BEHIND the HEADLINES

VOLUME 59 NO. 4 SUMMER 2002

The Use of Force Against Iraq: A Legal Assessment

JUTTA BRUNNÉE

Why the Invasion of Iraq was Lawful

DAVID R. WINGFIELD

Contributions on topical foreign policy, international affairs and global issues should be addressed to:
Behind the Headlines, CIIA
Glendon Hall, 2275 Bayview Avenue
Toronto, Canada M4N 3M6
Telephone: 416-487-6830
Facsimile: 416-487-6831 E-mail: mailbox@ciia.org
Submissions, typed double spaced, with a minimum number of endnotes, must not exceed 6,000 words.

The mission of the Canadian Institute of International Affairs is to promote an understanding of international affairs and Canada's role in a changing world by providing interested Canadians with a non-partisan, nation-wide forum for informed discussion, analysis, and debate. The Institute as such is precluded by its constitution from expressing an institutional opinion on any aspect of world affairs. The views expressed in *Behind the Headlines* are therefore those of the authors.

Published quarterly
$4.95 per single issue
$19.95 per year
(Canadian addresses add 7% GST)
GST Registration No. 10686 1610 RT

Date of issue — June 2003 ISSN 0005-7983
Publications Mail Registration No. 09880

Co-editors:

Gayle Fraser
Michelle Rossi

The Use of Force Against Iraq: A Legal Assessment

JUTTA BRUNNEE

gainst the backdrop of two world wars, one of the overriding objectives in creating the United Nations in 1945 was, as utlined in the preamble to the UN charter, to 'save succeeding generations from the scourge of war.' To that end, article 2(4) provides a general prohibition of the threat or use of armed force against other states. An exception to this prohibition is provided only in article 51: pursuant to their 'inherent right of individual or collective self-defence,' states may use force to respond to an 'armed attack.' Arguably, in limited circumstances involving imminent threats, the right to self-defence also encompasses anticipatory action. In all other cases of threats to international peace and security, resort to force must be collective. That means that, outside the ambit of individual states' rights to self-defence, the use of force must be authorized by the United Nations Security Council.

In September 2002, the government of the United States published the much-quoted 2002 *National Security Strategy,* which promotes the adaptation of the rules on the use of force to permit pre-emptive strikes against 'emerging threats' posed by 'rogue states' with weapons of mass destruction.' That same month, President George W. Bush took his case for military action against Iraq to the United Nations. Since then, international law has enjoyed unusual popularity as a topic of discussion and concern. Politicians, pundits, and the proverbial people on the street have debated the rules of self-defence and the merits of a doctrine of pre-emptive strike, discussed the ` material breach' of UN Security Council resolutions, or opined on the need for additional resolutions explicitly authorizing the use of force against Iraq. The war in Iraq has generated many strongly held

---

JUTTA BRUNNEE is Professor of Law and Metcalf Chair in Environmental Law at the University of Toronto.

views and much heated rhetoric. This essay aims to look beyond the rhetoric to shed some light on the legality of the Iraq campaign. It provides a review of the three potential legal justifications for the use of force and explains why none of them ultimately supports the us-British intervention.

First, given the us rhetoric regarding the threat posed by Iraq, one might think that self-defence or pre-emptive self-defence was one of the justifications advanced for the intervention. Yet, while the us government may have deployed the language of self-defence at a political level, it was not invoked for purposes of legal justification. It is worth taking a closer look at this fact.

In situations of self-defence, states can act unilaterally. They must simply notify the Security Council that they are acting in self-defence. For example, in the case of military action in Afghanistan in 2001, the us reported to the Council that it had initiated actions in the exercise of its inherent right of individual and collective self-defense following armed attacks that were carried out ... on September 11, 2001:2 Given the political differences over intervention in Iraq, a self-defence argument would have had the advantage, from a us standpoint, that action could have been taken without Security Council approval. The fact that the us did not invoke self-defence, then, speaks for itself. A case of self-defence simply could not be made. Iraq had not attacked the us, and an attack by Iraq (or attributable to Iraq) was not imminent.

