

**CRISIS ACTION/PEACERIGHTS**  
**IN THE MATTER OF THE POSSIBLE USE OF FORCE AGAINST IRAN**

**JOINT OPINION**

**INTRODUCTION**

1. We have been instructed by Public Interest Lawyers to advise Crisis Action and Peacerrights on certain questions relating to the possibility that the US might use UK airbases or an Irish airport to launch a strike or strikes against Iran. We shall focus on the position regarding the UK; but the principles that we explain are (we believe) equally applicable to Ireland. A summary of our Opinion can be found at the end.
2. Our response will be clearer if we begin with the question of the legality under international law of any strike against Iran, and then move to address the other questions put to us.

**THE LEGALITY OF AN ATTACK ON IRAN**

3. International law on the use of force is clear. It was set out by the then Attorney-General, Lord Goldsmith, in advice dated 7 March 2003. There he wrote:-
  - “2. ... there are generally three possible bases for the use of force:
    - (a) self-defence (which may include collective self-defence)
    - (b) exceptionally, to avert overwhelming humanitarian catastrophe; and
    - (c) authorisation by the Security Council acting under Chapter VII of the UN Charter.”<sup>1</sup>He noted that base (b), the use of force to avert overwhelming humanitarian catastrophe, “remains controversial”. As there is no reason to suppose that this basis for the use of force might possibly be relevant in the context of Iran, we shall say no more about it.

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<sup>1</sup> The advice related to the invasion of Iraq. Unusually it has entered the public domain, having been disclosed by the Government after parts of it were leaked in 2005. The Attorney’s advice was published at < [www.attorneygeneral.gov.uk/sub\\_disclosure\\_log\\_2006.html](http://www.attorneygeneral.gov.uk/sub_disclosure_log_2006.html) >, and is reprinted in the *British Year Book of International Law*, vol. 77, pp. 819-829 (2006).

4. The Attorney General's statement of the law would be broadly accepted by practically all international lawyers as an accurate summary of the circumstances in which force may lawfully be used against another State.
5. There has been no UN Security Council authorisation for the use of force against Iran, and none appears to be likely. If the Security Council were to pass any such resolution, its terms would have to be read and considered carefully, because they would determine the limits of the authorisation to use force. But as there is no reason to suppose that this might be a possible basis against Iran, we shall say no more about it. It is important to note, however, that (contrary to opinion in some quarters) the legal basis given by the British Government for the invasion of Iraq in 2003 was *not* the doctrine of self-defence (still less the notion of "pre-emptive strikes"), but rested exclusively upon base (c): however controversial that suggestion may have been (and most international lawyers disagreed with it) the Attorney General was clear that the only possible basis for the invasion of Iraq was authorisation by the UN Security Council, something which cannot be said to be available as things stand in relation to Iran.
6. That leaves (a), self-defence, as the only possible basis for the use of force against Iran. It is important to appreciate the subtle differences between UK and US views of international law on this point.

#### ANTICIPATORY AND PRE-EMPTIVE SELF-DEFENCE

7. The USA has developed a doctrine of 'pre-emptive self-defence'. In a section of the *US National Security Strategy 2006*, under the heading "Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction", the doctrine is referred to as follows:–

"Our strong preference and common practise is to address proliferation concerns through international diplomacy, in concert with key allies and regional partners. If necessary,

however, under long-standing principles of self defense, we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack. When the consequences of an attack with WMD are potentially so devastating, we cannot afford to stand idly by as grave dangers materialize. This is the principle and logic of preemption. The place of preemption in our national security strategy remains the same. We will always proceed deliberately, weighing the consequences of our actions. The reasons for our actions will be clear, the force measured, and the cause just."<sup>2</sup>

8. In 2004 the British Government was asked whether it accepted the legitimacy of pre-emptive armed attack as a constituent of the inherent right of individual or collective self-defence under Article 51 of the UN Charter. The Attorney General, Lord Goldsmith, replied in Parliament on 21 April 2004. His reply is a detailed and authoritative statement of the position of the British Government, which is in our view an accurate statement of international law; and we are confident that it would be accepted as such by the overwhelming majority of international lawyers.

9. It is worth setting out at the Attorney's statement at some length. It reads, in part, as follows:—

“Article 51 of the Charter provides that,

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations".

It is argued by some that the language of Article 51 provides for a right of self-defence only in response to an actual armed attack. However, it has been the consistent position of successive United Kingdom Governments over many years that the right of self-defence under international law includes the right to use force where an armed attack is imminent.

It is clear that the language of Article 51 was not intended to create a new right of self-defence. Article 51 recognises the inherent right of self-defence that states enjoy under international law. That can be traced back to the "Caroline" incident in 1837. .... It is not a new invention. The Charter did not therefore affect the scope of the right of self-defence existing at that time in customary international law, which included the right to use force in anticipation of an imminent armed attack.

...It is ... the Government's view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote. However, those rules must be applied in the context of the particular facts of each case. That is important.

The concept of what constitutes an "imminent" armed attack will develop to meet new circumstances and new threats. For example, the resolutions passed by the Security Council in the wake of 11 September 2001 recognised both that large-scale terrorist action could

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<sup>2</sup> < <http://www.whitehouse.gov/nsc/nss/2006/sectionV.html> >

constitute an armed attack that will give rise to the right of self-defence and that force might, in certain circumstances, be used in self-defence against those who plan and perpetrate such acts and against those harbouring them, if that is necessary to avert further such terrorist acts. It was on that basis that United Kingdom forces participated in military action against Al'Qaeda and the Taliban in Afghanistan. It must be right that states are able to act in self-defence in circumstances where there is evidence of further imminent attacks by terrorist groups, even if there is no specific evidence of where such an attack will take place or of the precise nature of the attack.

Two further conditions apply where force is to be used in self-defence in anticipation of an imminent armed attack. First, military action should be used only as a last resort. It must be necessary to use force to deal with the particular threat that is faced. Secondly, the force used must be proportionate to the threat faced and must be limited to what is necessary to deal with the threat.

In addition, Article 51 of the Charter requires that if a state resorts to military action in self-defence, the measures it has taken must be immediately reported to the Security Council. The right to use force in self-defence continues until the Security Council has taken measures necessary to maintain international peace and security. That is the answer to the Question as posed.”<sup>3</sup>

10. The key passage is that which states that it is “the Government's view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote.” That distinguishes the UK position from the US position, the latter apparently accepting that States are entitled to use force pre-emptively even before any actual attack is imminent. There can be little doubt that the Attorney’s speech was intended precisely to signal that distinction, and to distance the UK from the US doctrine of pre-emption.
11. It must, however, be emphasised that the distinction is subtle and not as great as it may at first appear. Even on the UK view, force can lawfully be used when there is good reason to believe that an actual attack is imminent: it is not necessary to wait for the attack to begin before using force in self-defence against it.
12. The plain and unavoidable consequence of this principle of international law, expressly accepted by the British Government, is that no attack could be launched

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<sup>3</sup> House of Lords Debates (Hansard), 21 April 2004, Vol. 660, columns 369-372; reprinted in the *British Year Book of International Law*, vol. 75, pp. 822-825 (2004).

lawfully against Iran unless an attack by Iran were reasonably believed to be imminent.

13. It follows quite clearly that any attack on Iraq by the US in circumstances where there are no grounds for a reasonable belief that an armed attack from Iran was imminent would violate the prohibition against the use of force, set out in Article 2(4) of the UN Charter and elsewhere and universally recognised as a fundamental principle of international law. Art 2(4), which binds the UK and all other States as a matter of international law, reads as follows:

“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.”

