
TEARING UP THE RULES: The Illegality of Invading Iraq

March 2003

The Center for Economic and Social Rights
Emergency Campaign on Iraq



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The Center for Economic and Social Rights in Iraq

The Center for Economic and Social Rights (CESR), based in Brooklyn, NY, is an international human rights organization based in New York dedicated to promoting social justice through human rights. CESR currently has consultative status with the United Nations Economic and Social Council and serves as the Secretariat for the International Network on Economic, Social, and Cultural Rights, with hundreds of member organizations throughout the world.

Since 1991, CESR has produced a series of groundbreaking legal and humanitarian reports on the Iraq crisis. These include the first independent report on the public health crisis after the 1991 Gulf War;¹ the first post-war epidemiological survey to document increased child mortality in Iraq as a result of war sanctions;² the first medical journal article to report over half a million excess child deaths since 1991;³ the first law journal article to report on war crimes by Coalition forces;⁴ and the first legal report to condemn U.N. sanctions policy for violating the human rights of the Iraqi population.⁵

CESR recently launched an *Emergency Campaign on Iraq* to promote solutions to the Iraq crisis based on well established principles of international law. As part of this campaign, CESR has produced a set of educational resources and fact sheets, prepared legal and humanitarian reports, and conducted fact-finding in Iraq. From January 17-30, 2003, CESR organized a mission to Iraq to assess the potential humanitarian consequences of war through a combination of field surveys, interviews, and access to confidential UN documents. The research team concluded that a U.S.-led military intervention in Iraq will trigger the collapse of Iraq's fragile public health and food distribution systems, leading to a humanitarian crisis that will far exceed the response capacity of U.N. and other relief agencies.⁶ Other legal and humanitarian reports will be forthcoming.

Please contact Jacob Park at CESR for copies of the report and information about the Emergency Campaign on Iraq: tel: 718.237.9145, ext. 21 or jpark@cesr.org.

Preface

The thrust of this report is to demonstrate the immense and unbearable cost to the rule of law which will result from a decision by a handful of powerful western nations to take the law into their own hands. The theme is an old one, but it cuts to the heart of efforts championed by a majority of states—including a succession of American administrations, be they Democratic or Republican—to establish a world order which insists that war can only be a last resort and that the decision to unleash its horrors on innocent populations can only be taken according to the duly established law itself.

The point has probably best been made in a speech by Sir Thomas More, written by playwright Robert Bolt, in *A Man for All Seasons*. More turns to his former confidant Will Roper who has become a vigilante in the name of justice and asks:

And when the last law was cut down and the devil turned around on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast – man’s laws, not God’s – and if you cut them down, and you’re just the man to do it, do you really think that you could stand upright in the winds that would blow then?

The moral is clear. If the world allows the laws protecting our collective security to be cut down just to get at Saddam, what protection will remain when China seeks to invade Taiwan, or the EU or Spain to invade Morocco, or the United States to invade other nations—the laws all being flat?

Enforcement of UN resolutions against Iraq’s weapons of mass destructions must surely be undertaken in accordance with the law, and not in blatant disregard of it.

Philip Alston, President of the Board, Center for Economic and Social Rights, Professor of Law and Director of the Center for Human Rights and Global Justice at New York University

1. world at the brink of war

This section (i) outlines the purpose and framework of this report, (ii) summarizes the value and role of international law, and (iii) discusses the fundamental challenge to international law posed by the Iraq crisis.

overview

This legal report by the Center for Economic and Social Rights (CESR) is the first in a series of reports that will address critical issues of international law in the Iraq crisis. It focuses on whether the United States and United Kingdom, and any countries acting in concert with them,⁷ can launch a war against Iraq under the rules governing the use of force from the U.N. Charter, well-established principles of customary international law, and precedents from the Nuremberg Military Tribunal and the International Court of Justice.

The central question that this report seeks to answer is: can the U.S. and U.K. *lawfully* attack Iraq—either with Security Council approval or, in the absence of such approval, on the basis of previous Council resolutions or under the principle of self-defense?

The importance of legal argumentation in this context is clear. Far from being an esoteric topic for scholars and diplomats to debate, international law cuts to the heart of the claimed legitimacy of this war. The overwhelming public opposition to a war against Iraq in almost every country in the world, except the U.S., highlights the need to derive legitimacy from somewhere other than the will of the people. If the war is authorized by international law, then the small coalition of willing states can argue that they are legally entitled to ignore world public opinion. This in turn explains why, on March 17, U.S. Secretary of State Colin Powell declared the war to be legal,⁸ the U.K. Attorney-General issued a legal opinion on this issue,⁹ and the Australian Government claimed that its legal advice, which it has nonetheless refused to release, supports the case for war.¹⁰ In short, law matters.

The report is divided into five sections:

- **Section 1** introduces the purpose of international law and the content of this report.
- **Section 2** discusses the general prohibition against force established by the U.N. Charter, and introduces the two primary exceptions that provide for the lawful use of force: legitimate self-defense and Security Council authorization.
- **Section 3** assesses whether U.S. and U.K. justifications for invading Iraq fit within the self-defense exception under the U.N. Charter and customary international law, or under the disputed doctrine of humanitarian intervention.
- **Section 4** assesses whether war can be legally justified either with or without express Security Council authorization.
- **Section 5** offers conclusions regarding the legality of the use of force against Iraq and specific recommendations for achieving a law-based resolution to the crisis.

The Center for Economic and Social Rights believes that respect for basic principles of international law is the indispensable precondition for protecting economic, social and cultural rights everywhere. The unlawful use of force in Iraq threatens to return us to a world in which the law of the jungle prevails over the rule of law, with potentially disastrous consequences for the human rights not only of Iraqis but of people throughout the region and the world.