What is perhaps most noteworthy is that the us government refrained not only from making a self-defence argument, but also from relying on the pre-emptive strike doctrine promoted in its *National Security Strategy*. This doctrine has raised concerns because it would leave virtually no standard capable of providing normative guidance or constraining unilateral assessments. In the 1962 Cuban Missile crisis, the United States refrained from invoking pre-emptive self-defence for this very reason.' In 2003, one might have expected the Bush administration to make Iraq, a 'rogue state' alleged to have weapons of mass destruction and ties to global terrorism, the test case for the pre-emptive strike doctrine. It did not. In fact, the State Department's legal adviser took pains to bring pre-emption within the confines of the 'traditional framework,' stressing that 'a preemptive use of proportional force is justified only out of necessity.' He added that 'necessity includes both a credible, imminent threat and the exhaustion of peaceful remedies.' Indeed: 'While the definition of imminent must recognize the threat posed by weapons of mass destruction and the intentions of those who possess them, the deci-

sion to undertake any action must meet the test of necessity ... in the face of overwhelming evidence of an imminent threat, a nation may take preemptive action to defend its nationals from unimaginable harm." Three observations can be made. First, it appears that the us acknowledges that a sweeping right to pre-emptive military strikes does not exist under current international law. Second, in outlining criteria to reign in the overbroad concept of `emerging threat' contained in the *National Security Strategy*, the United States appears to acknowledge the need for standards of review. Third, political rhetoric notwithstanding, the us government did not seem to think that these standards had been met in the case of Iraq.

A second justification for the invasion of Iraq that has received some attention is that of 'humanitarian intervention."5 Again, it is important to separate rhetoric designed to sway public opinion from legal argument. With the onset of hostilities, there was certainly a noticeable shift in the 'packaging' of the Iraq war for public consumption. The us and, to a lesser extent, Britain emphasized the liberation of the Iraqi people from dictatorship.'6 As a legal matter, however, no attempt was made to cast the war as a humanitarian intervention. Once again, the absence of legal argument speaks volumes. It speaks to the fact that there is no firm legal basis for asserting a right of individual states to intervene forcibly in other countries on humanitarian grounds. To be sure, there is a current of opinion suggesting that, in exceptional circumstances, armed force may be used when it is the only means to forestall an immediate, overwhelming humanitarian disaster.' It was this idea that animated the NATO intervention in Kosovo in 1999. But even in that case of extreme crisis, the balance of opinion remains that the notion of humanitarian intervention did not provide a legal justification for the use of armed force.' It is therefore hardly surprising that there was no attempt by the US or Britain legally to justify the Iraq war as a humanitarian intervention. In any case, even if one were to accept in principle that humanitarian interventions are legal in a narrow range of extreme circumstances, Iraq did not fall into that range. There is little doubt that the Iraqi government repressed and brutalized its citizens. The recent discoveries of mass graves bear witness to the regime's brutality.' However, there was no urgent humanitarian crisis that necessitated immediate use of force, and none was alleged by the us or British governments. In short, while the liberation of the Iraqi people may have been a positive side-effect of 'Operation Iraqi Freedom,' under existing international law it cannot convert otherwise illegal use of force into lawful action.

This takes us to the last possible legal basis for the Iraq intervention, and to the arguments that were actually deployed by the us and Britain to justify it. In essence, the argument is that the Security Council had authorized the use of force through a set of resolutions, encompassing resolution 678 (29 November 1990), resolution 687 (3 April 1991), and resolution 1441 (8 November 2002).'10 To appreciate the purchase of this argument, it is necessary to consider the relevant resolutions in some detail.

Iraq invaded Kuwait on 1 August 1990. In resolution 660 of 2 August, the Security Council called upon Iraq to withdraw from Kuwait 'immediately and unconditionally.' In light of Iraq's refusal to heed this and other calls by the Council for withdrawal, the preamble to resolution 678 'recalled and reaffirmed' a series of resolutions pertaining to Iraq, beginning with resolution 660 and ending with resolution 677 (1990). It then noted Iraq's refusal 'to comply, with its obligation to implement resolution 660 (1990) and the abovementioned subsequent resolutions.' In paragraph 2 of resolution 678, the Council therefore authorized 'Member States cooperating with the Government of Kuwait ... to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.' Several weeks later, in January 1991, 'Operation Desert Storm' was undertaken to expel Iraq from Kuwait.