That provision was solemnly proclaimed and elaborated upon by the UN General Assembly in Resolution 2625 (XXV), the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, in the following terms:

“[The UN General Assembly] Solemnly proclaims the following principles:

**The principle that States 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.**

Every State has the duty to refrain in its 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. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.

In accordance with the purposes and principles of the United Nations, States have the duty to refrain from propaganda for wars of aggression.”

That Declaration is generally accepted to be an authoritative elaboration of the basic principles of international law, as the International Court of Justice acknowledged in the *Nicaragua* case.<sup>4</sup>

14. The prohibition on the use of force is, moreover, generally accepted as a peremptory rule of international law (a rule of *jus cogens*): i.e., a rule that admits of no possible derogation.<sup>5</sup> In other words, no State may by agreement or otherwise modify the rule.<sup>6</sup> Indeed, it is the clearest example of such a rule.

15. Assuming that our hitherto hypothetical attack was in fact an armed attack by the US (as opposed to, say, the imposition of economic sanctions), any such attack would constitute an unlawful attack or use of armed force.

16. While there is some dispute over the precise definition of aggression in international law, it is in our view clear that any such attack upon Iran would amount to the crime of aggression *as a matter of international law*. We emphasise the final words because it was established by the decision of the House of Lords in *R v Jones (Margaret)* [2007] 1 AC 136, that an act of aggression under international law will not amount to a crime of aggression under English law. Crimes in English law can now be created only by Parliament; and there is as yet no statutory crime of aggression in English law. However, we shall return later to the question of whether English public law (as distinct from criminal law) is powerless to do anything about an act of aggression by the British Government which is contrary to fundamental norms of international law.

## COLLECTIVE SELF-DEFENCE AND NATO

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<sup>4</sup> See, e.g., the statements by the International Court of Justice in the *Nicaragua* case, (*ICJ Reports 1986*, 14 at 99-101 (§§ 187-190); Sir R Jennings and Sir A Watts, *Oppenheim's International Law*, 9<sup>th</sup> ed, 1992, pp. 333-335 (§ 105).

<sup>5</sup> See Sir R Jennings and Sir A Watts, *Oppenheim's International Law*, 9<sup>th</sup> ed, 1992, pp. 7-8 (§ 2).

<sup>6</sup> It may be modified only by the emergence of another rule of *jus cogens*: see Article 53 of the 1969 Vienna Convention on the Law of Treaties.

17. It would be sufficient if the imminent attack were aimed at another NATO Member State. That would warrant the use of force in collective self-defence. There are suggestions from the International Court of Justice in the *Nicaragua* case that the targeted State would first have to request that force be used on its behalf; but it is very unlikely that any international tribunal would rule that a use of force by one NATO State to prevent an imminent attack on another NATO State within the NATO area (and we shall return to this point shortly) would be unlawful.

18. Article 5 of the 1949 NATO Treaty would, in our view, provide an adequate basis for the use of force in such circumstances. It reads as follows:–

**“Article 5**

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security .”

19. An ‘armed attack’ would, however, have to be against targets within the ‘North Atlantic area’ in order to trigger the right to use force in collective self-defence under the 1949 NATO Treaty. That geographical limitation is set out in Article 6 of the NATO Treaty, which reads as follows:-

**“Article 6**

For the purpose of Article 5, an armed attack on one or more of the Parties is deemed to include an armed attack:

- on the territory of any of the Parties in Europe or North America, on the Algerian Departments of France <sup>(2)</sup>, on the territory of or on the Islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer;
- on the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer.

(The reference to the 'Algerian Departments of France ceased to be applicable in 1963.)

20. It will be observed that the provisions of NATO Article 5 do not extend beyond the North Atlantic and the Mediterranean. An attack on Diego Garcia, for example, would not be covered by the NATO Treaty.
21. If no collective self-defence agreement such as the NATO Treaty exists, a State that is the victim or target of an armed attack may request other States to use force to assist it in exercising its right of self-defence.
22. In summary, an attack on Iran would violate international law unless it was undertaken either (a) in exercise of the right of individual or collective self-defence, or (b) with the authorisation of the UN Security Council.

#### LEGAL RESPONSIBILITY FOR AIDING OR ASSISTING AN ATTACK ON IRAN

23. The next question is what the responsibility under international law of the UK or Ireland would be if bases in the UK or Ireland were used for an attack on Iran. This is essentially the same question as the question whether the UK would violate international law in those circumstances. When a State violates international law, it incurs international responsibility – i.e., a duty to make reparation to the injured State for its wrongdoing. When a State incurs international responsibility, it is because it has violated its obligations under international law.
24. This question is governed by the principles of State responsibility, which were codified by the UN's International Law Commission ('ILC') in 2001 in the *Articles on Responsibility of States for Internationally Wrongful Acts*.<sup>7</sup> Though technically not

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<sup>7</sup> < [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) >. The text here is headed 'Draft Articles', but the Articles were finally adopted by the ILC without any material change.

binding upon States as a matter of international law, those Articles are generally regarded as an authoritative statement of the rules of international law.

25. It is ILC Article 16 that is most relevant in this context. It governs the responsibility of one State for aiding or assisting a wrongful act by another State (i.e., an act in violation of international law). Article 16 reads as follows:–

**“Article 16. Aid or assistance in the commission of an internationally wrongful act**

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.”

The responsibility of States for aiding or assisting a wrongful act by another State is well established in international law. It was affirmed, for example, by the International Court of Justice in the *Namibia*<sup>8</sup> and *Construction of a Wall*<sup>9</sup> cases.

26. Article 16 is not concerned with circumstances where States act jointly to violate international law, for example by jointly attacking another State. In such a situation each participating State would, plainly, be responsible for its own acts in violation of international law.

27. Article 16 deals with a different situation. Suppose that State A permits State B to use airfields in State A for military purposes. State A does not violate international law by permitting State B to use its airfields. If State B uses State A’s airfields to attack State C, State A may itself have done nothing to attack State C. Article 16, however, stipulates that State A may incur international responsibility, not because State A itself actually attacked State C but simply because State A aided or assisted State B to attack State C. It does not matter that nothing that State A did – such as permitting the use of bases on its territory – was *inherently* lawful. The responsibility derives not from the fact that State A itself engaged in an inherently unlawful act, but from the fact that State A assisted State B to commit an unlawful act.

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<sup>8</sup> ICJ Reports 1971, p. 16, at pp. 54-56 (paragraphs 119-127).

<sup>9</sup> ICJ Reports 2004, p. 136 at p. 200 (paragraph 159). This was an advisory opinion.

28. Thus, the UK would incur responsibility under international law if it aided or assisted an unlawful attack by the US on Iran from bases in UK territory.
29. In order for the UK to incur responsibility in accordance with the rule set out in ILC Article 16 several conditions would have to be met.
30. First, it would have to be shown that the UK had ‘aided or assisted’ the attack. The ILC’s *Commentary* on Article 16<sup>10</sup> casts light upon this requirement. It makes it clear that no particular kind or level of aid or assistance is necessary in order for international responsibility to arise, as long as it is shown that the aid or assistance ‘materially facilitates’<sup>11</sup> or ‘contributes significantly to’<sup>12</sup> the internationally wrongful act.
31. It is not necessary that the ‘aid’ or ‘assistance’ be active. For example, military aircraft have no general right to overfly the territory of another State. To permit such overflight would amount to ‘aid or assistance’, even though it does not involve the State that gives the permission in actively doing anything (other than giving the permission).
32. It is not necessary that the aid or assistance should have been *essential* for the wrongful act, in the sense that the act could not have occurred without it.<sup>13</sup> On the other hand, aid that assists the wrongful act in a remote and indirect or a minimal way is not a sufficient basis for responsibility. There is, accordingly, a *de minimis* threshold; but there is no other limitation on the nature of the assistance.

