The Inquiry has reproduced this Index to the Public Interest Lawyers submission, which was submitted in paper form. It has added the titles of individual Press Releases and Reports received under Tab 1 in red, for the reader's information.

For documents which are available on the internet, the Inquiry has not re-published the text. Two documents (marked **) could not be found online in the form submitted to the Inquiry. The text of those documents can be found below.

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THE IRAQ INQUIRY

PIL LETTER 27 OCTOBER 2009

ON BEHALF OF CND AND PEACERIGHTS

- ENCLOSURES –

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The United States **and possible war on Iraq**

CND opposes all nuclear weapons as well as all other weapons of mass destruction (WMD). The possession or use of WMD cannot be justified under any circumstances. We oppose such weapons, whoever possesses them, whether it be the declared Nuclear Weapon States (NWS) of the United States, Britain, France, Russia and China or the undeclared states of India, Pakistan and Israel. It also includes the possession of chemical or biological weapons by any states.

CND believes that international nuclear disarmament can be brought about only by diplomacy and negotiation, not by military action. CND is alarmed at the recent rejection of such treaties by the US, for example the Comprehensive Test Ban Treaty and the Protocol to the Biological Weapons Convention. United Nations resolutions and international treaties, including the nuclear Non-Proliferation Treaty (NPT), must be adhered to by all nations, not just Iraq.

Background

When the Gulf War ended in 1991, there were many in the US Administration who felt that there was still 'unfinished business'. The fact that Saddam Hussein remained in power rankled with many. Resolution 687, known as the ceasefire resolution and adopted by the United Nations Security Council, had called for many things (see below) but it did not include getting rid of Saddam.

After the horrific attacks of 11 September 2001, initial suspicions centred on Iraq. But it soon became clear that there was no link. Indeed it was never likely that Iraq, a secular state, would support Islamic organisations. Speculation moved on to Iraq possibly sponsoring terrorist groups. But again, no proof was found. The reason for any possible war then moved on to Iraq's possession of WMD. There were conflicting reports from different former UN Weapons Inspectors as to whether this was possible. But again, no proof has been presented. So now the mission is described in the way that many thought it was all about in the first place, namely that a 'regime change' would be beneficial. This view was supported by news that an organisation named 'Project for the New American Century (PNAC)' published in September 2000 a report called 'Rebuilding America's Defenses'. It called for a regime change in Iraq, talked about how to achieve that and the US role in the future of the Middle East. It shows that plans to attack Iraq were there well before Bush was even elected. Another paper on the PNAC website was sent to Clinton in 1998 outlining how important it was for Saddam to be overthrown. The PNAC includes the likes of Vice President Dick Cheney, Defence Secretary Donald Rumsfeld and other officials and advisors such as Paul Wolfowicz, John Bolton, Lewis Libby and Richard Perle.

Many commentators also take the view that US strategic and resource priorities – especially securing access to the region's oil reserves – are a key factor in the US's attitude towards Saddam's regime.

The current situation

George W Bush and others in his administration are certainly keen to launch an attack on Iraq. Some of the US senior military personnel and those with military experience, such as US Secretary of State, Colin Powell, were initially far more cautious. This has led to another 'charm offensive' whereby the US talks to as many countries as possible in an attempt to win their support. At the time of writing, the only state to unconditionally support an attack is Israel. Pakistan, India and many countries in the Middle East are opposed while Britain and most of Europe are either undecided or would support action only if there were proof of WMD possession.

The possible consequences of an attack were highlighted by a number of speeches and comments during 2002. Iraq was one of the countries named on President Bush's nuclear hit-list, those states that the US could consider attacking with nuclear weapons. The US Defense Secretary, Donald Rumsfeld, spoke of not necessarily needing proof before attacking a state. Closer to home, Geoff Hoon talked about the possibility of Britain using nuclear weapons against a non-nuclear weapon state. Although this was not really a change of policy (Britain, along with the US, France and Russia,

does not have a no-first-use policy) it was unusual for it to be made in public and particularly at such a time of tension. In addition to that, the threat to use nuclear weapons against a non-nuclear state contravenes agreed Negative Security Assurances. UK nuclear weapons are part of the NATO nuclear arsenal, which also has a first strike policy, and has refused to give Negative Security Assurances.

A further concern is the development of new nuclear weapons by both the US and Britain. These 'mini-nukes' are meant to be for penetrating command bunkers and all deep-buried targets. They are clearly being seen as useable nuclear weapons. The danger of even contemplating using such weapons in Iraq is clear. But they would also lower the threshold generally.

UN Resolution 687

As with all resolutions of this type, there was a long list of events that were noted, or that caused concern, before getting on to what Iraq actually had to do. But this list contained many interesting clauses for us to examine. For example:

- That Iraq has subscribed to the 1925 Geneva Protocol held in Paris from 7 to 11 January 1989, establishing the objective of universal elimination of chemical and biological weapons,

- That Iraq has signed, but not ratified, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, of 10 April 1972,

- The importance of all States adhering to this Convention and encouraging its forthcoming Review Conference to reinforce the authority, efficiency and universal scope of the convention,

- The importance of an early conclusion by the CD of its work on a Convention on the Universal Prohibition of Chemical Weapons and of universal adherence thereto,

- Concerned that Iraq has attempted to acquire materials for a nuclear-weapons programme contrary to its obligations under the NPT,

- ***Recalling the objective of the establishment of a nuclear-weapons-free zone in the region of the Middle East,***

- **Conscious of the threat that all weapons of mass destruction pose to peace and security in the area and of the need to work towards the establishment in the Middle East of a zone free of such weapons,**

- **The resolution also called for Iraq to reaffirm unconditionally its obligations under the NPT.**

While of course, CND would support Iraq adhering to all of the above, we would also support ALL states having to do the same. We fully support universal adherence to the nuclear Non-Proliferation Treaty and the conventions banning chemical and biological weapons. However, countries like the US and Britain are hardly in a position to criticise anyone for breaking these treaties when they themselves do the same. In the summer of 2001, the US withdrew from the Protocol to the Biological Weapons Convention. They launched a diplomatic campaign that led to the ousting of the head of the Chemical Weapons Convention. Along with all the nuclear weapon states, they still have failed to carry out their obligations under the NPT. (For more details see the CND document 'The United Kingdom's Record on Nuclear Disarmament' written in April 2002 for the NPT Preparatory Committee meeting in May 2002).

Of course, this also brings up again the idea that it's acceptable for some countries to have WMD but not others. To have a situation where the country with more nuclear weapons than any other, (and we don't know how many chemical or biological weapons the US possesses) wants to stop another country from having any at all, is farcical. The hypocrisy is staggering. If the US, or anyone else, says that it needs WMD to protect itself, then why shouldn't every country do the same? The only just situation is for no-one to have them.

This is a very strong resolution but many countries are selecting the bits that they support and ignoring others which they might find difficult. For example, the clauses concerning a Middle East free of nuclear weapons and all WMD. This cannot be achieved without considering Israel's nuclear weapons. Indeed, if the criteria for this proposed war is possession of WMD and failure to comply with UN resolutions, Israel could be next on the list.

Halabja

Much is made of the fact that the threat from Saddam Hussein possessing WMD is clear as he once used them on his own people. Perhaps we can put to one side the

fact that it is highly unlikely that Saddam considers Kurds to be his own people. The reference is to the chemical weapons attack on the town of Halabja in the 1980s. It is interesting to note how attitudes have changed. At the time, the attack was barely reported. CND and the peace movement tried hard to raise the issue. It should be remembered that when the attack happened, Iraq was on 'our side'. The 'enemy' in the region was Iran and during the Iran-Iraq war, despite Britain at one point arming both sides, the West supported Iraq. This was why some reports from the US at the time blamed Iran for the attack. So Saddam may have been an 'evil dictator' but he was our 'evil dictator'. At the time, the idea of attacking civilians with chemical weapons wasn't seen as a problem to the governments of the West. Now it's convenient to use it as part of an excuse to go to war.

UN Weapons Inspectors

CND thinks that it is vital for weapons inspectors to be back in Iraq. However, there are problems. We were informed by Iraqi sources at the NPT Preparatory Committee meeting in May 2002 that the inspectors would be allowed back in if a timeframe could be agreed. The proposal from the UN was for inspectors to go where they liked, when they liked and to stay as long as they liked. It's difficult to see any country accepting such proposals. In August 2002, negotiations were still going on regarding allowing weapons inspectors back into Iraq. However, when the US seemed to be saying that it was going to attack anyway, Iraq decided to oppose such a move. Despite all this, in September 2002, Iraq announced that it would accept UN weapons inspectors unconditionally. CND welcomed the move and stressed that any UN resolution must not impose unacceptable conditions on the return of weapons inspectors. Islamic Holy Days should be respected, the inspection team should be truly international and there should be no repeat of earlier inspection teams containing spies. CND supports inspectors in ALL countries which have weapons of mass destruction.

If the UN inspectors do go back, we await their report with interest, particularly in light of the comments of the former UN weapons inspector Scott Ritter. He dismissed allegations that Iraq could have re-established its weapons programmes since inspectors withdrew in 1998. He explained that the manufacture of chemical and biological weapons emits vented gases that would have been detected by now if they existed and nuclear weapons emit gamma rays that would have been detected. As the US has been watching via satellite and other means, it would have seen the signs.

The recent report from the International Institute of Strategic Studies was held up as proof that action against Iraq was necessary. But two points in particular stood out. One was that Iraq could produce a crude nuclear device if it received enough weapons-grade material and extensive foreign help, but "there is no evidence that Iraq had done so". The other was that Iraq's chemical, biological and ballistic missile programmes are all far less potent now than 11 years ago.

Conclusions

Any war on Iraq is going to kill thousands of innocent civilians and as such would be illegal as well as immoral. If the British Government supported such a war, it would be guilty of a crime against humanity. CND agrees with Former US Attorney General Ramsey Clark who said *"An attack by the United States on Iraq to overthrow its government would be a flagrant violation of the UN charter, the Nuremberg charter and international law"*.

So why do the US and Britain seem so keen to attack Iraq? CND believes that the US and Britain are being hypocritical in their statements on Iraq.

If they want to attack Iraq because they may have WMD then why not condemn India, Pakistan, Israel and themselves? If it is because they have broken UN resolutions then what about Israel, Iran, Pakistan, among others? If it is simply a case of wanting a regime change, the quote from Ramsey Clark says it all. *"The US, along with any other country, has the right to oppose the policies of any world leader. But that does not give them the right to go to war. It does not give them the right to bomb and kill thousands of innocent civilians"*.

CND supports all international treaties aimed at abolishing nuclear weapons and all WMD. We must use all forms of protest to bring tremendous pressure to bear on our government. Marches, lobbies, publicity, advertising and direct action. And we need to involve all sections of the community.

CND, September 2002 (The situation is changing fast ar update this briefing as often as possible).

2

The Iraq War, International Law and the Search for Legal Accountability

PHIL SHINER

I. Introduction

It is one of recurrent themes of this book that, in relation to the Iraq War of 2003 and its aftermath, the USA and the UK, with lesser players, took practical and effective steps not just to challenge international law but to change or manipulate it, where it stood in the way of their objective. The purpose of this chapter is to examine how certain legal actions, which related to the decision to go to war, in the UK courts have both highlighted the extent of this challenge and manipulation and, perhaps ironically, demonstrated the extent to which a search for accountability, employing the very foundations of international law under threat, may nevertheless still be possible. In this sense, the chapter is a story of revelation and resistance. Revelation, because the cases demonstrate the scope and depth of threat to international law. Resistance, because they represent one avenue taken in the struggle to attach responsibility to the regimes that have chosen to ignore fundamental values of peace and respect for human rights.

The legal actions considered here focus on issues arising from the plan to use force against Iraq: that is, the law of *jus ad bellum*. Of course, other chapters in this book address significant matters of concern that relate to the subsequent occupation of Iraq. Various actions have been instigated that involve accusations of breaches of *jus in bello* and international human rights norms.[1] There can be little doubt, however, that questions concerning the legality of undertaking the war have held centre stage in both the public and political arenas ever since the prospect of military action became apparent in 2002. The legal actions reviewed in this chapter explore the evolution of the public understanding of the arguments for and against the legality of the use of force in two parts. In each part, further detail and nuances are revealed.

[1] The focus of this chapter is on the struggle for legal accountability in the UK. It has to be acknowledged, however, that other legal challenges have taken place elsewhere, such as in the USA, the Netherlands, Germany, Canada and Ireland.

The first part examines legal resistance to the use of force prior to the war. This took the form of a pre-emptive legal inquiry held by civil society, widely reported in the media, and a pre-emptive legal challenge through judicial review in the High Court of England and Wales. These actions demonstrate how international law and its breach became crucial in the run-up to the invasion in the public judgement of the rights or wrongs of military action. The second part concerns the attempt, after the invasion and subsequent occupation, to review and have adjudicated the legality of the UK government's decision to issue military orders to invade Iraq. It centres on a further judicial review on behalf of the relatives of servicemen who had died in the conflict. Together, therefore, these parts relate how the search for legal accountability for instigating military action has been and remains a fundamental issue. This has significant implications for international law, both highlighting its importance as a potential moral counterweight to the actions of powerful states and as a source of inspiration for public challenge of government policy. Whether this has something to say about the nature of international law in the 21st century is explored in the conclusion to this chapter.

II. *Jus Ad Bellum* and Pre-emptive Challenges to the Use of Force in Iraq: The Peacerights Legal Inquiry and the *CND* Case

A. Public Debate and Legal Challenge

In the UK, as with other common law jurisdictions, there is a long line of authority on the question of justiciability. Until recently, courts would routinely find that issues of high foreign policy or defence policy (for instance, where the security of the realm is at issue) are simply not for courts but remain exclusively within the preserve of the executive. In this volume Rabinder Singh discusses the historical case law and makes clear the argument that post Human Rights Act 1998 in the UK there is no forbidden territory for judicial scrutiny if there are actual or potential violations of fundamental rights or freedoms in issue.[2] However, in early 2002, when the Iraq storm clouds began to gather, the prospects of a legal challenge to an executive decision pursuant to the Royal Prerogative to wage war looked slim. Indeed, in January 2002 the Court of Appeal had reiterated the relatively narrow scope of a court in this area. In the case of *Marchiori* Laws J held:

> [I]t seems to me, first, to be plain that the law of England will not contemplate what may be called a merits review of any honest decision of government on matters of national

[2] R Singh, 'Justiciability in the Areas of Foreign Relations and Defence' (ch 9 in this book).