Upon completion of 'Desert Storm,' resolution 686 of 2 March 1991 outlined an initial, provisional ceasefire. Resolution 687 followed to provide for a permanent ceasefire, which was contingent upon Iraq's unconditional acceptance of various conditions, including extensive disarmament obligations. In paragraph 33 of the resolution the Security Council declared that 'upon official notification by Iraq ... of its acceptance of the provisions above, a formal ceasefire is effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with resolution 678 (1990).' In paragraph 34 of the resolution, the Council decided 'to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area.'

As is well known, Iraq's compliance with its obligations under resolution 687 and a series of subsequent resolutions was less than satisfactory. Notably its compliance with disarmament obligations and its co-operation with UN weapons inspectors left much to be desired. In September 2002, the Bush administration vowed to put an end to a 'decade of deception and defiance.'" The administration

called on the Security Council to enforce Iraqi compliance, if necessary through military means. However, other members of the Security Council were reluctant to set the tracks toward a military solution. After intense negotiations, a compromise was finally enshrined in resolution 1441.

The Council found that 'Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687' (paragraph 1) and gave Iraq a 'final opportunity to comply with its disarmament obligations' (paragraph 2). Any further noncompliance would 'constitute a further material breach,' which would be 'reported to the Council for assessment' (paragraph 4). Based on the reports of Iraq's performance, the Council would convene immediately 'in order to consider the situation and the need for full compliance ... in order to secure international peace and security' (paragraph 12). The resolution recalled 'that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations' (paragraph 13). Finally, the Council decided 'to remain seized of the matter' (paragraph 14).

In the weeks following the adoption of resolution 1441, the Security Council was not able to agree on whether Iraq's conduct warranted an armed intervention, and no resolution explicitly authorizing such intervention was adopted. The us and Britain have maintained that an additional resolution providing specific authorization of force was not required. If they had entertained discussions on a 'second resolution,' they argued, it was for political not legal reasons. According to the us government, taking action against Iraq was a question merely of will, not of authority.'12 The three resolutions outlined above — 678, 687, and 1441 — were said to provide all the authority needed to enforce Iraqi compliance. The argument goes roughly like this: resolution 678 authorized force against Iraq, for purposes that included restoring peace and security in the area. Resolution 687 suspended the authority provided in resolution 678, but did not terminate it. Rather, the ceasefire was contingent upon Iraq's compliance with the various conditions in resolution 687. If Iraq were in material breach of this arrangement, the authority to use force under resolution 678 would be revived. Resolution 1441 confirmed that Iraq was and continued to be in material breach. Resolution 1441 required reporting to and discussion by the Security Council of Iraq's breaches, but not an express further decision to authorize force.'

This line of argument has been rejected by an overwhelming majority of international lawyers, who have spoken out on the matter

in unusual numbers." Indeed, a senior legal adviser to the British foreign secretary resigned over the issue.'[15] Why?

Security Council resolutions are carefully crafted compromises, often the product of delicate diplomatic tangos behind closed doors. But, like all treaty-based arrangements, they ultimately must be measured against the standard of the ordinary meaning of the language employed and interpreted in good faith. Add to that the fact that the Security Council has explicitly authorized the use of force only twice in its history — once during the Korean War in 1950 and once in response to Iraq's invasion of Kuwait in 1990. Given the reluctance of the Council to authorize forcible measures, it is difficult to see how resolutions 678, 687, and 1441 could in good faith be interpreted as an open-ended authorization of the use of force against Iraq. A closer look at the excerpts from these resolutions highlighted above further supports this conclusion. A number of points can be made in that regard.

First, the authority to use force provided by resolution 678 was quite clearly focused on Iraq's invasion of Kuwait. For better or for worse, it took this dramatic a transgression by Iraq to prompt the Security Council to authorize 'all necessary means.' But this authority related to compliance with resolution 660 and a specified set of subsequent resolutions relating to Iraq's invasion of Kuwait — *not* an indeterminate set of future resolutions on Iraq. Similarly, the phrase *`restore* peace and security' was carefully chosen to confine the authority provided.