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<sup>10</sup> < [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) >.

<sup>11</sup> The term used by the Special Rapporteurs of the International Law Commission: see *Second Report on State Responsibility* by Mr James Crawford, *Special Rapporteur*, UN Doc. A/CN.4/498/Add.1 (1999), paragraph 180.

<sup>12</sup> ILC, *Commentary on Article 16*, paragraph 5.

<sup>13</sup> See John Quigley, ‘Complicity in international law: a new direction in the law of State responsibility’, 57 *British Year Book of International Law* 77-131, at 121-122 (1986); *Second Report on State Responsibility* by Mr James Crawford, *Special Rapporteur*, UN Doc. A/CN.4/498/Add.1 (1999), paragraph 180.

33. To put those points into concrete terms in the present context, the UK would plainly be liable if it permitted UK bases to be used by US bombers, surveillance or supply aircraft engaged in an unlawful attack on Iran. On the other hand, the giving of purely verbal political support to the US in respect of such an attack would not engage UK responsibility.
34. Much lies between those clear extreme cases. For example, the use of monitoring facilities in UK territory for general intelligence-gathering purposes would in our view very probably not entail UK responsibility; but the use of such facilities for the specific purpose of the detailed preparation for or implementation of the attack probably would entail UK responsibility. To take another example, ordering UK naval vessels to undertake tasks that would ordinarily have been undertaken by US naval vessels in the Indian Ocean, in circumstances where the US vessels are diverted to deploy themselves in anticipation of the attack, would probably not entail UK responsibility; but allowing US naval vessels to refuel or take on supplies at UK naval bases while they were on their way to participate in the attack probably would entail UK responsibility, in our view.
35. The uncertainty in those latter examples flows primarily from a second requirement in Article 16: knowledge of the circumstances of the internationally wrongful act. This condition is necessary because the act which amounts to the aid or assistance will generally not be inherently unlawful. There is, for instance, no law against permitting a warship to refuel in a State's ports. But if the act is undertaken (or the permission given) knowing that it will facilitate a breach of the law, it is right that responsibility should attach to it. That is the approach that Article 16 follows.
36. It must be shown that the assistance was given "with a view to facilitating the commission" of the unlawful act, and that it actually did facilitate it.<sup>14</sup> That point was made in a report by the ILC which preceded its adoption of the Articles on State Responsibility:—

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<sup>14</sup> ILC Commentary on Article 17, paragraphs 3, 5: <  
[http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)>.

“the aid or assistance must be rendered ‘for the commission of an internationally wrongful act’, i.e. with the specific object of facilitating the commission of the principal internationally wrongful act in question. Accordingly it is not sufficient that aid or assistance provided without such intention could be used by the recipient State for unlawful purposes, or that the State providing aid or assistance should be aware of the eventual possibility of such use. The aid or assistance must in fact be rendered with a view to its use in committing the principal internationally wrongful act. Nor is it sufficient that this intention be ‘presumed’; as the article emphasises, it must be ‘established’.” [emphasis added] <sup>15</sup>

37. Thus, it would be necessary to show actual knowledge on the part of the UK that its acts were aiding or assisting an attack on Iran. It would not be enough to show that the acts did in fact assist such an attack. Nor (to pursue an earlier example) would it be enough to show that the UK was asked by the US to deploy UK naval vessels in place of US vessels in the Indian Ocean and did so, if the UK did not know that the substitution was sought by the US in order to facilitate arrangements for an attack on Iran.

38. One might raise the question whether the UK can shield itself from responsibility in the context of apparently innocuous acts such as redeployments of UK warships by not asking questions of the US as to its plans and intentions. That is an important question, both legally and logically; but in the present case it is not a question that we shall pursue, because there is in our view no practical possibility of obtaining detailed information as to exactly what information was or was not given to the UK by the US concerning US intentions, or was available from other sources. We shall focus on those cases where common sense indicates that the UK must have known that it was assisting an attack on Iran.

39. We have explained that the criterion for establishing responsibility is that assistance was given by State A with a view to facilitating the commission of the unlawful act by State B, and that it actually did facilitate it.

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<sup>15</sup> See paragraphs 14 and 18 of the Commentary on what was then draft article 27 in the *Yearbook of the International Law Commission* 1978, vol. II (Part Two) pages 99-105.

40. The third requirement under ILC Article 16 is that the act that constitutes the unlawful conduct must be such that it would have been wrongful if it had been committed by the assisting State itself. There is no need to explore this further, because it is clear that, in the circumstances we have envisaged in this Opinion, an attack by the US would have been equally wrongful if it had been committed by the UK. This condition would certainly be met.
41. In summary, the UK would incur international responsibility if it knowingly did something that aided or assisted an unlawful attack on Iran. In other words, the UK would violate international law in such circumstances.

IS THE US REQUIRED TO OBTAIN UK PERMISSION TO USE UK BASES TO ATTACK IRAN?

42. There is no general right for any State to use or establish military facilities in another State. (We shall refer to the State in whose territory the facilities are used or located as the ‘territorial State’.) If a State uses or establishes military facilities in another State it must be done with the express consent of the territorial State. Thus, the US must as a matter of law obtain the consent and/or approval of the UK Government and the Irish Government for any use of bases or facilities in the UK or Ireland respectively by US military forces.
43. This obligation flows from basic principles of international law, recognised by the Permanent Court of International Justice in the *Lotus* case, PCIJ Ser. A, No. 10 [1927]. There it was said that “the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State.” The deployment of military forces is just such an ‘exercise of power’.
44. Clearly, any such uses of another State’s territory must stay within the limits of the permission granted. If it did not, it would amount to an unlawful violation of the territorial State’s sovereignty, in breach of international law.

45. If facilities on UK territory were used to launch an attack against Iran, one of two situations must necessarily arise: either (a) it is done with UK permission, or (b) the US would violate UK sovereignty, in breach of international law. That position is well understood both by the US and the UK.
46. It is almost inconceivable that UK bases could be used by the US for such a purpose without the explicit permission of the UK being sought in advance. That statement covers a range of possibilities, and needs further explanation.
47. It is in our view absolutely inconceivable that UK bases could be used by US bombers to launch attacks on Iran without UK knowledge, or at the least UK's acquiescence. It is perhaps possible that the US might use facilities on UK territory for surveillance or other ancillary activities in support of an attack in Iran without UK knowledge.
48. If UK (or Irish) permission were granted for the use of facilities on UK (or Irish) territory, and those facilities were used to launch an unlawful attack against Iran, that would undoubtedly entail the international responsibility of the UK (or Ireland) under international law, in accordance with the principles set out in Article 16 of the ILC Articles on State Responsibility, as explained above.

#### THE POSITION IN ENGLISH LAW

49. As we have explained, the use of UK or Irish bases for the launching of an attack would in principle amount to a clear violation of international law by the UK or Ireland, as the case may be. We say 'in principle' because the violation would depend upon the state of the knowledge of the UK or Ireland as to the purposes for which their territory was being used, and it is possible that their territory may be used in support of an attack on Iran without their knowledge.