> defence policy. Without going into other cases which a full discussion might require, I consider that there is more than one reason for this. The first, and most obvious, is that the court is unequipped to judge such merits or demerits. The second touches more closely the relationship between the elected and unelected arms of government. The graver a matter of State and the more widespread its possible effects, the more respect will be given, within the framework of the constitution, to the democracy to decide its outcome. The defence of the realm, which is the Crown's first duty, is the paradigm of so grave a matter. Potentially such a thing touches the security of everyone; and everyone will look to the government they have elected for wise and effective decisions. Of course they may or may not be satisfied, and their satisfaction or otherwise will sound in the ballot box. There is, and cannot be, any expectation that the unelected judiciary will play any role in such questions, remotely comparable to that of government.[3]

On that basis, civil society representatives in the UK, intent on the peaceful resolution of conflict, were advised by lawyers that it would be difficult to challenge an executive decision to wage war, let alone a decision not yet taken. Accordingly, in early August 2002, the representatives met with academic and practising lawyers and it was decided that if the courts were not able to scrutinise a proposed decision to go to war in Iraq instead, in the best traditions of Peoples' Tribunals,[4] civil society would hold its own legal inquiry. In October 2002 an inquiry was held in Gray's Inn, London.[5] This inquiry had two important consequences. First, the initiative helped start a public debate about the legality of the war that continues today.[6] Second, it succeeded in identifying at an early stage what was to be the key legal justification by the USA and the UK, namely the 'revival doctrine', and it assisted in focusing the minds of the public and lawyers as to why this doctrine did not provide a proper or even plausible legal justification. In both respects, the initiative contributed to the struggle for accountability for an aggressive war.

But is it true to assert that this inquiry assisted in starting the public debate about legality? A number of points can be made. First, international law had never featured so much in the public examination of a potential conflict. The Vietnam War provoked considerable discussion about legality, but only once its horrific effects had become apparent. The 1990 Gulf War had the benefit of a chapter VII authorisation by Resolution 678 and it is, perhaps, not surprising that there

[3] *Marchiori v Environment Agency & Anor* [2002] EWCA Civ 3, 38.

[4] The first well-known Peoples' Tribunal was the Russell Tribunal, an international body presided by Bertrand Russell, established in 1966 to investigate and evaluate US foreign policy and military intervention in Vietnam. Lelio Basso, one of the members of the Tribunal, later worked to set up the Permanent Peoples' Tribunal. For recent work, see 'Permanent Peoples' Tribunal on Global Corporations and Human Wrongs, University of Warwick, 22–25 March 2000, Findings and Recommended Action', (2001) 1 *Law, Social Justice & Global Development Journal* <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2001_1/ppt> accessed 22 November 2007.

[5] 'A Citizen's Inquiry Concerning the Legality of a Prospective Use of Force by the United Kingdom Against Iraq' 11 October 2002 <http://www.peacerights.org/documents/JUDGEMENTOFPROFESSORWARBRICK.doc> accessed 22 November 2007.

[6] See P Sands, *Lawless World: America and the Making and Breaking of Global Rules* (London, Penguin, 2005)('Sands'); see also M Danner, *The Secret Way to War: The Downing Street Memo and the Iraq War's Buried History* (New York, New York Review Books, 2006).

was little, if any, public debate about its legality.[7] However, by November 2002, when the media examination of the pending invasion of Iraq began to intensify, there was no way of knowing whether there would be an authorisation again. Nevertheless various supporters of a war in Iraq made the case in public that a Security Council authorisation would be preferable as it would give the war a legitimacy it might otherwise lack.[8] Further, although the UK government had participated in the NATO action in Kosovo, the question of the legality of the UK's role specifically did not take centre stage. This is notwithstanding the subsequent controversy in the legal world as to whether the doctrine of humanitarian intervention provided a third valid reason to use force.[9]

[7] However, it should be noted that the UK public had no way of knowing that this foreign intervention was also of dubious legality. It is known now because of the following passage from the advice of the UK's Attorney-General of 7 March (fully discussed below) which states that he had 'taken account of the fact that on a number of previous occasions, including in relation to Operation Desert Fox in December 1998 and Kosovo in 1999, UK forces have participated in military action on the basis of advice from my predecessors that the legality of the action under international law was no more than reasonably arguable. But a "reasonable case" does not mean that if the matter ever came before a court I would be confident that the court would agree with this view': Attorney-General, 'Iraq: Resolution 1441' (Note to the Prime Minister of 7 March 2003) <http://www.number10.gov.uk/output/ Page7445.asp> accessed 22 November 2007, para 30 ('Attorney-General's advice of 7 March 2003'). It might be thought that the public debate about the legality of these interventions might have been intense if this advice from his predecessors had been publicly known. Further, given the central importance of humanitarian intervention to the shift in foreign policy signaled by Tony Blair's 'Chicago Speech', one wonders what wider impact there might have been if these facts had been known: T Blair, 'Doctrine of the International Community' (Speech at the Economic Club, Chicago, 24 April 1999) <http://number10.gov.uk/output/page1297.asp> accessed 5 December 2007.

[8] It now appears that although the debate was couched in terms of this legitimacy, the USA and the UK were apparently prepared to obtain this Security Council resolution by illegitimate means. On 13 January 2003 staff at the UK's GCHQ surveillance centre were ordered to cooperate with a US espionage mission on Security Council Member States after a request from the US National Security Agency. A leaked memorandum stated that the agency wanted to gather 'the whole gamut of information that could give US policymakers an edge in obtaining results favourable to US goals or to head off surprises' (in particular from the non-Permanent Members of the Security Council): memorandum cited in M Bright, E Vulliamy and P Beaumont, 'Revealed: US dirty tricks to win vote on Iraq war' *Observer* (London 2 March 2003) <http://www.guardian.co.uk/Iraq/Story/0,,905937,00.html> accessed 5 December 2007; see also M Bright and P Beaumont, 'Britain spied on US allies over war vote' *Observer* (London 8 February 2004) <http://observer.guardian.co.uk/iraq/story/0,,1143672,00. html> accessed 5 December 2007, memorandum available from <http://observer.guardian.co.uk/iraq/story/0,,1143672,00. html> accessed 5 December 2007. It is also worth noting that Clare Short publicly revealed in February 2004 that Britain had colluded in the bugging of the office of the UN Secretary-General, Kofi Annan: --, 'UK "spied on UN's Kofi Annan"' *BBC News* (London 26 February 2004) <http://news.bbc.co.uk/1/hi/uk_politics/3488548.stm> accessed 5 December 2007.

[9] C Gray, *International Law and the Use of Force* (Oxford, OUP, 2004) ('Gray'); Editorial Comments: 'NATO's Kosovo Intervention' (1999) 93 *AJIL* 824; MJ Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo* (New York, Palgrave Macmillan, 2003); NJ Wheeler, 'Review: Humanitarian Intervention after Kosovo: Emergent Norm, Moral Duty or the Coming Anarchy?' (2001) 77 *Royal Institute of International Affairs* 1; NJ Wheeler, 'The Limits of Humanitarian Intervention from the Air: The Cases of Bosnia and Kosovo' in *Saving Strangers: Humanitarian Intervention in International Society* (Oxford, OUP, 2000); R Thakus, *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action and International Citizenship* (Tokyo, United Nations University Press, 2000); S Chesterman, *Just War or Just Peace?: Humanitarian Intervention and International Law* (Oxford, OUP, 2002).

Second, the inquiry led immediately to a High Court challenge by the Campaign for Nuclear Disarmament (CND) through judicial review that had a demonstrable impact on the legal debate. This can be seen most clearly in the damage done to the UK government's case for war by the eventual leaking of the full legal advice of the Attorney-General, and the centrality of CND's legal position in that opinion. The following extracts from the Attorney-General's full advice of 7 March 2003 make the point:

> Given the controversy surrounding the legal basis for action, it is likely that the [International Criminal] Court will scrutinise any allegations of war crimes by UK forces very closely. The Government has already been put on notice by CND that they intend to report to the ICC Prosecutor any incidents which their lawyers assess to have contravened the Geneva Conventions ... It is also possible that CND may try to bring further action to stop military action in the domestic courts, but I am confident that the courts would decline jurisdiction as they did in the case brought by CND last November ... In short, there are a number of ways in which the opponents of military action might seek to bring a legal case, internationally or domestically, against the UK, members of the government or UK military personnel. Some of these seem fairly remote possibilities, but given the strength of opposition to military action against Iraq, it would not be surprising if some attempts were made to get a case of some sort off the ground. We cannot be certain that they would not succeed.[10]

Third, the legality debate can be tracked back in time by careful research. Prior to the start of September 2002 there is no public record of any debate about whether a prospective use of force against Iraq by the UK would be lawful. That is not surprising given that at this stage neither the Cabinet and Parliament nor the public knew, or could possibly have known, of the controversial revelations from the leaked 'Downing Street Memoranda'.[11] These made clear that the UK government, through its Prime Minister, had more or less committed itself to 'regime change' in partnership with the US government as early as April 2002. In preparation for the forthcoming inquiry held by Peacerights it made public an important legal opinion by Rabinder Singh QC and Janet Kentridge on 6 September 2002. This foreshadowed their lengthy skeleton argument to the inquiry and set out at considerable length three strong arguments. First, that the right of self-defence under UN Charter Article 51 would not justify the use of force against Iraq by the UK; second, that Iraq's alleged failure to comply with all or any of the existing 29 UN Security Council resolutions would not justify the use of force; third, that a further UN Security Council resolution would be required clearly to authorise such use of force. The opinion was the subject of live debate the following morning on the BBC Radio 4 *Today* Programme while Prime Minister, Tony Blair, was meeting with the US President, George Bush, at Camp David.[12] By 24 September 2002,

[10] Attorney-General's advice of 7 March 2003, n 7, paras 33–5.

[11] Downing Street Memo: 'Iraq: Prime Minister's Meeting, 23 July' (23 July 2002) <http://www.downingstreetmemo.com/memos.html> accessed 22 November 2007.

[12] We now know from the Downing Street Memoranda that Blair had agreed to go to war by that weekend, and that he re-emphasised his support to the USA on this occasion.

when asked about the legal position and legal advice as to whether a further UN resolution would be necessary, the Prime Minister said: 'Of course, we will always act in accordance with international law'.[13]

For the next few weeks there were many assurances from representatives of the UK government that it would 'abide by', 'comply with' or 'act in accordance with' international law.[14] Indeed, it was these assurances that the government would comply with international law that opened up the possibility of the subsequent legal challenge by CND.[15] Naturally, it could be said that it was merely coincidental that the start of the legality debate was coterminous with the Peacerights initiative, and the fact is that the government's full reasoning will remain a matter for public speculation until such time as there is an independent public inquiry into the matter. Nevertheless it seems reasonable to suggest that the initiative at least helped to start the public legality debate. The nature of this legal confrontation must now be explored.

B. The Use of Force and the Revival Doctrine[16]

By October 2002 there was academic legal debate about whether it could be lawful for a state, or group of states, to decide unilaterally (that is, without Security Council backing) that it, or they, could rely on UN Security Council Resolution 678, from the first Gulf War, to use force against Iraq subsequently and specifically in respect of its alleged failures to disarm pursuant to Resolution 687 and subsequent resolutions. This involved a determination by a state (or states) that Iraq's breaches of the ceasefire were sufficiently serious to justify a conclusion that the

[13] The Prime Minister to Parliament, Hansard (House of Commons Daily Debates 24 September 2002) <http://www.publications.parliament.uk/pa/cm200102/cmhansrd/vo020924/debtext/20924-02.htm#20924-02_spmin0> accessed 5 December 2007.

[14] Its public statements included the following: 'If there is military action any participation in it by Her Majesty's Government would be strictly in accordance with international law' (the Prime Minister to Parliament, 24 September 2002); 'If there is military action, any participation in it by Her Majesty's Government would be strictly in accordance with our obligations in international law' (the Foreign Secretary to Parliament, 24 September 2002); 'I repeat, any decisions that we make in respect of military action will be made within the context of the body of international law' (the Foreign Secretary to Parliament, 7 November 2002); 'If force becomes necessary, any decisions made by Her Majesty's Government will be careful, proportionate and consistent with our obligations in international law' (the Foreign Secretary to Parliament, 25 November 2002).

[15] One of the arguments deployed in *CND* was that as the Government had specifically stated that it would act in accordance with international law, whether it was to do so became a proper matter for judicial scrutiny: see *R v Secretary of State for the Home Department, ex p Launder* [1997] 1 WLR 839 (HL) 867C–F (Lord Hope); endorsed by Lord Steyn in *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326 (HL) 367E–H.

