

WHY INTERNATIONAL LAW SUPPORTS THE INVASION OF IRAQ: A SHORT HISTORY ON UN DECLARATIONS OF WAR

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Was the invasion of Iraq by the US-led “coalition of the willing” a legal act of war, sanctioned by the United Nations? Toronto lawyer David Wingfield argues that the coalition had all the legal authority needed in last November’s UN Security Council Resolution 1441, warning of “serious consequences” if Iraq did not comply with UN inspections for weapons of mass destruction. Indeed, Wingfield argues, Iraq constantly violated the terms of the ceasefire ending the first Gulf war in 1991, and the US action was legally justified on those grounds alone. On only two occasions in its history has the UN actually authorized the use of force, in Korea in 1950 and Kuwait in 1990. The 1999 Kosovo campaign, which put an end to ethnic cleansing, was a NATO operation never sanctioned by the UN. What follows is a short legal history of war and the UN.

L’invasion de l’Irak par une « coalition alliée » menée par les États-Unis constituait-elle un acte de guerre légitime sanctionné par les Nations unies ? L’avocat torontois David Wingfield soutient que la résolution 1441 du Conseil de sécurité de l’ONU adoptée en novembre 2002, selon laquelle l’Irak s’exposait à de « sérieuses conséquences » s’il ne se conformait pas aux exigences des inspecteurs de l’ONU en quête d’armes de destruction massive, accordait à cette coalition tous les pouvoirs légaux dont elle avait besoin. En fait, ajoute l’avocat, l’Irak a répétitivement violé les modalités du cessez-le-feu ayant mis fin à la guerre du Golfe de 1991, ce qui aurait suffi à justifier légalement l’intervention américaine. De plus, dans toute son histoire, l’ONU n’a autorisé l’usage de la force qu’à deux reprises, soit en Corée en 1950 et au Koweït en 1990. Même la campagne du Kosovo de 1999, qui a mis fin au nettoyage ethnique dans cette région, était une action de l’OTAN menée sans l’aval des Nations unies. L’auteur poursuit sa démonstration en traçant du point de vue du droit un bref historique des Nations unies face à la guerre.

