

# INVASION OF IRAQ: AN ILLEGAL WAR

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Kofi Annan was, of course, right. He said in a BBC interview in September 2004 that 'I hope we do not see another Iraq-type operation for a long time—without UN approval and much broader support from the international community'. He believed there should have been a second UN resolution following Iraq's failure to comply over weapons inspections. And it should have been up to the Security Council to approve or determine the consequences, he added. When pressed on whether he viewed the invasion of Iraq as illegal, he said: 'Yes, if you wish. I have indicated [in March 2003] it was not in conformity with the UN charter from our point of view, from the Charter point of view, it was illegal.'<sup>1</sup>

Mr Annan's comments provoked angry suggestions from a former Bush administration aide that they were timed to influence the US November election. 'I think it is outrageous for the Secretary-General, who ultimately works for the member states, to try and supplant his judgement for the judgement of the member states', Randy Scheunemann, a former advisor to US Defence Secretary Donald Rumsfeld told the BBC.<sup>2</sup> Similar statements were made by representatives of other 'allied' powers.

## *Weapons of Mass Destruction, al Qaeda and Self-defence*

International lawyers have expressed different views with respect to various international conflicts. They have for example published opposite interpretations pertaining to the war against Afghanistan. They argued mostly over the interpretation of the right of self-defence, and whether the U.S. had the right to attack Afghanistan.<sup>3</sup> This was, of course, a very complex question. However,

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<sup>1</sup> [www.news.bbc.co.uk/2/hi/middle\\_east/3661134.stm](http://www.news.bbc.co.uk/2/hi/middle_east/3661134.stm), September 16, 2004.

<sup>2</sup> Ibid.

<sup>3</sup> The author of this article is of the opinion that 'since 11 September the United States had been in a permanent state of self-defense against those states that harbor and support the organizers and perpetrators of terrorist acts'. (László Valki, *The 11 September Terrorist Attacks and the Rules of International Law*. In Péter Tálás (ed.), *Responses to Terrorism*. SVKH: Budapest, 2002. p. 110.)

this is not the case with regard to Iraq, since the international legal issues that emerged in connection of this war are much less complex and easy to be answered.

The U.S. and British governments attempted to justify the necessity of going to war against Iraq on three legal grounds: (1) the inherent right of self-defence, (2) the authorisation of the Security Council, and (3) the liberation of the Iraqi people. Apart from this kind of reasoning, many others have been articulated at various times. But in terms of international law, only one claim is relevant, i.e. the one that the respective governments made public *prior* to the attack and not subsequently when the first claim turned out to be groundless. Viewed from the legal aspect, the U.S. and Great Britain proceeded along the following path:

- First, they claimed that Iraq has weapons of mass destruction (WMD) that threaten the security of the region. They also claimed that Iraq co-operates with various terrorist organisations – above all the al Qaeda – and may supply them with WMD. Hence, other regions of the world – including the territory of the U.S. and Britain – could also be threatened. At the beginning, neither Washington nor London has claimed that Iraq has *directly* threatened their countries' territorial integrity or political sovereignty.
- Second, the two states have claimed that Iraq has violated several Security Council resolutions, above all resolution 687, by possessing WMD.
- Third, resolution 678 of November 1990 would permit an attack against Iraq. This resolution empowered the states co-operating with the Kuwaiti government to 'use all necessary means' to liberate the country from Iraqi occupation.<sup>4</sup>
- Fourth, in November, they persuaded the member states of the SC to determine that Iraq has indeed violated prior SCRs. Subsequently, on the basis of resolution 1441, UNMOVIC and IAEA weapons inspectors started to uncover Iraqi WMD. This resolution, however, made no mention of any possible connection between Iraq and terrorist organisations.
- Fifth, when it became clear that the weapons inspectors did not find any WMD in Iraq, they claimed that, contrary to the reports of Hans Blix and alBaradei, these weapons exist on Iraqi territory and, moreover, they insisted that Iraq co-operates with al Qaeda. The U.S. President and the British Prime Minister repeatedly stated: 'we shall disarm Iraq'.

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<sup>4</sup> Foreign and Commonwealth Office, March 17, 2003. [www.fco.uk](http://www.fco.uk).

- Sixth, when it became clear that neither the American nor the British soldiers found any WMD in Iraq, the two states brought up another claim to substitute the first one. They said that Saddam is sustaining an ugly dictatorship in Iraq, consequently, the real purpose of the attack has been the liberation of the Iraqi people. This claim appeared in the list of earlier claims too,<sup>5</sup> but only as a 'collateral advantage' of the attack.