[16] It should be noted that the case for the UK Government on the validity of this doctrine was to be the subject of a chapter in this book by its main architect, Professor Christopher Greenwood QC. Despite repeated assurances that his chapter would be submitted, in the end it was not. This is regrettable as, despite the passage of time revealing a more or less complete consensus among international lawyers that the doctrine was fundamentally flawed, it did deserve attention, not least because of the huge loss of Iraqi civilian life that flowed directly from the reliance on that advice.

ceasefire had been destroyed. At this stage the last piece of the 'revival doctrine' framework was not yet in place, namely Resolution 1441. However, the arguments by counsel at the Peacerights inquiry as to why the government could not rely on an implied authorisation, subsequently taken up and developed in his ruling to the inquiry by Professor Warbrick, are important and the fact that they were put in the public domain at an early stage helped. Further, many of these arguments formed the basis of the case for CND in the legal case discussed below. Thus, in tracing the evolution of public awareness of the government's case for the invasion, and how thin it turned out to be, it is important to see what the arguments were at this stage as to why a specific Security Council authorisation of force was required. The main points to be distilled from this legal argument can be summarised as follows:

1. The context of whether the use of force would or would not be lawful is the requirement of Article 2(4) of the UN Charter,[17] described by the ICJ as a peremptory norm of international law, from which states cannot derogate.
2. Post the end of the Cold War, the Security Council has shown that it is well prepared to authorise the use of force. At this time it had done so many times in the post Cold War years.[18] The argument for implied authorisations is thus weakened.
3. When the Security Council wishes to authorise force it does so in clear terms, with a phrase such as 'all necessary means'.[19] This again weakens the case for unilateral action, based on unilateral interpretation of other words and phrases in Security Council resolutions.
4. At the end of hostilities in the first Gulf War the Security Council passed Resolution 686. By paragraph 4 it expressly reserved the right to use force provided by Resolution 678. As Singh and Kentridge note:

   > However, Resolution 687, which marked the permanent ceasefire, uses no such term. This demonstrates a clear recognition that the right to use force requires express

[17] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14, para 190. Art 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'.

[18] See J Lobel and M Ratner, 'Bypassing the Security Council: Ambiguous Authorisations to Use Force, Cease-Fires, and the Iraqi Inspection Regime' (1999) 93 *AJIL* 124 ('Lobel and Ratner'). These occasions were: Resolution 678, authorising states to 'use all necessary means' to uphold and implement earlier resolutions in cooperation with the Government of Kuwait; Resolution 770, authorising states to take 'all measures necessary' to enforce humanitarian assistance and enforce the no-fly zones in Bosnia; Resolution 794, authorising 'all necessary means to establish' as soon as possible a secure environment for humanitarian relief operations in Somalia; Resolution 929, authorising France to use 'all necessary means' to protect civilians in Rwanda; and Resolution 940, authorising 'all necessary means to facilitate the departure from Haiti of the military leadership': UNSC Res 678 (29 November 1990) UN Doc S/RES/678; UNSC Res 770 (13 August 1992) UN Doc S/Res/770; UNSC Res 794 S/RES/794 (3 December 1992); UNSC Res 929 (22 June 1994) S/RES/929; UNSC Res 940 (31 July 1994) S/RES/940.

[19] See n 18.

terms if it is to be continued. The absence of any clear terms in any resolution after 686 leads to the conclusion that no such use of force was authorised.[20]

5. The comparison of 686 with 687 on this point is important and critically undermines the argument that 687 only suspended the use of force from 678. As can be seen just as the Security Council uses clear terms when it authorises force, so too it does when it suspends an authorisation as it did in 686, and did not in 687. It is noted that at no stage prior to the invasion did proponents of the 'revival doctrine' face up to the problem posed by 686. It is absent from Professor Greenwood's memorandum to the Foreign Affairs Select Committee of 24 October 2002[21] or the Foreign and Commonwealth Office's legal advice of 8 March 2002,[22] and absent from either the full advice of the Attorney-General or his short statement to the House of Lords on 17 March 2003 (both discussed below). It is no answer to suggest, as Greenwood does, in his memorandum noted above, that Resolution 687 did not repeal 678. No one need suggest it did. However, it leaves unaddressed why 687 did not, like 686, expressly provide for a suspension of the authorisation of the use of force. Further, the validity of the argument that 687 only suspended the use of force, as it did not repeal 678, runs headlong into the buffers of the objections set out below about allowing individual states acting unilaterally to decide that their unilateral interpretation of the wording of historical resolutions should prevail over the fundamental commitment of all Member States to the collective.
6. After the adoption of Resolution 687 Iraq had to decide whether to accept the provisions of the resolution, that is, the terms of the ceasefire. Paragraph 33 provides that a formal ceasefire will arise between Iraq on the one hand and Kuwait and the Coalition on the other on 'official notification by Iraq' of its acceptance of the provisions of the resolution and decides that the Council will remain seized of the matter and it will 'take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region.' Thus, as the term 'ceasefire' implies, once Iraq had provided official notification, the authorisation of Resolution

[20] Cited in G Farebrother and N Kollerstrom (eds), *The Case against War: The essential Legal Inquiries, Opinions and Judgments concerning War in Iraq* (Nottingham, Spokesman, 2004) 23 ('*The Case against War*'). UNSC Res 686, UNSC Res 687, and UNSC Res 678 will be referred to *both* as 'Resolution 686', 'Resolution 687' and 'Resolution 678', and also in the further abbreviated form of '686', '687' and '678', due to the frequency of appearances in the text.

[21] See C Greenwood, 'The Legality of Using Force against Iraq, Memorandum to The Select Committee on Foreign Affairs' (Memorandum to Foreign Affairs Select Committee 24 October 2002) <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfaff/196/2102406.htm> accessed 29 November 2007 ('Greenwood').

[22] Downing Street Memo 'Iraq: Legal Background' (8 March 2002) <http://www.downingstreet-memo.com/memos.html> accessed 22 November 2007. See also Memorandum by the Foreign and Commonwealth Office, 'Iraq: Legal Basis for the Use of Force' (17 March 2003) <http://www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/annex_c_-_memorandum_by_foreign_and_commonwealth_office_170303.pdf> accessed 22 November 2007>.

678 came to an end. Putting together points 4 and 5, another way of putting this position is that there was no surviving authorisation to revive.[23]

7. It is apparent that the Coalition to liberate Kuwait that had acted pursuant to the Resolution 678 authorisation long since ceased to exist, having being disbanded on the official notification by Iraq pursuant to paragraph 33 of 687. As Warbrick put it:

   > This authorisation [678] is to 'the states co-operating with the government of Kuwait' to take action effectively to restore the authority of the government of Kuwait (no longer an issue) and to restore international peace and security in the area (potentially a wider authority)—but the Coalition is no longer in existence and the power being sought is related to the implementation of resolutions pursuant to Resolution 678.[24]

   Thus not only did the Resolution 678 authorisation not survive, to be revived, but neither did the Coalition who acted on its authority.

8. Given the peremptory norm of Article 2(4), the divesting by individual states of the use of force in the collective security provisions of chapter VII (except Article 51 and self-defence), and the fundamental importance of the peaceful resolution of disputes underpinning what is referred to by Warbrick as 'the compact'[25] of the UN, it is of fundamental constitutional significance that force be used only as a last resort when there is an explicit Security Council authorisation. This is well expressed by Lobel and Ratner:

   > To resolve these issues [whether the current resolutions implicitly authorise the use of force], two interrelated principles underlying the Charter should be considered. The first is that force be used in the interest of the international community, not individual states. That community interest is furthered by the centrality accorded to the Security Council's control over the offensive use of force. This centrality is compromised by sundering the authorisation process from the enforcement mechanism, by which enforcement is delegated to individual states or coalition of states. Such separation results in a strong potential for powerful states to use UN authorisations to serve their own national interests rather than the interests of the international community as defined by the United Nations.[26]

9. Subsequent to the end of hostilities in 1990 various senior members of the US and UK establishments at the time made explicit the constraints they had assumed there were in acting pursuant to Resolution 678. Former President George Bush (Senior), for example, said: 'Going in and occupying Iraq, thus unilaterally exceeding the United Nations' mandate, would have destroyed the precedent of international response to aggression that

[23] *The Case against War*, n 20, at 178.

[24] *The Case against War*, n 20, at 55–6. Further, OP 6 of Resolution 687 noted that the deployment of the UN force on the Kuwait–Iraq border would allow the Coalition to withdraw from Iraq.

[25] Cited in *The Case against War*, n 20, at 49.

[26] Lobel and Ratner, n 18, at 127; for reference to Warbrick's 'compact' of the UN, see text accompanying n 92 below.

we hoped to establish'.[27] Sir John Major has said: 'Our mandate from the United Nations was to expel the Iraqis from Kuwait, not to bring down the Iraqi regime'.[28]

10. After Iraq notified its acceptance of the terms of Resolution 687 the Security Council passed Resolution 688. This was not a chapter VII Resolution. It dealt with the humanitarian issues arising from the situation in Iraq. However, amid a great deal of legal controversy the USA, the UK and France used Resolution 688 as authority to establish 'safe havens' for Kurds and Shiites, and later to establish no-fly zones over Iraq.[29] The UK and the USA argued that Resolution 688 implicitly authorised Member States to respond to Iraq's actions, including by establishing no-fly zones, and thereafter to defend these zones by force. They argued that these zones were essential for humanitarian purposes and to monitor Iraq's compliance with the Security Council's requirements. Gray rejects this position in clear terms:

> In fact there did not seem to be any adequate legal basis for the establishment of the safe havens by the Coalition Forces. Resolution 688, although referred to at the time by the states involved, clearly does not authorise forcible humanitarian intervention. It was not passed under Chapter VII and did not expressly or implicitly authorise the use of force. The USA, UK and France did not expressly rely on a separate customary law right of humanitarian intervention in any Security Council debates or in their communications to the Security Council at the time of the establishment of the safe havens. Such a right is notoriously controversial; since the Second World War it has always been more popular with writers than with states.[30]

This is an important background to explain why the revival doctrine is fundamentally flawed. And it explains in particular how the USA and the UK fought and lost the struggle to establish the legal validity of the essential framework of the doctrine at an earlier stage. This struggle was in the context of their efforts to establish that there was 'automaticity' within an earlier Resolution, 1154, which stated that the Security Council is 'determined to ensure immediate and full compliance by Iraq without conditions or restrictions with its obligations under Resolution 687 (1991) and the other relevant resolutions'.[31]

The Security Council also stressed that any violation by Iraq of its requirements under 687 and in particular to accord immediate, unconditional

[27] G Bush and B Snowcroft, *A World Transformed* (Knopf, New York, 1998), cited in R Alexander, 'Iraq: The Pax Americana and the Law', Justice Tom Sargant memorial lecture (2003), fn 82 <http://www.justice.org.uk/50_anniversary/index.html> accessed on 5 December 2007 ('Alexander').

[28] He continued on to say that: 'To go further than our mandate would have been, arguably, to break international law': Sir John Major, speaking at Texas A&M University 10th Anniversary Celebrations of the liberation of Kuwait, 23 February 2001, cited in Alexander, n 27.

[29] See Gray, n 9, at 34–5 and 254.

[30] C Gray, 'After the Cease Fire: Iraq, the Security Council and the Use of Force' (1994) 68 *BYIL* 135 ('Gray').

[31] UNSC Res 1154 (2 March 1998) UN Doc S/Res/1154, Preamble.

and unrestricted access to the Special Commission (that is, UN Special Commission, the predecessor to the UN Monitoring, Verification and Inspection Commission (UNMOVIC)) and the International Atomic Energy Agency (IAEA) would have 'severest consequences'. Would the UN members have the right to use force without more if Iraq failed to comply with Resolution 1154? Blokker summarises the debate as follows:

> No agreement was reached on this issue. The US and the UK did not receive support for the view that UN members would have such an automatic right. The other members of the Council, including the other permanent members, emphasised the powers and authority of the Security Council and in some cases explicitly rejected any automatic right for members to use force. Sweden emphasised that 'the Security Council's responsibility for international peace and security, as laid down in the Charter of the United Nations, must not be circumvented.' Brazil stated that it was 'satisfied that nothing in its [the resolution's] provisions delegates away the authority that belongs to the Security Council under the Charter and in accordance with its own resolutions.' And Russia concluded that, 'there has been full observance of the legal prerogatives of the Security Council, in accordance with the United Nations Charter. The resolution clearly states that it is precisely the Security Council which will directly ensure its implementation, including the adoption of appropriate decisions. Therefore, any hint of automaticity with regard to the application of force has been excluded; that would not be acceptable for the majority of the Council's members.[32]

Thus, we see that the combination of Resolution 678, the terms of 687, and all subsequent resolutions including 1154 and in particular the threat of 'severest consequences' was not sufficient in 1998 to provide 'automaticity'. As will be seen, this argument was to assume a key prominence after Resolution 1441 was passed on 8 November 2002.

11. Finally, from the moment of cessation of hostilities once Iraq had notified its acceptance of the terms of 687, there existed a situation of peace, in which the obligation under Article 2(4) not to use force applied again in full. Further, the Security Council provided by paragraph 34 of 687 that it 'decided to remain seized of the matter'. This decision by the Security Council to occupy the field, provides another powerful objection to the UK's arguments prior to Resolution 1441 that remained valid in the build-up to the war. Thomas Franck makes this perfectly clear:

> By any normal construction drawn from the administrative law of any legal system, what the Security Council has done is occupy the field, in the absence of a direct attack on a member state by Iraq. The Security Council has authorised a combined military operation; has terminated a combined military operation; has established the terms under which various UN agency actions will occur to supervise the cease-fire, to establish the standards with which Iraq must comply; has established the means by which it may be determined whether those standards have been met (and this has been done

[32] N 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' (2000) 11 *EJIL* 541, 559 ('Blokker').

> by a flock of reports by the inspection system); and has engaged in negotiations to secure compliance. After all these actions, to now state that the United Nations has not in fact occupied the field, that there remains under Article 51 or under Resolution 678, which authorised the use of force, which authorisation was terminated in Resolution 687, a collateral total freedom on the part of any UN member to use military force against Iraq at any point that any member considers there to have been a violation of the conditions set forth in Resolution 678, is to make a complete mockery of the entire system.[33]

It is not the purpose of this section to attempt to answer comprehensively the case for the revival doctrine advanced by the UK government and its legal advisers. Many others have done so.[34] However, many of these counter-arguments rely on some or all of the above points, and it is worth collecting them together in demonstrating the role played by the Peacerights legal inquiry. It is worth noting also how legal arguments developed in the legal inquiry were deployed by CND in the case now described.

