# PART III

## THE BBC'S SHADOW "JUDICIAL REVIEW" BY THE "TODAY" PROGRAMME

## 9. Adjudication of Professor Vaughan Lowe, 19 December 2002

INTRODUCTION

**Scope of the hearing**

1. The purpose of this hearing has been to consider the question of the legality under international law of any possible military action that might be taken against Iraq in the coming months.

2. In order to give the clearest possible presentation of the legal issues involved, the hearing was organised on the pattern of proceedings before an international court. Legal arguments were presented from two perspectives. One corresponds to the view that one might expect to be taken by States that consider that the only possible legal basis for any military action against Iraq is a specific authorisation that might be given by the Security Council at some time in the future. The other perspective corresponds to the view that one might expect to be taken by States that consider that as a matter of international law the United States, assisted by other States such as the United Kingdom, already has the legal right to take action against Iraq, without the need for any further authorisation from the Security Council.

3. It must be made clear that the arguments advanced on either side do not represent the official positions of any of the States concerned. All involved in this exercise have tried to give as full and fair an account as possible of the arguments that could be made out for either side. It is, however, quite possible that the States concerned would not wish to advance some of these arguments, and possible also that they might frame some arguments differently or even advance some entirely different arguments.

4. It must also be stressed that no legal analysis can be detached from the facts. Again, all involved have tried to take into account all publicly available facts as of the date of the hearing. If new facts emerge, or new light is cast on existing facts, the analysis here would have to be reconsidered.

**The Question is not whether or not to strike, but lawfulness of unilateral action**

5. It is important to emphasise four points at the outset. First, it is accepted by both sides that if the Security Council were to direct that military action be taken against Iraq, such action would be lawful. The right of

the Security Council itself to decide upon military action against Iraq is not in doubt it is the right of individual States such as the United States and the United Kingdom to take action unilaterally, without any further express Security Council authorisation, that is in issue.

6. The second point is that the question that is being addressed is whether or not there is a need for further Security Council authorisation in order for it to be lawful for the United States and the United Kingdom to take military action against Iraq. The question is not whether or not there should be such military action. If there is a legal right to take such action, moral or political considerations might lead to the conclusion that it would be wrong or inadvisable to exercise that right. Conversely, even if there is no legal right to take such action, moral or political imperatives might lead to the conclusion that the action must be taken anyway, despite the fact that it would amount to a violation of international law.

7. That said, the question of the legality of any action against Iraq remains a matter of very great importance. The importance of the legal position has been emphasised repeatedly by politicians in many States; and rightly. If action is taken and that action is unlawful, it will undermine respect for the law and for the United Nations. Regional superpowers and others would doubtless see the action as a precedent permitting the use of military force by any State that considers that the public good or some higher justifies it in forcibly imposing policies on other States. The corrosive effects of unlawful action continue for many years, and are difficult to reverse. Conversely, if action is taken and that action is in accordance with international law, the action will tend to strengthen the Rule of Law, and to indicate that States cannot violate international law with impunity. In other words, those who must decide whether or not to take military action against Iraq must consider not only the moral, political, economic and other policy arguments, but also the legality of the action. If a course of action is proposed that would be unlawful, it must be asked whether the advantages of taking such action outweigh the disadvantages that would flow from the consequent weakening of international law.

**The role of counsel**

8. The third point concerns the role of counsel. These arguments have been presented by two prominent international lawyers. The case against the legality of unilateral action was argued by Nicholas Grief, international law professor at Bournemouth University and a barrister practising from 3 Paper Buildings. The case for the legality of unilateral action was argued by Professor Tony Aust, Deputy Director of the British Institute of International and Comparative Law and visiting professor at

University College London. In the great tradition of the English Bar, each of them has been asked to put forward not their own personal views, but the best argument that can be made out on behalf of a hypothetical client -a hypothetical State that might submit the legality of unilateral action against Iraq to an international court, and a State that might be called upon to defend such a case. The arguments that they put forward do not necessarily represent the views of any particular State, or of any organization with which they are or have been associated.

9. Given the natural concern with the role of the United Kingdom in the events in Iraq, the question put before this hearing is framed in terms of the United Kingdom's right to act; but that way of framing the question has been adopted for clarity only, and must not obscure the fact that we have all approached the issue in general terms, asking whether any State has a right to take unilateral military action against Iraq.

10. I, also a professor of international law and practising barrister, am asked to play the role of an international court, and to summarize the arguments on each side and identify the central issues. In a real court, the verdict is the bottom line, and usually the main focus of interest. That is, I hope, not so here. The aim of all of us has been to give the clearest and most accurate summary of the arguments on either side of this serious and profoundly important controversy. I have reached my own personal view as to the proper decision on these questions, and will give it and explain it in due course; but it will necessarily be a personal, though informed, view.

**A question of international, not English, law**

11. The question is to be answered on the basis of international law that is, the body of laws that bind States in their relations with one another. All States accept that they are bound by international law, although there may be deep disagreement over what the law requires or permits States to do -exactly as there are disagreement over English law.

12. That brings me to the third preliminary point. Even if the unilateral use of military force against Iraq were to be a breach of international law, it would not follow that the British Government would be in breach of the law of the United Kingdom English Law or Scots law and so on. This is because of the constitutional relationship between the Government and the courts in this country. Curious as it may seem, more than three centuries after the Civil War which is commonly considered to have established that the Crown is subject to the Law and that Parliament is supreme, large areas of the conduct of foreign relations remain within what we still call the Royal or Crown Prerogative. That is to say, they are matters for the Executive - the Government - to decide, and not for Parliament or for the courts. While measures that change the legal rights

and duties of citizens in the United Kingdom need to be enacted by the full procedure of three readings in the House of Commons and House of Lords followed by the formal giving of the Royal Assent, the Government has the power to decide to take the United Kingdom to war, without the duty even of consulting Parliament, and the courts have no power to interfere with that decision.

13. Accordingly, even if a Government decision to use force against Iraq were clearly in breach of international law, it is very improbable indeed that any English or Scots court would order the Government to reconsider, let alone reverse, that decision. The courts would be very likely either to decide that they should not become involved in issues of this kind - that is, that the issues are non-justiciable - or to defer to the views of the Government.