The present report is the first in a series to examine critical international law issues related to the Iraq crisis. A forthcoming report will assess the legality of the actual conduct of war based on all available evidence, including fact-finding from inside Iraq. This initiative is part of an unprecedented worldwide effort by legal organizations, practitioners, and scholars to uphold the rule of law by putting governments on notice that they will face public condemnation and legal prosecution for any war crimes committed in Iraq.¹¹ Future CESR reports will focus on the realization of economic, social and cultural rights in Iraq and on the legality of post-war relief efforts in light of well-established principles guaranteeing impartial humanitarian access to occupied populations, independent of military forces.

the role of law in international affairs

Every country in the world is bound by principles of law developed over centuries to govern international relations. International law was significantly strengthened through the creation and universal acceptance of the U.N. Charter, the Universal Declaration of Human Rights, and the Geneva Conventions over 50 years ago. These laws establish a common set of rights and duties for states and citizens to resolve conflicts peaceably, protect human life and dignity, and promote sustainable economic and social development.

The essence of legality is the principled, predictable, and consistent application of a single standard for the strong and weak alike. Selective manipulation of international law by powerful states undermines its legitimacy, just as domestic order is destroyed when powerful individuals are allowed to act above the law. This is the fundamental distinction between the rule of law to serve the common good of all people and the diktat of force to advance the special interests of a privileged elite.

Since World War II, however, the steady expansion and strengthening of human rights and humanitarian principles through international treaties and institutions has been undermined by the persistence of abject poverty and radical inequalities, and the deaths of 20 million civilians in 250 major conflicts.¹² These contradictory trends demonstrate that international law's revolutionary promise of equal justice for all can be fulfilled only through the shared commitment of the world community. The imperfect instrument of the United Nations remains the best hope for closing the gap between the universal ideal of international law and its selective enforcement in practice.

international law and the Iraq crisis

A divided international community faces a crossroads in Iraq. The escalating crisis has called into question the relevance of international law itself, as the world's strongest military power prepares to invade and occupy a member state of the United Nations without legal authority under the U.N. Charter or well-accepted principles of law.

The United States will invade Iraq with “a coalition of the willing nations, either under United Nations authority or without United Nations authority, if that turns out to be the case.”¹³

Colin Powell, U.S. Secretary of State, March 6, 2003

The U.N. system has failed repeatedly to prevent wars in the past half century. But this is the first time that the primary role of the Security Council as guarantor of international peace and security has been openly challenged by two of its permanent members—the United States and the United Kingdom. The outcome of this challenge may determine whether future conflicts will be resolved through lawful multilateral means or unlawful resort to force by individual states. At stake is the future of the U.N. system of collective security established after World War II to protect humanity from a recurrence of that unprecedented carnage.

The United Nations—founded to save succeeding generations from the scourge of war—has a duty to search until the very end for the peaceful resolution of conflicts... If the U.S. and others were to go outside the Council and take military action, it would not be in conformity with the Charter.¹⁴

Kofi Annan, U.N. Secretary-General, March 11, 2003,

The Iraq crisis presents the world with a stark choice: allow the dismantling of already-limited legal protections for humanity in times of war, or join together to reinvigorate the multilateral framework for ensuring peace, security and human rights for all. This is not an abstract debate. Human lives hang in the balance.

2. prohibition against force in international law

This section summarizes the international consensus supporting the U.N. Charter's prohibition against the use, or threatened use, of force, and describes the two exceptions enumerated in the Charter.

The United Nations was created in a mood of popular outrage after the horrors of World War II. Its central purpose was to serve as instrument for maintaining peace in order “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”¹⁵ Leading jurists consider the U.N. Charter as the highest embodiment of international law—codifying and superceding existing laws and customs.¹⁶

Under Article 1(1) of the Charter, the world organization's central purpose is “to bring about by peaceful means and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”¹⁷

Similarly, Article 2(3) obligates member states to “settle their international disputes by peaceful means,”¹⁸ while Article 2(4) provides that:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.¹⁹

It is beyond dispute that these provisions, and the Charter as a whole, impose a *general prohibition on the use of force* to resolve conflicts in international relations. The Security Council and General Assembly have consistently reaffirmed this legal principle.²⁰ The prohibition against force is binding on all states not only through the Charter but as a peremptory norm in customary international law,²¹ so fundamental that “no derogation is permitted.”²² It is, in short, the cornerstone of the collective security system established by the U.N. to prevent any recurrence of the horrors of World War II.

Only *two exceptions*, specified in the Charter and supplemented by customary international law, permit the lawful use of force. First is the right of individual or collective self-defense in response to an armed attack, under Article 51. Second is the specific authorization of force by the Security Council as a last resort to maintain international peace and security, under Chapter VII.

If the planned attack by the U.S. and U.K. against Iraq fails to meet the specific criteria set forth in these exceptions, or under principles of customary international law, then it will be an unlawful act of aggression—defined and condemned by the Nuremberg Military Tribunal as “the supreme international crime.”²³

3. right of self-defense in international law

This section assesses U.S. and U.K. arguments for attacking Iraq in light of (i) the U.N. Charter's narrowly defined right of self-defense, (ii) the disputed customary international law right of preemptive self-defense, (iii) the Nuremberg Tribunal's absolute prohibition against preventive war, and (iv) the new and legally dubious doctrine of humanitarian intervention.

limits of self-defense in the U.N. Charter

Article 51 of the U.N. Charter recognizes that member states have the “inherent right of individual or collective self-defense *if an armed attack occurs.*”²⁴ The urgency of responding to such attack entitles a state to defend its sovereignty through the unilateral use of retaliatory force—but only “until the Security Council has taken measures necessary to maintain peace and security.”²⁵ As discussed in Section IV below, once the Security Council formally determines the existence of a threat to international peace and security, individual states may no longer exercise the right of self-defense without the Council’s express prior approval (as happened in the 1991 Gulf War).