From the legal point of view the most pertinent justifications for going to war against Iraq were enumerated by President Bush in a speech delivered shortly before March 20, 2003. This was the one in which the President called on Saddam Hussein to leave the country within 48 hours and warned that if he refuses to comply, the U.S. would resort to the use of force. Moreover, the President went beyond stating that the U.S. would have to defend itself against Iraq and asserted that by providing Iraqi WMD to terrorists, practically the *whole world* is being threatened. Bush made the following statement:

Intelligence gathered by this and other government leaves no doubt that the Iraq regime continues to possess and conceal some of the most lethal weapons ever devised. The regime has a history of reckless aggression in the Middle East. It has deep hatred of America and our friends. And it has aided, trained and harbored terrorists, including operatives of al Qaeda. The danger is clear: using chemical, biological or, one day, nuclear weapons, obtained with the help of Iraq, the terrorists could fulfil their stated ambitions and kill thousands or hundreds of thousands of innocent people in this country, or any other.<sup>6</sup>

A document published by the American administration a day before the attack also sets out the same premise:

The Congress determined that ... members of al Qaeda, an organization bearing the responsibility for attacks on the United states, its citizens, and interests, including the attacks that occurred on September 11, 2001, are known to be in Iraq. Iraq continues to aid and harbour other international terrorist organizations, including organizations that threaten the lives and safety of the United states' citizens. ... Both because Iraq harbours terrorists and because Iraq could share weapons of mass destruction with terrorists who seek them for use against the United states, the use of force [against Iraq] would be a significant contribution to the war on terrorists of global reach.<sup>7</sup>

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<sup>5</sup> The attack was officially called 'Operation Iraqi Freedom'.

<sup>6</sup> President says Saddam Hussein must leave Iraq within 48 Hours. Remarks by the President in Address to the Nation. March 17, 2003. [www.whitehouse.gov/news/releases/2003/03/iraq/20030317.html](http://www.whitehouse.gov/news/releases/2003/03/iraq/20030317.html).

<sup>7</sup> Report In Connection with Presidential Determination under Public Law 107-243. *Washington File*, March 19, 2003. [www.usinfo.state.gov](http://www.usinfo.state.gov).

According to these document Washington, when it attacked Iraq, ostensibly aspired to act not only in its own self-defence, but also in the defence of the whole world. Hence, the question is whether the U.S. had the right to use force in the defence of itself and indeed, the whole world. My answer is an unequivocal no. The fundamental norms of international law, as described by the UN Charter, would not empower any state to carry out such an attack. The Charter provides that:

1. The threat or use of force against the territorial integrity and political independence against any state is prohibited [Art. 2(4)].
2. There are only two exemptions from this general prohibition:
  - (a) All states have the inherent right of individual or collective self-defence in case of an armed attack (Art 51).
  - (b) The UNSC may decide on the use of force as may be necessary to maintain or restore international peace and security (Art 42).
3. The member states of the UN conferred the primary responsibility on the Security Council for the maintenance of international peace and security [Art. 24 (1)], thus only the UNSC may decide on the threat or use of force.
4. No decision on the threat or use of force may be made without the consent of the five permanent members [Art. 27 (3)].

Since no one has claimed in 2002 or 2003 that Iraq would have posed a direct threat or used force against the U.S., Great Britain or any other state, it is no way to invoke the right of self-defence. Furthermore, the Security Council – in the absence of consent among the five permanent members – has not decided that the situation in Iraq constituted any threat to peace and security in the region, and has not authorized any state to use force against Iraq. *Consequently, the two states had no right to launch an armed attack against Iraq.*

International law does recognise the right of self-defence, but only in such instances when a military attack has occurred against a state. Some international lawyers, like János Bruhács of Hungary, do not challenge this fact, but query whether it is the inherent right of a state to resort to self-defence against the perpetrators of *terrorist attacks*. They do not not rule out that the contents of international norms may now be changing in this respect, which could thus provide legitimacy for the U.S. case.<sup>8</sup> This eventuality, however, is totally ir-

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<sup>8</sup> See János Bruhács, *The Iraqi War and International Law. Foreign Policy* (Budapest), Vol. 2. No. 1. 2003.

relevant to the case of Iraq. Washington – on the ground of the SCR endorsement of the right of self-defence, too<sup>9</sup> – lawfully attacked Afghanistan. However, in the case of Afghanistan the issue concerned whether the U.S.

