR 111 at 118-121).

TIMING

44. The government has not yet taken a decision to go to war; and it has stated that it has not yet made a decision to commit troops (see the article on *Guardian* website, 20 November, referring to a statement by Mr Geoff Hoon)[10]. Nor has the government said unequivocally that it considers that the UK would be entitled to attack Iraq without a further UN Security Council Resolution upon Iraq's breach of its obligations under SCR 1441, although it has made statements which could be interpreted in that way (see Statement of Facts).

45. It is quite clear, however, from the statements of Ministers set out in the Statement of Facts firstly that the government considers that a decision on war against Iraq is imminent, and would in one way or another follow upon breach of SCR 1441, and secondly that the legality of such an attack, if for example a further UN Security Council Resolution were to be vetoed, is a matter of constant debate and some confusion (see the Prime Minister's monthly press conference on 25 November 2002 at B70A-D, and the debate of 25 November 2002 in the House of Commons at B244-341).

46. The Claimant in its letter before action explicitly asked the Defendants to state whether they agreed that action against Iraq for non-compliance with SCR 1441 without a further UN Security Council Resolution would be in breach of international law. The Defendants in their response to (B359Q-R) refuse to give a reply, stating that there is no obligation on them to engage in a debate about legal analysis or to provide an explanation with reasons. The Defendants do not explain

why it is that they cannot even state what their position is, let alone engage in a debate or provide reasons for that position.

47. A material breach of SCR 1441 within the meaning of paragraph 4 of the resolution might be deemed to take place, if Iraq were to obstruct the weapons inspections provided for by paragraph 5, thereby triggering a report to the Security Council under paragraph 11. The principal date for compliance, however, as the timetable set out above demonstrates, is 8 December 2002 (paragraph 3 of SCR 1441), and it appears to be in expectation of a breach on this date that the US is making its preparations for war and encouraging its allies to do the same.

48. It is clear then that the timetable set in motion by SCR 1441 is extremely tight, and that if the UK does decide to go to war without a further UN Security Council Resolution a decision could be made in a matter of weeks. It is equally clear that once a decision on war is made, there will be little point asking the court for a declaratory judgment to the effect that the government misdirected itself as to the legality at international law of its actions.

49. The Claimant is not suggesting that the court may arrest the process of war either before or after a decision is taken. The Claimant is simply asking the court to inform the government's decision-making process with a declaration on the legality of the course of action the government is considering, the government having made it clear that it considers legality at international law to be a necessary and relevant element of any decision it makes.

50. There are four reasons why the court should consider itself to have the jurisdiction in judicial review to make such a declaration in advance of the decision being taken:

    (1) practicality: a declaratory judgment at this stage serves a purpose as it informs the government and the general public on the legality of an action that is proposed. If it is accepted that the issue is justiciable then it makes no sense to wait until an irreversible decision has been taken on the basis of an erroneous view of the law. As Sedley J (as he then was) stated in R v Secretary of State for Transport, ex parte London Borough of Richmond Upon Thames and Others [1995] Env LR 409 at 413

    "…the want of an identifiable decision is not fatal to an application for judicial review: see R v Secretary of State for Employment, ex p. Equal Opportunities Commission [1995] 1 AC 1, 26 (per Lord Keith) and 34-36 (per Lord Browne-Wilkinson). If it is arguable that the new consultation is

proceeding on a false basis which is justiciable in law, there will be every reason to lean in favour of deciding the issue sooner rather than later."

(2) This is no mere hypothetical issue. Nor is it an abstract or theoretical debate. It is clear that this very question is being considered by the government with a view to taking a decision on it. It may even be that the government has a reached a clear view on this question but is reluctant to publicise it (see the Defendants' response to the Claimant's letter before action at B359Q-359R). *In Rusbridger v Attorney General and DPP*, Divisional Court, judgment of 22 June 2001, an application for declaratory relief on the compatibility of section 3 of the Treason Felony Act with the Human Rights Act 1998 was refused permission on the basis that there was no decision which was susceptible to challenge[11], and that the claimants were not victims of any unlawful act of the Defendant. In that case, however, there was no suggestion that a decision or action was even being considered.

Here, although the government statements on the legality of attacking Iraq without a further UN Security Council Resolution are equivocal, they give a strong indication that the government is minded to attack without a further resolution. It is clear therefore that there is a live dispute between the Claimant and the Defendants based on the very real possibility of an attack on Iraq (see Zamir & Woolf, The Declaratory Judgment, Third Edition, 2002 at 140-162; see also *Ruislip-Northwood Urban District Council v Lee* (1935) 145 LT 208).