Second, the ceasefire effected pursuant to resolution 687 was contingent only upon Iraq's formal acceptance of the conditions set out in the resolution. Nowhere does the resolution indicate that the ceasefire merely suspended paragraph 2 of resolution 678 (the authorization of force), or that it could be terminated in case of Iraqi non-compliance. This silence stands in marked contrast to resolution 686, the earlier provisional ceasefire arrangement, which explicitly recognized that paragraph 2 of resolution 678 remained valid during the period required for Iraq to comply with the terms of the provisional ceasefire. In any event, a termination of the ceasefire would be a matter for the Security Council, not for individual states. Paragraph 34 of the resolution makes this plain through the decision of the Council that *it* will 'remain seized of the matter' and 'take such further steps as may be required.' Further, resolution 687 speaks of a ceasefire between Iraq, Kuwait, and ' Member States cooperating with the Government of Kuwait.' The latter terminology refers to the coalition of states that had

self-defence against Iraq's invasion and that had been authorized to use force in resolution 678. This coalition of states no longer exists, and it is difficult to see how authority to use force or to end the ceasefire with Iraq could now rest with the United States or with Britain.

Third, authority for the use of force against Iraq cannot be found in resolution 1441. Yes, paragraph 13 reminds Iraq that it would face serious consequences as a result of its continued non-compliance. But, given the deep disagreements that led to the adoption of this compromise resolution, it is impossible to read this paragraph as an express or even an implied authorization of force. It is also true that resolution 1441 did not expressly require an additional resolution authorizing force, but no conclusions can be drawn from that fact. If the Council had indeed previously authorized the use of force, as the us and Britain maintain, no such additional decision, and therefore no reference to it, was needed. Conversely, if previous resolutions did not provide authority, as other Security Council members asserted, there was no need for resolution 1441 to state the obvious — that an authorizing resolution was required for lawful use of force. With respect to the question of force, then, resolution 1441 was simply a place holder. It allowed the UN process to proceed in the hope that it would resolve the Iraq situation through renewed weapons inspections. In the meantime, it preserved the legal status quo.

In short, resolution 1441 did not authorize the us and Britain to take military action against Iraq. The legality of their intervention in Iraq therefore turns on whether resolutions 678 and 687, adopted more than a decade earlier in the aftermath of Iraq's invasion of Kuwait, provided open-ended authority to enforce Iraqi disarmament with 'all necessary means.' They did not.

The UN charter has not accomplished the ambitious goal of eliminating war. Nonetheless, the rules on the use of force have done important work. They have served to constrain the resort to force by states, notably by providing a normative framework against which actions must be justified and can be assessed. In the case of the war against Iraq, neither justifications based on UN Security Council authorization, nor arguments based on self-defence or humanitarian intervention can carry the day. One may hold any number of opinions on whether or not the war against Iraq was necessary and appropriate, and even on whether or not international law *should* accommodate this type of intervention. But we should all be clear that, under existing international law, the use of force against Iraq was illegal.

ENDNOTES

1 *The National Security Strategy of the United States of America,* September 2002, 13-16; available at www.whitehouse.gov.nsc/nss.pdf

2 'Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council'; available at www.un.int/usa/s-2001-946.htm

3 See Abram Chayes, *The Cuban Missile Crisis: International Crisis and the Role of Law* (London and NY: Oxford University Press 1974), 63-6.