Article 51 applies only in the event of an actual armed attack. As Iraq has not attacked the U.S. or U.K., and there is no credible, substantiated evidence connecting Iraq to the September 11th attacks, the U.S. and U.K. may not invoke self-defense under the U.N. Charter to justify attacking Iraq. They must therefore rely on the disputed doctrine of preemptive self-defense under customary law.

pre-emptive self-defense in customary international law

Although the Charter itself does not provide legal authority to use force against a perceived threat of imminent attack,²⁶ there does exist a disputed customary international law right of preemptive self-defense. According to the famous formulation of U.S. Secretary of State Daniel Webster, adopted by the seminal *Caroline Case*, the legitimate exercise of this right requires “a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”²⁷

This has been interpreted to establish a red line between “anticipatory” self-defense in response to an attack that *might* occur at an unknown point in the future, and “interceptive” self-defense in response to an *imminent and unavoidable* attack. It is generally accepted that “in the case of anticipatory self-defense, it is more judicious to consider such action as *legally prohibited.*”²⁸ Only in the rare case where interceptive self-defense can be shown, through clear and convincing evidence, as necessary to avoid a greater harm might it arguably be lawful to use force outside the limits of the Charter.²⁹

The International Court of Justice has affirmed in the *Nuclear Weapons Case* that lawful self-defense must be both “proportional to the armed attack and necessary to respond to it.”³⁰ It has not yet resolved the question of whether the pre-existing customary right of preemptive self-defense survives the Charter’s express rejection of that doctrine.

The U.S. and U.K. now seek to justify war on the grounds that Iraq intends to acquire and use weapons of mass destruction against them at an unspecified point in the future. Yet despite advanced intelligence-gathering capabilities, neither country has presented any credible evidence that Iraq still possesses any proscribed weapons, let alone the intent and capacity to use them in an imminent attack. After conducting more than 550 inspections in almost four months, UNMOVIC teams have not uncovered evidence that Iraq maintains either stocks of such weapons or the operational capacity to deploy and deliver them against the U.S. or U.K.³¹ Even Iraq’s neighbors have rejected the

argument that military intervention from outside powers is necessary under the right of collective self-defense to protect them from an imminent Iraqi threat.

Under these circumstances, war against Iraq would violate any reasonable interpretation of either the Charter's limited provision for self-defense exception or the customary law principle of preemptive self-defense. The potential threat Iraq poses to the U.S. and U.K. is not imminent, unavoidable, or even particularly credible. Launching a massive invasion to overthrow its government and occupy its territory in response to a dubious hypothetical future threat is neither a necessary nor proportionate response. In essence, the U.S. and U.K. argument for preemptive strike closely resembles the long-discredited doctrine of preventive war, definitively abolished after World War II.

Nuremberg ban on preventive war

We must make it clear to the Germans that the wrong for which their fallen leaders are on trial is not that they lost the war, but that they started it. And we must not allow ourselves to be drawn into a trial of the causes of the war, for our position is that no grievances or policies will justify resort to an aggressive war. It is utterly renounced and condemned as an instrument of policy.³²

*Robert L. Jackson, Chief Prosecutor at Nuremberg and U.S. Supreme Court Justice
August 12, 1945*

Preventive war is unequivocally illegal. In 1946, the International Military Tribunal at Nuremberg rejected Germany's argument that it had been compelled to attack Norway and Denmark in self-defense to prevent a future Allied invasion.³³ The Tribunal concluded that these attacks violated customary law limits on self-defense and instead constituted wars of aggression whose prohibition was demanded by the conscience of the world.³⁴ As the Tribunal stated:

To initiate a war of aggression, therefore, is not only an international crime; it is *the supreme international crime* differing only from other war crimes in that it contains within itself the accumulated evil of the whole.³⁵

selected principles of the Charter of the Nuremberg Tribunal

PRINCIPLE I: Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.

PRINCIPLE III: The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him of responsibility under international law.

PRINCIPLE IV: The fact that a person acted pursuant to order of his Government or superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

PRINCIPLE VI: (a) Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned in (i).

PRINCIPLE VII: Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

Source: English Text published in "Report of the International Law Commission Covering Its Second Session, 5 June-29 July 1950," Document A/1316, pp. 11-14.

Nuremberg's condemnation of preventive war was incorporated into the U.N. Charter, affirmed by the General Assembly, and accepted by the Security Council.³⁶ In 1978, the U.S. mobilized the Security Council to condemn Vietnam's invasion of Cambodia and overthrow of the violently repressive Khmer Rouge regime, terming it a breach of Charter and an act of aggression in violation of international law.³⁷ Similarly, in 1981, the Council unanimously condemned Israel's "preventive" attack against an Iraqi nuclear plant as a "clear violation of the Charter of the UN and the norms of international conduct."³⁸ A Council member explained the consensus:

The concept of preventive war, which for many years served as a justification for the abuses of powerful States, since it left to their discretion to define what constituted a threat to them, was definitively abolished by the Charter of the U.N.³⁹

The German argument in favor of preventive war was judged and condemned by the Nuremberg Tribunal, and German leaders held individually accountable as war criminals. Any return to this doctrine by powerful states such as the U.S. and U.K. would undermine world public order, and in the process encourage states and non-state actors alike to launch unilateral acts of aggression unconstrained by longstanding principles of international law.