**The Application**

14. In order to keep a sharp focus on the issues, the hearing followed the conventions of a judicial procedure. Accordingly, the starting point of the hearing was the application made by Professor Grief for a declaration that

> "Under present circumstances it would be contrary to international law for the United Kingdom to engage in military action against Iraq, or assist any other State in taking such action, unless it was expressly authorised to do so by the United Nations Security Council."

It is the specific terms of that request which are the focus of our discussion.

15. The arguments in favour of the granting of a declaration - in other words, the arguments against unilateral action against Iraq, were put by Professor Grief. The arguments on the other side were put by Professor Aust.

**The common ground**

16. There is a good deal of common ground between the two sides. While each side might describe this common ground slightly differently, I think that I can fairly summarise the generally-accepted position, shared by both sides, as follows.

17. Iraq, the United Kingdom, and the United States, and indeed all of the States primarily concerned, are members of the United Nations. They have all therefore chosen to bind themselves as a matter of international law by the provisions of the United Nations Charter. The Charter does not absolutely prohibit the use of force in international relations it does, however, regulate it.

18. The basic principle enshrined in the Charter is that the use of armed force by States is forbidden. The Charter provides for the lawful use of force in only two circumstances. First, force may be used by or with the authority of the Security Council to safeguard the interests of the international community. When the Charter was drafted, fifty years ago, it was intended that the Security Council should have its own United Nations forces at its disposal; but that plan was never realised and the Council proceeds instead by authorising States to take action in the name of the United Nations and subject to its overall control.

19. Decisions to authorise the use of force are taken by the Security Council; and it is necessary that any State that considers that force should be used in this way should convince a majority of the fifteen men and women who represent the States that the international community has elected onto the Security Council of the wisdom of that action. The majority in the Security Council must include all of the five permanent members of the Security Council - China, France, Russia, the United Kingdom, the United States of America.

20. The Security Council necessarily reaches its decisions only after the careful deliberation that is necessary in respect of such overwhelmingly important issues. The Charter is, however, realistic in recognising that sometimes States are not able to wait for a final decision from the Security Council before resorting to the use of force. That is why there is a second circumstance in which force may be used lawfully under the Charter. If any State, or group of States, is the victim of an armed attack, then that State or States has the right to use force to defend itself until such time as the Security Council has been able to take appropriate action.

21. These are not matters of policy. These are binding rules to which the States Members of the United Nations have solemnly committed themselves by ratifying the Charter. These rules cannot be disregarded by any State without it repudiating the obligations of United Nations membership.

22. In the present circumstances there are, therefore, only two possible legal bases upon which a right to use military force against Iraq might be asserted.The first is the undisputed right to self-defence under Article 51 of the Charter; and the second is that the Security Council, acting under Chapter VII of the Charter, has already provided the necessary degree of authorisation for such action.

23. It is necessary now to examine in a little more detail the way in which these principles are secured in the provisions of the United Nations Charter.

**The prohibition on the threat or use of force**

24. The basic rule is set out in Article 2(4) of the UN Charter, which stipulates that "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."

25. That provision embodies the deliberate decision of the international community to move beyond the provisions that had been included in the Covenant of the League of Nations, which imposed no more than a cooling off period before States were entitled to resort to war. It also reflects a decision, which was set out in the 1925 Pact of Paris, to move beyond the prohibition on recourse to war for the solution of international controversies and as an instrument of international policies of states in their relations with one another. 'War' has, or had, a technical definition; and not all uses of force were on a scale or of a nature that amounted to war; but the UN Charter decided to use the much wider terms and prohibit the threat or use of 'force'.

26. The League Covenant and the Paris Pact were themselves reactions to the appalling horrors of the First World War. They were clear statements that the scale of suffering and damage resulting from modern warfare made it intolerable that warfare should be employed except in the most exceptional circumstances. That conviction hardened with the experiences of the Second World War and the first sight of the destructive potential of weapons of mass destruction. Since 1945 the prohibition of the unilateral use of force by States has been a cornerstone of the international system.

27. The basic prohibition in Article 2(4) of the Charter has been reaffirmed many times, notably in instruments such as the General Assembly's 1970 Declaration on Principles of International Law (GA Res. 2625 (XXV)), and in the decision of the International Court of Justice in the Nicaragua (Merits) case (ICJ Reports 1986, p. 14).

28. The prohibition in Article 2(4) of the Charter actually refers not to "the threat or use of force" but to "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." It has sometimes argued that force that is not directed against the territorial integrity or political independence of any State, and which is used in a manner "consistent with the purposes of the United Nations" is permissible.

29. Professor Aust did not seek to rely upon any such narrow interpretation of Article 2(4); but it may be helpful for the sake of completeness, to

say that both the drafting history of Article 2(4) and its subsequent interpretation at the hands of States make clear that the provision was intended to impose a comprehensive prohibition on the threat or use of armed force in international relations. The reference to the threat or use of force "against the territorial integrity or political independence of any State" was not intended to limit the scope of the prohibition see B. Simma (ed.), The Charter of the United Nations (2d ed. 2002), pp. 123-124.

The power of the Security Council to decide to use force 30. The qualifications to the basic prohibition on the use of force in Article 2(4) are found later in the UN Charter.

31. First, Chapter VII of the Charter empowers the Security Council to take action with respect to threats to peace, breaches of the peace and acts of aggression. In particular, Article 42 empowers the Security Council to take such action, including the use of force, as may be necessary to maintain or restore international peace or security. Those powers may be exercised either by the establishment of United Nations forces, or by the authorisation of one or more member states to take forcible action on behalf of the United Nations.

32. The question whether the Security Council has, in its existing resolutions in relation to Iraq, already provided sufficient authorisation to justify military action by the United States and the United Kingdom in the event of a further material breach by Iraq of its international obligations, is clearly central to the question before us. Indeed, the arguments presented by Professor Grief and Professor Aust made clear that it is on this question that the main difference between them rests. That being the case, it will be convenient to clear the way for the main discussion by dealing next with second exception the right to use force in self defence.

**The right of self-defence**

33. The right to self-defence, is set out in Article 51 of the Charter. That provides that "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."

34. Professor Aust did not argue that Article 51 provided a justification for unilateral military action against Iraq at the present moment. On the facts as they stand, that seems to me to be right. There is no suggestion that the United States or the United Kingdom is currently the victim of an armed attack by Iraq; and they plainly cannot rely upon an argument that they need to use force to defend themselves against any such attack.

