British military doctor court martialed for refusing to serve in Iraq

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On April 13, a court martial sentenced a British Royal Air Force (RAF) doctor to eight months imprisonment for failing to comply with orders when he refused to cooperate in training and deployment for a third tour of Iraq.

A panel of five RAF officers at Aldershot in Hampshire convicted Flight Lieutenant (Dr.) Malcolm Kendall-Smith on five charges, including refusing to serve in Basra. He will be dismissed from the air force. As an additional punitive measure Kendall-Smith was ordered to pay £20,000 from his personal savings towards the costs of his defence.

Dr. Kendall-Smith told the military hearing that he had refused to serve in Basra last July because he believed that the invasion of Iraq was illegal and did not want to be complicit in an "act of aggression" contrary to international law. He is the first officer to challenge the legality of the Iraq conflict at a court martial.

Kendall-Smith said he formed his belief that the war was unlawful after serving tours of duty in Kuwait and Qatar at the time of the US-led invasion.

At a pre-trial hearing, defence counsel Philip Sapsford QC argued that the doctor believed there was no lawful reason to enter Iraq because it had not attacked the UK. Sapsford added that Kendall-Smith was "an officer of impeccable character" with an "exemplary record" and a "man of great moral courage."

In order to limit any discussion on the legality of the Iraq war, all the defence witnesses—including former service personnel—were barred. The defence was also heavily constricted in its ability to air any of the findings upon which Kendall-Smith had based his decision. The doctor told the court, "I have evidence that the Americans were on a par with Nazi Germany with [their] actions in the Persian Gulf. I have documents in my possession which support my assertions. This is on the basis that ongoing acts of aggression in Iraq and systematically applied war crimes provide a moral equivalent between the US and Nazi Germany."

He said he had refused to take part in training and equipment fitting prior to the deployment because he believed these were "preparatory acts which were equally criminal as the act itself."

He considered the war in Iraq to be the equivalent of an "imperial invasion and occupation." He had become extremely disturbed by the US "imperial campaign of military conquest," which was in direct conflict with his stated duties:

"It struck me as incongruous and disturbing that the US air force published the phrase 'global power for America' on their documentation during the conflict. I found that the phrase 'global power for America' was imperial."

Asked by David Perry, prosecuting counsel, whether he really believed that the actions of US forces in Iraq were comparable to those of the Third Reich, Kendall-Smith replied, "On the basis of active aggression and systematically applied war crimes, serious violations of international law—yes."

Perry then asked, "By cross-examining you in this court, am I responsible for a criminal act?" Kendall-Smith replied, "Yes. You are demonstrating complicity with ongoing criminal acts."

Perry said the doctor lived in a "utopian world" and that soldiers could not be expected to read and understand numerous books on international law.

Kendall-Smith replied, "It is a utopian world. I joined as an idealist and I remain so. I love the air force as much today as the day I joined."

Opening the case for the prosecution, Perry asserted that Kendall-Smith did not have the "responsibility" to question the legality of orders given to him.

"The presence of British forces was not unlawful and as a regular serviceman he could not pick and choose those orders he did or did not wish to obey and no question of any unlawful order being given to him arises in this case," he told the hearing.

Kendal-Smith's legal team was prevented from making a more sustained argument over the illegality of the war. At a pre-trial hearing Judge Advocate Jack Bayliss had ruled that the question of the legality of the 2003 invasion was not relevant to the court martial because it predated the charges, which date back to last year. The judge stated that the US and British forces were now in Iraq on the invitation of the Iraqi government.

In a trial marked by bitter exchanges, Bayliss repeatedly shouted down the defendant and his counsel. At one point when Kendall-Smith began to refer to the notes in front of him on the witness box about the legal standing of the war, the judge snapped, "I will not allow diatribes on international law. It is already clear in your evidence that you believe the war is illegal."

Later the judge stated, "I will not let this court be used as a grandstand." Kendall-Smith replied, "I am not grandstanding. It's in the context of the presentation of my position in my case to outline misconceptions put before this court.... If I am unable to speak how can I put my position to the court?"

Bayliss retorted, "I am not prepared to be argued with by a witness defendant in my court."

In summing up, the judge advocate said, "None of the orders given to the defendant in this case was an order to do something which was unlawful. I also conclude that it is no defence to a charge of wilfully disobeying a lawful order that the defendant believed that the order was not lawful. That might be a point in mitigation, but it cannot

provide a defence in law ... the offence is a deliberate disobedience of an order which the defendant received and understood."