humanitarian intervention

The U.S. and U.K. have also sought to justify war under the legally dubious doctrine of humanitarian intervention, a new concept that has not gained the support of the international law community. This doctrine—recently advocated by several Western countries and human rights organizations—proposes that the international community has the right and duty to use military force for humanitarian purposes such as stopping egregious violations of human rights.⁴⁰ This concept has aroused considerable skepticism from most international lawyers, in part because it circumvents well-established procedures and principles of the U.N. Charter and international law.⁴¹ Even supporters concede that humanitarian intervention is a moral argument rather than a legal right.⁴²

The attraction of humanitarian intervention lies in its capacity to redress gross human rights abuses that otherwise might fall outside the scope of Security Council action—the genocide in Rwanda, for example. However, this is a misreading of the Council's authority. Major crises like the Rwandan genocide have regional and international repercussions. The Council is therefore already empowered, under Chapter VII, to respond with force if necessary as a final resort to maintain peace and security and uphold the U.N.'s fundamental purposes, which include "encouraging respect for human rights and fundamental freedoms."⁴³ As a matter of historical record, the Security Council did consider military intervention in Rwanda but was blocked repeatedly by its permanent members, including the U.S., the U.K., and France.⁴⁴

human rights violations under sanctions

The Center for Economic and Social Rights was among the first groups to argue that Security Council sanctions violate the human rights of the Iraqi population on the grounds that the deaths of hundreds of thousands of civilians, even if unintended, is disproportionate to any political gains from containing President Saddam Hussein and his Ba'athist regime. There is now significant support among law-based organizations for the proposition that, in Iraq, people's basic human rights cannot be sacrificed even in pursuit of legitimate international goals such as disarmament, especially when alternatives such as non-economic sanctions are readily available.

Source: CESR Report, "Unsanctioned Suffering: Human Rights Violations Under Sanctions (May 1996), www.cesr/iraq.

The obvious danger of humanitarian intervention is that it enables individual states to intervene wherever and whenever they perceive a compelling humanitarian necessity, unaccountable to established legal limits on the use of force. There is no safeguard to prevent states from manipulating this concept to serve narrow political interests rather than universal humanitarian concerns. From the standpoint of preventing human rights abuses, it would seem more effective, morally and legally, to promote principled and consistent enforcement of the existing legal framework of the U.N. Charter, the Universal

Declaration of Human Rights, the Geneva Conventions, and international law in general.

This is a very evil man [Saddam Hussein] who, left to his own devices, will wreak havoc against his own population, his neighbors and, if he gets weapons of mass destruction and the means to deliver them, on all of us. It is a very powerful moral case for regime change... if Saddam Hussein is left in power, doing the things that he's doing now, this is a threat that will emerge, and emerge in a very big way.⁴⁵
Condoleezza Rice, U.S. National Security Adviser

In the case of Iraq, this controversial new doctrine is being interpreted by the U.S. and U.K. to circumvent the Charter altogether and justify war against Iraq without Security Council approval. The U.S. has openly called for “regime change” in Iraq—ostensibly in response to the government’s well-documented record of political repression, human rights abuses, and chemical weapons use—despite having systematically ignored these abuses during the 1980s when President Saddam Hussein was actively serving U.S. interests in the region.⁴⁶

The human rights situation in Iraq is being invoked with unusual frequency by some Western political leaders to justify military action. This selective attention to human rights is nothing but a cold and calculated manipulation of the work of human rights activists.⁴⁷
Irene Khan, Secretary-General of Amnesty International, September 25, 2002

The prohibition on the use of force is a peremptory norm, the highest value in the international system, and as such, “can be modified only by a subsequent norm of general international law having the same character.”⁴⁸ By invoking the concept of humanitarian intervention to justify an otherwise unlawful use of force, the U.S. and U.K. would effectively overturn the established hierarchy of international law. The practical outcome would be to shift decision-making on basic issues of peace and security from multilateral U.N. mechanisms to individual states, empowering them to use force without accountability to general principles of law.

4. Security Council authorization for force

This section summarizes the Security Council’s responsibility for authorizing force to maintain peace and security and assesses the legality of war against Iraq under three scenarios: (i) previous Security Council resolutions, (ii) failure to obtain a new resolution, and (iii) force authorization under a new resolution.

Under Chapter VII of the Charter, the Security Council is the sole legitimate arbiter of the use of force in international relations outside of the narrow exception of self-defense discussed below. The Council alone is empowered to authorize, in response to a “threat to the peace, breach of the peace, or act of aggression... such action by air, sea or land forces as may be necessary to maintain or restore international peace and security.”⁴⁹ Such authorization can be taken only after the Council determines that peaceful measures “would be inadequate or have proved to be inadequate.”⁵⁰

war justified by previous resolutions

The U.S. and U.K. insist that previous Security Council resolutions are sufficient to justify attacking Iraq. Indeed this is the only argument relied upon by the UK Attorney General in the opinion he presented to Parliament on March 17, 2003.⁵¹ According to this view, Resolution 678 (1990), which authorized the use of force in the 1991 Gulf War, can be invoked unilaterally at any time by individual Council members to authorize force in response to a material breach by Iraq of any of the conditions in any of the relevant resolutions, especially cease fire Resolution 687 (1991).

Resolution 678 specifically invoked the two exceptions to the Charter's prohibition against force—Chapter VII and the self-defense—while authorizing members to use “all necessary means” to reverse the Iraq's illegal occupation.⁵² This is the Council's recognized diplomatic term for authorizing force, identical to language later used in Rwanda, Bosnia, Somalia, and Haiti.⁵³

But Resolution 687 terminated the force authorization and declared that “a formal cease-fire is effective between Iraq and Kuwait and member states cooperating with Kuwait in accordance with resolution 678.” Moreover, 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 region.”⁵⁴ This language places the future approval of force expressly within the mandate of the Council acting as a whole and not in the hands of any individual members.