50. The question whether any breach of international law would entail a breach of UK or Irish law is separate and distinct from questions of legality under international law.
51. We must say immediately and clearly that we profess no expertise in anything other than international law and English law. In particular we do not possess expert knowledge of Irish law or Scots law. The following points are made subject to that qualification.
52. For the reasons we develop below we consider that a reasonable argument can be made that English public law would be violated by the grant of permission by the UK Government to the US Government to use UK bases for the purposes of an unlawful attack upon Iran.
53. We recognise immediately that practically all action which might be the subject of review in the English courts would be taken under the Royal Prerogative and may well be regarded by the domestic courts as non-justiciable. The courts have long been very reluctant to intervene in questions of foreign policy and of the deployment of UK military forces.
54. However, we consider that the time has come for it to be recognised that the concept of “non-justiciability” has no place in modern public law. In particular we suggest that there are in principle no “no go areas” as has been traditionally thought in relation to foreign relations and defence. The main components of the argument can be summarised as follows:<sup>16</sup>
- (1) A fundamental principle of our constitution is the rule of law.
  - (2) One particular aspect of the rule of law is that the executive has no unlimited powers. In principle every power has legal limits.

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<sup>16</sup> Much of the analysis here and in what follows draws upon R Singh, ‘Justiciability in the areas of foreign relations and defence’ in P Shiner and A Williams (eds), The Iraq War and International Law (2008, Hart Publishing, forthcoming).

- (3) Another aspect of the rule of law is that questions of law, such as what the limits are on the executive's powers and whether the executive has transgressed them, are ultimately ones that are entrusted for authoritative decision by independent courts.
- (4) However, there is a strong countervailing principle, which in fact flows from what has already been said. The courts' only function is to correct errors of law by the executive, not to question the political wisdom of its actions. If the courts are unable to detect an error of law in the executive's decision they must refrain from interfering with it, however wrong or immoral or foolish it may seem to be to the court.
- (5) So much is as true of the ordinary situation that comes before the Administrative Court as the politically more controversial areas with which we are concerned here. The principles are well-recognised in areas like local authority finance, immigration, planning etc. It is *never* the function of the court to sit on appeal from a decision on the *merits* of a decision; its function is only ever to *review its legality*.
- (6) There is no room or need for any further concept of "non-justiciability" in areas such as foreign relations or defence. If the true analysis is that no error of law can be shown in those areas, the argument will fail – not because the issue is non-justiciable but because there is no legal basis on which the court could interfere even if the case arose in some other, less controversial context.
- (7) To say otherwise is to accept that there are questions of law which ordinarily would and should be decided by the courts which are immune from judicial review. That represents the negation of the rule of law and should no longer be countenanced in the law of a modern constitutional state.

55. A second argument which we consider is reasonably available is as follows:

- (1) The prohibition on the use of force is a norm of customary international law (see above).
- (2) Norms of customary international law are generally to be regarded as a source of English common law and do not need transformation by Act of

Parliament: see *R Jones (Margaret)* [2007] 1 AC 136, para. 11 (Lord Bingham of Cornhill).

- (3) That general principle does not apply to domestic criminal law, since only Parliament can now create new criminal offences, not the courts developing the common law: *R v Jones (Margaret)*, paras. 28-29 (Lord Bingham of Cornhill); paras. 59-62 (Lord Hoffmann).<sup>17</sup>
- (4) However, that does not mean that the norm is not part of English public law, which governs the powers and duties of public authorities, including the Crown, and which is not concerned to attribute individual criminal responsibility, which is what criminal law is about.
- (5) If we are right in our argument about justiciability (above), therefore, a distinct legal issue can be identified: it is precisely the same issue as in international law which we have discussed above, namely whether it would be contrary to the fundamental norm against the use of force for the UK to assist the US in committing an unlawful attack on Iran.

56. We need not elaborate on this second argument, which we consider to be well-established in domestic law, subject to the question of justiciability. We consider below the leading authorities on the concept of justiciability but, before we do so, we outline the different ways in which the concept of “non-justiciability” is used in English law.

#### *The different meanings of “non-justiciability”*

57. Although the term “non-justiciability” appears frequently in English jurisprudence (as in other jurisdictions), it will be helpful to distinguish between three different ways in which it has tended to be used. The case law indicates that the phrase is used:

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<sup>17</sup> It is fair to note that Lord Hoffmann’s Opinion goes further at paras. 63-67 and at least in part appears to endorse what he called the “discretionary” or “non-justiciable” nature of the power to make war. The other members of the House of Lords agreed with both Lord Bingham and Lord Hoffmann. However, in our view, the *ratio* of *Jones* is that the crime of aggression is not a crime in domestic criminal law; it was not on its facts a case about judicial review of a decision of the executive.

- (1) To reflect a principle of English law relating to the recognition of acts of foreign states e.g. *Buttes Gas and Oil Co v Hammer* [1982] AC 888; *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883. This use of the term has no direct relevance to the subject of this Opinion, which is concerned with the legality of the actions of the government of the United Kingdom, not a foreign state. However, as will be pointed out below, what is instructive is that even in relation to foreign states, the principle of non-justiciability is not absolute. It is for this reason that in modern case law (such as *Buttes Gas and Kuwait Airways*) the preferred phrase has been “judicial restraint”, which recognises that there is room for judicial supervision albeit that there is a need for caution. *Kuwait Airways* is of particular interest as it concerned the *jus cogens* norm against the use of force which is the subject of this Opinion and we shall return to that case later.
  
- (2) To reflect the traditional dualist view of English law in relation to treaty law: e.g. *J H Rayner Ltd v Department of Trade* [1990] 2 AC 418. The important point of contrast for present purposes is that, as we have seen above, the position in relation to customary international law is generally that its norms are automatically part of English common law without the need for transformation by legislation although this has recently been held not to be true of the crime of aggression: *R v Jones (Margaret)* [2007] 1 AC 136. *Kuwait Airways* is important in this context too: in that case the House of Lords did not regard the norm of international law against the use of force to be irrelevant to domestic law; far from it, it formed an important source of English “public policy”, which is a well-established doctrine of the common law.
  
- (3) To reflect the notion that certain areas of law fall within the exclusive competence of the executive and therefore cannot be adjudicated upon in a court of law. Traditionally, these areas (most typically in the sphere of foreign relations and defence) have been excluded from determination by the courts through reference to the fact that the source of these powers lies in the Royal Prerogative. However, in more recent times, as will be seen below, the courts

have held that what is critical is not the source of the power but the nature of the issue. It is this third use of the concept of non-justiciability in English law which will be the primary focus of this Opinion as we now turn to the leading authorities.

### *Chandler v DPP*

58. The question of justiciability in the context of national security and defence arose in *Chandler v Director of Public Prosecutions* [1964] AC 763. It is important to bear in mind that this was a criminal case, not a judicial review case.

59. The six appellants in *Chandler* were all members of the 'Committee of 100'. The Committee had been set up in 1960, with the objective of furthering the aims of the Campaign for Nuclear Disarmament through non-violent demonstrations of civil disobedience. They participated in the planning of a demonstration at Wethersfield Airfield, a location which was a 'prohibited place' under section 3 of the Official Secrets Act 1911. Their admitted objectives included to ground all aircraft, irrespective of whether these were carrying nuclear weapons or not; to immobilise the airfield; and to reclaim the airfield for civilian use.

60. The appellants were charged with conspiring together to commit a breach of section 1 of the Official Secrets Act 1911. In their defence, the appellants pleaded that their acts did not amount to a section 1 offence; that the appellants' purpose was to benefit the state, that purpose being founded on a reasonable belief in certain facts and that they did not have the requisite *mens rea*; and that the appellants' purpose was not in fact prejudicial to the safety or interests of the State.

61. During the trial at the Central Criminal Court, the Director of Air Operations at the Air Ministry, as it was then called, gave evidence to the effect that the airfield was essential to the defence of the United Kingdom and that interference with the ability of aircraft to take off from this airfield (as had been one of the purposes of the civil disobedience), would hamper their effectiveness. As a consequence of objections on

behalf of the prosecution, counsel for the defence was refused the opportunity to cross-examine this witness and to call evidence as to the defendants' belief that their actions were beneficial to the state or to demonstrate that their purpose was not, in fact, prejudicial to the interests and safety of the state.