Nor is there any evidence of an imminent attack from Iraq, of the kind which might be argued to leave the intended target no other possible option but to use immediate force to ward off the threat.

35. Nor can the United Kingdom or the United States at present invoke the right of collective self-defence. In 1990, Kuwait was the victim of an armed attack by Iraq. There was no doubt that Kuwait was entitled to use force to defend itself, and to seek the assistance of other States in doing so, in exercise of the right of collective self-defence recognized in Article 51 of the Charter. It did so, seeking the support of the United States and others at a very early stage. But again, there is no suggestion that any other State is currently the victim of an armed attack by Iraq.

36. One sometimes sees statements that link in a single proposition the threat posed by Iraq and the threat posed by Al Qaeda. Al Qaeda has indeed mounted armed attacks on the United States and other "western" targets; and it might be suggested that there is therefore an "armed attack" that triggers the right of self defence under Article 51. The implication is that in acting to remove the continuing threat from Al Qaeda the United States may need to take action against Iraq. The short answer to any such argument is that on the facts as they have been made known up to the present, it is no part of the official position of the British Government that there is any such link between Al Qaeda and Iraq.

37. No such link was posited in either of the 'dossiers' on Iraq published in the autumn of 2002 by the Government see Iraq's Weapons of Mass Destruction. The Assessment of the British Government, and Saddam Hussein crimes and human rights abuses. A Government spokesman addressed the issue on 10 December 2002 and said that "[i]t is not clear that there are links between the Iraqi regime and al-Qaeda" see Hansard. House of Commons, 10 December 2002, columns 144-145. There has been no attempt in this hearing to make out a case for a link between Iraq and Al Qaeda; and neither counsel suggested that there is any such link, although Professor Aust did refer in general terms to Iraq's links with international terrorism.

38. There is evidence of Iraq's past links with international terrorism; and Professor Aust suggested that Iraq may now be supporting terrorism. He drew attention to the secrecy with which terrorists operate and to the dependence of governments upon secret intelligence to determine the nature of terrorist threats. That is undoubtedly true; but it is an axiom of the Rule of Law that a case must be made out. If, for reasons of secrecy or lack of information or whatever, a State does not make out the factual basis that would support a claim to use force in self-defence, no legal tribunal can admit that claim.

39. Professor Aust also suggested that Iraq could attack other States in the future but it is perfectly clear that Article 51 does not give States any right to pre-empt an attack. The right of self-defence necessarily exists only where an attack has already been made, or is so plainly imminent that there is no time to seek to avert the threat by any other means than by the use of force in self-defence.

40. Professor Aust conceded that any detailed argument on self-defence would be speculative, and therefore chose to rely upon his arguments concerning Security Council authorisation, rather than upon a right of self-defence. That seems to me a sensible decision, given the information available to us at the hearing.

41. I do, however, wish to add a few words on this point. There are official indications that the British Government does not consider that there is any imminent threat in this case. In the British Government dossier Iraq's Weapons of Mass Destruction. The Assessment of the British Government it was said (at p. 27) that while sanctions remain effective Iraq could not produce a nuclear weapon, and that if sanctions were removed it would take Iraq at least five years to produce sufficient fissile material for a weapon indigenously. If fissile components and other essential components were obtained from foreign sources, that timescale would be reduced to between one and two years. In any event, there is no nuclear threat that is 'imminent' in the sense required by the law on self defence.

42. The position on chemical and biological weapons is somewhat different. It is known that Iraq has had considerable stocks of chemical weapons and stocks of biological agents, and the means for their delivery. There is clear evidence of the use of chemical weapons by Iraqi forces against Iraqi citizens in Halabja in 1988, and against Iran in the Iran-Iraq war. The British Government estimates that Iraqi forces are able to deploy chemical and biological weapons within 45 minutes of a decision to do so. The British Government also believes that Iraq has retained, in breach of Security Council Resolution 687, up to 20 al-Hussein missiles, whose range would allow their use against targets in, for example, Israel and Cyprus. These matters are discussed in *Iraq's Weapons of Mass Destruction. The Assessment of the British Government*, pages 14-15, 17-19, 28.

43. There can be no doubt that Iraq's record of compliance with humanitarian law is appalling, and that it has acted with great brutality. One may accept, too, that it is imperative that something be done, and done quickly, to ensure that this pattern of behaviour does not repeat itself. But this does not necessarily mean that any individual State is entitled to take the law into its own hands. The right of self-defence

cannot justify the use of armed force to prevent a State acquiring, retaining or enhancing its capacity to attack other States in the future. 'Pre-emptive self-defence' is an oxymoron, unknown to international law and incoherent as a concept. If the threat is so grave and imminent that there is, in the familiar words of the Caroline case, "a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation", proportionate force may be used to defend against that threat. If it is not so imminent, there is no such right. If the time allows, States must do what they committed themselves to do when they ratified the UN Charter, and take the matter to the Security Council.

44. It may be observed that on the one occasion when a State did try to argue that it had a right akin to 'pre-emptive self-defence', when Israel attacked the Osirak reactor in 1981, the raid was unanimously and strongly condemned by the Security Council, in Resolution 487, as a "clear violation" of the Charter.

45. In the present case, it is impossible to avoid the conclusion that the opportunity, and therefore the obligation, exists to allow the Security Council to determine what is the appropriate response to the threat posed by Iraq. The circumstances that exist at present do not, in my view, support any claim to act in self-defence.

**A third exception? Humanitarian Intervention**

46. As counsel noted at the hearing, some people have argued in recent years that there is a further exception to the prohibition on the unilateral use of force set out in Article 2(4) of the Charter, comparable to the right of self-defence in as much as it would justify unilateral action by States, without the need for Security Council authorisation. This further exception is known as the right of humanitarian intervention, and was most notably articulated in relation to the NATO intervention in the former Yugoslavia. It is said that armed force may be used as an exceptional measure in extreme circumstances, in support of purposes already laid down by the UN Security Council, but without the Council's express authorisation for the use of force, when that use of force is the only means to avert an immediate and overwhelming humanitarian catastrophe.

47. By no means all States took the view that even in the extreme circumstances of the Former Yugoslavia an individual State or group of States had the legal right to take it upon itself to override the explicit prohibition on the use of force in the UN Charter and to use force in another State. The so-called right of humanitarian intervention remains controversial, and is by no means a settled part of international law. Its uncertain status is, however, no obstacle to deciding upon the rights and duties of States in this hearing.