The same issue arose during Security Council discussions on Resolution 1154 (1998), which warned Iraq of “severest consequences in the event of noncompliance” with UNSCOM, the previous weapons inspection regime. The Council used weaker diplomatic language than “all necessary means,” and again made explicit that it alone retained authority to “ensure implementation of this resolution and peace and security in the region.”⁵⁵ During the debate, a majority of Council members disputed U.S. and U.K. contentions that previous resolutions gave them the right to take unilateral military action against Iraq in response to a material breach.⁵⁶ Russia stated that “any hint of such automaticity with regard to the application of force [by individual states] has been excluded; that would not be acceptable for the majority of the Council's members.”⁵⁷

key UN Security Council resolutions on Iraq

1441 (8 November 2002): Establishes “an enhanced inspection regime with the aim of bringing to full and verified completion the disarmament process,” demands that Iraq provide an “accurate, full, and complete” declaration of its proscribed weapons programs, recalls that “the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations,” and “decides to remain seized of the matter.”

1284 (17 December 1999): Replaces UNSCOM with UNMOVIC, demands Iraqi cooperation on prisoners of war, alters the Oil-for-Food Program and allows for suspension of sanctions upon certification of disarmament by UNMOVIC.

1154 (2 March 1998): “Commends the initiative by the Secretary-General to secure commitments from the Government of Iraq on compliance with its obligations under the relevant resolutions” and warns Iraq that non-compliance on the part of Iraq will entail “severest consequences.”

687 (3 April 1991): Declares effective a formal cease-fire ending the Gulf War, establishes the UN Special Commission on Weapons (UNSCOM) to supervise the destruction of proscribed weapons in Iraq, extends sanctions until compliance with list of conditions, in particular disarmament.

678 (29 November 1990): Authorizes UN member states to use “all necessary means” to bring Iraq into compliance with previous Security Council resolutions regarding its invasion of Kuwait if it failed to comply with them by 15 January 1991.

661 (6 August 1990): Imposes comprehensive sanctions on Iraq and establishes a committee to monitor them.

660 (2 August 1990): Condemns the Iraqi invasion of Kuwait and demands Iraq's immediate and unconditional withdrawal.

Source: Campaign against Sanctions on Iraq (CASI), “UN Security Council resolutions relating to Iraq.” At <http://www.casi.org.uk/info/scriraq.html>.

The U.S. and U.K. nevertheless ignored the plain language of the resolution and launched the Operation Desert Fox air strikes against Baghdad. France subsequently ended its participation with the U.S. and U.K. in enforcing the “no-fly zones” on the grounds that the air patrols had shifted purpose from humanitarian protection to illegal military operations unauthorized by the Security Council.⁵⁸

Resolution 1441 (2002), mandating the resumption of weapons inspections under UNMOVIC, represents a further weakening of the language of potential force, referring only to “serious consequences” in the event of a “material breach” of past resolutions. France, Russia, and China, a majority of the veto-bearing members, added a written proviso stating that the resolution did not authorize “automaticity in the use of force” and that any approval of force remained with the Council as a whole.⁵⁹

After all these actions, to now state that the United Nations has not in fact occupied the field, that there remains under Article 51 or under Resolution 678... total freedom on the part of any UN member to use military force against Iraq at any point that any member considers there to have been a violation of the conditions set forth in Resolution 687, is to make a complete mockery of the entire system.⁶⁰

Thomas Franck, Professor of International Law, New York University

It appears evident that there is no legal basis for the U.S. and U.K. to maintain that previous Council resolutions allow them to attack Iraq absent a new resolution with appropriate language authorizing force.

war without a new resolution

The U.S. and U.K. have recently advanced the argument that a resolution passed by a majority of nine Council members would be sufficient to overcome a veto by one or more permanent members. This flatly contradicts 50 years of U.N. procedure, as well as consistent U.S. practice. Since 1986, the U.S. has used the veto far more frequently than all other permanent members combined, most recently in January 2003 to block otherwise unanimous condemnation of Israel for killing three U.N. staff and destroying a U.N. food warehouse in the Occupied Palestinian Territories.⁶¹

Removing or modifying the veto privilege of permanent members has long been a central demand of U.N. democratic reformers.⁶² But until such changes are agreed, the veto can be circumvented legally only through a Uniting for Peace resolution by the General Assembly.⁶³

war with a new resolution

In the increasingly unlikely event that the Security Council approves a new resolution on Iraq, it would be necessary to assess whether the resolution actually authorized force. The most recent text proposed by the U.K. invokes neither Chapter VII nor the right of self-defense, and refers only to “serious consequences” in case of material breach by Iraq.⁶⁴ Such language would not legally authorize force even if the resolution were approved by the Council.