62. Amongst the grounds on which the appellants appealed were that the judge had erred in law in refusing the cross-examination and the evidence upon which the appellants' purpose was based. Another ground was that the judge had erred in law in excluding cross-examination and evidence as to whether the appellants' purpose was prejudicial to the safety or interests of the state.

63. When the case reached the House of Lords, the case had been referred by the Court of Appeal (Criminal Division) with a certification of a point of law of general public importance. This point of law concerned the proper construction of the words 'purpose prejudicial to the safety or interests of the State' as used in the Official Secrets Act.

64. Lord Reid, at p. 790 of the judgment, reformulated the question in the following manner:

*"The question more frequently arises as to what is or is not in the public interest".*

His Lordship then added:

*"I do not subscribe to the view that the Government or a Minister must always or even as a general rule have the last word about that".*

However, Lord Reid continued (p. 791):

*"It is in my opinion clear that the disposition and armament of the armed forces are and for centuries have been within the exclusive discretion of the Crown and that no one can seek a legal remedy on the ground that such discretion has been wrongly*

*exercised. ... Anyone is entitled, in or out of Parliament, to urge that policy regarding the armed forces should be changed; but until it is changed, on a change of Government or otherwise, no one is entitled to challenge it in court”.*

This is entirely consistent with our view that this is not on analysis a statement about non-justiciability at all. No public lawyer could quarrel with that statement: “policy” matters are always a matter for the executive and not for the courts. No court can impugn an exercise of discretion on the ground that it was “wrong”, only that it was “unlawful.” Lord Reid further acknowledged that within the sphere of criminal law, all the elements of the crime must be proved by evidence. However, he pointed out that in the present case *“the question whether it is beneficial to use the armed forces in a particular way or prejudicial to interfere with that use would be a political question... Our criminal system is not devised to deal with issues of that kind.”* (p. 791)

65. Similarly, Lord Radcliffe said (p. 798):

*“The disposition and equipment of the forces and the facilities afforded to allied forces for defence purposes constitute a given fact and it cannot be a matter of proof or finding that the decisions of policy on which they rest are or are not in the country’s best interest. I may add that I can think of few issues which present themselves in less triable form”.*

Again, there is nothing surprising there: it is never for the courts to find that decisions of policy – even in a less controversial context than national defence – are or are not in the country’s best interest.

66. In many ways the most interesting speech in *Chandler* reading it today is that by Lord Devlin because he went outside the strict confines of the criminal law and considered what the position would be if an issue arose by way of judicial review. At p. 809 he said that although *“the courts will not review the proper exercise of discretionary power ... they will intervene to correct excess or abuse”*. In *Chandler*, no

question of abuse of power was at issue, so this was not pursued. In other words, Lord Devlin articulated the point which is at the heart of our argument: that there is a crucial distinction between questioning the political wisdom of a policy (whether in relation to defence or for that matter anything else) and challenging the legality of the government's actions. The reason why the former is not amenable to judicial review is not that it is non-justiciable but because it does not raise any question of legal error at all. If, however, a question of law does arise, Lord Devlin confirmed that it would be for the courts to decide it – even though the context is that of military deployment. In other words, it is not the context that matters but the nature of the issue.

### *CCSU v Minister for the Civil Service*

67. The case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 (more commonly referred to as the 'GCHQ case') concerned the issue of justiciability in the area of national security and the rules of 'natural justice.' Government Communications Headquarters (primarily based at Cheltenham) provided the Government with intelligence and was tasked with ensuring the security of military and official communications and the handling of classified information vital to national security. At the relevant time (1982) the Government were experiencing significant problems with organised industrial action. As part of this, GCHQ had been targeted by trade unions in a campaign of industrial action designed to disrupt Government agencies. Since the establishment of GCHQ in 1947, all of its staff had been permitted membership of trade unions, and most employees were in fact members of such unions.

68. The Minister for the Civil Service (the Prime Minister, Margaret Thatcher) responded to the industrial action by giving an instruction, purportedly under the Civil Service Order, effectively prohibiting staff at GCHQ from being members of trade unions. Prior to issuing the instruction, there had been no consultation, either with staff at GCHQ or with the trade unions.

69. The applicants sought judicial review of that instruction. For present purposes, the essence of the grounds of appeal before the House of Lords was that they sought to have the order banning trade union membership quashed because the Minister had been in breach of her duty to act fairly by consulting them prior to issuing the instruction. The application failed in the result because the interests of national security (which were evidenced in an affidavit from the Cabinet Secretary) overrode the duty of consultation which would otherwise have arisen.

70. On the question of principle Lord Fraser of Tullybelton held that the decision under challenge was reviewable because it was made not directly under the prerogative but under an Order in Council which had in turn been made under prerogative powers. Lord Brightman agreed with Lord Fraser. The other members of the House of Lords, Lord Scarman, Lord Diplock and Lord Roskill, would have been prepared to countenance the availability of judicial review in principle of the direct exercise of a prerogative power. In subsequent cases, the courts have entertained applications for judicial review of the direct exercise of the prerogative: e.g. *R v. Secretary of State for Foreign and Commonwealth Affairs, ex p. Everett* [1989] QB 111 (which concerned the issuing of passports); *R v. Secretary of State for the Home Department, ex p Bentley* [1994] QB 349 (which concerned the grant of pardons).

71. Accordingly, the fact that the decision of the UK Government to assist the US in any attack on Iran would be taken under the Royal Prerogative will not render it immune from judicial review: what matters today is not the source of the power but the nature of the issue raised before the court.

72. On the question of national security, Lord Scarman interestingly recognised that even in this area there was a role for judicial review, saying (at p. 404) that,

*“though there are limits dictated by law and common sense which the court must observe in dealing with the question, the court does not abdicate its judicial function. If the question arises as a matter of fact, the court requires evidence to be given. If it*

*arises as a factor to be considered in reviewing the exercise of a discretionary power, evidence is also needed so that the court may determine whether it should intervene to correct excess or abuse of the power”.*

73. Lord Roskill, at p. 418, considered that the current decision did not – by reason of its subject matter – fall within what he considered the “excluded categories”, i.e. prerogative powers that “because their nature and subject matter are such as not to be amenable to the judicial process”. Lord Roskill *obiter* suggested that there were certain prerogative powers which would not by reason of their subject-matter be amenable to judicial review but he was careful not to be too categorical even about those (p.418):

*“...I do not think the right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces deployed in a particular manner or Parliament dissolved on one date rather than another.”* (Emphasis added)

74. There are two observations which can be made about that passage. First, some of the prerogative powers mentioned there as being unreviewable have in fact subsequently been the subject of judicial review. In *Bentley* (cited above) the Divisional Court corrected an error of law by the Home Secretary in relation to the prerogative of mercy. In *R v. Secretary of State for Foreign and Commonwealth Affairs, ex p. Rees-Mogg* [1994] QB 552 the Divisional Court entertained an application for judicial review in relation to the United Kingdom’s agreeing to the

Maastricht Treaty although the challenge failed.<sup>18</sup> Secondly, it is by no means clear that in principle the others should not be amenable to judicial review provided a proper basis for such review can be invoked. It is true, as Lord Roskill said, that the courts are not the place to decide whether a treaty “should” be concluded or the armed forces deployed in a particular manner but then they are never the place to decide what “should” happen as a matter of policy. In such contexts as the grant of honours it is now perfectly conceivable that there may be a role for the courts to play – provided an error of law can be identified. The position may be different in relation to matters to do with Parliament, such as the date of dissolution – but that would reflect the unique constitutional position of Parliament and not because of the immunity of the executive from judicial review. In any event, foreign relations and defence are matters for the executive: judicial review in those contexts should not unduly interfere with the internal workings of Parliament.