In *R v British Advertising Clearance Centre ex parte Swiftcall Ltd* 16 November 1995, unreported, Carnwath J stated:

"as to whether there is a reviewable decision, BACC says with some force that it has done no more at this stage than respond to BT's complaint by seeking Swiftcall's views and suggesting possible amendments, but that no conclusive view has been reached. However, this is an area in which decisions are made very quickly. Looking at the letters and affidavits realistically, they give a clear indication of how BACC is minded to act [and] as Swiftcall argue [that] the course they are suggesting is fundamentally unlawful, the sooner that is decided the better."

(3) There is no advantage to be gained, and every disadvantage to be had, in awaiting a decision. The court is in as good a position now to examine the legality of any proposed action as

it would be once the decision to take military action is made. This is not a case where the subject-matter of the review is a discretion whose exercise depends on factual circumstances which can only be determined at the time of the decision itself (see *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800).

(4) Even if the dispute between the Claimant and the Defendants cannot be characterised as a live dispute, the public importance and urgency of the issue is such that the court should exercise its discretion to grant declaratory relief. Clive Lewis, Judicial Remedies in Public Law, Second Edition, 2000 at 7-043 - 7-045

".. restrictions flow from the general principle that declarations will only be granted where a genuine justiciable issue arises for determination, and relief will not be granted if the matter is hypothetical or academic. These restrictions are increasingly seen as discretionary barriers rather than absolute jurisdictional bars".

He continues:

"There is a strong argument that the courts ought to have jurisdiction in limited circumstances at least to grant advisory declarations in appropriate circumstances.

At Chapter 9 of Zamir & Woolf, The Declaratory Judgment, there is a discussion of the advantages of extending the scope of advisory declarations. It concludes:

"Both the Law Commission in its report on Administrative Law: Judicial Review and Statutory Appeals, and the Bowman Committee in its Review of the Crown Office List recommended that it should be possible to obtain advisory declarations in matters of public importance, provided the parties affected have been given an opportunity to be represented. It is disappointing that this reform has yet to be implemented. ***However, statutory intervention is not needed. What is required is a willingness for the courts to be prepared to make a much broader use of the remedies they have now been given.*** *An essential change of approach is required. The courts should use the opportunity of the introduction of the Civil Procedure Rules to develop the ability to assist parties constructively by not only resolving legal disputes but also facilitating solutions to complex problems."* (Emphasis added)

The court has in any event accepted that in certain

circumstances advisory opinions are appropriate (see for example, *Sedley LJ in London Borough of Islington v Camp*, 20 July 1999 unreported.)

PART III: THE SUBSTANTIVE ISSUE

FURTHER DISCUSSION

DOES UN SCR 1441 ENTITLE THE UK TO USE FORCE AGAINST IRAQ IN THE EVENT OF ITS BREACH WITHOUT A FURTHER UN SECURITY COUNCIL RESOLUTION?

Legal Background

51. The United Nations Charter provides the framework for the use of force in international law.

Article 1 states:

"The Purposes of the United Nations are:

(1) *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*."

52. Articles 2(3) and 2(4) then set out the fundamental principles governing the settlement of international disputes and the use of force. Article 2(4) states:

"*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 in any other manner inconsistent with the Purposes of the United Nations.*"

53. In classifying the prohibition on the use of force contained in Article 2 (4) as a principle of customary international law, the International Court of Justice (*Nicaragua v United States*, [1986] ICJ Reports 14, at para 190) referred to the widely held view that this principle was *ius cogens*, in other words a peremptory norm of international law from which states cannot derogate.

54. Chapter V of the Charter governs the constitution and powers of the Security Council. Article 24 of the Charter states:

1. *In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and*

security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII.…

55.

56. Chapter VII confers on the Security Council the duty of determining the existence of any threat to the peace, breach of the peace, or act of aggression, and the duty of deciding what action should be taken to maintain or restore international peace and security (Article 39).

57. Article 41 gives the Security Council the power to take peaceful measures to give effect to its decisions, and by Article 42, where the Security Council considers that those measures would be, or have proved to be, inadequate it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.