48. It has, admittedly, been widely alleged that the Government of Iraq has in the past subjected its own population to extreme abuse and cruel repression, including the use against its own civilian population of chemical weapons. That might at first sight be thought to provide a possible basis for a right of humanitarian intervention.

49. Indeed, the maintenance by the United States and the United Kingdom (and, initially, France) of the so-called 'no-fly zones' were a direct response to this. Iraq was said to be forcibly repressing its Kurdish population in the north of Iraq, and its population of Marsh Arabs living in the south. In order to protect those two groups, the United States and United Kingdom declared two zones, one in the north and one in the south, in which they stipulated that Iraq may not fly aircraft or helicopters. The zones have been, and still are, regularly patrolled by American and British aircraft, which have on many occasions fired upon Iraqi facilities that were considered to be threatening the American and British aircraft. (The international legality of these two no-fly zones is not itself an issue in this hearing. The legality of any use of military force of the kind now contemplated against Iraq does not depend upon the legality or illegality of the no-fly zones.)

50. Nonetheless, well-known as the accusations of past abuses of its people by the Iraqi government might be, and despicable and widespread as the abuses with which Iraq is charged undoubtedly are, they afford no basis upon which a claim of humanitarian intervention might be built. There is no suggestion that Iraq is currently engaged in massive killing of its own citizens on a scale comparable to that which was said to justify the NATO intervention in Kosovo, and in the Balkans more generally, as 'the only means to avert an immediate and overwhelming humanitarian catastrophe.' In the Balkans there had been almost daily accounts of the systematic rounding up and killing of large numbers of civilians during the forcible imposition of policies of ethnic cleansing. There is no such evidence in relation to Iraq at this moment. There is no suggestion that there is at the present moment any massive and systematic use of force against the Iraqi people. The situation in Iraq does not, as a matter of fact, constitute the kind of circumstance in which a right of humanitarian intervention could arise, even if that right were recognized in international law.

51. It may be said that Iraq has engaged in such policies in the past, and that it may engage in such policies in the future. Whether or not that is true, it does not advance the argument. The right of humanitarian intervention has only ever been asserted in the face of actual, current slaughter by a State of its citizens, demanding an immediate response. Any extension of that alleged right to allow the punishing of States for

past misdeeds, or to disable States from the commissioning of misdeeds in the future, quite clearly falls outside the scope of that right. Nor did Professor Aust seek to make out any case that the right of humanitarian intervention could justify military action against Iraq of the kind that we are now considering.

52. Having dealt with the scope of the right of defence, and the possible right of humanitarian intervention, and shown that neither would justify unilateral military action against Iraq at this time, I turn to the arguments advanced by Professor Aust in support of the legality of unilateral action. Those arguments focus upon the manner in which the Security Council has been dealing with the situation in Iraq over the past twelve years.

**The scope of existing Security Council authorisation**

*The key resolution Resolution 1441*

53. The argument that the Security Council has already provided sufficient authorisation for military action by the United States and the United Kingdom against Iraq is based upon the terms of a number of Security Council resolutions, and in particular upon Resolution 1441, adopted by the Security Council on 8 November 2002. The wording of that Resolution 1441 was negotiated intensively, over many days. Its analysis demands the same close and detailed attention.

54. The Resolution begins by recalling a series of earlier Security Council resolutions passed between 1990 and 1999. Those earlier resolutions form part of the context within which Resolution 1441 must be understood; and it is therefore necessary to pause to examine those earlier resolutions before proceeding with the analysis of Resolution 1441 itself.

*The earlier resolutions*

Resolutions 660 and 661

55. The earlier resolutions specifically identified begin with Resolution 661, adopted on 6 August 1991. That resolution was adopted under Chapter VII of the Charter. It reaffirmed the condemnation of the Iraqi invasion of Kuwait in resolution 660, which the Council had adopted on 2 August 1990, and imposed binding obligations upon States to apply economic sanctions against Iraq.

Resolution 678.

56. The series of resolutions includes resolution 678, by which Member States co-operating with the Government of Kuwait were authorized, in the well-known words of that resolution, "to use all necessary force to uphold and implement resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area."

Resolution 687.

57. The November 2002 resolution also specifically identifies resolution 687, the so-called "armistice" or "cease-fire" resolution adopted at the end of the 1991 'Operation Desert Storm' in Iraq. Resolution 687 is a measure of central importance. It imposed an extensive series of obligations upon Iraq and other States.

58. It is necessary to consider those obligations in some detail for two reasons. First, because they demonstrate the comprehensive, inter-linked and long-term nature of the cease-fire terms imposed by the Security Council, and make clear that resolution 687 was neither ephemeral nor of merely incidental significance. As the Security Council itself put it, in the preamble to resolution 1441, resolution 687 imposed obligations on Iraq as a necessary step for achievement of the Council's stated objective of restoring international peace and security in the area. Secondly, it is resolution 687 that imposed the legal obligations on Iraq to disarm.

59. The specific obligations imposed by the cease-fire resolution include the following (and I summarize the obligations for brevity's sake)-

> " respect by Iraq and Kuwait of the international boundary between them;
>
> " unconditional acceptance by Iraq of "the destruction, removal, or rendering harmless, under international supervision, of all chemical and biological weapons... and all research, development, support and manufacturing activities, [and] all ballistic missiles with a range greater than 150 kilometres, and related major parts, and repair and production facilities";
>
> " an unconditional undertaking by Iraq not to use, develop, construct or acquire chemical or biological weapons or ballistic missiles with a range exceeding 150 kilometres;
>
> " unconditional agreement by Iraq not to acquire or develop nuclear missiles or nuclear-weapons-useable material;
>
> " payment by Iraq of compensation of all direct loss and damage, including environmental damage and the depletion of natural resources, resulting from its invasion and occupation of Kuwait;
>
> " payment by Iraq of the foreign debt that it had purported to repudiate;
>
> " the maintenance of sanctions against Iraq of sanctions in the terms decided upon by the Security Council;
>
> " cooperation by Iraq with the Red Cross in securing the repatriation of Kuwaiti and third country nationals; and

" the requirement that Iraq inform the Security Council that it will not commit or support an act of international terrorism.