### *Marchiori*

75. The case of *R (Marchiori) v Environment Agency* [2002] Eu LR 225 concerned the manufacture of Trident and the discharge of nuclear waste. The appellant – Emanuela Marchiori – sought judicial review in respect of some authorisations granted by the Environment Agency permitting the discharge of radioactive waste from two nuclear sites at Aldermaston and Burghfield, sites at which the design, manufacture and servicing of Trident nuclear warheads take place. It was submitted by the appellant that the manufacture and maintenance of Trident was contrary to international law.

76. Although the case concerned an authorisation permitting the discharge of waste at the sites, the issue for the appellant was wider, in that she had a firmly held belief that the manufacture and maintenance of Trident nuclear warheads was contrary to international law.

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<sup>18</sup> More recently the High Court granted permission for a claim for judicial review to be brought challenging the refusal by the Government to hold a referendum on the Treaty of Lisbon, rejecting the submission that the case was unarguable in part on the ground of non-justiciability: see *R (Wheeler) v Prime Minister* [2008] EWHC 936 (Admin), paras. 23-29 (Owen J). The case is listed for a substantive hearing on 9-10 June 2008.

77. In terms of the question of justiciability, the question arose: was the Environment Agency required to make a judgment for itself regarding the merits or demerits of Trident or did they simply have to accept the Government's nuclear weapons policy as it was? If the question was answered in the affirmative, then they would not have acted according to proper procedure since they had merely substituted the Secretary of State's views for their own. Necessary to answer this question is whether the Secretary of State had within his exclusive ambit to decide upon the merits or demerits of having and maintaining a nuclear deterrent. It had been made clear in a statement by the respondent that they regarded themselves effectively bound to regard Trident, considering the clear Government policy, as a benefit for the purposes of the justification principle to be applied pursuant to the relevant legislation.

78. Laws LJ found it at para. 38 *"to be plain that the law of England will not contemplate what may be called a merits review of any honest decision of government upon matters of national defence policy"*. But he might have added that the courts *never* engage in "merits review" of any policy of the executive: they can only ever review the legality of government actions, not their merits. He continued:

*"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 not, and cannot be, any expectation that the unelected judiciary play any role in such questions, remotely comparable to that of government"*.

However, he added an important proviso to this at para. 40:

*“...this primacy which the common law accords to elected government in matters of defence is by no means the whole story. Democracy itself requires that all public power be lawfully conferred and exercised, and of this the courts are the surety. No matter how grave the policy issues involved, the courts will be alert to see that no use of power exceeds its proper constitutional bounds. There is no conflict between this and the fact that upon questions of national defence, the courts will recognise that they are in no position to set limits upon the lawful exercise of discretionary power in the name of reasonableness. Judicial review remains available to cure the theoretical possibility of actual bad faith on the part of ministers making decisions of high policy. In the British state I assume that is overwhelmingly unlikely in practice. Close to reality, perhaps, is that a statute might itself require the courts to review high policy decisions ... That I think was the position in Operation Dismantle. In this jurisdiction such a state of affairs may most obviously arise in the execution of the judges’ duty under the Human Rights Act 1998.”<sup>19</sup>*

#### *Kuwait Airways*

79. As mentioned above, *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 brought up the question of whether the legitimacy of action taken by a foreign state was justiciable. It is instructive in the present context because the House of Lords recognised that even then there is no absolute concept of non-justiciability; and in particular affirmed that breaches of fundamental principles of international law would lead to the English courts’ declining to give effect to certain acts of foreign states.

80. The case concerned action taken by Iraq’s government during the occupation of Kuwait in 1990. Immediately following the invasion, the Revolutionary Command

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<sup>19</sup> Laws LJ made similar remarks *obiter* in *R (International Transport Roth GmbH) v Secretary of State for the Home Department* [2003] QB 728, para. 85: “... It is well settled that executive decisions dealing directly with matters of defence, *while not immune from judicial review*, cannot sensibly be scrutinised by the courts on grounds relating to their factual merits ... The first duty of the courts is the maintenance of the rule of law. ...”

Council of Iraq had adopted resolutions proclaiming the sovereignty of Iraq over Kuwait and designating Kuwait as a 'governate' within Iraq. The Iraqi armed forces, upon taking control of the airport at Kuwait, seized ten commercial aircraft belonging to Kuwait Airways, subsequently transferring all property belonging to the Airways to the state-owned Iraqi Airways. The latter was done through a resolution issued by the Revolutionary Command Council.

81. Taking as a starting point that the law to be used for determining issues brought under a tortious claim would be the law of the country in which the actions constituting the tort took place, Lord Nicholls of Birkenhead said at [16] that *"[e]xceptionally and rarely, a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice as administered by an English court. A result of this character would not be acceptable to an English court. In the conventional phraseology, such a result would be contrary to public policy. Then the court will decline to enforce or recognise the foreign decree to whatever extent is required in the circumstances."*

82. What the House of Lords had to decide was whether the resolution of the Revolutionary Command Council of Iraq was of this character. Their Lordships accepted that *"this seizure and assimilation were flagrant violations of rules of international law of fundamental importance"* [para. 20].

83. In finding that the Iraqi resolution was of this character, and therefore should not be applied, Lord Nicholls made some general observations on UN law, customary international law and the question of justiciability at paras. 22-23:

*"22. Article 2(4) of the United Nations Charter provides that in their international relations all members shall refrain from the use of force against the territorial integrity of any state. This is also a principle of customary international law binding on states independently of the provisions of the Charter: see the International Court of Justice in **Nicaragua v United States of America** [1986] ICJ Reports 14, 98-100, paras 187-188.*

23. Further, article 25 of the United Nations Charter provides that the members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the Charter.... Decisions of the Security Council taken under these chapter VII powers are legally binding upon all members of the United Nations”.<sup>20</sup>

### *Abbasi*

84. The question of justiciability arose in the context of Guantanamo Bay in the case of *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76.

85. Feroz Abbasi is a British national. He was captured by US forces in Afghanistan, from where he was transported to Guantanamo Bay, which is in Cuba on lease to the USA. By the time the case was heard by the Court of Appeal in September 2002, Mr Abbasi had been held captive for eight months without access to a court or tribunal, or to a lawyer.

86. In the case before the Court of Appeal, the claimants sought, through the means of judicial review, to compel the Foreign and Commonwealth Office to make representations on Mr Abbasi’s behalf to the United States Government, to take other appropriate action or at least to give reasons why this had not been done.

87. In relation to the question of whether the actions of the Secretary of State were non-justiciable, their Lordships summarised their views as to what the authorities established at [106] as follows:

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<sup>20</sup> It is not easy to reconcile this approach to the status of resolutions of the UN Security Council (which are unincorporated international instruments) with that taken by the Divisional Court in *CND* (below). We suggest that, in so far as there is a conflict, the approach of the House of Lords in *Kuwait Airways* and in the later case of *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332, which concerned actions of the UK Government and not a foreign state, are to be preferred.