- could use force in response to an attack
- a few weeks *after* the event
- against a *distant country* that did not attack the U.S., but merely provided safe-haven and support for terrorist groups that carried out the attack.

In the case of Iraq the question is whether the U.S. and Great Britain lawfully used force purely on the grounds of

- the illegal *possession* of WMD and
- Iraq's *connections* with terrorist organisations.

In September 2002, Washington introduced in its *National Security Strategy* a new interpretation for the concept of self-defence and since then it has officially adopted the position that it has the right to act preemptively against states possessing WMD and harbouring and supporting terrorists. According to the Strategy:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of imminent threat – most often a visible mobilization of armies, navies, and air forces preparing an attack. We must develop the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. ... Instead, they rely on act of terror and, potentially, the use of weapons of mass destruction – weapons that can easily be concealed, delivered covertly, and used without warning. ... To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.<sup>10</sup>

Not one single international lawyer would agree with this assertion. First, international law by definition does not recognise 'for centuries' the right to preemptive strikes, since until the end of World War One, it did not even limit the use of armed force. Thus the question of legality could not even arise. Any state, on any pretext, had the right to launch a war against any other state. Sec-

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<sup>9</sup> UNSC resolution 1368 (2001) and 1373 (2001).

<sup>10</sup> The National Security Strategy of the United States of America. Washington, September 2002. p. 15. [www.whitehouse.gov/msc/uss.pdf](http://www.whitehouse.gov/msc/uss.pdf).

ond, the total prohibition of launching a war was encompassed for the first time in the 1928 Kellogg-Briand Pact. This, however, made no mention at all of the legitimacy of preemptive strikes, but purely stated that the contracting parties 'renounce [the war] for the solution of international controversies and renounce it as an instrument of national policy in their relations with each other'.<sup>11</sup> Third, the UN Charter, as it was mentioned before, prohibits any kind of 'threat or use of force', regardless its purpose. Fourth, while the Charter recognises the 'inherent right' of self-defence, it makes no reference to the right of any state acting in self-defence to preempt an attack. Finally, as it was also mentioned, in terms of the Charter, the SC has the exclusive right to determine whether or not the situation in a given state constitutes a threat to international peace and security, as well as to authorise armed sanctions. Consequently, the *United States has no right to invoke the inherent right of self-defence* with regard to the attack against Iraq. Interestingly enough, the U.S. referred to its right of self-defence in general terms only during the period immediately preceding the war and did not mention the concept of *preventive* self-defence. Oddly enough, Great Britain never invoked this argument.<sup>12</sup> A White House document published a day before the attack said the following:

Based on the existing facts, including the nature and type of the threat posed by Iraq, the United states may always proceed in the exercise of its inherent right of self defense, recognized by Article 51 of the UN Charter. Accordingly, the United states has clear authority to use military force against Iraq to assure its national security...<sup>13</sup>

As regards the possession of WMD, it is of course a material breach of international law, since SCR 687 has ordered Iraq the 'destruction, removal or rendering harmless of all chemical and biological weapons and stocks of agents and related subsystems and components and all research, development, support and manufacturing facilities'.<sup>14</sup> Moreover, it also stipulated that Iraq 'shall unconditionally undertake not to use, develop, construct or acquire nuclear weapons or nuclear-weapons-usable material or any subsystems or components or any research, development, support or manufacturing facilities related to the above...'<sup>15</sup> Without doubt the Iraqi government, as it seems to transpire from

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<sup>11</sup> General Treaty for the Renunciation of War as an Instrument of National Policy. Signed in Paris on August 27, 1928. Art. 1.

<sup>12</sup> Only a German international lawyer with military background was so far who shared the American considerations with regard to preventive war. (Armin A. Steinkamm, *Der Irak-Krieg – auch völkerrechtlich eine neue Dimension: Unumgängliche Diskussion über das Recht der präventiven Verteidigung. Neue Zürcher Zeitung*, May 16. 2003. NZZ Online, [www-nzz.ch](http://www-nzz.ch).)

<sup>13</sup> Report In Connection...

<sup>14</sup> Para 8.

<sup>15</sup> Para 12.