58. Chapter VII[13] originally envisaged that the Security Council would carry out such enforcement action itself using the armed forces of Member States[14]. As a consequence there is no express authority for the Security Council to delegate to Member States the competence to carry out enforcement action under their own command and control (see Danesh Sarooshi, The United Nations and the Development of Collective Security, (Oxford, 1999), at p143).

59. The only express reference in Chapter VII to the use of force by Member States acting alone is at Article 51 which 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*."

60. Nonetheless a practice has arisen of authorising Member States to carry out enforcement action on the Security Council's behalf. It is important to emphasise, however, that there is no express authority in the UN Charter for Member States to carry out actions under Article 42 under their own command and control either with or without a Security Council Resolution.

Does SCR 1441 authorise the use of force?

Express authorisation

61. It is clear that SCR 1441 does not expressly authorise Member States to

use force in the event of non-compliance. A study of resolutions adopted by the Security Council, including Resolution 678, shows that that the language used to authorise force is bold and consistent. Member states are '*authorised*' to '*use all necessary means*' or '*take all necessary measures*' in pursuit of a specified goal.[15]

62. As can be seen from the excerpts of the draft resolutions set out in the Statement of Facts, the UK and the US sought express authorisation in such terms in the first draft of their resolution. Such express authorisation is manifestly lacking in the final draft. This was for reasons which the other Security Council permanent members Russia, China and France made clear: they did not want the resolution to authorise force.

63. Instead SCR 1441 provides at paragraphs 4, 11 and 12 that in the event of non-compliance the matter will be referred to the Security Council, which will convene to consider the need for full compliance with all of the relevant Security Council resolutions. This clearly contemplates that it is the Security Council which will decide on any further action to be taken against Iraq.

64. Paragraph 13 states that the Security Council "*Recalls, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations*." The words '*in that context*', which appeared first in the 6 November draft, clearly indicate that any serious consequences which Iraq will face are to be decided upon in the context of the discussion by the Security Council envisaged by paragraph 12. In any event, it is clear that the phrase "serious consequences" does not itself authorise the use of force but is a reference to previous warnings which this part of the Resolution "recalls".

Implicit authorisation

65. As can be seen in the Statement of Facts, the question of whether SCR 1441 gave Member States an automatic right to use force in the event of its breach was extensively discussed, and agreement was reached on the issue of "automaticity" and "hidden triggers" with Russia, China, France, and even the UK and the US ambassadors agreeing that both were absent from SCR 1441 **(B63-7A)**.

66. Having failed to obtain an express authorisation for the use of force, having incorporated minute changes to the final draft whose sole purpose was to exclude the possibility of 'automaticity' and 'hidden triggers' and to preserve the role of the Security Council, and having publicly agreed in their explanation of the vote for adoption of SCR 1441 that there was no such implied authorisation for force, there is and

can be no basis for the claim that SCR 1441 can be interpreted as authority for the use of force without a further Security Council Resolution.

67. Furthermore any use of force by the UK in reliance on SCR 1441 without a further Security Council Resolution would be a violation of the Purposes of the UN Charter set out in Article 1, and of Article 2(4) for the reasons set out below.

The Charter

68. The use of implied authorisation of force is in conflict with the fundamental objectives of the Charter set out in Articles 1 and 2 to preserve peace and to prohibit force save in specified circumstances. First, the fundamental nature of the prohibition against the use of force in Article 2(4) means that any ambiguities in interpretation should be resolved in favour of that prohibition. The Charter's overriding commitment to the use of force only as a last resort entails that explicit authorisation be required.

69. Secondly, the power given to the Security Council alone under Chapter VII to decide to use force to restore peace is intended to ensure that any decisions on the use of force are reached collectively. The implied authorisation arguments of the UK and the US permits states to make unilateral decisions on the use of force, which is precisely what Chapter VII and the Charter as a whole are designed to avoid.

70. Furthermore, as pointed out above, it is only the Security Council which has the power under Article 39 to determine whether there has been a breach of the peace or threat to the peace and to decide whether to take action under Articles 41 and 42. Since the Security Council is exercising powers delegated to it by Member States under Article 24 of the UN Charter, powers which it must exercise in compliance with the Purposes and Principles of the United Nations, it cannot delegate certain of its functions under Chapter VII to a Member State, and must retain effective authority and control over those functions which it does delegate. (see Danesh Sarooshi, The United Nations and the Development of Collective Security, (Oxford, 1999), at pp154-5; see also Niels Blokker, *Is the Authorisation Authorised? Powers and Practice of the UN Security Council to Authorise the Use of Force by 'Coalitions of the Able and Willing'* EJIL 2000 Vol 11 No 3 at 552),

71. It is clear that a practice has grown up of delegating the carrying out of enforcement action to Member States, but it is equally clear that in so doing the Security Council has increasingly sought to retain overall control of the operation with clear mandates, time-limited authorisations and reporting requirements (See Blokker, ibid, at 561-5).