*“i. It is not an answer to a claim for judicial review to say that the source of the power of the Foreign Office is the prerogative. It is the subject matter that is determinative.*

*ii. ... there is nothing which supports the imposition of an enforceable duty to protect the citizen. The European Convention on Human Rights does not impose any such duty. Its incorporation into the municipal law cannot therefore found a sound basis on which to reconsider the authorities binding on this court.*

*iii. However the Foreign Office has discretion whether to exercise the right, which it undoubtedly has, to protect British citizens. It has indicated in the ways explained what a British citizen may expect of it. The expectations are limited and the discretion is a very wide one but there is no reason why its decision or inaction should not be reviewable if it can be shown that the same were irrational or contrary to legitimate expectation; but the court cannot enter the forbidden areas, including decisions affecting foreign policy.*

*iv. It is highly likely that any decision of the Foreign and Commonwealth Office, as to whether to make representations on a diplomatic level, will be intimately connected with decisions relating to this country's foreign policy, but an obligation to consider the position of a particular British citizen and consider the extent to which action might be taken on his behalf, would seem unlikely itself to impinge on any forbidden areas.*

*v. The extent to which it may be possible to require more than that the Foreign Secretary give due consideration to a request for assistance will depend on the facts of the particular case.” [Emphasis added]*

88. As is apparent from i. at [106], a reference to a prerogative power is not sufficient to oust the jurisdiction of the court; it is the subject matter of the claim for judicial review that is essential. However, we suggest that what is meant by “subject matter” in this context is not the *general* context in which a case arises (e.g. foreign relations) but rather the nature of the particular issue which is brought before the court: it is only if that issue is a legal one (i.e. one which can be decided by reference to legal standards) that the court can interfere. However, if the nature of the issue *is*

a legal one, then it is submitted that the court not only can but must go on to decide it even if the context in which it arises is a sensitive or controversial one. That is required by the rule of law. Read in this way, it is suggested that the use of the phrase “forbidden areas” in *Abbasi* should not cause any problems. All that is meant by “forbidden” is that the court cannot question the merits of the executive’s decisions in foreign relations. In principle the Court of Appeal was prepared to countenance that all the usual grounds for judicial review would be available, including irrationality (cf. *Marchiori* above, where Laws LJ was doubtful); but no doubt the jurisdiction would in practice be exercised with caution precisely so as to avoid intruding on the merits. That is a far cry from saying that legal issues are non-justiciable: the Court of Appeal was saying precisely the opposite.

CND

89. The case of *R (Campaign for Nuclear Disarmament) v The Prime Minister and Ors* [2003] LRC 335 is arguably one which comes closest to the facts of the scenario contemplated in the present Opinion and provides what may be the most difficult hurdle that our argument would have to overcome. The case came before the courts in December 2002, at a time of heightened concern about a possible US-led invasion of Iraq. The UN Security Council had passed Resolution 1441 on 8 November 2002, just over a month before the case was heard. The international controversy had turned to the question of whether another Resolution – expressly authorising the use of force – would be needed for states such as the UK to invade Iraq.

90. The Campaign for Nuclear Disarmament sought – by way of judicial review – an advisory declaration as to the meaning of Resolution 1441 from the court. In particular, they wanted to know whether non-compliance on the part of Iraq could authorise states to take military action. As Simon Brown LJ (as he then was) put it in the judgment at para. 2: “...the court is being invited to declare that the UK Government would be acting in breach of international law were it to take military action against Iraq without a further Resolution”. It was clear that the court had, in principle, jurisdiction to grant relief in the form of an advisory declaration [para. 15];

the question, however, was whether such jurisdiction should be exercised in this case.

91. We consider that the decision in *CND* can be distinguished from the present context on two main grounds. First, a key part of the reasoning of the Divisional Court was that it was being invited to interpret an unincorporated international instrument, namely a UN Security Council resolution. There is no such resolution in the present context, at least as things stand at present.

92. By way of example Simon Brown LJ said [para. 23]:

*“Ordinarily speaking, English courts will not rule upon the true meaning and effect of international instruments”.*

At para. 36, Simon Brown LJ made clear that the court was unwilling to pronounce on the true meaning of Security Council Resolution 1441 in the case before it:

*“Should the court declare the meaning of an international instrument operating purely on the plane of international law? In my judgment the answer is plainly no. All of the cases relied upon by the applicants in which the court has pronounced upon some issue of international law are cases where it has been necessary to do so in order to determine rights and obligations under domestic law”.*

In the same paragraph, he continued:

*“...There is in the present case no point of reference in domestic law to which the international law issue can be said to go; there is nothing here susceptible of challenge in the way of determination of rights, interests or duties under domestic law to draw the court into the field of international law”.*

See also Maurice Kay J (as he then was) at para. 50 who agreed with Simon Brown LJ *“that the “international law ground” is more appropriately categorised as going to jurisdiction rather than justiciability”*.

93. The second point of distinction, we suggest, is that in *CND* there was evidence before the Court that, given the delicate time at which the case was being heard and in circumstances where the UK Government was not prepared to state openly its stance on the meaning of Resolution 1441 because of negotiations that were taking place with other states, it would be harmful to the national interest for the Court to give an advisory declaration in that case. Simon Brown LJ said at para. 47,

*“The Court would in any event decline to embark upon the determination of an issue if to do so would be damaging to the public interest in the field of international relations, national security or defence. That too is the position here. Whether as a matter of judicial theory such judicial abstinence is properly to be regarded as a matter of discretion or a matter of jurisdiction seems to me for present purposes immaterial. Either way I regard the substantive question raised by this application to be non-justiciable”*.

Richards J (as he then was) took the view that [para. 57]:

*“...even if this court were otherwise free to do so, it would be undesirable for it to rule on the interpretation of Resolution 1441 as an abstract legal question in advance of any decision and in circumstances where any difference of view over the correct interpretation of that instrument might not be of any relevance at the end of the day. In practice the point may not arise at all. If it does arise, it will arise against a particular factual background and in circumstances where the position adopted by other states may also be relevant and other rules of international law may also be in play. I recognise the force of CND's point that if one waits for a decision it will be too*

*late to raise the issue in the national court; but even leaving aside the inappropriateness of entertaining such a claim when any ultimate decision would be unreviewable (see below), I consider there to be real objections to examining a question of this kind in isolation and on a contingent basis”.*

94. Our reading of *CND* derives some support from the recent judgment of the Divisional Court in *R (Corner House Research) v Director of the Serious Fraud Office* [2008] EWHC 714 (Admin), paras. 108-109, where both the points of distinction from *CND* we have mentioned were made by the Court.

*R v Jones*

95. In *R v Jones (Margaret) and others* [2007] 1 AC 136 the appellants had all committed acts in February and March 2003 – immediately preceding the US-led invasion of Iraq – which would have been criminal acts, unless a valid defence could be put forward. For present purposes the defence sought to be relied upon was – in very simplified terms – that the UK, in preparing for, declaring and waging war in Iraq, was engaged in unlawful acts which the appellants were justified in attempting to prevent through the use of reasonable force, cf. s. 3 Criminal Law Act 1967.

96. Most significantly, per Lord Bingham at para. 30, was the following reasoning:

*“A charge of aggression, if laid against an individual in a domestic court, would involve determination of his responsibility as a leader but would presuppose commission of the crime by his own state or a foreign state. Thus resolution of the charge would (unless the issue had been decided by the Security Council or some other third party) call for a decision on the culpability in going to war either of Her Majesty’s Government or a foreign government, or perhaps both if the states had gone to war as allies. But there are well-established rules that the courts will be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services, and very slow to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane*

*of international law*". (Emphasis added. Note the words "very slow to review" – not that the courts can never review the exercise of such powers.)

And in the same paragraph:

*"In considering whether the customary international law crime of aggression has been, or should be, tacitly assimilated into our domestic law, it is none the less very relevant not only that Parliament has, so far, refrained from taking this step but also that it would draw the courts into an area which, in the past, they have entered, if at all, with reluctance and the utmost circumspection".* (Emphasis added. Again, the language is striking: "reluctance" and "circumspection" do not suggest that the matters are inherently non-justiciable.)