UNSCOM and IAEA reports, failed to comply with these obligations up to 1994-95. It is not clear what has happened since. However, it is well-known that the UNMOVIC and IAEA reports before the commencement of the war, determined that they did not find any WMD in Iraq, nor did they detect any traces of prohibited subsystems, research, development, etc. They only complained about the Iraqi government's unwillingness to disclose adequate information concerning the time these instruments were destroyed.

### Some Facts

The above quoted Hungarian international lawyer claimed that 'he is not in the position to make a judgement about the truth of the American and British claims', in other words, about those facts, which provided the grounds for determining the basic issue. It is difficult to agree with this view. If anyone were to study official documents and press reports published prior to, during and after the war, could not honestly claim that is unable to make an appropriate judgement with respect to the released facts. Moreover, the ongoing debate concerns not whether the above claims correspond with the truth or not, but whether the various intelligence agencies have presented the truth to their governments in their reports. According to some, at the time of the attack the two powers had been well aware of all that discussed above, yet their governments continued to insist that Iraq has WMD, which may well be passed onto al Qaeda. British Foreign Secretary, Robin Cook, for example, described the situation with the following words:

When the cabinet of Prime Minister Tony Blair's government discussed the dossier on Saddam's weapons of mass destruction, I argued that I found the document curiously derivative. It set out what we knew about Saddam's chemical and biological arsenal at the time of the Gulf War. ... It then leaped to the conclusion that Saddam must still possess all those weapons. There was no hard intelligence of a current weapon program that would represent a new and compelling threat to our interest. ... It is inconceivable that no one in the Pentagon told Rumsfeld these home truths, or at the very least tried to tell him. So why did he build a case for war on a false claim of Saddam's capability? ... Britain was conned into a war to disarm a phantom threat in which not even our major ally really believed. The truth is that the United states chose to attack Iraq not because it posed a threat but because they knew it was weak and expected it militarily to collapse.<sup>16</sup>

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<sup>16</sup> Robin Cook, Britain must not let Iran become the next Iraq. *International Herald Tribune*, June 4, 2003. p. 8.

Several news agency reports also arrived at the same conclusion. Just to mention only a few examples: According to the BBC, Downing Street sent the draft British dossier on WMD 6 to 8 times to the Joint Intelligence Committee before making it public, since they did not find the various versions convincing.<sup>17</sup> One of the information in particular that alleged that the Iraqis had the capability to deploy their WMD within 45 minutes seemed very dubious indeed.<sup>18</sup> In another report, the BBC wrote: 'The secret September 2002 Pentagon [DIA] intelligence report concluded that there was 'no reliable information' that Iraq had biological or chemical weapons'.<sup>19</sup> According to *The Independent*, 'both governments knew UN inspectors had not found any nuclear, chemical or biological weapons in Iraq since least 1994, aside from a dozen abandoned mustard shells, and that the vast majority of any weapons produced before 1991 would have degraded to the point of usefulness within 10 years. ... There is no UN report after 1994 that claims that Iraq continued to possess weapons of mass destruction. ... That such a claim could appear in a purported intelligence document is a clear sign that the information was 'pumped up' for political purposes, to support the case for an invasion.'<sup>20</sup> *The Guardian* reported that former international development secretary, Clare Short even told at the meeting of the House of Commons foreign affairs select committee that, according to her information gathered from MI6 officials, the British prime minister and the American president made a secret agreement as early as last summer to invade Iraq in February or March 2003. According to her, before the war Tony Blair had 'used a series of half-truths, exaggerations, reassurances that were not the case to get us into conflict by the spring'.<sup>21</sup>

According to press reports, the situation was similar with respect to the Iraqi government and its cooperation with al Qaeda. *The Associated Press* noted: 'Iraq and the September 11 attacks are frequently mentioned in the same sentence, even though officials have no good evidence of such a link.'<sup>22</sup> *The Washington Post* wrote that 'senior intelligence officials' have claimed the Dick Cheney, with his cabinet chief, Lewis Libby, 'made multiple trips to the CIA over the past year to question analysts studying ... alleged links to Al

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<sup>17</sup> The author of this article found the assertion unconvincing even in the first IISS-dossier. (László Valki, *Kit fenyeget Irak? [Who is threatened by Iraq?]*. *Népszabadság*, September 18, 2002. p. 10.

<sup>18</sup> Weapons dossier 'sent back six times'. June 6, 2003. [www.newsvote.bbc.co.uk/2/hi/middle\\_east-2970064.stm](http://www.newsvote.bbc.co.uk/2/hi/middle_east-2970064.stm).