C. The *CND* Case

On 17 December 2002 the Divisional Court gave judgment on an application for judicial review on behalf of CND.[35] The case was lost.[36] However, in analysing its impact, two matters should be considered. First, how CND's arguments here as to why a reliance on Resolution 1441 without a Security Council authorisation would breach international law came to be widely regarded as legally correct. Second, how it paved the way for further key developments on the issue of *jus ad bellum* and the Iraq War that continue today.[37] It is not the purpose of this section to analyse in great detail the precise wording of Resolution 1441, and how that resolution on its own or in combination with Resolution 678 and 687 did not provide an authorisation.[38] However, in considering the state of international

[33] T Franck, 'Legal Authority for the Possible Use of Force Against Iraq' (1998) *ASIL Proceedings* 139 ('Franck').

[34] V Lowe, 'Iraq Crisis: What Now?'(2003) 52 *ICLQ* 859.

[35] *R (CND) v Prime Minister* [2002] EWHC 2777 (Admin), [2003] LRC 335. Campaign for Nuclear Disarmament is a non-governmental organisation established in 1958 to campaign for the abolition of nuclear weapons. For more on its history, including an account of its case against the Iraq War, see K Hudson, *CND: Now More Than Ever: The Story of the Peace Movement* (London, Vision Paperbacks, 2005).

[36] It is a testament to how much the UK common law's approach to justiciability has changed in five years that this case would be decided differently now. In particular, the court's reliance in *CND* on *Marchiori* (*Marchiori v Environment Agency & Anor*, n 3), which reasserted the correctness of the traditional approach to justiciability that can be traced back to *Chandler v Director of Public Prosecutions* [1964] AC 763, no longer looks to be tenable. It is expected that in *Gentle et al* the House of Lords will review this area of case law. It is hoped that the House will take the opportunity to bring the area into line with a more enlightened approach as argued for by Singh in this book (ch 9).

[37] See section III below.

[38] For discussion on this, see, eg, D McGoldrick *From '9/11' to the Iraq War 2003: International Law in an Age of Complexity* (Oxford, Hart, 2003).

law now it is important to note how little justification for war was provided by the adoption of 1441.

Resolution 1441 has to be analysed in the context of relevant guiding principles as to interpretation of Security Council resolutions.[39] First there is the requirement that a resolution must be interpreted in accordance with its objects and purposes, including its preamble.[40] Second, there is an argument that, 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 accordance with the Purposes and Principles of the United Nations—it must retain effective authority and a tight control over those functions which it authorises Member States to use by a chapter VII resolution. Accordingly these limits mean that the terms of a resolution that authorises chapter VII powers are to be interpreted narrowly.[41] Third, the language of a resolution should be carefully analysed before a conclusion would be made as to its binding effect under Article 25 of the Charter (Namibia Advisory Opinion, (1971) ICJ Reports 15 at 53). Fourth, 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 discussion leading to it, the Charter provisions invoked and, in general, all the circumstances that might assist in determining the legal consequences of the resolution'.[42]

In the light of these principles it is important to examine the *travaux préparatoires* and discussion before and after the adoption of the resolution, and in particular key ambassadorial statements made by Member States immediately after adoption on 8 November 2002. First, the *travaux préparatoires* included draft resolutions put forward for discussion by the USA and the UK that would have authorised military action in circumstances of non-compliance. As the grounds of challenge in CND note: '[s]uch 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'.[43]

[39] See generally MC Wood, 'The interpretation of Security Council Resolutions' (1998) 2 *Max Plank Year Book of United Nations Law* 73; and 'The Security Council as Law Maker: The Adoption of (Quasi) Judicial Decisions' in R Wolfrum and V Röber (eds) *Developments of International Law in Treaty Making* (New York, Springer, 2005).

[40] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31.

[41] D Sarooshi, *The United Nations and the Development of Collective Security* (Oxford, OUP, 1999) 44, 154–5 ('Sarooshi'); see also Blokker, n 32. These arguments were referenced at para 70 of the statement of grounds for judicial review of 8 November 2002 in the *CND* case, contained in *The Case against War*, n 20, at 95.

[42] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion) [1971] ICJ Rep 16, para 114.

[43] Para 14(7) of statement of grounds for judicial review of 8 November 2002 in the *CND* case, cited in *The Case against War*, n 20, at 82. A draft resolution circulated in October contained the following paragraph: 'Decides that false statements or omissions in the declarations submitted by Iraq to the Council and the failure by Iraq at any time to comply and to co-operate fully in accordance with the provisions laid out in this resolution, shall constitute a further material breach of Iraq's obligations, and that such breach authorises member states to use all necessary means to restore international peace and security in the area.'

Second, the explanation as to the resistance from Russia, China and France is the earlier attempts made by the USA and the UK to invoke Resolution 1154 together with Resolutions 678 and 1205 as authority for the use of force. On this occasion all three insisted on detailed changes to the final draft of 1441 to ensure that the same arguments could not be used again.[44] Third, both the US Ambassador, John Negroponte, and the UK Ambassador, Jeremy Greenstock, made clear statements at the time of adoption to the effect that the two governments accepted that there was no implied authorisation issue this time. Negroponte assured Council members that 'this resolution contains no "hidden triggers" and no "automaticity"' with respect to the use of force.[45] Greenstock stated:

> We heard loud and clear during the negotiations the concerns about 'automaticity' and 'hidden triggers'—the concern that on a decision so crucial we should not rush into military action; that on a decision so crucial any Iraqi violations should be discussed by the Council. Let me be equally clear in response, as a co-sponsor with the United States of the text we have adopted. 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 a discussion as required in operational paragraph 12. We would expect the Security Council then to meet its responsibilities.[46]

To support the argument that it was never intended that there should be an implied authorisation within 1441 taken with earlier resolutions, the majority of the other members made ambassadorial statements as it was adopted confirming the commitment to a multilateral approach, confirming that there was no automaticity and that it would be for the Security Council to decide on further action if Iraq did not cooperate. In a joint statement issued on 8 November, France, Russia and China stated: 'Resolution 1441 (2002) adopted today by the Security Council excludes any automaticity in the use of force'.[47]

[44] These changes included, of course, the removal of any reference to 'all necessary means' and the addition of para 12 to ensure that whatever issue of Iraq's non-compliance arose, it was for the Security Council to decide on what, if any, further action was required. Paragraph 12 reads: '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': UNSC Res 1441 (8 November 2002) UN Doc S/RES/1441. As noted below, the US Administration later insisted in private discussions with the UK's Attorney-General that it never intended or accepted that the Security Council's further role was to 'decide' what further action, if any, was required if Iraq failed to comply fully with 1441, but was limited to considering the situation.

[45] Statement by Ambassador John Negroponte of the USA, 'Explanation of Vote on Resolution 1441'(8 November 2002) <http://www.globalpolicy.org/security/issues/iraq/document/2002/1108usstat.htm> accessed 22 November 2007, also cited in *The Case against War*, n 20, at 63 <http://www. inlap.freeuk.com/case.htm> accessed 22 November 2007.

[46] *The Case Against War*, n 20, at 62.

[47] 'Joint Statement by China, France and Russia Interpreting UN Security Council Resolution 1441 (2002)' (adopted 8 November 2002) <www.staff.city.ac.uk/p.willetts/IRAQ/INDEX.HTM> accessed 22 November 2007. Clare Short noted on Greenstock's speech: 'This speech is very important and was an on-the-record statement of the UK Government position. There had been tension in the drafting of the resolution over whether it would give Iraq a last chance to disarm and if it failed the issue would come back to the Security Council, or whether the resolution would give the US authority to declare

There are other aspects of the legal debate post 1441 that were dealt with in the grounds of challenge in *CND* that are important in understanding how the case for war based on the 'revival doctrine' was comprehensively dismissed at an early stage in both the Peacerights inquiry and the subsequent CND case.[48] To understand these further arguments it is necessary to refer to the full text of the Attorney-General's statement to the House of Lords of 17 March 17 2003 that became the UK government's official case for war.

Reading Greenwood's memorandum with the later statement of the Attorney-General, it is clear that the 'revival doctrine' rests on five key principles:

1. That 'Resolution 687 suspended but did not terminate the authority to use force under Resolution 678'.[49]
2. That 'a material breach of Resolution 687 revives the authority to use force under Resolution 678'.
3. That in Resolution 1441 'The Security Council determined that Iraq has been and remains in material breach of Resolution 687'.
4. The Security Council in Resolution 1441 gave Iraq a 'final opportunity to comply with its disarmament obligations'; and
5. Warned Iraq of the 'serious consequences' if it did not.

There are just three questions here:

1. As there is no doubt that Resolution 1441 did determine that Iraq was in material breach of 687, does this material breach alone, or with other factors, revive the 678 authorisation?[50]
2. What, if anything, is added by the reference to 'final opportunity'?
3. What, if anything, is added by the reference to 'serious consequences'?

war if they judged Iraq had not complied. This is what automaticity meant. The US had wanted a resolution giving them authority to declare war as they saw fit. The rest of the Security Council did not want this. This is why it took nearly two months to reach agreement on the resolution. Jeremy Greenstock's statement was therefore very important. He made a promise on behalf of the UK in that statement which was later broken when Blair decided that he had legal authority for war without another resolution. The point was later fudged by the claim that the issue went back to the Security Council for discussion, but that is not a fulfillment of the promise "there is no 'automaticity' in this resolution": C Short, *An Honorable Deception?: New Labour, Iraq and the Misuse of Power* (London, Free Press, 2004) 157.

[48] Also the Peacerights inquiry approach to airing the issues which was to replicate the judicial review process was taken up by the BBC's *Today* programme. The Adjudication of Professor Vaughan Lowe in that debate is of importance as it is a precursor to the powerful arguments subsequently made by Lowe that the authorisation from 678 had terminated and that there was, therefore, nothing to revive.

[49] The arguments as to why this is wrong, relying on Resolution 686, and the summary of the position by Franck and Lowe are adequately dealt with above.

[50] The US Secretary of State, Colin Powell, had stated that 'past material breaches, current material breaches, new material breaches' provide more than enough without a fresh Security Council Resolution. T Harden and A Sparrow, 'We Are Ready to Attack, US Warns Saddam' *Daily Telegraph* (London 11 November 2002), as cited in AJ Bellamy, 'Feature-Legality of the Use of Force against Iraq—International Law and the War with Iraq' (2003) 4 *Melbourne Journal of International Law* 497.

The first question is discussed below. The other two questions I will return to in section III of this chapter.

Briefly, then, in answering the first question one has to return to the context of arguments made above about:

1. The Purposes and Principles of the UN Charter.
2. The peremptory norm of Article 2(4).
3. The clear evidence that if the Security Council wishes to authorise force it uses clear terms to do so.
4. The reassurances given at the time of adoption as to no 'automaticity'.
5. That the Security Council had provided a clear mechanism within paragraphs 4, 11, 12 and 14 that further violations would lead to a convening immediately of the Council who would 'consider the situation' (para 12) and remained 'seized of the matter' (para 14).[51]

The earlier opinion of Singh and Kentridge had already dealt with the question as to whether a 'material breach' by Iraq of the ceasefire resolution could amount to a revival of the authorisation from 678. It had concluded:

> If such use of force can ever be justified, this is clearly a decision to be taken by the Security Council ... Given the system of collective decision-making, the emphasis on peaceful resolution wherever possible, and the Security Council's active management of the Iraqi situation to date, neither breaches of the cease-fire agreement nor breaches of any other resolution authorise the unilateral use of force.[52]

Nevertheless the reference to Iraq's 'material breach of its obligations under relevant resolutions, including 687 (1991)' from paragraph 1 of 1441 is there for a reason and had survived the redrafting of the earlier draft which had seen the removal of reference to 'all necessary means'.[53]

It is suggested that the language of 'material breach' was used deliberately is strengthened by analysing Greenwood's arguments to the UK's Foreign Affairs Select Committee of October 2002 which expressly argued:

> It is open to the Security Council to determine that Iraq continues to be in breach of the cease-fire conditions in Resolution 687 and that that breach involves a threat to international peace and security which peaceful means have failed to resolve. The effect of such a determination would be that the authorization of military action in Resolution 678 would again be rendered active. That would not necessarily require a Security Council Resolution. It could be done by means of a Presidential Statement (which would

[51] Dorf wrote in January 2003 about these phrases: 'The Resolution itself expressly considers material breach to be a trigger for further deliberation, not automatic war' (MC Dorf, 'Is Iraq in "Material Breach" of its obligations under the UN Resolution: A GO political question, not simply a legal one' <http://writ.news.findlaw.com/dorf/20030108.html> accessed 22 March 2007.

[52] *The Case Against War*, n 20, at 30.

[53] Text of draft resolution of 2 October 2002 at <www.casi.org.uk/info/usukdraftscr021002.html> accessed 23 March 2007. OP 1 read: 'Decides that Iraq is still and has been for a number of years, in material breach of its obligations under relevant resolutions, including resolution 687 (1991)'. This version remained until 25 October. A draft of 5 November contains an OP 1 in the same terms as 1441.

> require a consensus in the Council). Moreover a resolution stipulating that Iraq must take certain steps by a prescribed date could (depending on its wording) mean that the Council was determining that failure by Iraq to take such steps was a breach threatening international peace and security.[54]

The USA and the UK had used the cover of 'material breaches' in 1993 and 1998 to use further force against Iraq and, presumably, as the bombing raids to enforce the no-fly zones intensified in the months before the invasion, continued to rely on this justification. The language of material breach reflects Article 60 of the Vienna Convention on the Law of Treaties (1969).[55] As McGoldrick notes:

> Using Article 60 by analogy, it would be necessary to determine which states are 'specially affected' by the material breach or whether the material breach radically changed the position of the parties. The argument would be that at least the members of the 1991 coalition against Iraq would be so specially affected … William Taft and Todd Buchwald submit that: '[A]ll agreed that a council determination that Iraq had committed a material breach would authorise individual states to use force to secure compliance with council resolutions'. With respect this seems to be exactly what the states in the SC were not agreed.[56]

As 'the grounds' put it at 40: 'It would be extraordinary if, having failed to obtain an express authorisation for the use of force, having incorporated in it 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, the UK and US were to be able to use SCR 1441 as authority for the use of force without a further Security Council Resolution'.[57]

And also in 'the grounds', bearing in mind the above points, and that a unilateral decision by the USA, the UK or both that 1441 contained the trigger to use force, that is, that there was an implied authorisation, it was argued this would thwart the notion of collective security that left such decisions to use force to the Security Council:

> 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.[58]

[54] Greenwood, n 21, at para 19.