4 William Taft, iv, 'Memorandum: The Legal Basis for Preemption,' 18 November 2002; available at www.cfr.org/publication.php? id =5250

5 Ed Morgan, 'Use of force against Iraq is legal,' *National Post,* 19 March 2003.

6 'Village by village, city by city, liberation is coming. The people of Iraq have my pledge: Our fighting forces will press on until their oppressors are gone and their whole country is free.' President Bush, Radio Address, 5 April 2003; available at www.whitehouse.gov/news/releases/2003/04/20030405.html. See also the 'Liberation Update'; available at www.whitehouse.gov/news/releases/2003/05/iraq/20030506-19.html

7 For a thoughtful treatment, see International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (December 2001); available at www.dfait-maeci.gc.ca/iciss-ciise/report-en.asp

8 See Nico Krisch, 'Legality, morality and the dilemma of humanitarian intervention after Kosovo,' *European Journal of International Law* 13(no 1, 2002); available at www3.oup.co.uk/ejilaw/hdb/Volume_13/Issue_01/

9 See Patrick E. Tyler, 'An open secret is laid bare at mass grave in Iraqi marsh,' *New York Times,* 14 May 2003; available at www.nytimes.com/2003/05/14/international/worldspecia1/14GRAV. html

10 Security Council resolutions can be accessed at www.un.org/Docs/sc/unsc_resolutions.html

11 See *A Decade of Deception and Defiance,* 12 September 2002; available at www.whitehouse.gov/news/releases/2002/09/iraq/20020912.htm l

12 President Bush, *Address to the Nation,* 17 March 2003; available at www.whitehouse.gov/news/releases/2003/03/20030317-7.html

13 On the us position, see 'Letter dated 30 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council'; available at www.un.int/usa/s2003_351.pdf. On the British position, see Attorney General, Lord Goldsmith, 'Legal basis for use of force against Iraq,' 17 March 2003; available at www.pmo. gov. uk/output/Page3287.asp

14 See, for example, 'Howard must not involve us in an illegal war,' 26 February 2003; available at www.theage.com.au/articles/2003/02/25/1046064031296.html (Australia); 'War would be illegal,' *Guardian, 7* March 2003; at education.guardian.co.uk./ Print/0,3858,4620124,00.html (Britain); Peter Slevin, 'Legality of war is a matter of debate- many scholars doubt assertion by Bush,' *Washington Post,* 18 March 2003; at www.commondreams.org/headlines03/0318-05.htm (us); Jeff Sallot, 'Legal experts say attack on Iraq is illegal,' *Globe and Mail,* 20 March 2003, A 10 (Canada).

15 Ewen MacAskill, 'Adviser quits Foreign Office over legality of war,' *Guardian,* 22 March 2003, available at http://politics.guardian. co.uk/iraq/story/0,12956,919647,00.html

Why the Invasion of Iraq was Lawful

DAVID R. WINGFIELD

When the United States, Britain, Australia, and their allies invaded Iraq, they claimed that they were acting in accor- dance with international law because resolutions passed by the United Nations Security Council had authorized the war. Many countries and international lawyers disagree. They claim that no resolution of the Security Council authorized the war and that as a consequence the invasion was illegal. Who is right?

The debate is reminiscent of Humpty Dumpty's debate with Alice. Humpty Dumpty said that when he uses a word 'it means just what I choose it to mean–neither more nor less.' In response to Alice's question of whether he could make words mean different things, Humpty Dumpty replied 'the question is, which is to be master – that's all.' Stripped to its core, the debate over the Iraq war was, and continues to be, a debate over who is to be master of the interpretation of Security Council resolutions - those countries that used force or those countries that opposed the use of force.

Democracies resolve debates within their borders about the meaning of words in statutes or other legal documents by referring the matter to a court. The international community cannot do so, however. It has no court that operates like a domestic court in a Western democracy. (The International Court of Justice can only decide disputes that the concerned states agree be submitted to it.)

For this reason, the legality of the invasion of Iraq cannot be tested in a court of law. It can be tested only by reference to reason: is there a rational basis for concluding that the invasion of Iraq was

DAVID WINGFIELD is a Toronto lawyer and holds an MA in international relations.

invasion was a smart thing to do. After all, international law exists for the benefit of the United States, too. The us should not be prevented from acting in accordance with its security needs by appeals to international law if it can make a rational case of legality.

The charter of the United Nations authorizes the use of force under chapter VII, which permits war under two circumstances. One circumstance is individual or collective self-defence pursuant to article 51. Countries that are attacked have the inherent right to defend themselves by war. The other is when the Security Council, on behalf of the international community, authorizes the use of force against another country.

The use of force under the charter begins 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.' The wording of article 39 is very broad. The article gives the Security Council the power to 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.