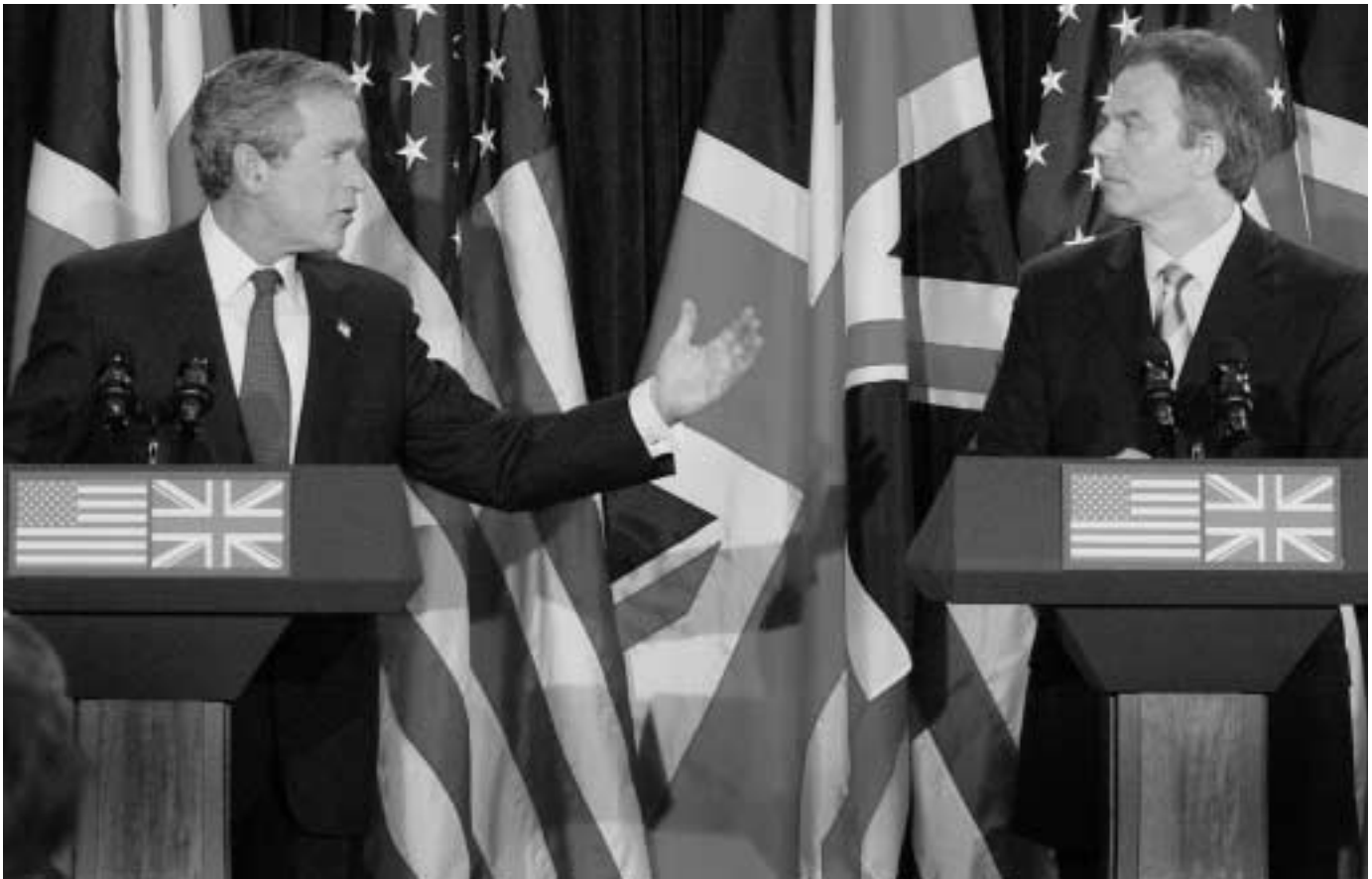


Many commentators and political leaders here and abroad have expressed the view that since the United Nations Security Council has not enacted a fresh resolution authorizing the invasion of Iraq, the countries attacking Iraq were breaching international law by doing so. Indeed, some people, including Canadian parliamentarians, have argued that the leaders of those countries, notably US President George W. Bush and British Prime Minister Tony Blair, are war criminals.

The question of when it is appropriate for one sovereign nation to use force against another can be debated almost without end. Nevertheless, the narrower question of whether the Security Council has authorized this war is easier to answer. When the relevant sections of the Charter of the United Nations and the relevant Security Council resolutions

are examined, it is clear that the Security Council has authorized this war. One of the problems with Security Council resolutions, however, is that they are written in a form of international legalese, using the vaguest of nouns and verbs to describe an authorization for war. Therefore, in order to understand why the Security Council’s resolutions authorize this war, it is best to start with the Charter of the United Nations under which these resolutions have been passed to see what they must say in order to constitute an authorization for war. Then one can turn to the practice of the Security Council to see what it does when it authorizes war.

The UN Charter authorizes the use of force in Chapter VII. This chapter permits war in two circumstances. One circumstance is individual or collective self-defence pursuant to Article 51. Countries that are attacked have the inherent



AP Photo

US President George W. Bush and British Prime Minister Tony Blair at their two-day war summit in Northern Ireland: Did they need a second UN resolution to make the invasion of Iraq legal, or was UN Security Council Resolution 1441 enough — warning Saddam Hussein of “serious consequences” for noncompliance with UN weapons inspections?

right to defend themselves by war. The other circumstance is when the Security Council declares war on behalf of the international community.

Now, Chapter VII doesn't actually use the word “war” or describe a resolution pursuant to this chapter as a “declaration of war.” The Charter is a bit more circumspect than that, and gets to war in a roundabout sort of way starting with a “determination” under Article 39, the first article of Chapter VII.