<sup>19</sup> Fresh doubts over Iraq's arsenal, *ibid*.

<sup>20</sup> Glen Rangwala, The lies that led us into war. *The Independent*, June 1, 2003. [www.news.independent.co.uk](http://www.news.independent.co.uk).

<sup>21</sup> *The Guardian*, June 19, 2003. p. 1.

<sup>22</sup> Quoted by Paul Krugman, Who's Accountable? *The New York Times*, June 10, 2003. [www.nytimes.com](http://www.nytimes.com).

Qaeda, creating an environment in which some analysts felt they were being pressured to make their assessments fit with the Bush administration's policy objectives.' These visits, stated by a high-ranking CIA official, 'sent signals, intended, or otherwise, that certain output was desired from here'. There have been precedents for such visits in the history of the agency; nonetheless they seem to be unusual. These visits have made it possible for the Secretary of Defence to make direct contact with the analysts, which is a deviation from the traditional practice whereby Cheney and his aids would officially confer back after reading the daily reports. According to *The Washington Post*, other intelligence officers have surmised that besides these persons, State Secretary Wolfowitz and Undersecretary for Policy Douglas Feith exercised specific pressure on them to pass on such information that would substantiate the Administration's accusations *vis-à-vis* Iraq.<sup>23</sup> The situation was further aggravated prior to the outbreak of the war against Iraq by the establishment of a special intelligence unit in the Pentagon by Rumsfeld to analyse information. Speaking at a news conference on June 4, 2003, Pentagon Undersecretary for Policy Feith stated that this bureau gathered interesting information about the relations between Iraq and al Qaeda following September 11. According to the newspaper, Wolfowitz had been anxious for some time to learn more about these relations; hence he encouraged the members of this unit thereof. On September 11 he stated to a number of senior CIA officials that he thought that Iraq is behind the attack. 'I was scratching my head because everyone else thought of al Qaeda,' said an analyst to the newspaper correspondent.<sup>24</sup> A prominent columnist of *The New York Times* also claimed that some politicians directly contacted intelligence analysts. He wrote, 'that's the way the intelligence game sometimes operates: the information is voluminous, confusing and contradictory, and prone to abuse, and it need to be protected from policy makers rather than massaged to make them feel good.' Rumsfeld is considered an 'idealist' in intelligence circles. 'He doesn't start with the facts, even though he is quite brainy. He has a bottom line, and then he gathers facts to support the bottom line', said 'one man in the spy world of the secretary'.<sup>25</sup>

These articles have been cited, of course, purely to underscore that the issue at stake is not whether Iraq possessed weapons of mass destruction on March 19, 2003 or whether it maintained relations with al Qaeda, but what the White House and Downing Street knew about the truth. In the light of recent leakings, memoirs and other developments neither of two governments thought that these weapons posed a real threat even to other Middle East countries let alone the United States.

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<sup>23</sup> Walter Pincus, Dana Priest: Some Iraq analysts felt pressure From Cheney visits. *The Washington Post*, June 5, 2003. p. A01.

<sup>24</sup> Ibid.

<sup>25</sup> Nicholas D. Kristof: Cloaks and Dangers. *The New York Times*, June 6, 2003. [www.nytimes.com.20030606](http://www.nytimes.com.20030606).

### *The Lack of Authorization by the Security Council*

The lack of consensus between the five superpowers and even the non permanent members of the Security Council, a resolution has not been passed that unambiguously would have authorised the two powers to launch the war. The question is whether the SC resolutions of 1990-91 would be pertinent to this case. In fact, first the British Attorney-General Lord Goldsmith issued a statement on March 17, 2003 which said that:

The legal basis for any military action against Iraq would be the authorisation which the Security Council, by its resolution 678 (1990), gave to Member states to use all necessary means to restore international peace and security in the area. That authorisation was suspended but not terminated by Security Council resolution 687 (1991), and revived by resolution 1441 (2002).<sup>26</sup>

According to the Attorney-General, no time limit has been set in resolution 687, hence it is still in force today. A similar statement was issued a day before the war by the U.S. report quoted above:

U.S. action is consistent with the UN charter. ... The Security Council authorized the use of force in UNSCR 678 with respect to Iraq in 1990. This resolution ... remains in effect today.<sup>27</sup>

These opinions are fully unacceptable. First, in its resolutions the SC systematically adheres to the practice in a given case by referring to all its relevant prior resolutions. The council would never 'terminate' the validity of any of its previous resolutions, even when they become anachronistic. In such cases the SC usually reiterates that it still acts according to prior resolution(s). The same happened in this case.