If a new resolution did specifically authorize force, it would be necessary to assess whether such authorization is lawful. The Security Council has wide latitude to determine and respond to a threat to the peace. But the Council is not a law unto itself, and its scope of action is not unlimited. As the International Court of Justice has observed, “one only has to state the proposition thus—that a Security Council resolution may even require participation in genocide—for its unacceptability to be apparent.”⁶⁵

The history of the United Nations...corroborates the view that a clear limitation on the plenitude of the Security Council's powers is that those powers must be exercised in accordance with the well-established principles of international law.⁶⁶
C.G. Weeramantry, former Vice President of the International Court of Justice

Article 24 of the Charter directs the Council to act only within the specified purposes and principles of the U.N. itself,⁶⁷ which include promoting peace and encouraging respect for international law, especially "human rights and fundamental freedoms."⁶⁸ As stated by the Chairman of the Human Rights Committee of the English Bar:

The Security Council is a creature of law and must act in accordance with it. It cannot confer legitimacy on conduct which is in reality an act of aggression or is unjustified because it is a disproportionate response to a threat to the peace.⁶⁹

The Security Council cannot therefore violate basic principles of international law by authorizing the use of preventive force against Iraq. Given that Iraq is cooperating with the world's most intrusive weapons inspections regime and no longer poses a credible military threat even to its neighbors, it would be legally dubious for the Council to justify a determination that Iraq poses an imminent threat to international peace and security necessitating immediate military force. This is especially true in light of the Council's obligation under Chapter VII to exhaust all peaceful avenues before authorizing war.⁷⁰

If we were to be given four months, I would welcome it. There were eight years of inspections and four years of no inspections, and now we have had a couple of months. And it seems to me a rather short time to close the door and say, this is it.⁷¹
Hans Blix, chief United Nations weapons inspector, March 11, 2003

Our common objective remains the full and effective disarmament of Iraq, in compliance with Resolution 1441. We consider that this objective can be achieved by the peaceful means of the inspections.... In these circumstances, we will not let a proposed resolution pass that would authorize the use of force.⁷²
Foreign Ministers Dominique de Villepin (France), Ivan S. Ivanov (Russia), and Joschka Fischer (Germany), March 11, 2003

If the United Nations fails to act, that means that the United Nations will not be the international body that disarms Saddam Hussein. Another international body will disarm Saddam Hussein. There are many ways to form international coalitions. The United Nations Security Council is but one of them.⁷³
Ari Fleischer, White House spokesman, March 11, 2003

Serious questions are also raised by the public U.S. strategy of using extraordinary political and economic pressures to coerce undecided Council members to support a new resolution approving war against Iraq—going so far as to conduct illegal surveillance of their U.N. Missions.⁷⁴ Under these circumstances, a new resolution authorizing war must be scrutinized carefully to ensure that it accords with fundamental principles of human rights and international law rather than the interests of its most powerful member.

5. The end of the UN or a new beginning?

U.S. policy towards Iraq poses a direct challenge the central purpose of the United Nations, in particular the Charter's prohibition on the use of preventive force. Poised at the brink of war, a divided Security Council is failing to hold to the common ground of international law. While Prime Minister Blair has hesitated to pursue open defiance of the U.N. and sought legal justification for war, the Bush Administration has publicly insisted that the U.S. will invade Iraq and pursue "regime change" under any and all circumstances, including opposition in the Council. As President Bush recently declared, "we really don't need anybody's permission."⁷⁵

As this report demonstrates, war against Iraq cannot be justified under any reasonable interpretation of international law. U.S. and U.K. arguments in support of attacking Iraq are based, in essence, on the unilateral right of powerful states to preempt even the possibility of future threats from other states, no matter how speculative or remote. This position is manifestly illegal, and constitute an act of aggression within the legal definition of a crime against peace.

If an unlawful war is chosen over the rule of international law, vulnerable Iraqi civilians would immediately a high price, and the world would become a far more dangerous place. A successful U.N. weapons inspections process would be rejected in favor of disarmament through war—paving the way for global proliferation of weapons of mass destruction. The Security Council's collective responsibility for maintaining international peace and security would be dismantled—opening the door to the unilateral use of force by states and non-state actors alike. International laws for promoting peace and human rights would be abandoned—without putting into place a more effective framework to bind together a world already riven by conflicts.

Alarmed by the imminent threat to global security and the U.N. system as a whole, international lawyers have rapidly developed a consensus that war against Iraq would violate the outer limits of laws regulating the use of force.⁷⁶ Legal associations and human rights groups around the world have condemned the threatened used of force by the U.S., U.K. and states acting in concert with them, and initiated actions to hold such governments accountable for war crimes and crimes against the peace.

The Administration has made clear that such an attack is based on long-term foreign policy, if not moral reasons, and not on any concept of defending the United States from an imminent military threat... The Committee concludes, therefore, that Resolution 678 does not provide authorization for the invasion contemplated by the Bush Administration.⁷⁷
The New York City Bar Committee on International Security Affairs, Fall 2002

We consider that any future use of force without a new U.N. Security Council Resolution would constitute a crime against peace or aggressive war in violation of the U.N. Charter.⁷⁸
Center for Constitutional Rights, on behalf of over 1,000 law professors and U.S. legal organizations, January 24, 2002

Our view is that current Security Council resolutions do not authorise the use of force against Iraq. Such force would require further authorization from the Security Council. At present the United Kingdom is therefore not entitled, in international law, to use force against Iraq.⁷⁹
Public Interest Lawyers, January 23, 2003

The US Administration has offered several different justifications for a war against Iraq. Yet, in essence, the planned military action comes down to an act of aggression against Iraq,

the characterization of which as a “preventive” war does nothing to alter its illegality under international law.

Freiburg Lawyers Declaration, on behalf of over 100 German jurists, February 10, 2003

Our governments are planning to commit nothing short of mass murder. They are planning to kill Iraqi civilians without any lawful justification or excuse. That’s a crime in England and in Canada and under international law. No one is above the law, even Prime Ministers.

If they do this terrible thing, we are going to see to it that they are personally brought to justice. We are going to prosecute them for each and every crime that they commit.⁸⁰

Canadian Lawyers Against War, January 23, 2003

The overwhelming global support for a peaceful resolution to the Iraq crisis presents an opportunity to strengthen rather than undermine fundamental principles of law. There remains a small window of opportunity for public officials at all levels—from governments to the U.N.—to act in defense of the foundation laid by U.N. Charter and the Universal Declaration of Human Rights. The promise of peace and human rights expressed in these laws represents a far more hopeful future than the path of endless war.

