13. Response to the Attorney General's Statement by Rabinder Singh QC and Charlotte Kilroy 18 March 2003, published in the Solicitor's Journal

By the time you read this article the UK government will most probably have embarked with the US on an attack against Iraq which has not been authorised by a fresh resolution of the United Nations Security Council. If they do so, in our view they will be acting in contravention of international law.

On 17 March 2003 the Attorney General issued a written statement to the House of Lords in which he set out what he called `the legal basis' for war. On the same day the UK and the US announced at the United Nations that they would not put their so called `second resolution' to the vote, and that they `reserved their right' to take their own steps to secure the disarmament of Iraq.

In our view the argument set out in the Attorney General's statement is wrong. The UK and the US have no right to take military action to secure the disarmament of Iraq, and in our view a war against Iraq in present circumstances without clear authorisation from the Security Council would be contrary to international law.

The prohibition on the use of force by one state against another, set out in Article 2(4) of the UN Charter, is one of the most fundamental principles of international law. It is not only a treaty obligation but part of customary international law. It is recognised as having the status of `ius cogens', in other words a peremptory norm of international law from which states may not derogate.

The UN Charter recognises two exceptions to this fundamental prohibition on the use of force. The first is the right of self-defence in the face of an armed attack, preserved by Article 51. As Iraq has not attacked the UK and there is no evidence that an attack is imminent, the UK and the US may not rely on this exception. The other exception is authorisation by the Security Council under Article 42.

The Attorney General's view appears to be that Resolution 1441, combined with Resolution 687, `revives' the authorisation to Member States acting in cooperation with the government of Kuwait which the Security Council gave at the beginning of the Gulf War in Resolution 678. This argument implicitly accepts that Resolution 1441 alone does not authorise force.

Resolution 1441 cannot be said to authorise force for three clear reasons. Firstly, nowhere in Resolution 1441 is there any language indicating that the Security Council has authorised Member States to use force. The clear and consistent formula used by the UN Security Council when authorising force is that `Member States' are `authorised' `to use all necessary means' or `take all

necessary measures' in pursuit of a specified goal. None of this language appears in Resolution 1441. Secondly, Resolution 1441 provides at paragraphs 4 and 11 that if the inspectors of UNMOVIC or IAEA find that Iraq has made false statements or omissions in its declaration under Resolution 1441, and that it is not cooperating with the ins*pectors in revealing and destroying weapons or materials, then they will make a report to the Security Council. Paragraph 12 of Resolution 1441 provides that on receipt of such a report the Security Council* will convene to consider the situation and the need for compliance. In other words the Security Council has specifically stated that it will monitor compliance itself. Thirdly, on the passage of Resolution 1441, all the Permanent Members including the ambassadors of the US and the UK made clear statements to the Security Council that the resolution contained no `automaticity' and `no hidden triggers'. It was only on this understanding that the Resolution was adopted at all. The first draft of Resolution 1441 had been rejected by France, Russia and China precisely because it stated that "breach [of Resolution 1441] authorises Member States to use all necessary means to restore international peace and security in the area."

In an apparent attempt to circumvent these arguments the Attorney General asserts in his statement that Resolution 687, which imposed a formal ceasefire after the end of the Gulf War, suspended and did not terminate the authorisation to use of force. He states that a material breach of Resolution 687 `revives' the authorisation for the use of force contained in Resolution 678.

This argument is flawed for several reasons. There is no language anywhere in Resolution 687 which indicates that the authorisation to use force in Resolution 678 was merely suspended by the ceasefire, pending compliance with the disarmament obligations contained in paragraphs 8-13 of that Resolution. On the contrary, paragraph 33 of Resolution 687 provided that once Iraq had notified the Security Council of its acceptance of the provisions in 687 the formal ceasefire would be effective. Iraq did notify its acceptance to the Security Council and the formal ceasefire became effective. Paragraph 34 then provided that the Security 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.' In other words, once the formal ceasefire was in place the Security Council took over the task of implementing the disarmament provisions of Resolution 687.

The wording of Resolution 686, the provisional ceasefire resolution adopted before the adoption of Resolution 687, makes it clear that if the Security Council had wanted to keep the authorisation to use force alive, it would have used clear language to do so. Paragraph 4 of Resolution 686 stated that

`during the period required for Iraq to comply with' the terms of that resolution, the authorisation to use force contained in Resolution 678 would remain valid. This indicates that the Security Council considered it necessary explicitly to state that the authorisation to use force would remain alive during a provisional ceasefire. The fact that the Security Council did not make the same explicit statement in Resolution 687 is the clearest indication that it did not intend merely to suspend the authorisation for the use of force.

Resolution 678 was adopted for a specific purpose, the liberation of Kuwait. This is reflected in the fact that the authorisation was to `Member States cooperating with the government of Kuwait.' The phrase `restore international peace and security in the area' has to be read in the context of the invasion of Kuwait by Iraq. It cannot credibly be argued that a Member State can revive that authorisation twelve years after the ceasefire was put in place and the coalition disbanded.

The Attorney General concludes his statement with the observation that Resolution 1441 would have provided that a further decision of the Security Council to sanction force was required if that had been intended. He states that all that resolution 1441 requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorise force. In our view, this is wrong. The UN Charter requires that force only be used in self-defence or with authorisation from the Security Council. It is not necessary for this to be repeated in Resolution 1441 for it to apply to the US and the UK. The prohibition on the use of force is so basic a principle that the onus is on those seeking to show that they have authorisation to use force to demonstrate that it has in fact been authorised.

Even if we are wrong and Resolution 678 could be revived now, it would need a clear decision by the Security Council itself: unilateral decisions by members of the UN will not suffice. As we have illustrated above, Resolution 1441 cannot provide that clear decision, as the Security Council members who adopted it clearly agreed that it contained no `automaticity'.