Second, the assertion that SCR 687 of 1991 did not suspend SCR 678 of 1991 is unfounded. Resolution 678 passed before the attack against Iraq did not only authorise to exercise collective self-defence, but also ordered Iraq 'to withdraw unconditionally all its forces' from Kuwait 'and restore peace and security in the area.'<sup>28</sup> Resolution 687, passed after the war, determined that this had been accomplished. The SC welcomed 'the restoration to Kuwait of its

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<sup>26</sup> Opinion of the Attorney-General [on the legal grounds of the attack against Iraq]. Full text. March 17, 2003. [www.news.bbc.co.uk](http://www.news.bbc.co.uk). Some days later in a leaked memo of March 26 of the Attorney-General suggested it would not be lawful for the coalition to reshape Iraq without new UN authority. Legal doubts over UK's Iraq Role. [www.news.bbc.co.uk/go/pr/fr/-/2/hi/uk\\_news/politics/3048457.stm](http://www.news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/politics/3048457.stm).

<sup>27</sup> Report In Connection...

<sup>28</sup> This text refers to SCR 660, passed on the day of the Iraqi invasion of Kuwait.

sovereignty, independence and territorial integrity and the return of its legitimate government.<sup>29</sup> For what reason would the SC infinitely and unconditionally uphold its prior authorisation? Kuwait did not have to be liberated again. According to Bruhács, resolution 687, which endorsed the ceasefire between Iraq and Kuwait, carried a hidden agenda 'for a possible resumption of hostilities at a later date'. Why would the SC do that? Would it have stipulated that Iraq might regroup its army and attack Kuwait again? The SC was well aware that Iraq's Republican Guard and other regular troops were completely annihilated by the coalition forces at the beginning of 1991, thus there was no such a danger that they might launch another attack. In 1991, events did not develop along the pattern of *impromptu* warfare of previous centuries.

Indeed, in 1991-92, the U.S. and Great Britain – perceiving the grave situation in Southern Iraq and subsequently in Northern Iraq – declared the two regions as no-fly zones and continued to bomb military targets in the area until March 2003. At the time, the two powers invoked the same arguments as the Attorney-General, the American report and Bruhács, namely that the 1990-91 SCR was still in effect. However, resolution 660 has dealt with the invasion of Kuwait and not with the conflict caused by the crushing of the Shiite uprising or the persecution of the Kurds. Consequently, it could not have provided any sort of authorisation for an armed intervention against Iraq, nor did it subsequently adopt any resolution in this context. Hence, the U.S. and Great Britain acted unlawfully in enforcing the no-fly zone and the bombings too. It is another matter, however, that the international community – on political and humanitarian grounds – did not condemn the conduct of the two powers at the time.

Third, why would the ceasefire agreement carry a hidden agenda for the possible 'resumption of hostilities at a later date', as the Attorney General put it? The meaning of ceasefire line in international law is similar to that of international border. Neither the former nor the latter can be transgressed by using force. Otherwise Russia – which has never signed a peace agreement with Japan – could at any time resume military hostilities against Tokyo. South Korea and North Korea have not signed any peace agreement for the last 50 years either. Would it be lawful to resume the hostilities at any time by any party? On the other hand, Baghdad has recognised the previously disputed border between Iraq and Kuwait in an international agreement signed in 1963, and resolution 687 referred to that.<sup>30</sup>

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<sup>29</sup> Preamble of resolution, para 2.

<sup>30</sup> Agreed Minutes between the state of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters, signed at Baghdad on October 4, 1963.

Fourth, the Attorney-General has stated ‘authorisation [to use all necessary means] was suspended for as long as Iraq complied with the conditions of the ceasefire. But the authorisation could be revived if the Council determined that Iraq was acting in material breach of the requirements of SCR 687.’ The high-ranking British lawyer misinterpreted the context of resolution 687, since it guaranteed automatically the territorial integrity only of Kuwait: ‘The Security Council decides to guarantee the inviolability of the above-mentioned international boundary and to take as appropriate all necessary measures to that end in accordance with the Charter’.<sup>31</sup> In any other case of Iraqi violation (the manufacture and storage of WMD, etc.) the SC decided ‘to take further steps as may be required for the implementation of this resolution and to secure peace and security in the area’.<sup>32</sup> In other words the automaticity of SC authorisation for the use of force could not be extended to any other violations. After adopting the resolution, had the SC learned of such violations, it would have had to adopt a new resolution.

