

Peter Carter: America and Britain had no right to act as vigilantes on behalf of the UN

The Legal View

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Was the invasion of Iraq legal? This has always been an important question, and the decision to drop the case against Katharine Gun last week has brought it back into focus. One reason it matters so much is that, according to some reports, the armed services would have refused an order to go to war in the absence of an opinion from the Attorney General confirming that the war was lawful. The armed forces are informed by lawyers who take an enlightened view of international law. So his opinion became critical in the process.

The Attorney gave a very brief statement to the House of Lords asserting that war was justified. A subsequently published summary of his opinion was still remarkably brief.

The Attorney General, Lord Goldsmith, is a good lawyer and an honourable man. Any good lawyer makes clear that an opinion is based upon the assumption that the facts upon which he or she is asked to advise are true. Often a lawyer is asked to provide an opinion saying whether a particular proposition of law can be justified, even though the lawyer may have doubts that it is the correct answer or believes that it would not survive serious intellectual scrutiny in court. We have not been told what facts formed the basis of Lord Goldsmith's brief, nor whether he had the time or opportunity to subject them to a lawyer's critical scrutiny, nor whether he was asked for both sides of the argument.

The justification - and the only justification - relied upon was the persistent breach of UN Security Council resolutions on disarmament, the famous WMD. The argument went like this. Use of force in the first Gulf War was expressly authorised by Security Council Resolution 678. This resolution referred to states using "all necessary means" (a euphemism for armed force) to liberate Kuwait from Iraq's invasion. At the end of that conflict, Security Council Resolution 687 set out the terms of a ceasefire and imposed various conditions on Iraq, including its agreement to destroy its WMD and be subject to inspection for verification. By indicating its acceptance of those conditions, Iraq brought the hostilities to an end and the ceasefire into effect.

We all know the fraught history of the weapons inspections. Iraq made life difficult for those inspectors so that various other Security Council Resolutions followed, ending in Resolution 1441, adopted on 8 November 2002. This gave Iraq what it termed a "final opportunity to comply with its disarmament obligations" and threatened "serious consequences" should it fail to do so.

As a justification for war, the US and the UK argued that Iraq was in breach of Resolution 1441, and that meant that the ceasefire set out in Resolution 687 was revoked and the use of force authorised in Resolution 678 was reinstated. That argument is wrong. The ceasefire set out in Resolution 687 was 12 years old. Since then there had been resolutions recording Iraq's non-compliance, none of which invoked the use of force in that earlier resolution. Critically, Resolution 1441 did not do so either. It specifically referred to serious consequences, ie something to be decided by the Security Council if satisfied there was a breach that justified extreme measures.

The Security Council did not take that view in early 2003, despite the efforts of the UK and the US to persuade it. Resolution 1441 concluded by saying that the Security Council is to "remain seized of this matter". That does not mean that the Security Council has delegated the matter to whatever state decided to enforce what it thought the Security Council should have resolved.

In international law, states are not allowed to be vigilantes claiming to act on behalf of the Security Council. Such claims are spurious. The result is that any acts taken without Security Council authorisation are unlawful, unless justified as self-defence. Self-defence was not used as a justification and could not have been on the material available.

The draft resolution put before the Security Council by the UK in an effort to give authority for war did include the expression "all necessary means". Try as the apologists might to argue that was purely to err on the safe side, it reflects a proper interpretation of what the law required, namely a clear authorisation by the Security Council for member states to invade Iraq. There was no such resolution. The invasion was unlawful.

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