[55] Vienna Convention, n 37. Article 60(1) reads: '1. A material breach of bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part'.

[56] McGoldrick, n 38, at 63, quoting WH Taft and TF Buchwald, 'Pre-emption, Iraq, and International Law' (2003) 97 *AJIL* 557,560. See also J Yoo, 'International Law and the War in Iraq' (2003) 97 *AJIL* 563.

[57] *The Case Against War*, n 20, at 68.

[58] *The Case Against War*, n 20, at 97.

There are, thus, overwhelming reasons why the language of 'material breach' does not amount to an authorisation, taken with 678 and 687, and that international law does not recognise the right of states to use force to secure the implementation of international law. As Warbrick noted in his Adjudication:

> Something more, then, is required to allow the use of force than the mere fact of Iraq's non-compliance (even if it is described as a 'material breach'). In my view the burden of showing this 'something more', viz Security Council authorisation, rests on the states claiming to use force, a claim that the UK has not made out.[59]

The debate about whether a 'material breach' could in these circumstances amount to an authorisation of force should now be explored in the context of the revelations into the government's case from the leaked full advice of the Attorney-General of 7 March 2003, and the later disclosure statement provoked, at least in part, by post-war legal action. Before doing so it is interesting to note that before the negotiations to obtain the later second SC resolution failed, the UK government's own case in the event of any further material breach after 1441 was that there should be a second SC resolution authorising military action.[60]

III. *Jus Ad Bellum* and The Legality of the Military Orders: The *Gentle et al* Case

On 3 May 2005 a letter before action was served on the Prime Minister. It was on behalf of the families of 10 soldiers killed during the Iraq War and occupation. It asked for an independent inquiry into the deaths and asserted that the scope of the inquiry should be broad so that the families could learn the full circumstances surrounding the decision to issue the relevant military orders. In the Court of Appeal in December 2006, where the case failed, the court referred to the relevant question to be answered in the inquiry called for as 'the invasion question'. That question to be answered required an inquiry to adjudicate on the *jus ad bellum* and, specifically, to examine the circumstances that led to the Attorney-General's lengthy advice of 7 March being replaced with his short statement of 17 March. At the time of writing the case proceeds to the House of Lords on the basis of a petition that describes the legality of the Iraq War question as 'the most important legal question of this generation'.[61]

[59] *The Case Against War*, n 20, at 58.

[60] See *The Case against War*, n 20, at 114–15; 'Resolution 1441 does not stipulate that there has to be a second Security Council resolution to authorise military action in the event of a further material breach by Iraq ... [T]he preference of the Government in the event of any material breach is that there should be a second Security Council resolution authorising military action'.

[61] The case of *R (on the application of Gentle and another) v The Prime Minister and others* is to be heard by the House of Lords on 11–13 February 2008 [AQ: update now?].

It is not the purpose of this section to discuss the relevant domestic and European Court of Human Rights case law upon which the case is grounded. In particular, the Strasbourg jurisprudence on the adjectival duty that protects Articles 2 and 3 of the ECHR may be well known to readers and can be gleaned from the judgment of the Court of Appeal.[62] Instead it is intended to explore the process whereby further litigation put yet more material and legal argument as to why the Iraq War was unlawful into the public domain.[63]

In the grounds in *Gentle et al* it was pleaded that: 'in circumstances in which it is unlikely that [the soldiers] would have been sent to war without the clear and categorical advice of [the Attorney-General] a duty arises to investigate'.[64] The three defendants argued that '[T]he decision to take military action in Iraq was in no sense the immediate, direct or operative cause of the deaths of the claimants' relatives ... the legality of the decision to take military action in Iraq has no bearing on the circumstances which led to their deaths'.[65] Thus, the legal question as to whether there was a causative connection between the Attorney-General's advice (and thus his change of mind) took centre stage in the case. It is apposite, then, to explore the background to this legal advice. The starting point arises from the judgment of the Divisional Court in *CND*. Lord Justice Simon Brown said: 'There is no sound basis for believing the government to have been wrongly advised as to the true position in international law'.[66] This followed the representations made to the court by counsel for the three defendants that, of course, the government would not get international law wrong because it had access to specialist international law advice.

We now know that without the Attorney-General's decision to abandon his 7 March advice most probably the UK would not have been part of the coalition that invaded Iraq. On 10 March 2003 the Chief of Defence Staff (CDS), Admiral Sir Michael Boyce, demanded a formal assurance that the war would be legal. He recorded later:

> I asked for unequivocal advice that what we were proposing to do was lawful. Keeping it as simple as that did not allow equivocations, and what I eventually got was what I required ... Something in writing that was very short indeed. Two or three lines saying our proposed actions were lawful under national and international law.[67]

[62] *R (Gentle and another) v The Prime Minister and others* [2006] EWCA Civ 1690. The judgment can be obtained at <www.publicinterestlawyers.co.uk> last visited on 5 December 2007.

[63] It is not suggested that material such as the Downing Street Memoranda which had been widely available at <www.downingstreetmemo.com> for some months were now for the first time available to the public because of this litigation. Further, the excellent analysis of Sands in his chapter 'Kicking Ass in Iraq' (Sands, n 6) was both acknowledged and specifically referenced in the legal argument.

[64] Argument of counsel for the appellants contained in the grounds, para 18. A copy of these is on file with the author.

[65] Summary grounds of defence, para 19. A copy of these is on file with the author.

[66] *The Case Against War*, n 20, at 145, para 47(iii).

[67] A Barnett and M Bright, 'War chief reveals legal crisis' *Observer* (London 7 March 2004) <http://www.guardian.co.uk/Iraq/Story/0,,1164079,00.html> accessed 22 November 2007, see also Sands, n 6, at 196–7.

Boyce's position was communicated to the Attorney-General and others at a meeting in Downing Street on 11 March.[68] However, it was not just the CDS who needed this unambiguous advice; it was also the Cabinet, the Ministers making the decision, and as Andrew Turnbull, the Cabinet Secretary and Head of the Civil Service, records in his evidence to the Public Administration Select Committee on 10 March 2005, he required this 'on behalf of civil servants committing the spending of money'.[69] Thus, it seems that the Attorney-General's lengthy equivocal advice of 7 March just would not suffice: if that advice remained his final advice neither the CDS, the Cabinet, relevant Ministers nor the Civil Service could have approved the invasion. And, although it is unwise to speculate, it is doubtful whether the government would have got its majority in the House of Commons vote on 18 March. It seems, with hindsight, that the Attorney-General had not foreseen that what had passed muster on previous occasions in Operation Desert Fox and Kosovo, namely that the legality of these actions 'was no more than reasonably arguable',[70] would not satisfy the CDS on this occasion. Thus, the Attorney-General, and subsequently the whole administration, was subjected to unprecedented political pressure.

On 22 May 2006 the Information Commissioner served an enforcement notice on the Attorney-General following a number of complaints he had received after requests had been made and refused for access to information relating to the advice given by him. The Attorney-General's disclosure statement contains key new information and was partially instrumental in persuading the Court of Appeal to allow this case to proceed to a full hearing. This statement attempts to explain how it came about that the UK's most senior lawyer took the unprecedented step of, first, reaching an opinion, admittedly equivocal, the subject of a 13-page advice; second, six days later changing that advice to a short, unequivocal assurance to the opposite (in the absence even of the later certification by the Prime Minister that there had been further material breaches by Iraq of relevant resolutions); and, third, a further four days later, giving a public statement that took a completely different line to the earlier advice.[71] This disclosure statement says:

> 23. On 13 March the Attorney General discussed the matter with his Legal Secretary. It was clear to the Attorney that there was a sound basis for the revival argument in

[68] Legality of military action in Iraq, disclosure statement, Cabinet Office and Legal Secretariat to the Law Officers <http://news.bbc.co.uk/1/hi/uk_politics/5017872.stm> para 19 accessed 22 November 2007. This paragraph also records: 'As the CDS subsequently put it in a media interview, he needed an "unambiguous black-and-white statement" saying it would be legal for us to operate if we had to.' Of course, it is always possible that Boyce might have resigned and been replaced with a new CDS who would have issued military orders to invade Iraq. It is thought that scenario is unlikely.

[69] See fn 10 in the disclosure statement, n 68.

[70] See Attorney-General's advice of 7 March 2003, n 7.

[71] It should also be noted that it is clear from the resignation letter of Elizabeth Wilmshurst, the Deputy Legal Adviser to the Foreign Office who resigned in protest that the war with Iraq would be illegal, that his equivocal advice of 7 March 2003 already represented a change of mind by the Attorney-General: "My views accord with the advice that has been given consistently in this office before and after the adoption of UN security council resolution 1441 and with that the Attorney General gave us to understand was his view prior to his letter of 7 March (the view expressed in that letter has of course changed again into what is now the official line)." <http://findarticles.com/p/articles /mi_qn4158/is_20050325/ai_n13462038> accessed on 22 November 2007.

principle. The question was whether the conditions for the operation of the revival doctrine applied in this case.

24. As the Legal Secretary recorded at the time, the Attorney confirmed in that discussion that, after further reflection, having particular regard to the negotiating history of resolution 1441 and his discussions with Sir Jeremy Greenstock and the representatives of the US Administration, he had reached the clear conclusion that the better view was that there was a lawful basis for the use of force without a second resolution. The crucial point was that Operative Paragraph 12 of resolution 1441 did not stipulate that there should be a further decision of the Security Council before military action was taken, but simply provided for reports of further breaches by Iraq to be considered by the Council. The Attorney General made it clear that he had fully taken into account the contrary arguments as set out in his 7 March minute to the Prime Minister. In coming to the conclusion that the better view was that a further resolution was not legally necessary, he had been greatly assisted by the background material he had seen[72] on the negotiation of resolution 1441.
25. It was agreed during that discussion that it would be proper for the Legal Secretary to confirm to the Ministry of Defence Legal Adviser that the proposed military action would be in accordance with national and international law. It was also decided to prepare a statement setting out the Attorney's view of the legal position and to send instructions to counsel to help in the preparation of that public statement.
26. Also on 13 March, following that discussion with his Legal Secretary, the Attorney informed Baroness Morgan and Lord Falconer at a meeting of his conclusion that action would be lawful without a further resolution.

Before commenting on the points arising from these, and subsequent, paragraphs in the disclosure statement it is important to set out the relevant summary paragraphs of the 7 March advice. Why this advice was not sufficient to authorise war will be immediately apparent:

26. To sum up, the language of resolution 1441 leaves the position unclear and the statements made on adoption of the resolution suggest that there were differences of view within the Council as to the legal effect of the resolution. Arguments can be made on both sides. A key question is whether there is in truth a need for an assessment of whether Iraq's conduct constitutes a failure to take the final opportunity or has constituted a failure fully to cooperate within the meaning of OP4 such that the basis of the ceasefire is destroyed. If an assessment is needed of that situation, it would be for the Council to make it. A narrow textual reading of the resolution suggests that sort of assessment is not needed, because the Council has predetermined the issue. Public statements, on the other hand, say otherwise.
27. In these circumstances, I remain of the opinion that the safest legal course would be to secure the adoption of a further resolution to authorise the use of force. [...] The key point is that it should establish that the Council has concluded that Iraq has failed to take the final opportunity offered by resolution 1441, as in the draft which has already been tabled.

[72] It is clear from his 7 March advice that "seen" is to be taken as including "heard about" from US Administration officials who impressed him with their sincerity: Attorney-General's advice of 7 March 2003, n 7.

28. Nevertheless, having regard to the information on the negotiating history which I have been given and to the arguments of the US Administration which I heard in Washington, I accept that a reasonable case can be made that resolution 1441 is capable in principle of reviving the authorisation in 678 without a further resolution.
29. However, the argument that resolution 1441 alone has revived the authorisation to use force in resolution 678 will only be sustainable if there are strong factual grounds for concluding that Iraq has failed to take the final opportunity. In other words, we would need to be able to demonstrate hard evidence of non-compliance and non-cooperation. Given the structure of the resolution as a whole, the views of UNMOVIC and the IAEA will be highly significant in this respect. In the light of the latest reporting by UNMOVIC, you will need to consider very carefully whether the evidence of non-cooperation and non-compliance by Iraq is sufficiently compelling to justify the conclusion that Iraq has failed to take its final opportunity.[73]

Returning to paragraphs 23 and 24 of the disclosure statement, the following questions arise to be answered if ever there is an independent inquiry into the invasion question:

1. His advice records his assessment of 'a reasonable case' for the revival doctrine. How was it now clear (and in his 17 March statement) it had a sound basis?
2. He previously records that he had seen 'the statements made on adoption of the Resolution'. Further he had previously referred to this material as giving him 'valuable background information' (paragraph 1 of his advice). Given the clarity of this background information on the issue of 'automaticity', what further and different insight did he now gain on 13 March from the negotiating history of Resolution 1441 and his discussions with Sir Jeremy Greenstock and the representatives of the US administration? Or is it that there were no new insights, or indeed further background information, but a mere change of view based on the 'same valuable background information' he had previously seen?
3. Given that the position was 'unclear' previously, how (without anything material changing on the ground) could he now be 'clear' that the 'better view' was that there was a lawful basis for the use of force *without* a second resolution? And how was it that the 'reasonable case' that could be made for a 'material breach' route into reviving 678 now became, without anything apparently changing, the 'better view' when on 7 March the 'safest legal course' was a second resolution?
4. Given that negotiations for a second resolution based on a draft resolution sponsored by the USA and the UK did not break down until late on 13 March (the day his advice was confirmed), and given that New York is five hours behind the UK at this time of year, does this mean that the Attorney-General's advice was given on 13 March without knowing for certain whether there would not be a second resolution? It will be recalled this had a key prominence in paragraph 27 of his 7 March advice.