Since the adoption of resolution 687, the U.S. and Great Britain used force twice against Iraq: in 1993 and in 1998. In both cases they invoked resolution 687. However, the 1993 incident was different from the other and indeed from any other use of force on the territory of Iraq. In January 1993, Iraq deployed anti-aircraft batteries in the immediate vicinity of the demilitarised zone between Iraq and Kuwait, Iraqi armed military personnel crossed into Kuwait and became engaged in crossfire with Kuwaiti soldiers. At the same time, Saddam Hussein delivered a speech, in which he repeated Iraq’s claim to the whole of Kuwait. Subsequently, the Kuwaiti government appealed to the U.S. for assistance that evoked air bombardment against Iraqi military targets. Saddam backed down, ordered the withdrawal of his troops and the air defence facilities. Clearly, in the 1993 incident, the above-mentioned automaticity prevailed, which applied to the violation or incursion of the Iraqi-Kuwaiti border. However, when President Clinton launched Operation Desert Fox against Iraq – although Baghdad did commit serious violations of its obligations (expelled UNSCOM weapons inspectors from Iraq) – it did not threaten the territorial integrity of Kuwait or any other state.

Fifth, the Attorney-General did not challenge the fact either that SCR 1441 adopted in 2002 did not *directly* authorize any state to attack Iraq. He wrote, that ‘on this occasion ... the Council decided ... to offer Iraq ‘a final opportunity to comply with its disarmament obligations’. ... Failure by Iraq to comply with the requirements of SCR 1441 was declared to be a further material breach of Iraq’s obligations’. Subsequently, the British lawyer correctly surmises:

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<sup>31</sup> Para 4.

<sup>32</sup> Para 34.

In the event of a further breach, or interference by Iraq with the inspectors or failure to comply with any of the disarmament obligations under any of the relevant resolutions, the matter was to be reported to the Security Council. The Security Council was then to convene 'to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security'. The Council warned Iraq that 'it will face serious consequences' as a result of its continued violations of its obligations. It is important to stress that SCR 1441 did not revive the 678 authorisation immediately on its adoption. There was no 'automaticity'. The resolution afforded Iraq a final opportunity to comply and it provided for any failure by Iraq to be 'considered' by the Security Council.

Then the Attorney-General went on to saying:

That paragraph does not, however, mean that no further action can be taken without a new resolution of the Council. Had that been the intention, it would have provided that the Council would decide what needed to be done to restore international peace and security, not that it would consider the matter. The choice of words was deliberate; a proposal that there should be a requirement for a second decision by the Council, a position maintained by several Council members, was not adopted. Instead the members of the Council opted for the formula that *the Council must consider the matter before any action is taken*.<sup>33</sup>

It is difficult to share the opinion of the Attorney-General. If a number of SC members stipulated that the council must consider the matter before any action is taken (and no draft resolution received majority support during this process<sup>34</sup>), then why does the Attorney-General insist that Iraq could be attacked even without a second resolution? It does not matter whether the position maintained by several Council members was accepted or not. In the context of resolution 1441 it seems obvious that the SC has not authorised anyone to do anything. Otherwise, the word '*authorisation*' would have been included in the text. Up until now, without exception, every authorization by the Security Council to use force was included in the resolutions (regarding, apart from the 1990-91 Gulf War, the Somalian, Haiti as well as the Bosnian conflicts.)<sup>35</sup>

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<sup>33</sup> Emphasis added.

<sup>34</sup> The draft text of the second resolution, which would have set a time limit of March 17, 2003 to Iraq to comply with the disarmament demands, handed over by the U.S., Great Britain and Spain on March 7, 2003, was rejected by the majority of SC members, hence it was not debated or voted on.

<sup>35</sup> The prominent Swiss international lawyer, Daniel Thürer also asserts that a second resolution was needed, because it is necessary to have a resolution of 'explicit minimal clarity for the use of force, since the relevance of the legal system is at stake'. (Der Krieg gegen Saddam als Testfall: Ist das Völkerrecht wirklich am Ende? *Neue Zürcher Zeitung*, March 20, 2003. NZZ Online, [www.nzz.ch](http://www.nzz.ch).)