60. The 1991 cease-fire resolution also provided for the establishment of a UN Special Commission, UNSCOM, to go into Iraq in order to monitor Iraq's compliance with its disarmament obligations.

61. It is particularly important to note that the obligations relating to the destruction of Iraq's chemical and biological weapons capacity, and its renunciation of nuclear weapons, were imposed by the Security Council and not by the United States, or any other State, acting unilaterally. It is also important to note that the obligations are without any doubt binding as a matter of law upon Iraq. Their binding nature follows from Article 25 of the UN Charter, which binds all UN Member States "to accept and carry out the decisions of the Security Council."

**The terms of Resolution 144.**

62. These resolutions formed the background to Resolution 1441, adopted by the Security Council on 8 November 2002. Resolution 1441 began by noting that Iraq had not fulfilled its obligations under the cease-fire resolution 687 and other UN resolutions. It specifically deplored Iraq's failure to provide accurate, full, final and complete disclosure of its weapons of mass destruction - a term that embraces chemical, biological and nuclear weapons - and related facilities. It also expressly deplored Iraq's repeated obstruction of the activities of the UNSCOM inspection team and the international inspectors sent, again under Security Council direction, by the International Atomic Energy Agency, the IAEA. (UNSCOM was in fact succeeded in 1999 by a new Commission, the UN Monitoring, Verification and Inspection Commission, UNMOVIC, under the terms of Security Council resolution 1284.)

63. Next, there follow the five key operative provisions of Resolution 1441.

64. First, the Security Council "Decides that Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq's failure to cooperate with United Nations inspectors and the IAEA."

65. Second, the Security Council set up an enhanced inspection regime in Iraq with the aim of bringing to full and verified completion Iraq's disarmament obligations.

66. Third, the Security Council ordered Iraq to provide to the Council and to the UN weapons inspectors "a currently accurate, full, and complete declaration of all aspects of its programmes to develop chemical, biological and nuclear weapons, ballistic missiles and other delivery systems," by 8 December 2002. The weapons inspectors were also given the right to a list of the names of all personnel currently and formerly

associated with Iraq's chemical, biological, nuclear and ballistic missile programmes.

67. Fourth, the Security Council decided that "false statements or omissions" in declarations made by Iraq and failures to cooperate in the implementation of resolution 1441 "shall constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment in accordance with [the procedure set out in resolution 1441]."

68. Fifth, the Security Council ordered Iraq to provide the UN weapons inspectors with "immediate, unimpeded, unconditional, and unrestricted access" to any and all sites and facilities that they might wish to inspect, including Presidential palaces.

**The procedure regarding material breaches**

69. Among those provisions, the most important in the present context is the fourth the decision that "false statements or omissions" in declarations made by Iraq and failures to cooperate in the implementation of resolution 1441 "shall constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment in accordance with [the procedure set out in Resolution 1441]." That is the language used in operative paragraph 4 of Resolution 1441.

70. That procedure is set out in two paragraphs, which are specifically referred to in operative paragraph 4. The first, paragraph 11, "Directs the Executive Chairman of UNMOVIC and the Director-General of the IAEA to report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including its obligations regarding inspections under this resolution."

71. In the second, paragraph 12, the Security Council "Decides to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security."

72. Those two paragraphs are followed by another paragraph, which, in contrast to paragraphs 11 and 12, is not referred to as part of the "procedure" to which instances of material breach are subject. It is paragraph 13, in which 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."

73. These provisions are clearly drafted. The scheme that they establish is simple. According to paragraph 4, any "false statements or omissions" made by Iraq, or failures by Iraq to cooperate in the implementation of

resolution 1441, is deemed to be a "material breach" of Iraq's legal obligations under the resolution and under the UN Charter. It is saying, in effect, that the obligations in Resolution 1441 are particularly important, not peripheral matters where less than full compliance by Iraq might be tolerated by the Security Council.

74. Lawyers are familiar with the drawing of a distinction between 'serious' or 'material' breaches of obligations on the one hand and less serious breaches on the other hand. The distinction is relevant to the consequences of the breach, material breaches generally leading to a wider range of possible remedies or sanctions against the violator. This is, of course, a reflection of the common-sense distinction between more and less serious violations of obligations.

75. The next question is, what is to happen when there is a material breach? The answer is given plainly by paragraph 4. Iraq's conduct "will be reported to the Council for assessment." That provision applies to any false statements or declarations made by Iraq, and to any failure by Iraq to cooperate in the implementation of any of the provisions of Resolution 1441.

76. That obligation is reinforced by paragraph 11, which stipulates that "any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including its obligations regarding inspections under [Resolution 1441]" must be reported immediately to the Security Council.

77. The Resolution does not expressly say so, but the British Government has taken the view that a report to the Security Council may be made either by the UN weapons inspectors or by a State Member of the Security Council: see Hansard, House of Lords, 25 November 2002, column 559. This point was not discussed at the hearing.

78. Paragraph 12 of Resolution 1441 then records the Security Council's decision that immediately upon receiving any such report it (the Security Council) will "convene immediately... in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security."

79. That is the entire procedure stipulated in Resolution 1441 for dealing with 'material breaches' by Iraq.

80. Resolution 1441 was adopted unanimously. No Member of the Security Council dissented from its terms. The States Members of the Security Council at the time that the resolution was adopted explained their votes see UN Document S/PV.4644, 8 November 2002. On two points, there was complete agreement.

81. First, there is no 'automatic trigger' in the Resolution. There is no provision that imposes upon Iraq a duty, failure to comply with which would automatically lead to the use of force against Iraq.

82. Second, the Resolution establishes a two-stage process. The first stage is the imposition by the Security Council of specific obligations upon Iraq by Resolution 1441. The second stage would be, in the event of a material breach by Iraq of its obligations being reported to the Security Council, the immediate consideration by the Council of "the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security." There is no doubt that if the Security Council decided to authorize the use of force against Iraq, that would be lawful.

83. On one point, however, there was not complete agreement on the proper interpretation of the Resolution. What happens if the Security Council is unable to reach an agreed decision on steps to be taken in response to a material breach by Iraq? May an individual State or States proceed to use armed force against Iraq without any further authorization from the Security Council? This is the question that is at the centre of this hearing.