He added that Kendall-Smith's understanding of the crime of aggression under international law was "seriously flawed." It was, he claimed, "a crime which can only be committed by those responsible for the policy of a nation at the top of government or of the armed forces and that responsibility for it does not trickle down to those at lower levels of the chain of command. The order for you to go to Basra, cannot therefore have made you complicit to such a crime given your junior rank and position as a doctor."

Demonstrating his extreme hostility, Bayliss continued. "You have, in the view of this court, sought to make a martyr of yourself and shown a degree of arrogance which is amazing. Consequently you have lost any credit you might have been given for guilty pleas."

A non-custodial sentence, he concluded, "would send a message to all those who wear the Queen's uniform that it does not matter if they refuse to carry out the policy of Her Majesty's government...

"Obedience of orders is at the heart of any disciplined force. Refusal to obey orders means that the force is not a disciplined force but a disorganised rabble.

"Those who wear the Queen's uniform cannot pick and choose which orders they will obey. Those who seek to do so must face the serious consequences."

After the trial, Kendall-Smith was taken from the court to Colchester military prison to undergo a medical examination and a period of demilitarisation that will see him stripped of his rank and ordered to hand over his uniform and kit.

He will then be transferred to a civilian prison, where he will serve the remainder of his sentence.

Following the sentencing, Kendall-Smith's solicitor, Justin Hugheston-Roberts (chairman of Forces Law, a network of lawyers giving advice to service personnel, who advised the solicitor of two British soldiers from the 16th Air Assault Brigade serving in Iraq, who refused to fight in April 2003) said his client was "shocked" and "distressed" by the judgment and would appeal against the sentence. "He has asked me to say that he feels now, more than ever, that his actions were justified and he would not, if placed in the same circumstances, seek to do anything differently."

In a statement released to the press, Kendall-Smith said the following, "As a commissioned officer I am required to consider ... every order that is given to me and I am required to consider the legality of each order." Having studied various documents, including the attorney general's advice to the government ("in particular the note to the prime minister dated 7 March 2003"), "I believe the occupation of Iraq is illegal ... and for me to comply ... would put me in conflict with both domestic and international law.... I would, in fact, refuse the orders as a duty under international law, the Nuremburg principles and the law of armed conflict."

Kendall-Smith is going to appeal against both his conviction and the sentence imposed on him.

The vicious character of the response to Kendall-Smith is underlined by the fact that he is a medical officer. The military top brass must understand from years of experience that a doctor is the most likely figure to be troubled by being placed in a war situation. While donning a uniform makes the wearer a combatant, a doctor's primary duty is to save lives, including those of enemy casualties. Such a man would naturally display a high degree of sensitivity to the mounting death toll In Iraq, more so even than the front line soldier.

There are at least 400 British military medical personnel in Iraq, including surgeons, dentists, physiotherapists and mental health specialists. They are exposed to a daily accumulation of human carnage that must often seem relentless. And it is significant that the first British soldier to come forward to urge mass refusal among the ranks to serve in Iraq, Lance Corporal George Solomou, served with the Royal Army Medical Corps.

One might assume that the last thing the RAF would want to do would be to make a "martyr" of Kendall-Smith. But the officer elite must have concluded that this was a necessary risk, not only as a warning to others but because he openly challenged the legality of the Iraq conflict in a court of law.

Every effort was made to prevent such issues being raised. But in doing so, the court martial has left unanswered the essential issue raised by Kendall-Smith. Judge Advocate Bayliss determined that the issue of the legality of the war was not relevant "due to the fact that the US/UK military is in Iraq on the invitation of the Iraqi government." But the fact remains that the Iraqi government was installed in power by US and British forces following an illegal war. Bayliss merely declared in court that the attorney general had advised the government that the war was legal and that members of the armed forces could not question this. But he was forced to concede that "legal opinion may be divided as to the correctness or otherwise of the advice given by the attorney general."

Moreover, the judge advocate's statements that "it is no defence to a charge of wilfully disobeying a lawful order that the defendant believed that the order was not lawful" and that responsibility for war crimes "does not trickle down to those at lower levels of the chain of command" is legally unsound.

The most important trials for war crimes in history were those conducted against the German Nazi regime at Nuremburg. The most famous of these involved 24 of the most important captured leaders of Nazi Germany held from November 1945 to October 1946. But 12 other trials were also conducted by the United States, under Control Council Law No. 10. These not only involved officers at the lower level of the chain of command, but the first of them involved 23 medical doctors accused of involvement in Nazi human experimentation. Seven of these doctors received death sentences and another 12 prison sentences ranging from 10 years to life imprisonment.

It should also be noted that the US prosecuted 16 German jurists and lawyers. Ten of these defendants were found guilty, of whom four received life sentences.