Under Article 39 the Security Council may “determine the existence of any threat to the peace, breach of the peace or act of aggression.” Article 39 is very broadly worded. The article gives the Security Council the power to decide (“determine”) that a threat short of an actual breach of peace and security

exists, that a breach of peace and security short of an act of aggression exists, that an act of aggression short of an attack on another country exists, or that an actual attack has taken place. Obviously in the last case the country that is the object of the attack has the right to defend itself by force independent of any Security Council determination under Article 39.

Interestingly, Article 39 does not require that the threat to or breach of the peace must have been committed

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by a sovereign nation. Although it is doubtful that the framers of the UN Charter had in mind state-sponsored

terrorists when they drafted the language of the Charter, Article 39 is written in language that is broad enough to encompass threats or breaches to the peace by states that sponsor terrorists but that otherwise do not overtly threaten any other country.

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Iraq invaded Kuwait. Therefore, in order to figure out what the Security Council must say in order to author-

ize war and what it does to wage the war, the best places to look are in its resolutions authorizing the Korean and Gulf wars.

The Korean war was conducted essentially under three resolutions, Resolutions 82, 83 and 84, which were enacted in June and July 1950. In these resolutions the Security Council “determined” that North Korea’s attack on the Republic of Korea constituted a breach of the peace. The Council then “called” upon the member states to provide assistance in enforcing these resolutions and “recommended” that the member states assist the Republic of Korea in restoring international peace and security to the area. Importantly, the Security Council recommended that those countries wishing to provide military assistance do so under the command of the United States of America. Although these resolutions did not expressly refer to Chapter VII or any article of that chapter, it is clear from the language of the resolutions that they were enacted under that chapter. The “determination” was obviously made pursuant to Article 39, and the “calling” on all other countries to restore international peace and security was obviously an “action” under Article 42.

After Iraq invaded Kuwait in 1990, the Security Council did not at first authorize war, although Kuwait, of course, had the right to defend itself. Rather, the Security Council passed Resolution 660 under Articles 39 and 40 of Chapter VII in which the Council “determined” that, as regards the Iraqi invasion of Kuwait, there existed a breach of international peace and security. This determination, which has been recalled in all subsequent resolutions, permitted the Security Council to decide what should be done about Iraq in order to restore international peace and security.

What the Security Council decided to do is pass Resolution 678. In this

resolution the Security Council demanded that Iraq fully comply with Resolution 660 and all subsequent resolutions that it breached. The Security Council gave Iraq until January 15, 1991 to comply with these resolutions. If Iraq did not do so, Resolution 678 authorized the member states “to use all necessary means” to “restore” international peace and security and ensure compliance with the resolutions Iraq had breached. Using all necessary means is obviously an “action” under Article 42. The Security Council also requested in this resolution that the member states provide appropriate support for the “actions” to restore international peace and security in the

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area. Unlike the Korean war resolutions, Resolution 678 was expressly enacted under Chapter VII of the Charter in its entirety. Resolution 678 was unambiguously a declaration of war, albeit a conditional one.

Of course, the UN does not possess its own military forces, and therefore it cannot itself wage war. Long before the second President Bush coined the phrase “coalition of the willing” the Security Council adopted the concept. When the Security Council declares war, it requests and authorizes a “coalition of the willing” to fight and permits that coalition to determine the tactics and strategy of the war as well as its aims. Therefore, after it declared war both against North Korea and

against Iraq, the Security Council left it to the nations going to war to figure out how to conduct the war and how to restore “peace and security.” In both cases it gave the United States of America conduct of that war.

After North Korea was ejected from South Korean territory, the Security Council enacted a resolution removing the complaint of aggression that had given legal sanction to the war from the list of matters of which the Council was then seized. In effect, the Council said that North Korea’s breach of the peace is now off its plate. However, when the first Gulf war ended the Security Council did the opposite. It enacted a ceasefire resolution and expressly resolved that the legal basis for the war remains until the terms of the ceasefire are complied with, which of course they never were.