84. The representative of Mexico took the view that the answer is, no. He said "the use of force is valid only as a last resort, with prior explicit authorization required from the Security Council." The representative of Ireland said that "it is for the Council to decide on any ensuing action." The representative of Syria said that "[t]he resolution should not be interpreted, through certain paragraphs, as authorizing any State to use force. It reaffirms the central role of the Security Council in addressing all phases of the Iraqi issue." The representative of China said that "[t]he text no longer includes automaticity for authorizing the use of force," and that on a report of non-compliance by Iraq with its obligations, "the Security Council [will] consider the situation and take a position". The statements are set out in UN Document S/PV.4644, 8 November 2002.

85. The United States representative took what might be thought to be a somewhat different view. He said, "[i]f the Security Council fails to act decisively in the event of further Iraqi violations, this resolution does not constrain any Member State from acting to defend itself against the threat posed by Iraq or to enforce relevant United Nations resolutions and protect world peace and security."

86. That statement, read literally, is certainly true. The Resolution does not expressly set out any constraints upon responses by anyone to material breaches by Iraq. The United States statement, however, implies that there is a right for any State, acting without Security Council authorization, to use armed force "to defend itself against the threat

posed by Iraq or to enforce relevant United Nations resolutions and protect world peace and security." It is the implication of the latter part of that phrase that is controversial.

87. It is not controversial that States have a right to act in self-defence in accordance with Article 51 of the Charter. But, as was explained above, it was not argued in the hearing that this right would in present circumstances warrant armed action against Iraq. The suggestion by the United States that individual States have the right to use armed force to enforce UN resolutions and protect world peace and security is, however, highly controversial.

88. Representatives of other States explained their positions in less precise and unequivocal terms. The representative of the United Kingdom, for instance, said that "there is no 'automaticity' in this resolution. If there is a further Iraqi breach of its disarmament obligations, the matter will return to the Council for discussion as required in paragraph 12. We would expect the Security Council then to meet its responsibilities." [see UN Document S/PV.4644, 8 November 2002]

89. The British Government has subsequently expanded upon its interpretation of the Resolution. A Government spokeswoman said "United Nations Security Council Resolution 1441 does not stipulate that there has to be a second Security Council resolution to authorise military action. Such a stipulation was never tabled as part of UNSCR 1441, which has enjoyed the unanimous support of the Security Council. My right honourable friend has made plain that the preference of the British Government in the event of a material breach is that there should be a second resolution. But we are not about rewriting UNSCR 1441. It says what it says, and it does not say that such a second resolution would be necessary." [Hansard, House of Lords, 25 November 2002, column 559.]

90. In the absence of a clear and unanimous interpretation of this provision, how is its meaning to be determined? Is there, or is there not, a need for a second resolution authorising the use of force?

91. The question becomes one of presumption. Professor Grief argued that the starting point under the Charter is the prohibition on the threat or use of force, and that exceptions to that prohibition had to be made out clearly and interpreted strictly and with due regard for the Purposes and Principle of the United Nations. It cannot be assumed that Resolution 1441 authorised the unilateral use of armed force simply because the resolution did not expressly forbid the use of armed force.

92. Professor Aust, on the other hand, argued that this position is wrong. He says that no State apart from Mexico in the Security Council expressly

contradicted the United States and United Kingdom statements indicating their view that Resolution 1441 would in the last resort entitle them to use force against Iraq in response to continuing material breaches of its international obligations, even if the Security Council was unable to reach an agreed decision authorising the use of force. The Resolution must therefore be interpreted in that context of that known intention of the United States and United Kingdom, the proposers of the resolution.

93. The Resolution was, Professor Aust says, drafted with painstaking care and attention to every word, and it is an essential and intended element of the resolution that it does not require any 'second resolution' authorising the use of force. This approach was adopted in the light of the fact that the Security Council had already expressly authorised the use of force against Iraq in 1990, in Resolution 678. That authorisation was "to use all necessary force to uphold and implement resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area." The subsequent resolutions plainly include the cease-fire resolution, Resolution 687, and the disarmament obligations that it set out. Accordingly, the authorisation already exists to use "all necessary means" (which phrase is accepted as including the use of armed force) in order to enforce Iraq's disarmament obligations. Moreover, the restoration of international peace and security in the area would also warrant the use of force. Resolution 1441 does not remove or limit that authorisation, but rather confirms and builds upon it, he says.

94. I should begin my analysis with the actual wording of Resolution 1441. It is self-evident that nothing in the language of its provisions expressly authorizes States unilaterally to take military action against Iraq.

95. The statement in paragraph 13 of the Resolution that "the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations" is a simple statement of what the Security Council has done in the past. It cannot in my opinion possibly be interpreted as an express or implied authorization to States unilaterally to take military action against Iraq in the future. Certainly, paragraph 13 amounts to an implied threat of 'serious consequences' if Iraq breaches its obligations in the future. But nothing in paragraph 13 suggests that the consequences would be decided upon and taken by anyone other than the body that has, under the procedure established in the immediately preceding paragraphs 11 and 12, been given responsibility for deciding how to respond to material breaches that is, by the Security Council itself.

96. Equally, the simple fact that Resolution 1441 does not expressly forbid the use of armed force plainly cannot itself amount to an implied authorisation to use force. That argument has no merit whatever. Most Security Council resolutions do not expressly forbid the use of force no one would argue that they therefore all authorise it.

97. Nor, in my view, do the circumstances of the adoption of Resolution 1441 alter the position. It may well be that the proposers of the resolution knew what they wished the effect of the resolution to be. But as the quotations that I have given from the explanations of votes of Security Council members indicate, the public positions of other States do not entirely support that view.

98. It is tempting to say that for all the skill and patience with which Resolution 1441 was drafted, the result is a resolution that, far from pinning down with precision the unanimous understanding of the Members of the Council, but rather left enough room for different interpretations to make it possible for all Members to accept the text. That may be unfair. A more cautious, and perhaps fairer and more accurate, conclusion would be that there was indeed unanimity on the matters set out in the resolution, including the need for a two-stage process and the reference of material breaches to the Security Council. But there the resolution stops. The resolution does not specify what could or should happen if the Council then fails to agree upon a response.

99. What is to be done where there is agreement upon a single text, understood to mean different things, or not providing answers to crucial questions concerning its meaning? In my view this is a question of truly fundamental importance, that can admit of only one answer.