72. The implied authorisation arguments put forward by the UK and the US would undermine the control exercised by the Security Council which is an essential feature of lawful delegation under the Chapter VII. These arguments would effectively allow Member States to take unilateral decisions on the interpretation of resolutions, reading into them authorisation to take action which does not appear clearly on the face of the resolution. This leaves the Security Council with little or no control of the functions it has delegated and unacceptably waters down the protections built into Chapters V and VII which enshrine the principle of collective decision-making.

73. Finally the limitations on delegation mean that the terms of a resolution which delegates Chapter VII powers are to be interpreted narrowly (See Sarooshi, The United Nations and the Development of Collective Security, above, at p 44).

74. In conclusion, the fundamental objectives and the constitutional framework of the Charter mean that the use of force by a Member State is not justified unless the Security Council authorises it in the clearest of terms. Use of force without such clear authorisation would therefore violate international law.

Interpretation of resolutions under Chapter VII

75. Even if implied authorisation were in principle compatible with the Charter it is clear both from the terms of SCR 1441 and from the discussions of the Security Council members prior to the adoption of SCR 1441 that authorisation to use force cannot be derived from the terms of this particular resolution.

76. As stated above paragraphs 4, 11 and 12 of SCR 1441 provide a clear mechanism in the event of Iraq's non-compliance with its obligations under SCR 1441. Given that there is such a clear mechanism on the face of the resolution there is no basis for arguing that an alternative mechanism should be implied into the resolution.

77. Furthermore, while the Ambassadors' statements to the Security Council after the adoption of SCR 1441 **(B63-67)** are not a definitive guide to their meaning, they provide the strongest possible evidence of the intentions of the Security Council members in adopting SCR 1441. In the *Namibia Advisory Opinion*, (1971) ICJ Reports 15, at p 53 the International Court of Justice stated that the language of a resolution should be carefully analysed before a conclusion could be made as to its binding effect under Article 25 of the Charter. The question of whether the powers under Article 25 had been exercised was to be determined "*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 of the resolution.…"

78. The same exercise should be employed where the terms of a resolution are ambiguous or unclear. The suggestion that ambiguity or uncertainty should permit Member States to reach a unilateral view on the meaning of a resolution is untenable. If the discussions and revisions leading up to the adoption of SCR 1441 are taken into account, it is clear that they rule out any arguments to the effect that paragraphs such as paragraph 13, which warns of serious consequences, and paragraph 2, which talks of affording Iraq a final opportunity, implicitly authorise the use of force.

79. In conclusion, any attempt by the UK to rely on SCR 1441 as the basis for taking military action against Iraq without a further Security Council resolution would be in violation of the terms both of the Charter and of customary international law.

The 'material breach' argument

80. SCR 1441 at paragraph 1 declares Iraq to be in material breach of its obligations under relevant resolutions and at paragraph 4 states that Iraq's failure to comply with the terms of SCR 1441 shall be a further material breach.

81. There is no authority anywhere in the Charter for a Member State to decide to use force in order to enforce breaches of Security Council resolutions. On the contrary that power is reserved to the Security Council at Article 42. It is only with an express delegation of that power that a Member State may use force against another Member State to ensure that it complies with a Security Council resolution.

82. Without that authorisation any use of force would be in clear contravention of the basic principle prohibiting the use of force in Article 2(4) of the Charter.

Authorisation in the event of the Security Council's failure to reach a resolution

83. Both the UK and US ambassadors to the UN and government ministers have made statements saying they expect the Security Council to '*meet its responsibilities*' (Ambassador Greenstock). Mr Jack Straw in his response to MPs' questions on 7 November 2002 set out in the Statement of Facts and at B267 alluded to the right to use force in the event of a veto of a further resolution from the Security Council.

84. It is plain that this is not the correct approach to the interpretation of the Charter. It is the Security Council which is the final arbiter of whether to take measures and what measures to take under Articles 39, 41 and 42. As explained above this collective decision-making process is at the heart of the powers conferred on the Security Council by the Charter. It

would be in contradiction to the fundamental objectives and the framework of the Charter for a Member State to review the decisions of the Security Council and take action in its stead if it does not agree with them.