The terms of the ceasefire are found in Resolutions 686 and 687. These resolutions, like all the other resolutions relating to Iraq’s invasion of Kuwait, were enacted under Chapter VII of the Charter in its entirety, including the articles authorizing the use of force. Resolution 686 notes that combat operations by the coalition forces had been “suspended”, not that the authority for these operations had been set aside. Resolution 687, which enacted the formal terms of the ceasefire, ordered Iraq unconditionally to destroy all its chemical, biological and nuclear weapons and not to acquire new ones or the means of making new ones, among other things. It is clear from the terms of Resolutions 686 and 687 that if Iraq breaches the ceasefire, the war can lawfully resume as if hostilities had never ceased in 1991. Indeed, the contrary cannot logically be argued.

As we all know, Iraq breached the terms of the ceasefire and subsequent resolutions. In response to some of its more flagrant breaches, such as ejecting the weapons’ inspectors in 1998, America and Britain bombed Iraq’s

military and security infrastructure. Nevertheless, over time the Security Council ignored Iraq's noncompliance with the terms of the ceasefire. However, in November 2002 the Security Council enacted Resolution 1441. This is the resolution that con-

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tains the phrase "serious consequences." It was not necessary to enact this resolution before resuming the war against Iraq. Over a dozen other resolutions enacted under Chapter VII, stretching back to the ceasefire resolutions, reaffirmed the right to wage war by "recalling" the earlier resolutions that had authorized the first Gulf war. Resolution 1441 was enacted to remedy the Security Council's nonaction over Iraq's noncompliance with the Security Council's resolutions going back to the ceasefire in 1991. In effect, the Security Council wanted to ensure that no one could argue that the legal effect of its previous resolutions had lapsed through lack of deliberate action to enforce them.

For this reason, in Resolution 1441 the Security Council simply reaffirmed that the legal basis for its declaration of war remains in effect. It did so by expressly recognizing under Chapter VII that Iraq's noncompliance with the previous resolutions poses a "threat to international peace and security." It specifically recalled that the ceasefire declared in Resolution 687 depended on Iraq's compliance with the terms of the ceasefire resolution and "decides" that Iraq remains in breach of these terms. The Security Council then gave Iraq a "final" opportunity to comply. Just to be sure that no one missed the point, at the end of all of this the Security Council reiterat-

ed that Iraq would face "serious consequences" as a result of its continued violations of its obligations. Serious consequences is, of course, an "action." In other words, in Resolution 1441 the Security Council expressly reaffirmed the language that is their code for war

and reaffirmed the right to resume the war should Iraq not immediately comply with its obligations. Short of saying "any country that wishes to do so may attack Iraq again if it does not immediately comply with the earlier resolutions," the meaning of Resolution 1441 could not be clearer.

Indeed, the US and Great Britain have been using force against Iraq for over a decade without opposition from those countries on the Security Council that tried to prevent American action over the past few months. Those countries accepted that the use of force over this period was authorized by the same Security Council resolutions they now say do not

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authorize the present use of force. This is a very odd position for these states to take. The use of force against a sovereign nation, such as Iraq, is illegal unless supported by international law, after all. This would include years of bombing targets in Iraq.

The whole point of using force under the Charter of the United Nations is to change the behaviour of a state. The only limit on the degree of force to be used under Article 42 is

that the force must be "necessary" to maintain or restore international peace and security. Sometimes the force necessary to do so will consist of limited bombing or the like. Often, though, it will be necessary to invade a hostile state's territory and remove its political and military leadership. Neither the Korean war resolutions nor the Gulf war resolution defined how much force was necessary to restore international peace and security. That was a matter for those countries using force under Chapter VII themselves to decide upon, as must be the case. In both wars, the coalition forces, not the Security Council, made this decision. The same goes for the war against Iraq.

Accordingly, the position of the US, Great Britain, Australia and their allies that Iraq's material breaches of the terms of ceasefire resolutions and others gave them the necessary legal authority to resume hostilities against Iraq for the purpose of changing the regime, was correct. Indeed, the legal basis for this war is much sounder than the legal basis for the military action against Serbia over Kosovo, which of course was not supported by any Security

Council resolution before the battle was joined under the auspices of NATO. Short of Iraq's invading a neighbouring country again, the legal justification for this war could not be more straightforward. Therefore, the debate over this war should stay where it belongs: in the arena of politics, not that of law.

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