It is interesting that article 39 does not stipulate that the threat to or breach of the peace has to be committed by a sovereign nation. Although it is doubtful that the framers of the charter of the United Nations 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 which otherwise do not overtly threaten any other country.

After the Security Council makes a determination under article 39 it has two choices. One choice, pursuant to article 41, is to decide on 'measures' that do not involve the use of armed force in order to give effect to its decisions. Economic sanctions, for example, are a permitted 'measure' under this article. The second choice, pursuant to article 42, is to take 'action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.'

Sharp-eyed lawyers will notice the disjunctive 'or' in article 42 between the nouns air, sea, and land and between the verbs maintain and restore. Consequently, by combining articles 39 and 42, it is clear that force can lawfully be used in anticipation of a breach of

international peace and security or as a reaction to such a breach. The threat or breach can come from the direct or indirect action of a country and the response can take any form of military action that is necessary either to maintain existing peace and security or to restore the peace and security that has been threatened or disrupted. In other words, pre-emptive attacks are perfectly lawful under international law providing that the Security Council has first 'determined' that another country threatens international peace and security and has authorized 'action' against that country to restore international peace and security.

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. The whole point of using force under the charter of the United Nations is to change the behaviour of a state. Sometimes the force necessary to change a state's behaviour will consist of limited bombing of some military or political targets. Often, though, it will be necessary to destroy completely a hostile state's ability to use military power or to control territory. It is to this latter activity that one customarily applies the concept 'war.'

Lawyers look to precedent to guide their interpretation of the law. The Security Council has twice authorized war: in 1950 when North Korea invaded the Republic of Korea and forty years later when Iraq invaded Kuwait. Therefore, to understand what the Security Council must say in order to authorize war and what it does to wage that war, the best places to look are its resolutions authorizing the Korean and Gulf wars.

Of course, the United Nations does not possess its own military forces, and therefore it cannot itself wage war. Long before President George W. Bush coined the phrase 'coalition of the willing,' the Security Council had adopted the concept. When the Security Council declares war it requests and authorizes a 'coalition of the willing' to fight and allows that coalition to determine the tactics and strategy of the war, as well as its aims, as it did in both the Korean war and the Gulf war.

The Korean war was conducted essentially under three resolutions, resolutions 82, 83, and 84, which were enacted in June and July 1950. In those 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. It is important

to note that the Security Council recommended that those countries that were willing to provide military assistance should do so under United States command. Although the resolutions did not expressly refer to chapter vII or to any article of that chapter, it is clear from their language that they were enacted under that chapter. The ` determination' was obviously made pursuant to article 39, and 'calling' on all other countries to restore international peace and security was obviously an 'action' under article 42.

After China entered the Korean war, 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 was now off its plate. Nevertheless, the Korean war continued for almost another two-and-a-half years without any further Security Council resolutions authorizing its continuation. The Korean experience demonstrates that, once the Security Council authorizes 'action' to restore international peace and security, the actions taken under that authorization remain lawful until the countries taking those actions are satisfied that they should stop fighting or until the Security Council enacts a resolution determining that international peace and security have been restored in the area. Any such resolution would make the continuation of hostilities illegal for those countries engaged in them.

Following Iraq's invasion of Kuwait in 1990, the Security Council did not initially authorize war, although Kuwait, of course, had the right to defend itself by war. Rather, the Security Council passed resolution 660 under articles 39 and 40 of chapter vII in which the Council 'determined' that the Iraqi invasion of Kuwait was indeed a breach of international peace and security. This determination, which has been recalled in all subsequent resolutions, allowed the Security Council to decide what should be done about Iraq so that international peace and security could be restored.

What the Security Council decided to do was to pass resolution 678, which demanded that Iraq fully comply with resolution 660 and all subsequent resolutions of which it was in breach. The Security Council gave Iraq until 15 January 1991 to comply with those resolutions. If it did not do so, resolution 678 authorized the member states 'to use all necessary means' to 'restore' international peace and security and to 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 resolution 678 that the member states provide appropriate support for the

`actions' to restore international peace and security in the 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.