#### *Gentle*

97. The case of *R (Gentle & Clarke) v The Prime Minister* [2008] 2 WLR 879 was an application for judicial review of the UK Government's refusal to conduct an independent inquiry into the circumstances leading up to the invasion of Iraq, in particular the circumstances in which the Attorney General came to make an unequivocal statement on 17 March 2003 that the invasion would be lawful.
98. The independent inquiry was sought – pursuant to Article 2 ECHR on the right to life – into the question of whether the UK Government had taken reasonable steps to satisfy themselves that the invasion of Iraq was lawful under principles of public international law. The applicants contended that there was a procedural obligation to inquire into whether such reasonable steps had been taken.
99. It was argued that the substantive obligation in relation to the present facts included taking reasonable steps to ensure that members of the armed forces were not deployed to participate in unlawful military activities. On the face of it, the UK Government were at least capable of being in breach of their substantive obligations under Article 2.

100. The *ratio* of *Gentle* in our view is that the claim failed at stage 1, because the House of Lords held that there was no arguable case that the substantive obligations to protect life in Article 2 had been breached: see e.g. Lord Bingham at paras. 6-8. Although there are certain dicta about what might be regarded as the issue of justiciability in the different Opinions in the House of Lords, we do not consider that the case ultimately affects what we have to advise upon in the present context.

*Alternative arguments*

101. Even if we are wrong in our above argument, we make two additional points.
102. First, the minimum that can reasonably be hoped for is a ruling from the English courts that the Government must take into account its legal obligations under international law when deciding upon questions such as requests for permissions to use UK bases for (unlawful) attacks upon Iran.
103. On this ground, however, we would expect the Government to assert that it has received and considered expert advice from the Attorney-General and the Foreign & Commonwealth Office on the relevant questions of international law and has decided on its policy in the light of that advice. Whatever the logical or legal arguments to the contrary, we do not think that there is any realistic possibility of the English Courts ordering the UK Government not to permit the US to use UK bases. It might, however, be possible to persuade a court at least to pronounce its own views on the questions of international law at stake in this case. In other words, declaratory relief might be granted but it is very unlikely that any coercive order would be made by a court.
104. Second, if it can be shown that a reasonable person would have had good grounds for supposing that there was an imminent breach of the provisions defining crimes against the Laws of War in the International Criminal Court Act, 2001 – for example, an imminent air strike which was known to aim to destroy the

infrastructure of power, water and sewage facilities on which the civilian population of Iran depends, without any genuine military advantage being obtained thereby, and which would therefore violate the Laws of War – then reasonable force may be used to prevent it. The peace protesters who broke into UK bases during the 2003 invasion of Iraq would be examples. That is because the core rules of the Laws of War (unlike the crime of aggression which was considered in *R v Jones (Margaret)*, above) are in turn made crimes in English Law by the International Criminal Court Act 2001, and under s. 3 of the Criminal Law Act 1967, “a person may use such force as is reasonable in the circumstances in the prevention of crime”. The Courts in England cannot ignore a statute of this (or any other kind) even if it deals with matters which were traditionally regarded as non-justiciable. Even Lord Hoffmann accepted in *Jones*, at para. 67, that there was “force” in the argument that it is not possible to conceive in law of a non-justiciable defence to a criminal charge: if Parliament has thought fit to give defendants a potential defence that they were acting to prevent the commission of a crime known to domestic law, the right to a fair trial – both at common law and under Article 6 of the European Convention on Human Rights (set out in Sch. 1 to the Human Rights Act 1998) – requires that the defence should be adjudicated upon by the tribunal of fact (in the Crown Court that will be a jury).

105. The success of any such defence under the International Criminal Court Act 2001 would depend upon the verdict of the jury, rather than the opinion of the judge. The jury would have to be convinced, among other things, that the person had used reasonable force to prevent the commission of a crime that s/he believed was imminent.

106. There is, therefore, a good arguable case that the UK Government must not act in violation of those rules of the Laws of War that are made crimes in English Law by the International Criminal Court Act 2001, and that reasonable force may lawfully be used in order to prevent any such crimes under English Law.

107. We have considered the probable position in Irish Law. There, the position is greatly influenced by the terms of the Irish Constitution. Though we profess no expertise in this area, our reading of decisions such as the *Horgan* case<sup>21</sup> in the Irish Supreme Court lead us to believe that the position in Irish law may well be significantly different from the position in English law.

108. The *Horgan* case concerned the question of Ireland's right to permit the use of Shannon airport in connection with the attacks on Iraq by the USA and the UK. The question arose in the context of Articles 28 and 29 specifically, contrary to Article 28 (which provides that Ireland shall not participate in any war save with the assent of the Dáil) and Article 29 (which provides that Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States) of the Constitution of Ireland.<sup>22</sup> The Irish court held that:

"... international law is only admissible in domestic law to the extent already indicated where in certain limited situations it may be availed of to determine private law claims, absent some contrary or conflicting provision of either the Constitution, statute law or common law. It may also avail other States in their dealings with this State on the international plane. It cannot however impose binding public law obligations on the Executive towards its own citizens under Article 29 for all the reasons stated.

Accordingly I find in favour of the defendants on all aspects of the case under Article 29. It follows from this conclusion that I do not accept the plaintiff's view that the court should hold that the Government are obliged as a matter of law under Article 29 to form any

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<sup>21</sup> *Horgan v. An Taoiseach & Ors* [2003 No. 3739P], [2003] IEHC 64 (28 April 2003), [2003] 2 ILRM 357, [2003] 2 IR 468, [2003] IEHC 64.

<sup>22</sup> The relevant passages read as follows: "**Article 28:** ... 2. The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government.

3. 1° War shall not be declared and the State shall not participate in any war save with the assent of Dáil Éireann."

"**Article 29** 1. Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality.

2. Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination.

3. Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States.

4. 1° The executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government.

2° For the purpose of the exercise of any executive function of the State in or in connection with its external relations, the Government may to such extent and subject to such conditions, if any, as may be determined by law, avail of or adopt any organ, instrument, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern.

....

6. No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."

particular view in relation to a war. Its only reviewable aspect lies in compliance with the requirements of Article 28.”

109. From that passage it would appear that there may well be a divergence between English law, which in general acknowledges that customary international law is part of the common law or at least a source of it, and Irish law in this respect. In view of our relative lack of expertise on Irish law, we say no more about that.

### THE RENDITION DEBATE

110. We have considered whether the rendition debate might be used to provide the legal framework for the analysis of these issues. In our view the legal principles applicable in this case are quite clear and it is neither necessary nor desirable to proceed by way of an argument from analogy with the rendition cases. Such a course would almost invite attempts to distinguish the two situations (an unlawful attack, and unlawful rendition) and blur the otherwise clear legal position in the present case. It may, however, be desirable from the political or public relations point of view to link the two issues: but that is a question on which we have no expert opinion.

### SUMMARY

111. For the reasons we have set out above, our opinion is that:

- (1) In present circumstances, and in the absence of any UN Security Council resolution authorising the use of force against Iran, it would clearly be contrary to international law for the US to attack Iran and for the UK or Ireland knowingly to assist that attack, for example by permitting the use of an airbase by US aircraft on bombing missions.
- (2) It is reasonably arguable that, in English public law, it would be unlawful for the UK Government to give such assistance.

**Rabinder Singh QC**

**Matrix Chambers**

**Vaughan Lowe QC**

**Essex Court Chambers**

**9 May 2008**