This is not a unique opinion. Some of the most famous British international lawyers (among them, interestingly enough, members of the legal team representing Hungary in the Gabcikovo-Nagymaros case before the International Court of Justice) published a letter before the war which said clearly:

Here is no justification under international law for the use of military force against Iraq. The UN Charter outlaws the use of force with only two exceptions: individual or collective self-defence in response to an armed attack and action authorised by the Security Council... There are currently no grounds for a claim to use such force in self-defence. ... Before military action can lawfully be undertaken against Iraq, the Security Council must have indicated its clearly expressed assent. It has not done so. ... The UK has used its Security Council veto on 32 occasions since 1945. Any attempt to disregard these votes on the ground that they were 'unreasonable' would have been deplored as an unacceptable infringement of the UK's right to exercise a veto under UN Charter Article 27. A decision to undertake military action in Iraq without proper Security Council authorisation will seriously undermine the international rule of law.<sup>36</sup>

Bruhács, who did not condemn the U.S. and British invasion, posed the question: 'does an international forum exist that could, with mandatory decision, determine the fundamental issue whether the war against Iraq is in accordance with international law.' His answer was naturally negative, since only the Security Council could decide on this issue and the resolution determining a possible violation must be endorsed also by the two occupying powers enjoying veto-rights, which is highly improbable. Hence, he concludes, 'It would be wiser to recognise that some issues are *beyond the limits of international law*.'<sup>37</sup>

In other words, if the case of an invasion is absolutely wrong, it should not be judged by international lawyers.

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<sup>36</sup> The letter was signed by Prof. Ulf Bernitz, Dr. Nicolas Espejo-Yaksic, Agnes Hurwitz, Prof. Vaughan Lowe, Dr. Ben Saul, Dr. Katja Ziegler (University of Oxford), Prof. James Crawford, Dr. Susan Marks, Dr. Roger O'Keefe (University of Cambridge), Prof. Christine Chinkin, Dr. Gerry Simpson, Deborah Cass (London School of Economics), Dr. Matthew Craven (School of Oriental and African Studies), Prof. Philippe Sands, Ralph Wilde (University College London), and finally one of their French colleagues, Prof. Pierre-Marie Dupuy (University of Paris). The Guardian, March 18, 2003.

<sup>37</sup> Emphasis added.

## RESÜMEE

**Irak: Die Rechtswidrigkeit der Invasion**

LÁSZLÓ VALKI

Es ist allgemein bekannt, daß die Bush-Administration die Invasion gegen den Irak damit begründete, daß Saddam Hussein rechtlich verbotene Massenvernichtungswaffen auf dem Gebiet des Landes deponiere, diese jederzeit gegen die umherliegenden Staaten einsetzen und sie sogar an internationale Terrororganisationen weitergeben könne. Dadurch gefährde er die Sicherheit nicht nur in der Region, sondern auf der ganzen Welt. Der in dieser Beziehung zitierte Beschluß des Sicherheitsrates Nr. 1441 (2002) ermächtigte jedoch niemanden zur Anwendung von Gewalt. Die Gewaltanwendung hätte eines weiteren Sicherheitsratsbeschlusses bedurft, der aber niemals gefaßt wurde. Deshalb übernahm die Bush-Administration in den letzten Tagen vor der Invasion die offizielle Argumentation des britischen Justizministers (attorney general), Lord Goldsmith. Gemäß seiner Argumentation wurde die Ermächtigung durch den Sicherheitsrat eigentlich bereits während des ersten Golfkriegs erteilt, als der Sicherheitsrat durch seine Beschlüsse Nr. 678 (1990) und 787 (1991) die „mit der kuwaitischen Regierung kooperierenden Staaten“ zur Gewaltanwendung ermächtigte, und der Beschluß Nr. 1441 habe die Anwendbarkeit dieser Beschlüsse „wiederbelebt“. In Wirklichkeit beschäftigten sich aber die während des ersten Golfkriegs gefassten Beschlüsse mit der Aggression des Irak gegen Kuwait, und sie waren mehr als ein Jahrzehnt später, im Jahr 2003 bezüglich des Irak in keiner Form „wiederbelebbbar“. Da das Völkerrecht die Rechtmäßigkeit eines „Preventiven Kriegs“ nicht anerkannte, verstieß die amerikanisch-britische Invasion grob gegen das Völkerrecht. Diese Schlußfolgerung ist übrigens unabhängig von der Tatsache, daß der Irak seit 1991 bzw. 1995 seine Projekte zur Entwicklung von Massenvernichtungswaffen ohnehin eingestellt hat.