[73] Attorney-General's advice of 7 March 2003, n 7.

5. Recalling the assurance to the court in *CND*, why did he wait until he had already changed his advice to send instructions to outside (and presumably expert) counsel?

Returning to the disclosure statement, paragraphs 27–28 summarises what is explained more fully in the Butler Review.[74] This records as follows: 'The legal secretary to the Attorney-General wrote to the private secretary to the Prime Minister on 14 March 2003 seeking confirmation that "it is unequivocally the Prime Minister's view that Iraq has committed further material breaches as specified in paragraph 4 of Resolution 1441"'.[75]

The Prime Minister's private secretary replied to the legal secretary on 15 March, confirming that:

> it is indeed the Prime Minister's unequivocal view that Iraq is in further material breaches of its obligations, as in OP 4 of UNSCR 1441 because of 'false statements or omissions in the declaration submitted by Iraq pursuant to this Resolution and failure by Iraq to comply with, and co-operate fully in the implementation of, this Resolution.[76]

The importance of what Sands has written about as a certification by the Prime Minister of 'further material breaches' is self-evident.[77] It did what the Attorney-General had previously advised could only be done by the Security Council. It was in effect a certification by the Prime Minister that there had been a material breach of the ceasefire and that Iraq had failed to take the 'final opportunity' afforded to it and that, accordingly, the authorisation of 678 was revived. This argument runs contrary to his previous advice and has since been widely derided by international lawyers and other senior members of the legal establishment.[78]

[74] Committee of Privy Counsellors, 'Review of Intelligence on Weapons of Mass Destruction' (14 July 2004) HC898 <http://www.butlerreview.org.uk/> accessed 22 November 2007 ('Butler Report').

[75] Para 383, n 74.

[76] Para 384, n 74.

[77] See Sands, n 6, at 197.

[78] In the speech by Lord Alexander referenced at n 27 he described how the Government 'desperately trawled way back to Resolution 678 to find a flag of convenience', that the 'flag simply cannot fly' and 'the suggestion that the authority to use force "revived" like spring flowers in the desert after rain, to be invoked by the US and the UK contrary to wishes of the Security Council, is risible. Nor does it find any support in international law' <http://www.justice.org.uk/trainingevents/annuallecture/index/html> accessed 26 March 2007, at 19. Reference should also be made to the first public speech of Lord Steyn (an ex Law Lord) that he agreed with Lord Alexander 'that the Iraq war was unlawful' and 'in its search for a justification in law for war the government was driven to scrape the bottom of the legal barrel' <http://www.guardian.co.uk/constitution/story/o.9061,1597486,00.html> accessed 26 March 2007. Lord Steyn has also referred to the dell of the Attorney-General's advice as being 'A black day for the rule of law': 'Our Government and the International Rule of Law Since 9/11' [2007] EHRLR 1, 5. It is also interesting to note from the Butler Report that it is recorded as follows: 'The Attorney General informed Lord Falconer and Baroness Morgan at a meeting on 13 March of his clear view that it was lawful under Resolution 1441 to use force without a further United Nations Security Council resolution': Butler Report, n 74, at para 381. It appears from the historical record that this was the first time he advised in such unequivocal terms and questions would be asked of him, if an independent inquiry were to be held into the legality of the Iraq War, as to why he so advised these two particular figures, given that Baroness Morgan was at the time a mere adviser and Lord Falconer not directly concerned with the matters in issue.

This unilateral decision by the UK that the 678 authorisation had revived raises the following questions for the Attorney-General. First, as there is no reference in the advice of 7 March (or the statement of 17 March) as to the counter-arguments discussed above as to why 678 was not capable of being revived, and especially not by states acting unilaterally, were these alternative views considered and, if so, with what outcome? Second, it has always been the UK's view that the USA were acting unlawfully when, in the context of the enforcement of the no-fly zones, it said it could unilaterally decide that there had been a material breach of the ceasefire resolution and that, accordingly, it could rely on 678 as the justification for the use of further force. The Attorney-General notes this in paragraph 9 of his 7 March advice:

> they [the USA] maintain that the fact of whether Iraq is in breach is a matter of objective fact which may therefore be assessed by individual member states. I am not aware of any other state which supports this view. This is an issue of critical importance when considering the effect of Resolution 1441.

And he re-emphasises this in paragraph 22 of the same advice:

> By contrast [with the US position] the UK position taken on the advice of successive law officers, has been that it is for the Security Council to determine the existence of a material breach of the cease-fire.[79]

Given this, on 7 March what led to the *volte-face* of 17 March? Paragraphs 6 and 7 of the 17 March statement, when read with the extract above from the Butler Review, make the position clear:

> 6 The Security Council also decided in Resolution 1441 that, if Iraq failed at any time to comply with and co-operate fully in the implementation of Resolution 1441, that would constitute a further material breach.
>
> 7 It is plain that Iraq has failed so to comply and therefore Iraq was at the time of Resolution 1441 and continues to be in material breach.

But plain to whom? The Prime Minister had certified the breach, but on what basis? Was it on the basis of an alleged non-compliance with the terms of Operative Paragraph (OP) 3 of Resolution 1441 that provided that Iraq should, within 30 days, make an 'accurate, full and complete declaration of all aspects of its programmes to develop chemical, biological and nuclear weapons etc'?[80] If so, it is worth noting from Blix's account of the position that on 13 March, the key date when the

[79] One of the leaked Downing Street memoranda is a legal options paper of 8 March 2002 entitled 'Iraq: Legal Background' <http://www.downingstreetmemo.com/docs/legalbackground.pdf> accessed 22 November 2007. It also notes that the author was not aware of any other state that supports this view. The similarity of the language of this assessment strongly suggests that the Attorney-General's advice of 7 March 2003 was based, at least in part, on this paper; see Attorney-General's advice of 7 March 2003, n 7.

[80] It should be noted that it is not clear whether UK intelligence services ever made an assessment of the 12,000-page report that Iraq delivered on 7 December 2002 under the terms of OP 3 of Resolution 1441.

Attorney-General's advice was changed, he had been working very hard to produce a 'benchmarks' paper which would give Iraq five verifiable positions to achieve within a few days of 17 March so that the international community through the Security Council had the evidence as to whether it was disarming.[81] Indeed, on the very day that the Attorney-General decided it was lawful to proceed without a second resolution on the basis of these 'further material breaches', the UK's Ambassador, Jeremy Greenstock, was attempting to win support for a British benchmark paper. It seems very odd that, in circumstances where the Attorney-General had advised that the 'safest course' was to obtain a second resolution, where Tony Blair and Hans Blix had agreed the basis for a 'benchmarks' resolution, where on 13 March the UK Ambassador was still trying to gain support for that approach, where negotiations for a second resolution did not break down until after all the key decisions and advice had been given by the Attorney-General, nevertheless it was the Attorney-General's advice that the 678 authorisation was now revived, and that the legal position was clear. Thus, for instance, what if the discussions at the Council on 13 March had considered the question of Iraq's non-compliance with 1441 and, in accordance with OPs 4, 11 and 12, concluded it should give Iraq a further warning as to 'serious consequences' of a further non-compliance so that it was made to understand it was required to comply with the terms of a new 'benchmarks' resolution to be subsequently drafted, negotiated upon and adopted? This would have undoubtedly been both a further Council consideration but also, importantly, leading to a further Council decision.

The key question here is: what caused the Attorney-General to abandon the conventional UK view that the question of a material breach of the ceasefire sufficient to justify an invasion was a matter for the Security Council alone? In answering that question it is necessary to address the interpretation of, first, 'material breach' and, second, the phrases 'final opportunity' and 'serious consequences'.

A. The Issue of 'Material Breach'

The starting point is: what did the UK understand constituted a 'material breach'? The answer is to be found at paragraph 17 of the Attorney-General's 7 March advice. In the context of the question 'who makes the assessment of what constitutes a sufficiently serious breach' to destroy the basis of the ceasefire the advice

[81] H Blix *The Search for Weapons of Mass Destruction: Disarming Iraq* (London, Bloomsbury, 2004), pp245–8. It is worth noting Blix's account of his telephone discussion with Tony Blair on 10 March when Blair 'said they needed five or six items on which the Iraqis could demonstrate their compliance with UNMOVIC's work programme' and that Blair appears to have confirmed to Blix that the benchmarks process 'could extend a few days beyond March 17' (245). Later, he notes that the British Ambassador to the UN, Sir Jeremy Greenstock, was on 13 March trying 'desperately to win support for the British benchmark paper' and that Blix records it was only on 14 March that 'all efforts to reach an agreement in the Council had collapsed' (248).

notes public statements 'to the effect that only *serious* cases of non-compliance will constitute a further material breach.' The Attorney-General notes:

> the Foreign Secretary stated in parliament on 25 November that 'material breach' means something significant; some behaviour or pattern of behaviour that is serious. Among such breaches could be action by the Government of Iraq seriously to obstruct or impede the inspectors, to intimidate witnesses, or a pattern of behaviour where any single action appears relatively minor but the action as a whole add [*sic*] up to something deliberate and more significant; something that shows Iraq's intention not to comply. (para 17)

He then notes the long-held UK view of the revival argument that only the Security Council 'can decide if a violation is sufficiently serious to revive the authorisation to use force' (para 17). Thus, in relying on the Prime Minister's certification of further material breaches, the Attorney-General specifically endorses an approach that involves the Prime Minister's assessment (rather than the Council's) that these breaches were sufficiently serious or significant that it could be reasonably argued that the effect was 'to destroy the basis of the cease-fire'. And that in doing so the UK now, for the first time, decided to support the US position on material breaches. The legal *volte-face* becomes even more striking when considering further aspects of his advice.

It was the Attorney-General's opinion that the finding by the Security Council that there has been a sufficiently serious breach of 687 to revive 678 means that the phrase 'serious consequences' from OP13 amounts to an indication of the use of force (para 10). He relies on 'the previous practice and statements made by council members during the negotiation of Resolution 1441'. Further questions arise. First, he records fairly 'it is very uncertain to what extent the court [if the matter ever came before one] would accept evidence of the negotiating history to support a particular interpretation of the resolution, given that most of the negotiations were conducted in private and that there are not agreed or official records' (para 23). Second, what we have are the ambassadorial statements referred to above which indicate clearly that the majority of Member States had the clear impression that 1441 provided that more was needed and that this requirement was an assessment of the situation by the Council itself.[82] Third, in relying on the previous practice of Council members, he is seeking to assert a rule of customary international law that a state or states may, acting unilaterally, decide this matter in circumstances where he has recorded twice in his advice that the USA stood alone on this, and that the UK had always had a different position. The advice of 17 March also leaves

[82] For example, the Syrian Ambassador said, on the record: 'Syria voted in favour of the Resolution, having received assurances from its sponsors, the United States of America and the United Kingdom, and from France and Russia through high-level contacts, that it would not be used for a pretext for striking against Iraq and does not constitute a basis for any automatic strikes against Iraq. The Resolution should not be interpreted, through certain paragraphs, as authorising any state to use force. It reaffirms the central role of the Security Council in addressing all phases of the Iraqi issue'. See <http://www.un.org.news/press/docs/2002/sc7564.doc.htm> accessed 26 March 2007 for a summary of all 15 ambassadorial statements and for a full text of the Syrian statement, see <http://www.en.wikipedia.org/wiki/un_security_council_1441> accessed 26 March 2007.

completely unaddressed the serious concerns of commentators such as Gray that Resolution 688, not being a chapter VII resolution, did not allow the use of force to enforce the no-fly zones.[83] It is difficult to imagine what other practice he could have had in mind in creating this 'rule'. Fourth, did he consider the body of opinion that references to 'serious consequences' and 'final opportunity' were clear, unequivocal warnings to Iraq but not intended to be capable of amounting to an authorisation? It is far from accepted or demonstrated that 'serious consequences' indicates the use of force.

The legal basis for the Iraq War, adopted by the UK government (but by necessary implication the US government too) rested on three planks: one, that there had been a 'material breach' of 687 and OP 4 of 1441; two, that Iraq had been afforded a 'final opportunity' to comply 'with its disarmament obligations under relevant resolutions of the Council' (OP 2 of 1441); three, that the 'Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations' (OP 13 of 1441). This is made clear by the following paragraphs of the Attorney-General's written statement to the Houses of Parliament of 17 March 2003:

3. A material breach of Resolution 687 revives the authority to use force under Resolution 678.
4. In Resolution 1441, the Security Council determined that Iraq has been and remains in material breach of Resolution 687, because it has not fully complied with its obligations to disarm under that resolution.
5. The Security Council in Resolution 1441 gave Iraq 'a final opportunity to comply with its disarmament obligations' and warned Iraq of the 'serious consequences' if it did not.

These paragraphs need to be read alongside paragraphs 6 and 7 set out above. Accordingly, it is necessary to ask whether international law, reflecting state practice, recognises that a 'material breach' can have this impact in these circumstances, or recognises that the phrases 'final opportunity' and 'serious consequences' amounted in this context to an authorisation of the use of force under chapter VII of the UN Charter. There can be no doubt that this was the basis of the UK government's case, as made clear from the following passage from the Attorney-General's 7 March advice:

> The previous practice of the Council and statements made by Council members during the negotiation of Resolution 1441 demonstrate that the phrase 'material breach' signifies a finding by the Council of a sufficiently serious breach of the cease-fire conditions to revive the authorisation in Resolution 678 and that 'serious consequences' is accepted as indicating the use of force. (para 10)

There are a number of aspects of the 7 March advice and the 17 March statement that are striking: first, the issue of justiciability, second, the relevance of 'State practice', and third, the role of the Security Council. I will address these in turn.