As with the Korean war, the first Gulf war did not technically end. The hostilities ceased with an armistice, or a ceasefire in modern parlance, not with a treaty of peace or its Security Council equivalent. The United States, North Korea, and China, not the United Nations, agreed to the Korean war armistice. However, in the Gulf war the Security Council, not the belligerent states, enacted its terms.

The terms of the Gulf war ceasefire can be found in resolutions 686 and 687, which were enacted (as were all the other resolutions relating to Iraq's invasion of Kuwait) 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 those 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, amongst other things. It is clear from the terms of resolutions 686 and 687 that if Iraq was to breach the ceasefire the war could lawfully resume as if hostilities had never ceased in 1991. Indeed, the contrary cannot logically be argued.

As we all know, Iraq did breach 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, the United States and Britain bombed Iraq's military and security infrastructure. Nevertheless, over time, the Security Council ignored Iraq's non-compliance with the terms of the ceasefire. But the Council never enacted a resolution declaring that international peace and security had been restored to the area, or even a resolution similar to that which the Council enacted in January 1951 to remove the issue of Korea from its plate. Rather, in each of the resolutions it enacted, it recalled that Iraq was and remained a threat to world peace and security; the Council remained seized of the problem that Iraq presented.

In November 2002, the Security Council enacted resolution 1441, the resolution that contains the phrase 'serious consequences.' Resolution 1441 was enacted to remedy the Security Council's lack of action over Iraq's non-compliance with Security Council resolu-

tions going all the way 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. Legally, this resolution was probably unnecessary. Over a dozen other resolutions enacted under chapter vII, stretching back to the ceasefire resolutions, re-affirmed the right to wage war by 'recalling' the earlier resolutions that had authorized the first Gulf war.

Thus, in resolution 1441 the Security Council was simply re-affirming that the legal basis for its declaration of war remained in effect. It did so by expressly recognizing under chapter vii that Iraq's non-compliance with the previous resolutions posed 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 'decided' that Iraq remained in breach of those terms. The Security Council then gave Iraq a 'final' opportunity to comply. Just to be sure that no one misses the point, at the end of all of this the Security Council 'recalled' that Iraq would face 'serious consequences' if it continued to violate its obligations under the many earlier resolutions. Serious consequences are, of course, 'actions.' In other words, in resolution 1441 the Security Council expressly re-affirmed the language that is its code for war and re-affirmed 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.

After resolution 1441 was passed, the Security Council authorized inspectors to enter Iraq to certify whether or not Iraq had fully complied with its disarmament obligations. The weapons' inspectors were unable to certify that Iraq had done so, thus confirming that Iraq remained in breach of its obligations. Therefore, the position of the United States, Britain, Australia, and their allies, that is, that Iraq remained in breach of the terms of ceasefire and other resolutions up to the moment of invasion, is unassailable. Iraq's breaches of the resolutions gave the coalition a rational basis in international law for resuming hostilities against Iraq for the purpose of destroying its military capability and changing its political leadership so that it would cease to threaten international peace and security. The legal basis for this war, for example, 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 battle was joined.

The debate over the invasion of Iraq raised, and continues to raise, many fundamental questions relating to the use of power, the best way to create a secure and stable international order, the control of weapons of mass destruction, the legitimacy of the use of force to protect or promote human and political rights, the effectiveness of Security Council resolutions, and the right of the United States to use its military forces against another country unilaterally. In the context of the invasion of Iraq, these are all political not legal questions. Dressing them in legal garb does not make them any less political. The legal issue is quite narrow and straightforward: can a rational case be made that the invasion of Iraq was supportable under international law? Such a case can be made, and therefore the debate over this war should stay where it belongs: in the arena of politics, not that of law.

CANADIAN INSTITUTE OF INTERNATIONAL AFFAIRS

INSTITUT CANADIEN DES AFFAIRES INTERNATIONALES

CIIA/ICAI

THE WORLD THROUGH CANADIAN EYES

c/o Glendon Manor
Glendon College
2275 Bayview Avenue
Toronto, Ontario M4N 3M6 Canada

Publications Mail Registration No. 40062474
Postage paid at Scarborough