Britain’s War on Saddam had the Law on its Side

Christopher Greenwood QC*

The charge of military adventurism is unfair; we upheld international law

Today’s House of Commons debate on Iraq will raise the question of whether Britain broke international law. It is an important question because in a democracy people expect their government to act within the law. Contrary to what critics claim, however, the military action was not illegal, nor was the government’s legal case made up on the hoof.

Lord Alexander of Weedon, QC, was right to emphasise in The Times (and see also pp. 3-28) the importance of the legal issue but he was wrong to liken Iraq to Suez and to characterise it as military adventurism. Britain’s actions over Suez had no semblance of legality and the Prime Minister of the day was openly dismissive of international law. In sharp contrast, the present government has gone to great lengths to ensure that it acted within the law and to explain the legal basis for its actions. In doing so it consistently relied on a legal justification that successive governments have advanced for more than ten years.

The action in Iraq was a lawful measure to remove a serious threat to international peace that had festered since Iraq’s invasion of Kuwait in 1990. Not only was that invasion a manifestly unlawful act, but the Security Council concluded that Iraq, which had twice invaded a neighbour and used poison gas to devastating effect against its own people, posed a threat to peace that went beyond the situation in Kuwait. That was why the council (in Resolution 678) authorised a coalition of states to use force against Iraq. That mandate was not only the legal basis for the military action that freed Kuwait in 1991, it remained central to the legal position thereafter, because Resolution 678 was not limited to the liberation of Kuwait but it authorised the coalition states to use force for the broader goal of restoring “international peace and security in the area”.

* Professor of International Law, London School of Economics; assisted the Government on the Iraq conflict. This article has been reprinted with the kind permission of The Times, where it appeared as a guest contribution on 22 October 2003.
To achieve that broader goal, the council decided that Iraq must rid itself not only of all weapons of mass destruction but of all raw materials and programmes for the development of such weapons and do so under close international supervision. These steps were made conditions of the cease-fire, laid down in Resolution 687, after the liberation of Kuwait. They were legally binding on Iraq and were accepted by Saddam Hussein’s government, although it never honoured them. Importantly, the council did not repeal Resolution 678. The authorisation of military action could therefore be revived if Iraq violated the cease-fire terms.

That was the legal justification relied on by the Conservative government, as well as by the American and French governments, when they took military action against Iraq in 1993. Their view was endorsed by Boutros Boutros Ghali, then the U.N. Secretary-General. The same justification for action was relied on by the government in December 1998 when the U.N. weapons inspectors were forced out of Iraq.

More recently, Resolution 1441, unanimously adopted in last November, made clear that the council considered that the earlier resolution was still in force. It also held that Iraq was in material breach of its cease-fire obligations. The legal basis for military action thus existed without the need for a further resolution. The council nevertheless gave Iraq a “final opportunity” to comply, saying that serious consequences would follow if it failed to do so. That Iraq did not take that opportunity was demonstrated by the successive reports of the U.N. weapons inspectors.

When those reports were debated, in March 2003, not one of the 15 council members questioned the proposition that Iraq was still in breach of Resolution 687. The council was not, however, able to agree on what to do next. The consequences of the council’s well-publicised failure to agree have been widely misunderstood. The council did not decide to reject military action. It was unable, because of divisions that existed among its members at the time, to take any decision at all. But no new decision was required as a matter of law.

Resolution 1441 made clear that continuing violations by Iraq had to be reported back to the council for consideration, but, crucially, proposals that would have required a further decision by the council were not included when the text of Resolution 1441 was adopted. The lack of a fresh decision in March this year did not alter what the council had already decided. It had already confirmed its earlier authority to use force for the restoration of peace and security; it had already decided that Iraq had still not done what the council had considered for 12 years was essential for the restoration of peace and security. In those circumstances, for Britain and the United States to rely on the existing authorisation was entirely lawful.

Nor does the fact that no “smoking gun” has yet been discovered in Iraq affect the legal basis for the action. The Security Council resolutions make clear that the critical question was not whether Iraq might possess a prohibited weapon capable of immediate use. Rather, what the council consistently required was that the inspectors it appointed be able to certify that all such weapons had gone and that there were no programmes in place by which new ones could be created. Iraq was required to take positive steps, of disclosure