[83] Gray, n 30, at 162.

i. Justiciability

In *CND* the court found that to interpret 1441 required the legal issue to be divorced from the conduct of international relations, which was not possible, and that, accordingly, the court was being asked to enter a 'forbidden area' of the government's conduct of international relations.[84] In relying on *CND* the Court of Appeal in *Gentle* held that it was not possible to consider legal questions of international law while respecting the principle of non-justiciability of non-legal issues of policy. It held that no sensible distinction could be made between a duty to take reasonable care to ensure that military operations are lawful, on the one hand, and militarily or politically desirable or sensible on the other. It also held, as related reasoning as to why the claim failed, that it was prohibited from considering the proper construction of Security Council resolutions since this would involve examining the discussions and negotiations between states leading to them—which involved political as well as legal questions.

Four points can be made on justiciability: first, the Attorney-General was asked to give his legal advice on the question of international law precisely because it is a discrete question of law capable of isolation and not purely a policy or political issue. He expressed no reservations about the difficulties of separating out that legal issue. It is interesting that the Attorney-General himself expressly introduces the so-called 'forbidden' areas of discussions and negotiations between states leading up to the adoption of 1441. In his 7 March advice he notes: 'I was impressed by the strength and sincerity of the views of the US Administration which I heard in Washington on this point [that is, that OP 12 of 1441 does not concede the need for a second resolution]'.[85] He further notes, however, that 'Having regard to the information on the negotiating history which I have been given and to the arguments of the US Administration which I heard in Washington I accept that a reasonable case can be made that Resolution 1441 is capable in principle of reviving the authorisation in 678 without a further resolution'.[86] Pausing only to note that 'a reasonable case' is difficult to square with an unequivocal assertion on the point 10 days later, it is quite extraordinary to view these statements in context. The Attorney-General himself notes the difficulty of relying on the assertions of

[84] See n 35: Richards LJ at 59(1).

[85] Attorney-General's advice of 7 March 2003, n 7, at para 23.

[86] AttorneyGeneral's advice of 7 March 2003, n 7, at para 28. There is further insight on this point from the disclosure tatement from the Legal Secretariat to the Law Officers of 25 May 2006 in response to an enforcement notice of 22 May 2006 under the Freedom of Information Act 2006 from the Information Commissioner <http://newsvote.bbc.co.uk/mpapps/pagetolls/print/news.bbc.co.uk/1/hi/uk_politics/50> accessed on 7 November 2007. This records that on 10 February 2003 the Attorney-General 'had meetings in Washington with members of the US Administration who have been closely involved in the drafting and negotiation of Resolution 1441' (para 4), that a 'principal purpose of these enquiries and discussions was for [him] to inform himself about ... whether the resolution was intended to require a further Council decision, or merely a Council discussion' (para 5). He records that the 'interpretation of the Foreign Secretary, Sir Jeremy Greenstock and the US Administration in the light of those negotiations, was that a further decision of the Security Council was not required' (para 13).

the US Administration that the French (and others) knew and accepted that they were voting for a further discussion and no more. As he notes:

> We have very little hard evidence of this beyond a couple of telegrams recording admissions by French negotiators that they knew the US would not accept a resolution which required a further Council decision ... a further difficulty is that, if the matter ever came before a court, it is very uncertain to what extent the court would accept evidence of the negotiating history to support a particular interpretation of the resolution, given that most of the negotiations were conducted in private and that there are no agreed or official records. (para 23)

Thus, if it is difficult to rely on US assertions or on the negotiating history in these circumstances it seems odd that the Attorney-General should then go on to conclude as he did in paragraph 28 as set out above. Further, it is to be regretted that the Court of Appeal found that the examination of these issues and negotiations as political questions, and thus being in forbidden areas, rendered the claim unsuccessful when it was those very same discussions and negotiations which became the subject of assertions by the US Administration, that led to the Attorney-General's fateful conclusion that a 'reasonable case' could be made, which then converted to the unequivocal position of the 17 March statement. If, as is clear, the Attorney-General's legal judgment on the legal issue took into account and gave considerable weight to these negotiations and discussions, how then can it be rational for the court to render the outcome, at least, of those negotiations and discussions out of bounds and beyond judicial scrutiny? One can see the difficulties that a court on judicial review will itself, in effect, interrogate that political material but does it not add considerable weight to the argument that an Article 2 inquiry that complies with the relevant Strasbourg jurisprudence on the requirements of the adjectival duty should be held so that, at least, the Attorney-General should be required to explain himself?

The second point on justiciability is that compliance with international law is a hard-edged legal question, even if it takes place in a highly political context. In *A (no 1)*, which concerned the question of indefinite executive detention without due process of foreign nationals by the UK government, the House of Lords was required by Article 15 of the ECHR to consider whether the derogation from the Convention complied with the UK's other international obligations. Clearly, the case had a significant political context, being a response from the UK government to the so-called 'war on terror'. The House of Lords did not characterise the issue of the derogation's compliance with international law as 'purely political (in a broad or narrow sense)'[87] and therefore non-justiciable. By the same token, the invasion of Iraq's compliance with international law was relevant to its 'political desirability': the government itself repeatedly stated in public in the month leading up to the war that it would only act if the invasion did also so comply.[88] That does not, it seems, render the question non-justiciable per se.

[87] *A and others v Secretary of State for the Home Department* [2005] 2 AC 68 (Lord Bingham).
[88] See n 14.

Third, the fact that the court may be required to consider political negotiations and discussions does not imply that the issue is non-justiciable. One need look no further than Keir Starmer's chapter in this volume on the case of *Al-Jedda*[89] for that proposition to be made good. In that case the courts, including the House of Lords, were required to interpret Security Council Resolution 1546 in the context of whether it was an obligation for the purposes of Article 103 of the UN Charter and were specifically obliged to consider discussions by various states that led to it being passed.[90] Additionally, the UK courts regularly consider Hansard and White Papers—which include political discussions.

Fourth, Strasbourg jurisprudence on the adjectival duty of Article 2, if properly analysed, demonstrate the general proposition that unless there is an identifiable question of law capable of determination, the courts will not and cannot decide it.[91] The European Court of Human Rights has reviewed highly sensitive areas of government, such as the activities of Secret Service operations in the case of the killings of IRA members in Gibraltar.[92] It does not recognise that there are areas within the exclusive competence of the executive which are beyond the reach of the Convention.

ii. Stated Practice

The second striking aspect is the reliance on state practice to justify the argument that there had been a finding by the Council of such a serious breach as to revive the authorisation in 678. It has already been noted that whether the authorisation from 678 had survived at all beyond 687 is not accepted by the vast majority of international lawyers. However, there is a separate point regarding whether a chapter VII authorisation of force can be triggered at all by a finding as to a material breach in these circumstances. It is important to recall that 678 was the first authorisation of force after the end of the Cold War. It used the phrase 'all necessary means' (OP 2) for the first time as a legal shorthand for force. As Simma notes, at the time this was itself controversial and not generally accepted. However, as the phrase was repeated in subsequent contexts, for example, Bosnia, Somalia, Rwanda and Haiti,[93] commentators reflected that accepted state practice relying on the phrase as an authorisation to use force indicated that this had become the standard phrase used by the Security Council to mean 'force'. It is stating the obvious to point out that when the Security Council means to authorise force as a last resort, so that states are protected by Article 103 of the Charter

[89] K Starmer, 'Responsibility for Troops Abroad: UN Mandated Forces and issues of Human Rights Accountability' (ch 10 in this book).

[90] *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, paras 17, 22, 26 and 34.

[91] See, eg, *Taylor v United Kingdom* (App no 23412/94) (1994); *McBride v United Kingdom* [2006] 43 EHRR SE10; *Jordan v United Kingdom* [2003] 37 EHRR 2.

[92] *McCann v United Kingdom* (1995) 21 EHRR 97.

[93] See UNSC Resolutions at n 19.

from breaching the *jus cogens* obligations of Article 2(4) of the Charter, it does so in the clearest possible terms, using that phrase, in order that all states are certain as to the consequences. That this was the understanding of at least the USA in the context of Iraq is underpinned by newspaper reports that prior to publishing a draft resolution on 24 September 2002, which was not adopted but did contain the phrase 'all necessary means', it had considered going further, 'demanding the Security Council approved the use of "all necessary means" to enforce its will'.[94] Thus it was argued in an opinion of 3 March 2003 from Singh and Kilroy that the subsequent draft resolution would not authorise force, as 'if wording exists which clearly authorises force, and this wording has not been pursued in favour of alternative wording which does not, then this is the clearest indication that, if adopted, this Draft Resolution would do something less than authorise force'.[95] If that is correct about the Draft Resolution which was never adopted but bearing in mind that in the first of its two Operative Paragraphs it attempted to shore up 1441 by deciding 'that Iraq had failed to take the final opportunity afforded to it in Resolution 1441', then the Attorney-General's position is even more surprising. He specifically advised 'that the safest legal course would be to secure the adoption of a further resolution to authorise the use of force ... and that it should establish that the Council has concluded that Iraq has failed to take the final opportunity offered by Resolution 1441, as in the Draft which has already been tabled' (para 27). So notwithstanding the advice referred to above in paragraph 10, he stood back and advised that a second resolution was required. However, when the negotiations for that resolution appeared to be about to break down, the Attorney undertook a complete *volte-face* and advised that it was permissible to proceed on the basis of the revival doctrine without that second resolution. Thus, one has no idea what his justification was to shift from the position of 'reasonable case' on 7 March to a completely unequivocal position 10 days later.

There is, therefore, the clearest indication from state practice that an authorisation in clear terms was required, that the language of 'material breach' in OPs 1 and 4 of 1441 did not amount to such an authorisation, and that the procedure decided upon by Ops 11 and 12 was that, in the event of a report from UNMOVIC and the IAEA that Iraq had failed to comply with its disarmament obligations, it was for the Council to consider the report and decide on what, if any, further action was required. This is consistent with the following: one, that authorisations of force are a matter for the collective decision-making of the Council and not to be the subject of unilateral decisions by a state or states based on their own interpretation of words or phrases in past resolutions; two, that the Council had deliberately occupied the field on the issue of Iraq's disarmament obligations by deciding 'to remain seized of the matter' in OP 34 of 687, which decision was subsequently reaffirmed in all 42 relevant resolutions that ended with 1441. The

[94] J Borger, 'Analysis: Julian Borger in Washington' *Guardian* (London 25 February 2003) <http://politics.guardian.co.uk/foreignaffairs/comment/0,,902523,00.html> accessed 22 November 2007.

[95] *The Case Against War*, n 20, at 195.

Council had re-asserted its authority in 687, and continued to do so; three, the dangers inherent in such unilateral interpretations are underlined by the UK government's own former legal adviser, Sir Michael Wood, who stresses that resolutions 'are often drafted by non-lawyers, in haste, under considerable political pressure, and with a view to securing unanimity within the Council'.[96]

Finally, subsequent state practice has demonstrated unequivocally that specific authorisations using clear terms are required. Presumably reacting to the US and UK failure to keep assurances that there was no automaticity in 1441, the Security Council, faced with a similar crisis in Iran (and previously North Korea), now includes a specific Operative Paragraph to make it impossible for there to be a repeat of what took place in Iraq.[97]

iii. The Role of the Security Council

Another aspect of the debate about the legality of the invasion concerns what Ops 4, 11 and 12 of 1441 amount to in terms of the Security Council's role. One needs to recall at the outset what Warbrick describes as 'the compact' whereby there is 'a vesting of authority in the Security Council to maintain international peace and security by a system of collective security'.[98] Against that the Attorney-General notes: 'The narrow but key question is: on the true interpretation of Resolution 1441 what has the Security Council decided will be the consequences of Iraq's failure to comply with the enhanced regime' (para 12). Another, or a more precise, way of putting it is: 'Whether a report comes to the Council under OP4 or OP11, the critical issue is what action the Council is required to take at that point' (para 21). However, earlier in discussing Ops 4, 11 and 12 he notes that what is clear is that 'if Iraq fails to comply there will be a further Security Council discussion. The text, is, however ambiguous and unclear on what happens next' (para 13). Given earlier warnings referred to above from Francks as to making 'a complete mockery of the entire system'[99] or that of Lobel and Ratner about powerful states using UN authorisations to serve their own interests,[100] it is unsurprising that the Attorney-General at first took the view that 'the safest legal course' would be to avoid these dangers by obtaining the second resolution he advises upon in paragraph 27. It is noteworthy that a mere six days later he resolved to authorise a course of action that amounted to a unilateral decision that what had previously been ambiguous and unclear was now 'plain'.[101]

[96] MC Wood, n 39, at 82. He also emphasises that 'such drafting practices as exist are not always well-known or appreciated, nor are they always applied consistently. The importance which lawyers attach to consistency of drafting has to be balanced against the need for flexibility if general agreement is to be reached and as often as not reached swiftly'.

[97] UNSC Res 1747 (24 March 2007) UN Doc S/Res/1747 para 13(c); UNSC Res 1737 (2006) S/RES/1737 para 24(c); UNSC Res 1718 (14 October 2006) UN Doc S/Res/1718 para 16; UNSC Res 1696 (2006) S/RES/1696 para 8.

[98] *The Case Against War*, n 20, at 46; see also Sarooshi, n 41.

[99] See Franck, n 33, at 139.

[100] See Lobel and Ratner, n 18, at 127.

[101] Attorney-General's advice of 17 March 2003, entitled 'Legal basis for use of force against Iraq' <http://www.pm.gov.uk/output/Page3287.asp> accessed 22 November 2007.