100. We must all be entitled to assume that legal instruments mean what they say. Often, there will be room for interpretation. It is well established that the proper approach to interpretation is to read the instrument in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the instrument's object and purpose see Article 31 of the Vienna Convention on the Law of Treaties.

101. In my view, therefore, it is completely clear from the wording of Resolution 1441 that the Security Council did not in that resolution itself give any authorization to any State or States to use military force against Iraq. The natural interpretation of these provisions is that it is left to the Security Council to decide how to respond to any material breaches notified to it. I do not see that any State, asked to support Resolution 1441, would be bound to accept that the Resolution itself authorised the use of armed force against Iraq by individual States even

if the Security Council did not decide to authorise such force when it met to consider a material breach by Iraq reported to the Council. Some members of the Council have, as was noted above, clearly taken a different view.

102. It may be added that the limitations on the use of force, in the UN Charter and in customary international law, are so fundamental to the international legal system that it seems to me arguable that there would in any event be a presumption to be overcome against implied authorisations of the use of force. Professor Grief submitted that this was indeed the case. But the wording of Resolution 1441 is sufficiently clear for it to be unnecessary to rely upon any such presumption.

103. That conclusion is enough to settle this point; but I feel obliged to add a further observation. If one can no longer read texts - agreements, laws, letters or whatever - and take them at their face value on the basis of their ordinary meaning, diplomacy and the Rule of Law become quite literally impossible. Not only the parties to agreements, but the rest of the world has an interest in knowing that when States publicly make agreements, the agreements mean what they say. Interpretations of resolutions that are reminiscent of the Looking-Glass world are corrosive of the Rule of Law and incompatible with the conduct in good faith of international relations.

104. I turn to Professor Aust's argument that the authorisation already given by the Security Council, in Resolution 678, has survived and would serve as a sound legal basis for the use of armed force in order to enforce Iraq's disarmament obligations.

105. This argument has considerable force. The UN Charter does not merely constrain the unilateral use of force. It imposes positive obligations, to take effective collective measures to maintain international peace and security. That is, indeed, given first place in the list of Purposes of the UN in Article 1 of the Charter. If the collective procedures contemplated when the Charter was drafted fifty years ago are inadequate for these purposes, the UN must find some other way of achieving them. Authorising Member States to take action on behalf of the UN is one way of doing this. Resolution 678 was such an authorisation; and it should be interpreted in such a way as to make the UN effective rather than ineffective.

106. For the argument to succeed, however, it would have to be shown that Security Council resolutions, including Resolution 678, are not - or are not necessarily - ephemeral instruments. This is indeed so. There are resolutions that impose obligations regarding mandatory sanctions, or that include determinations of the status of territory, which are plainly intended to have a lasting effect, and do so. There are, however, other

resolutions that are equally clearly temporary, being expressly or impliedly superseded by subsequent resolutions.

107. Into which category does Resolution 678 fall? Its authorisation to use force "to uphold and implement resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area" might suggest that it was intended to have a long, perhaps indefinite, life. On the other hand, Professor Grief drew attention to strong indications that this was not the intention.

108. First, Resolution 678 specifically authorised, not States in general but "Member States co-operating with the Government of Kuwait" to use force. There were such States in 1990. They co-operated in Operation Desert Storm. While many States 'co-operate' with Kuwait now, and Professor Aust submitted that, in effect, the coalition still exists, I find that proposition difficult to accept. The common understanding is that Operation Desert Storm is over; Kuwait is liberated; any new threat to Kuwait would be met by a new coalition, rather than by calling a continuing coalition into action.

109. Second, one of the Resolutions that followed 678 expressly affirmed that resolution 678 continued "to have full force and effect." That provision appeared in operative paragraph 1 of Security Council Resolution 686, adopted on 2 March 1991. Resolution 687 - the cease-fire resolution - , in contrast, affirmed in its operative paragraph 1 previous resolutions, including Resolution 678, "except as expressly changed below to achieve the goals of this resolution, including a formal cease-fire." There is no express revocation of Resolution 678. But does that mean that the authorisation to use force survived?

110. Perhaps the strongest evidence to this effect is to be found in the Preamble to Resolution 1441. That specifically recalls, in paragraph 4, that Resolution 678 authorised the use of all necessary means "to restore international peace and security in the area." The following paragraph then further recalls that the cease-fire resolution 687 "imposed obligations on Iraq as a necessary step for achievement of its stated objective of restoring international peace and security in the area." It might therefore be said that the clear implication is that the 678 authorisation to use force to restore peace and security included an authorisation to use force to enforce compliance by Iraq with the cease-fire terms.

111. This is a powerful argument. Its force is, however, diminished by three factors. First, the provision appears in the Preamble, and not in the operative provisions of the Resolution. This must inevitably affect its legal force.

112. Second, the Preamble to Resolution 1441 also states that "the resolutions of the Council constitute the governing standards of Iraqi compliance." That suggests that the Council, and not the coalition, determines whether there is a breach by Iraq. It is true that Resolution 1441, in operative paragraph 4, deems any false statement or omission by Iraq, or failure to co-operate, to be "a further material breach." Evidently, the Council regards Iraq as being already in material breach; and arguably Resolution 1441 automatically attaches the label of "material breach" to further acts of Iraqi non-compliance (although on the latter point I note that the British Foreign Secretary stated that "aside from the particular definition in paragraph 4, a material breach has to be something serious" [Hansard, House of Commons, 25 November 2002, column 52], which indicates the need for an appraisal of any breach in order that its materiality be established). Nonetheless, in a document that so boldly asserts that the Security Council has assumed its (legal and political) responsibility for the Iraq crisis, and has so clearly stamped the demands on Iraq with the authority of the Council, it is a remarkable proposition that there should be an implied authorisation to unnamed "Member States co-operating with the Government of Kuwait" - or States who were, twelve years ago, co-operating with the Government of Kuwait - to decide whether or not to go to war with Iraq in order "to restore international peace and security in the region."

113. The point was not argued in the hearing, but there is an important question of legal principle, as to the extent of the legal power of the Security Council to delegate decisions concerning the discharge of its responsibilities for the maintenance of international peace and security.

114. The third weakness in this argument is that it sits awkwardly with the history of the Council's dealings with Iraq in the period between Resolution 678 and Resolution 1441.