Such action could take many forms:

- public statements opposing war and defending international law from the world’s leading political and religious figures;
- a public statement by the Secretary-General, acting under Article 99 of the Charter, insisting that only the Council as a whole, and not its individual members, is entitled to authorize the use of force;
- a Security Council resolution asserting its exclusive responsibility under Chapter VII to authorize force if necessary to maintain international peace and security;
- an advisory opinion from the International Court of Justice on the legality of force by individual states acting outside of the authority of the Security Council; and
- a Uniting for Peace resolution by the General Assembly proposing concrete legal measures to resolve the Iraq crisis and demanding compliance by all U.N. member states, including the U.S. and U.K..

Any of these measures would help restore faith that the rule of law applies to the powerful and weak alike. By defending its founding principles and refusing to sanction an unlawful war, the United Nations would prove its “relevance” in the eyes of most of the world and plant the seeds for its eventual rejuvenation.

ENDNOTES

¹ Harvard Study Team, “Special Report: The Effect of the Gulf Crisis on the Children of Iraq,” *New England Journal of Medicine* 325 (1991): 977-980. Lead organizers of the Harvard Study Team and International Study Team went on to establish the Center for Economic and Social Rights in 1993.

² International Study Team, *Health & Welfare in Iraq After the Gulf Crisis: An In-Depth Assessment* (1991), <http://www.cesr.org/iraq/docs/ist1991report.pdf>.

³ Zaidi, S. and M. Fawzi, “Health of Baghdad’s Children,” *The Lancet*, 346 (2 Dec 1995).

⁴ Normand, R., and C. Jochnick, “The Legitimation of Violence: A Critical Analysis of the Gulf War,” 35 *Harvard International Law Journal* 2, at 387 (Spring 1994).

⁵ Center for Economic and Social Rights, *Unsanctioned Suffering: A Human Rights Assessment of United Nations Sanctions Against Iraq*, May 1996, <http://www.cesr.org/iraq/docs/unsanctioned.pdf>.

⁶ Center for Economic and Social Rights, *The Human Costs of War in Iraq* (February 2003), <http://www.cesr.org/iraq/docs/humancosts.pdf>.

⁷ This report focuses on the leading role of the U.S. and U.K. in the war against Iraq, but it is important to stress that all governments participating in the attack will share in responsibility for crimes against peace, war crimes, or violations of international law resulting from their actions. For example, Australia, Canada, Spain, and Bulgaria have pledged military support for war. Kuwait, Jordan, Qatar, UAE, Bahrain, Cyprus, and Turkey are allowing use their territory to support ground and/or air attacks. For more on participating states, see Institute for Policy Studies, *Coalition of the Willing or Coalition of the Coerced?* (26 February 2003).

⁸ "We believe that our actions now are supported by international law," cited in "U.S. Ends Diplomacy; Bush to Deliver Ultimatum," Reuters (17 March 2003).

⁹ Attorney General, Lord Goldsmith, cited in BBC News, http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk_politics/2857347.stm.

¹⁰ Margo Kingston, "It's legal, believe me," Sydney Herald (March 17, 2003).

¹¹ Two organizations leading these efforts in the U.S. and U.K. respectively are the Center for Constitutional Rights, see "Law Professors and NGO's Warn Bush of the Legal Consequences of a War on Iraq," <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=Zqb6ztXjyJ&Content=155>; and the Campaign For Nuclear Disarmament, see "Opinion in the Matter of the Potential Use Of Armed Force by the UK Against Iraq," <http://www.cnduk.org/briefing/opinion.htm>.

¹² See., e.g., United Nations Development Programme, Human Development Reports 1990-2002; <http://www.globalissues.net/Features/OverviewPeace.htm>.

¹³ John Tagliabue, "France and Russia Ready to Use Antiwar Veto," *New York Times*, 6 March 2003.

¹⁴ Patrick E. Tyler and Felicity Barringer, "Annan Says U.S. Will Violate Charter if It Acts Without Approval," *New York Times*, 11 March 2003.

¹⁵ Preamble, *Charter of the United Nations*, 26 June 1945, entered into force 24 October 1945.

¹⁶ After the establishment of the U.N., a number of influential international jurists argued that the Charter superceded all previous customary international law. See, e.g., Kelsen, *The Law of the United Nations* (London, 1950) at 914; Brownlie, *International Law and the Use of Force by States* (Oxford: OUP) at 264; Jessup, *A Modern Law of Nations – An Introduction* (New York: Macmillan, 1952) at 165.

¹⁷ Art. 1(1), UN Charter.

¹⁸ Art. 2(3), UN Charter.

¹⁹ Art. 2(4), UN Charter.

²⁰ See, e.g., Security Council Resolution 487/1981, 1981 ILM 965; Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States (GA Res. 2131 (XX) (1965)); Declaration of the Principles of International Law (GA Res. 2625 (XXV) (1970)); Definition of Aggression (GA Res. 3314 (XXIX) (1974)); Resolution on Enhancing the Effectiveness of the Prohibition of the Use of Force (GA Res. 42/22, 18 November 1987).

²¹ The prohibition on aggressive war is a *jus cogens*, or peremptory, norm, see Restatement (Third) of Foreign Relations Law of the United States, sec. 102, comment k (1987); *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits)*, ICJ Report 14, 100 (1986).

²² Vienna Convention on the Law of Treaties, Article 53.

²³ 6 FRD 69, 109.

²⁴ Art. 51, U.N. Charter. Emphasis added.