The Attorney-General addresses the problem that if OP 12 requires only the council to meet and consider, not assess and decide, this 'reduces the role of the council discussion under OP12 to a procedural formality'. He then notes:

> Others have jibbed at this categorisation, but I remain of the opinion that this would be the effect in legal terms of the view that no further resolution is required. The Council would be required to meet, and all members of the Council would be under an obligation to participate in the discussion in good faith, but even if an overwhelming majority of the Council were opposed to the use of force, military action could proceed regardless. (paragraph 24(iii))

Of course, the public was not to see this advice for over two years and plainly was never meant to see it. One notes it was not even disclosed to the Cabinet. However, it seems extraordinary that the Attorney-General could possibly have interpreted the ambassadorial statements that he discussed in paragraph 25 as less than clear that none of the other 13 Member States were prepared to allow the vesting of collective security provisions as meaning no more than a discursive role for the Council. And this in the context of Alexander's view that: 'surely there has been no more important or far-reaching issue of law for many years'.[102] It is noted that Lord Steyn (as an ex-Law Lord) later described this legal justification as scraping 'the bottom of the legal barrel'.[103]

B. The Issues of 'Final Opportunity' and 'Serious Consequences'

The first point to be made is that, as dealt with above, these phrases are not the equivalent of 'all necessary means' or 'all necessary measures' which is the established phrase used by the Security Council to authorise force. It is worth re-emphasising the importance of Member States, who decide to take up an authorisation to use force, being certain that this authorisation in clear terms triggers Article 103 of the Charter. Otherwise not only is that Member State open to challenge before the International Court of Justice by the state on the receiving end of such force for breach of the peremptory norm of Article 2(4),[104] but it is also open to challenge in domestic legal systems that recognise that the rule of customary international law prohibiting the crime of aggression is, in that criminal legal system, also a domestic crime.

The second point is that 'serious consequences' is evidently less of a warning to Iraq than the 'severest consequences' warned of in OP 3 of 1154.[105] That chapter VII resolution warning of 2 March 1998 was followed by another on 5 November 1998

[102] See speech of Lord Alexander, above, n 27.

[103] See *Guardian*, above, n 78.

[104] As in, eg, *Nicaragura v United States of America*, above, n 17.

[105] OP 3 reads: 'Stresses that compliance by the Government of Iraq with its obligations, repeated again in the memoranda of understanding, to accord immediate, unconditional and unrestricted access to the Special Commission and IAEA in conformity with the relevant resolutions is necessary for the implementation of resolution 687 (1991), but that any violation would have severest consequences for Iraq': UNSC Res 1153, n 28.

when Resolution 1205 recalled 1154[106] and by OP 1 condemned 'the decision by Iraq of 31 October 1998 to cease cooperation with the Special Commission as a flagrant violation of Resolution 687 (1991) and other relevant resolutions'. As is noted above in the passage from Blokker, a threat of 'severest consequences' was not sufficient to provide automaticity. Indeed, the United States attempted to persuade the Council to include an express authorisation of force in 1154, but failed. Again, the clearest of indications that 'severest consequences' does not amount to such an authorisation, and is no more than a warning to Iraq. The issue of implied authorisation remained a live issue, as noted above in the Attorney-General's references to the USA being alone in asserting that it could unilaterally declare that Iraq had breached 687 such that 678 revived. Further, the issue was particularly key in debates at the Council, following Operation Desert Fox, a US and UK series of air strikes on Iraq in December 1998. The UK and the USA argued that 1205 implicitly revived the authorisation of the use of force contained in 678. The matter was debated at the 3,930th meeting of the Council on 23 September 1998. The records show that the majority of states speaking in the debate argued that the use of force by the UK and the USA under the purported authorisation of resolutions 678, 1154 and 1205 was unlawful.[107] Thus, given that much of the implied authorisation argument deployed by the UK and the USA hinged on the threat of 'severest consequences', it is apposite to note that most Member States, including the other three Permanent Members of the Security Council, did not consider the interpretation of 678, 1154 and 1205 to the effect of an authorisation to be compatible with the framework laid down for collective decision-making. The UK and the USA had in this context fought and lost the argument that the phrase 'severest consequences' was a precursor to the revival of 678.

The third point focuses on the precise wording of OP 13 of 1441. It states that the 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'. It seems clear that the words 'in that context' indicate that any serious consequences which Iraq will face are to be decided upon in the context of the discussion by the Council envisaged by OP 12. Further, this paragraph does not itself warn of serious consequences but is a reference to the warning made in 1154 as to 'serious consequences' which this Operating Paragraph 'recalls'.[108] Lowe says on this:

[106] By Preamble para 1 of UNSC Res 1205 (5 November 1998) UN Doc S/RES/1205.

[107] Boris Yeltsin, President of the Russian Federation, stated that '[t]he UN Security Council resolutions on Iraq do not provide any grounds for such action. By use of force, the US and Great Britain have flagrantly violated the UN Charter and universally accepted principles of international law, as well as norms and rules of responsible conduct of states in the international arena … In fact, the entire system of international security with the UN and the Security Council as its centre-piece has been undermined'. China also expressed the view that the actions violated international law, and France ended its role in policing the no-fly zones. The French Minister for Foreign Affairs stated that France had ended its participation since the operation changed from surveillance to the use of force, and he considered that there was no basis in international law for this type of action. See C Gray, 'From Unity to Polarisation: International Law and the Use of Force Against Iraq' (2002) 13 *EJIL* 1, 22; and C Antonopoulos, 'The Unilateral Use of Force By States After the End of the Cold War' (1999) *JACL* 117, 155.

[108] It should be noted that the first paragraph in the Preamble of 1441 recalls 'all its previous relevant resolutions': UNSC Res 1441 (8 November 2002) UN Doc S/RES/1441.

> The statement in paragraph 13 ... 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 authorisation 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.[109]

The fourth point focuses on the reference to 'final opportunity' and whether that adds anything to the warning about 'serious consequences'. It is interesting to note that the draft resolution published on 24 February 2003 which was sponsored by the UK and the USA, and subsequently failed to get the necessary support, attempted to tie in 'final opportunity' with the crucial issue of whether the Security Council was intending merely to consider the issue of Iraq's non-compliance, or whether it was to consider and then decide what, if any, further action was required. OP 1 of the draft stated that the Council acting under chapter VII: 'Decides that Iraq has failed to take the final opportunity afforded to it by resolution 1441'. First, it is noteworthy that this draft faced up to the central problem, namely, that it was for the Council to decide on future action; second, having done so it does no more than attempt to have the Council decide a question of past fact, rather than decide as to an authorisation as to the future action of member states. That even this anodyne decision could not be agreed upon by other Member States, and Permanent Members, speaks volumes of their determination not to authorise force at this stage.

The fifth and final point also concerns 'final opportunity', and the question as to whether force automatically follows after the words have been used. Besides what is said above about Council practice on the use of the term 'all necessary means', it is obvious that just because Iraq had had its final opportunity tells Member States nothing about what was now decided or had been authorised. The need for certainty on this is emphasised by the point made above regarding Article 103. Accordingly, Iraq's failure to take its final opportunity might have led to the Security Council considering that, although it had indeed so failed, nevertheless the contemporaneous reports from IAEA and UMMOVIC led it to decide that an authorisation of force was not at this stage appropriate as Iraq was making progress towards full compliance and cooperation. Instead it may have decided that Article 41 measures[110] were appropriate at this stage before considering whether to decide to take Article 42 measures. Even if it had at this first stage

[109] *The Case Against War*, n 20, at 172.

[110] Art 41 of the UN Charter reads: 'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'.

moved immediately to Article 42 measures, or had first taken Article 41 and then later Article 42 measures, there are other possibilities of Article 42 measures not, at first, involving force. Thus, it may have decided to mount a blockade first. A determination that there has been a breach of the peace under Article 39 does not automatically entail military action. The importance of Article 39 is that it goes on to provide that the Council 'shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'.

Accordingly it was not open to the USA and the UK to pre-empt the outcome of the Council's discussions and assume not only that references to 'final opportunity' and 'serious consequences' automatically entailed Article 42 measures had been authorised and that these measures were not to first involve other alternatives such as a blockade, or even limited action by land in order to minimise civilian casualties. Instead, it was to be assumed that the Council had not just authorised the full force of Resolution 678, but had gone much further and authorised a full-scale invasion of Iraq. It will be recalled that 678 did no more than authorise the Coalition 'co-operating with the Government of Kuwait ... to use all necessary means to uphold and implement resolution 660',[111] and that 660 was limited to, in effect, restoring Kuwaiti sovereignty. It was precisely for these reasons that China, as a Permanent Member, through its ambassadorial statement as 1441 was adopted, noted that the USA and the UK had 'accommodated our concerns' and crucially that: 'The text no longer includes automaticity for authorising the use of force. According to the resolution, only upon receipt of a report by UNMOVIC and the IAEA on Iraq's non-compliance and failure to cooperate fully in the implementation of this resolution shall the Security Council consider the situation and take a position' (emphasis added).[112]

Whether or not the public will ever get to confront the true extent of the public defiance of international law on *jus ad bellum* depends, in the context of this litigation, on whether the judiciary in the UK follows a line of recent cases in which it has demonstrated that it is prepared to intervene in the area of executive decisions of high policy[113] or follow a more conservative route of judicial deference[114] and non-justiciability.[115] There is a compelling argument to be made that in the context

[111] UNSC Res 678, OP 2.

[112] By Ambassador Zhang Yashan, (8 November 2002) <http://globalpolicy.igc.org/security/issues/iraq/document/2002/1108chinastat.htm> accessed 23 November 2007.

[113] *A and others v Secretary of State for the Home Department* [2004] UKHL 56; *A and others v Secretary of State for the Home Department* [2005] UKHL 71; *R (on the application of Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55, *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311.

[114] F Klug, 'Judicial Deference under the Human Rights Act 1998' (2003) *EHRLR* 125, 128–9. For an assessment of, and response to, this critique, see A Kavanagh, 'Unlocking the Human Rights Act: the Radical Approach to Section 3(1) Revisited' (2005) *EHRLR* 259, at 267–70. See also generally: R Clayton, 'Judicial Deference and "democratic dialogue": the legitimacy of judicial intervention under the Human Rights Act 1998' [2004] *PL* 33; and J Jowell, 'Judicial Deference: servility, civility or institutional capacity' [2003] *PL* 592.

[115] Singh, n 2.

of actual or potential violations of human rights there is no area of government policy, not even the decision to wage war, that is automatically 'forbidden territory'. Strasbourg and UK jurisprudence in the context of a state's liability for interference with the right to life demands that lessons be learned from the outcome of an independent inquiry.[116] In the context of the Iraq War, lessons learned do not necessarily include that it was, or was not, an aggressive war (as there seems little doubt it was), nor even how inappropriate political pressure was applied to persuade the Attorney-General to change his advice. It may be that the real lesson to be learned concerns the future of international law and its key role in regulating the behaviour of states, and particularly the most powerful, to ensure the peaceful resolution of disputes, in a context where the USA and the UK have paid little regard to this key principles.

IV. Conclusion

The two themes addressed in this chapter speak of the resistance to government action purportedly taken in accordance with international law. Through pre-emptive public and legal enquiry *and* post-conflict legal review of the decision to go to war, there has been a significant assessment of both the action taken and the legal basis relied upon. It might well be clear that these inter-related stories illuminate how a democratic state, supposedly fully supportive of the ideals and provisions of the UN Charter, can operate so as to undermine generally accepted key precepts of international law that have been constructed over the past 60 years. But they might also tell us considerably more about the parallel threat to and opportunity for justice that international law poses. Taking a purely practical perspective, and putting aside more complex theoretical arguments concerning the nature of global justice and the basis upon which international law could and should be constructed, the Iraq War has been extraordinary in its effects.

From the perspective of 'threat', international law has been shown to be capable of manipulation for the purposes of justifying military action that has had a devastating effect upon the population of a whole country. Of course, some would say that it was ever thus. Power and *realpolitik* have always relied upon any argument found favourable to support a desired course of action, and law has always been a tool employed in that respect. The distinction may be, however, that international law has occupied a position of great strategic significance for those liberal democracies concerned since the end of the Cold War. It has provided an ethical framework that supposedly distinguished between right and wrong and enabled

[116] *McKerr v UK* (App no 28883/95) (2002) 34 EHRR 553; *Jordan v UK* (App no 24746/94) (2003) 37 EHRR 52. *R. (on the application of Amin) v Secretary for State for the Home Department [2003] UKHL 51.*

the actions of states to be judged. The first Gulf War confirmed that position of relative moral and legal certainty. But Iraq 2003 and all those legal machinations surrounding the invasion have undermined both the framework of and the belief in law as a force for global good. Weaknesses in international law have been exploited through legal sophistry and political manipulation. The dangers inherent in the current system of international law have thus been exposed, providing a precedent for other states to engage in 'pre-emptive self-defence' regardless of the legal environment as generally understood.[117]

But with that threat has come opportunity for resistance. Whereas before the end of the Cold War international law was known to possess little force other than moral, since the removal of bipolar global politics it has been invested with considerable significance. It has been a legal source for national judgement on the external affairs of states. 'Live by the sword, die by the sword' could now be translated as 'Live by the law, die by the law'. The cases and inquiries considered in this chapter confirm this rather optimistic revised epithet. They suggest that whatever power may do to use international law for its own purposes, law has already reached a position of independence from such political control. International law now possesses an authority of its own that has permeated the legal systems of those who previously might have wished for a weighty international law but believed it should never prevent them from taking any particular desired action. Now it transcends the international/national divide providing people, the public and individuals of conscience with the means of critique and one form of resistance. That is the story that underpins the challenges that have been described in this chapter. At the very least it gives the hope that, paraphrasing Hans Kelsen,[118] the idea of law will defeat the ideology of power. And in so doing, those seeking meaning behind the loss of life and suffering experienced on both sides of the conflict will find some evocative adjudicative avenue for their pains.

[117] The invasion of Lebanon by Israel in 2006 was a prime example of where the legal arguments deployed by the USA and the UK in Iraq were mimicked.

[118] H Kelsen, *Peace Through Law* (Chapel Hill, University of North Carolina Press, 1994).