115. There are in Resolution 687 itself indications that the Council did not see the authorisation to use force as continuing beyond the period of the coalition occupation of Iraq. It must remembered that at the time that Resolution 687 was adopted, coalition forces were still in Iraq. Their presence there demanded a legal justification, as paragraph 4 of Resolution 686 recognised. Resolution 678 provided that justification. But Resolution 687 stated, in operative paragraph 6, that the coalition could bring its military presence in Iraq to an end once the UN had deployed an observer unit. There was, therefore, a logical need for Resolution 687 to provide a continuing but temporary authority for the remaining days of the forcible occupation of Kuwait by the coalition; and one reading of Resolution 687 is that its reference to Resolution 678 was intended to do no more than that.

116. Perhaps the clearest indication that the Council considered that the authorisation granted to the coalition would be shortly be spent is to be found in operative paragraph 4 of Resolution 687, in which the Council "Decides to guarantee the inviolability of the... international boundary [sc., between Iraq and Kuwait] and to take as appropriate all necessary measures to that end in accordance with the Charter." It is plainly asserted that it is the Council, and not States co-operating with Kuwait, that will take such action; but if any coalition power could survive the cease-fire resolution it is surely the power to use force to guarantee the inviolability of the boundary.

117. One might point, too, to the comprehensiveness of the cease-fire resolution, on which Professor Aust remarked. It has all the marks of a comprehensive settlement of the matter. There is no sense of 'unfinished business', or of the Council dealing with only a part of the problem while the rest of the problem remained in the hands of the coalition. Compliance with the resolution did, of course, remain an urgent and serious concern but the natural reading of the resolution is that compliance was thenceforth the concern of the Council, not of the individual States that had been acting in coalition with Kuwait.

118. It is hard to avoid the implication that by the time of Resolution 687, adopted on 3 April 1991, the Security Council had decided that the force that it had authorised had been used and that the situation was in the Council's hands and not those of the Member States co-operating with Iraq. Indeed, the final operative paragraph of Resolution 687 says just that. In it, the Council "Decides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region." It is quite plainly the Council, and not the coalition States, that is to decide upon and take whatever further steps might be necessary. The same approach was taken in, for example, Resolution 1154, in March 1998.

119. Professor Aust referred to a practice during the 1990s of the Security Council being informed of Iraqi violations, to which the Security Council responded by issuing a Presidential Statement warning Iraq of the serious consequences of non-compliance with its obligations. Continued non-compliance resulted in the bombing of selected targets by British and American aircraft. He suggested that this practice evidenced a belief that the coalition forces retained the right to use force to enforce Iraq's international obligations. If it could be shown that there was a consistent practice that pointed unequivocally to a settled belief on the part of the Security Council that such powers of unilateral action persisted, it would be a very significant matter. But no detailed evidence was put before the hearing on this point; and it is in any event very

difficult to see how any such belief in the Security Council could have existed, given the difficulties in negotiating Resolution 1441 and the statements made by Security Council members, already quoted, explaining their view of that resolution.

120. In my view, these indications establish that the authorisation to use armed force that was given in Resolution 678 does not survive today. Even less can it be argued that the authorisation expanded so as to authorise the use of force by individual States to compel Iraq to comply with the disarmament obligations in the cease-fire resolution 687. It may be true that acceptance of the 687 disarmament terms was a condition of the cessation of hostilities and the adoption of Resolution 687; but it does not follow that the coalition States retained an indefinite right to take the initiative back from the Security Council even while the Council remains seised of the matter and to use force against Iraq as they see fit. The matter was taken back under the control of the Security Council in Resolution 687; and in my view it remains there today.

121. My conclusion, therefore, is that under present circumstances it would be contrary to international law for the United Kingdom to engage in military action against Iraq, or assist any other State in taking such action, unless it was expressly authorised to do so by the United Nations Security Council.

122. It follows from this that the United Kingdom would incur responsibility not only if United Kingdom forces themselves engaged in an unauthorised armed attack upon Iraq, but even if the United Kingdom merely provided material assistance to the United States. As Article 16 of the International Law Commission's Articles on State Responsibility, adopted in 2001, makes clear, States are responsible not only for the wrongs that they themselves do, but also for helping other States to do wrong. Since an unauthorised attack by the United States would be unlawful for the reasons given above, if the United Kingdom were in any way materially to facilitate such an attack it would be internationally responsible for the assistance that it gave.

123. I have not reached this conclusion without much thought and reflection; and there is one final point that I wish to make. The Security Council has a clear responsibility for the maintenance of international peace and security, and it is the Council's duty, legal and political, to respond appropriately to any further material breach by Iraq of its obligations. Resolution 1441 recognises that; and it indicates that the Council will immediately convene to discuss any further material breaches. If the Security Council decides to use force against Iraq, there will be no doubt concerning its legality. The Council is plainly entitled to decide to use or authorise the use of force, and all Member States are bound to

accept that decision. Similarly, all States would be bound to accept any formal decision of the Council not to use force against Iraq.

124. It is, however, possible that events may unfold in such a way that a very unsatisfactory situation arises, in which the Security Council clearly regards Iraq as being engaged in further material breaches of its obligations, and regards those breaches as threatening international peace and security. But it may be that, because of the use of a veto by a Permanent Member or because of wider opposition, the Council is unable to adopt any agreed decision on how to deal with the problem.

125. I am conscious that the view taken here would rule out the possibility of any State taking military action in such circumstances, and could therefore result in very serious breaches of international law passing 'unpunished', or (since the purpose of international law is not to punish but rather to induce compliance) more accurately, without a decisive and forcible response. That may be so; but the question is, if the structure of a legally-binding instrument such as the UN Charter is found to be seriously defective, who should put it right? In this hearing I was asked to put myself in the role of an international tribunal. I have no hesitation in saying that, however serious the defects in the Charter might be, and however urgent the need to remedy them, it is not the proper role of a tribunal to revise the Charter. Any revision is, and must be, the responsibility of the States Parties to the Charter; and until they do revise it, it is the responsibility of any legal tribunal to hold them bound by the terms of the Charter that they have solemnly accepted.

126. I would accordingly give Professor Grief the declaration that he seeks, and declare that under present circumstances it would be contrary to international law for the United Kingdom to engage in military action against Iraq, or assist any other State in taking such action, unless it was expressly authorised to do so by the United Nations Security Council.