No express requirement for the US and the UK to obtain a new resolution

85. In the debate in the House of Commons on 25 November 2002, Mr Jack Straw referred to the fact that SCR 1441 did not stipulate that a further Security Council resolution would be required, as a justification for his 'reserving his position' on whether military action could be taken to enforce SCR 1441. This argument is flawed. First of all any such proposed amendment would have been vetoed by the UK and the US so the non-inclusion of this requirement is no indication that Member States did not consider a further Security Council Resolution necessary. Secondly the other Member States made it quite clear that they did consider that a further Security Council resolution was necessary and required by the terms of the resolution (B67A). (See Jules Lobel and Michael Ratner *Bypassing the Security Council: Ambiguous Authorisations to use Force, Cease-fires and the Iraqi Inspection Regime*.' [1999] AJIL 124).

86. Thirdly, for the reasons set out above, it is unnecessary to insert wording in a resolution expressly requiring Member States to obtain an authorisation to use force, when the Charter makes it quite clear that with the exception of the inherent right of self-defence in Article 51[16], only the Security Council can make a decision to use force and only in the circumstances set out in Chapter VII.

CONCLUSION

87. It is clear from the above analysis that UN SCR 1441 does not authorise the use of force in the event of its breach. Any military action to enforce the terms of SCR 1441 would therefore need to be clearly authorised by a new Security Council Resolution in order to be compatible with international law.

88. The Claimant therefore invites the Court to give a ruling, which the Claimant respectfully suggests should be accompanied by a declaration, unless it be considered by the Court that the judgment itself suffices, that military action to enforce the terms of SCR 1441 without a further UN Security Council Resolution would be in breach of international law, and that the UK would be misdirecting itself in law if it were to take military action in these circumstances on the basis that it was acting compatibly with international law.

28.11.02

RABINDER SINGH QC
MICHAEL FORDHAM
CHARLOTTE KILROY

FOOTNOTES

1. Bold type in quotations connotes emphasis added.

2. Bold type in quotations connotes emphasis added.

3. *See Chandler v DPP* [1964] AC 763; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 418B-C.

4. Cf. *R (on the application of Bancoult*) *v Secretary of State for the Foreign and Commonwealth Office* [2001] QB 1067 (whether Ordinance compulsorily removing indigenous people from a former territory to make way for a US military base incompatible with Order under which made); *R v Secretary of State for Foreign and Commonwealth Affairs, ex p British Council of Turkish Cypriot Associations* [1998] COD 336 treating "the powers of the Crown, even in its diplomatic function", as justiciable "if it engages a question of domestic United Kingdom law", as where action was said to be "constrained by statute".)

5. *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 644E-G; *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* [1995]1 WLR 386, 395G-H.

6. *R v Secretary of State for the Home Department, ex p Mehari* [1994] QB 474, 491G-H.

7. Cf *R (On the application of Alconbury Developments Ltd) v Secretary of State for the Environment Transport and the Regions* [2001] UKHL 23 [2001] 2 WLR 1389 at [171].

8. Cf *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131E-F.

9. Lord Hoffman also stated (at [69]) that where the appellants claim to enforce a right which is not only given to them by the ECHR (prior to its incorporation into domestic law) but is also recognised by domestic law, the principle in *Rayner's* case did not require that the domestic court should not regard a judgment of the European court as providing clear guidance and that it should not follow that judgment unless required by statute to reach a difference conclusion.

10. Although in the recent debate in the House of Commons on 25 November 2002, Mr Geoff Hoon has made it clear that preparations are being made, Hansard, 25 November 2002, at cols. 127-8

11. The matter went to the Court of Appeal on a different point: *Rusbridger v Attorney General* [2002] EWCA Civ.

13. See Articles 43-49

14. See Jules Lobel and Michael Ratner *'Bypassing the Security Council: Ambiguous Authorisations to use Force, Cease-fires and the Iraqi Inspection Regime.'* [1999] AJIL 124 at 126; Danesh Sarooshi, The United Nations and the Development of Collective Security (Oxford, 1999), at pp 142-3

15. See inter alia S/Res/940 (Haiti), S/Res/1264 (East Timor), S/Res/1080 (The Great Lakes) (B53-62)