²⁵ *Id.*

²⁶ R. Singh, A. Macdonald, Matrix Chambers, Public Interest Lawyers on behalf of Peacerights, "Opinion on the legality of the use of force against Iraq," para. 17, p. 8 (10 September, 2002).

²⁷ Letter from US Secretary of State Daniel Webster to Lord Ashburton, August 6, 1842, quoted in Moore, *A Digest of International Law*, Vol. II (1906), at 412.

²⁸ A. Cassese, *International Law* (Oxford: 2001), p. 311.

²⁹ See e.g. Yoram Dinstein, *War, Aggression and Self-Defence*, 2nd ed. (Cambridge: Cambridge University Press, 1994), 188.

³⁰ *Nicaragua*, ICJ Reports (1986) at 14, 94 and 103; *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996) at para. 41.

³¹ Twelfth Quarterly Report of the Executive Chairman of UNMOVIC, S/2003/232 (28 February, 2003).

³² Robert L. Jackson, "U.S. Department of State Bulletin (Washington, DC: Government Printing Office, 1945).

³³ 6 FRD 69, 83.

³⁴ 6 FRD 69, 88, 117-8.

³⁵ 6 FRD 69, 109 (emphasis added).

³⁶ GA Res. 95(I) (11 December 1946).

³⁷ Find SC resolution and language.

³⁸ Operative Paragraph I, SC Res. 487/1981; 1981 ILM 965.

³⁹ Mexico, 1981 ILM 991-2.

⁴⁰ [Human Rights Watch, Report on Kosovo Bombing; Physicians for Human Rights Report]

⁴¹ B. Simma, NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1 at 22; A. Cassese, "Ex iniuria ius oritur. Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community: (1999) 10 *European Journal of International Law* 23 at 25; M. Koskeniemi, "The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law" (2002) 65 *Modern Law Review* 159 at 162.

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- ⁴² [See, e.g., Franck and others.]
- ⁴³ Article 1, UN Charter
- ⁴⁴ Samantha Power, *A Problem from Hell: America in the Age of Genocide*, Perseus Books, 2002.
- ⁴⁵ Condoleezza Rice interview with BBC, reported at <http://news.bbc.co.uk/1/hi/world/americas/2193426.stm> (Aug. 15, 2002) (emphasis added).
- ⁴⁶ Patrick E. Tyler, "Officers Say U.S. Aided Iraq in War Despite Use of Gas," *New York Times*, 17 August 2002.
- ⁴⁷ Irene Khan, "Iraq II: Who Cares about the People?" *International Herald Tribune*, 25 September 2002.
- ⁴⁸ Vienna Convention on the Law of Treaties, Art. 53.
- ⁴⁹ Art. 39, UN Charter.
- ⁵⁰ Art. 42, UN Charter. Under Article 53, the Security Council may delegate to a regional organization authority for the use of force.
- ⁵¹ Attorney General, Lord Goldsmith, cited in BBC News, http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk_politics/2857347.stm
- ⁵² Security Council Resolution 678.
- ⁵³ R. Singh, A. Macdonald, Matrix Chambers, Public Interest Lawyers on behalf of Peacerights, "Opinion on the legality of the use of force against Iraq," para. 52, p. 24 (10 September, 2002).
- ⁵⁴ Security Council Resolution 687.
- ⁵⁵ Security Council Resolution 1154.
- ⁵⁶ C. Gray, *From Unity to polarization: International Law and the Use of Force Against Iraq*, 13 EJIL 1, at 10 (2002).
- ⁵⁷ Cited in N. Blokker, *Is the Authorization Authorised? Powers and Practice of the UN Security Council to Authorize the Use of Force by Coalitions of the Able and Willing*, 11 EJIL 541 (2000).
- ⁵⁸ Id. at 22; C. Antonopoulos, *The Unilateral Use of Force After the Cold War*, JACL 117, at 155 (1999).
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- ⁶⁰ T. Franck, "Legal Authority for the Possible Use of Force Against Iraq," at 139, ASIL Proceedings (1998).
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- ⁶² Brahimi Report, Urquart and Childers Report.
- ⁶³ Duncan Currie, "Note: Convening an Emergency Session of the General Assembly Under the 'Uniting for Peace' Resolution 377 (A)(V);" See also draft resolution in Center for Constitutional Rights, http://www.ccr-ny.org/v2/reports/docs/Draft_Uniting_For_Peace_Resolution.pdf.
- ⁶⁴ UK draft resolution, <http://www.casi.co.uk>.
- ⁶⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, 1993 I.C.J. 325, 440 (Sep. Op. Lauterpacht).
- ⁶⁶ *Order with Regard to Request for the Indication of Provisional Measures in the Case Concerning Questions of Interpretations and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v United States)*, 1992 ICJ 114, 31 ILM 662, 694-696 (April 4, 1992) (Diss. Op. Weeramantry).
- ⁶⁷ Article 24, UN Charter.
- ⁶⁸ Article 1, UN Charter.
- ⁶⁹ Peter Carter QC, Chairman of the Human Rights Committee of the English Bar, *The Guardian*, London, Thursday 13 February 2003.
- ⁷⁰ Article 39, UN Charter.
- ⁷¹ Hans Blix, cited in "U.S. Says U.N. Could Repeat Errors of 90's," *New York Times*, p. A1 (March 11, 2003)..
- ⁷² Joint Statement, cited in "U.S. Says U.N. Could Repeat Errors of 90's," *New York Times*, p. A1 (March 11, 2003).
- ⁷³ Ari Fleischer, cited in "U.S. Says U.N. Could Repeat Errors of 90's," *New York Times*, p. A1 (March 11, 2003).
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- ⁷⁵ "U.S. Says U.N. Could Repeat Errors of 90's," *New York Times*, p. A1 (March 11, 2003).
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