

## **Legal Backgrounder 2**

### **New Zealand and Iraq (1990-2001)**

#### ***Background***

- On 1 August 1990 Iraq, reviving an historical claim to Kuwait as its 19th province and also accusing it of slant-drilling into Iraqi oilfields, invaded Kuwait, subsequently annexing it.

#### ***UN Action***

- On 2 August, the Security Council determined (SCR 660) that a breach of the peace had been committed, condemned the Iraqi invasion, demanded an immediate and unconditional withdrawal by Iraqi forces to the positions before 1 August, and supported the efforts of the Arab League for a peaceful settlement.
- On 6 August, the Council (in SCR 661) determined that the political independence and territorial integrity of Kuwait had been violated, noted the right of Kuwait to engage in individual and collective self-defence and (acting under its enforcement powers of Chapter VII, Article 41) applied sanctions against Iraq.
- On 28 November, the Council (SCR 677) condemned the demographic changes imposed by Iraq on Kuwait, and requested the Secretary-General to open a Kuwait Population Register.
- On 29 November, the Council (SCR 678) gave Iraq 'one final opportunity' to comply with Resolution 661 by 15 January 1991. On 16 January, Iraq having failed to withdraw, a coalition of armed forces led by the US involving 34 nations undertook military action, expelling Iraq from Kuwait. Coalition forces penetrated temporarily into Iraqi territory in 'hot pursuit' but otherwise remained at the Iraq-Kuwait border in compliance with SCR 660.
- On 3 April, with Iraqi forces out of Kuwait, the Council (SCR 687) established a Commission to settle the common boundary; and imposed conditions pertaining to WMDs (weapons of mass destruction). The Council 'decided' that Iraq would unconditionally accept the destruction and removal of chemical and biological weapons, and agree unconditionally not to acquire or develop nuclear weapons.

#### ***Conclusion on the Legal Merits of NZ Govt. Action***

The expulsion of Iraq from Kuwait in 1991 was a lawful action.

- Iraq's invasion was a clear case of inter-state 'aggression' as envisaged in the UN Charter, in violation of Article 2.4.
- Kuwait, as a Member State of the UN, had the right of individual or collective self-defence under Article 51, including seeking assistance from the armed forces of other countries through the collective security provisions of the Charter (Articles 30 to 42).
- The Security Council determined a breach of the peace under Article 39, thereby triggering its Chapter VII enforcement powers.
- The Council gave the regional organisation (Arab League) an opportunity to engage in pacific settlement under Article 40, before imposing economic sanctions on Iraq under Article 41.
- The Council then gave Iraq a 'final opportunity' to withdraw with a period of some 6 weeks.
- Upon the failure of Iraq to comply, the Council authorised, under Article 42, a military coalition to enforce that withdrawal.

### New Zealand and Iraq (1992- 2008)

From 1991 to 2001, the UN Security Council maintained strict surveillance of Iraq's WMD disarmament programme through UN inspections. The Council remained concerned over Iraq's compliance with its resolutions. Following the September 2001 terrorist attack in the US, the Security Council's concerns intensified over Iraq's compliance with its WMD disarmament resolutions.

- On 8 November 2002, the Council, acting under Chapter VII, determined (SCR 1441) that Iraq had been and remained in 'material breach' of its disarmament obligations, especially SCR 687 of April 1991. It gave Iraq 'one final opportunity' to comply by submitting an 'accurate, full and complete' declaration of its weapons programme. The Council also set up an 'enhanced inspection regime'. It decided to reconvene on receipt of the Iraqi declaration, warning Iraq that it would 'face serious consequences' as a result of its continued violations of its obligations.
- On 10 November, the Ministerial Council of the Arab League, noting the statements before the UN Security Council, decided (Resolution 6257) that SCR 1441 did not constitute the basis for automatic recourse to military action against Iraq. It urged the permanent members of the UN Security Council to remain committed to their assurances to that effect.
- On 5 February 2003, the UN Security Council reconvened, receiving an intelligence report from the US which claimed that Iraq was in further material breach of SCR 1441. Both the UN inspection team and the IAEA, however, reported that there was no conclusive evidence that Iraq was currently pursuing a WMD programme. Disagreement arose whether to resort to military force at that stage or allow time for the UN inspectors before making a final determination.
- The UK introduced a draft resolution, intended as a 'second resolution' to SCR 1441, calling for the use of force. The draft was withdrawn on 9 March when it was clear it would neither receive majority support nor avoid a veto.
- On 21 March, a 'coalition of the willing' comprising the US, UK and Australia jointly invaded Iraq, overthrowing the Iraqi Government on 11 April.
- On 25 March, the Arab League Council adopted a resolution condemning the 'US-British military aggression on Iraq as a violation of the UN Charter, a deviation from international legality and a threat to international peace and security. It called for the immediate and unconditional withdrawal of the occupying forces, and for an urgent session of the UN Security Council, failing which the General Assembly would convene an Emergency Session to consider the aggression.
- On 22 May, the UN Security Council (SCR 1483) recognised the occupying armies as comprising the Coalition Provisional Authority with the responsibilities of occupying powers. The Council appealed to Member States to assist the people of Iraq to reform their institutions and rebuild their country.
- On 14 August, the Council (SCR 1500) welcomed the establishment of Governing Council of Iraq as an important step towards the formation by the people of Iraq of an internationally-recognised, representative government that would exercise the sovereignty of Iraq. The Council established UNAMI, as a peace-building mission in Iraq.
- On 16 October, the Council (SCR 1511) authorised a multinational force under unified command (MNF) to take all necessary measures to contribute to the maintenance of security and stability in Iraq. It urged Member States to assist through the provision of military forces to the MNF.
- On 8 June 2004, the Council (SCR 1546) endorsed the formation of a 'sovereign Interim Government of Iraq'. It noted that the authority of the CPA would terminate on 30 June as the Interim Government assumed responsibility, pending the formation of a Transitional Government.

- On 11 November 2005, the Council (SCR 1637) welcomed the assumption of full governmental authority by the Interim Government on 28 June 2004, the direct democratic elections of the Transitional National Assembly on 30 January 2005, and the approval of the draft constitution on 15 October. It noted that the presence of the MNF in Iraq was at the request of the Transitional Government, and requested the US to report, on behalf of the MNF, on the efforts and progress of the force on a quarterly basis.
- On 28 November 2006, the Council (SCR 1723) welcomed the formation of a National Unity Government in Iraq with a detailed political, economic and security programme and a strong national reconciliation agenda. It looked forward to the day when Iraqi forces assumed full responsibility for national security and stability.

#### *Legal Views of the UN Secretary-General*

**On the outbreak of the invasion in March 2003, the UN Secretary-General described the coalition invasion of Iraq as 'lacking legitimacy'. On 16 September 2004, he responded in a BBC interview that the invasion had been a violation of the UN Charter and thus 'illegal'.**

#### *Legal Position of the US, UK and Australia*

- In 1998 the *Iraq Liberation Act* (PL 105-338) was adopted by the US Congress, calling for regime change in Iraq. The Act found that between 1980 and 1998 Iraq had (i) committed various and significant violations of international law; (ii) failed to comply with the obligations to which it had agreed following the Gulf War; and (iii) ignored resolutions of the UN Security Council. The stated purpose was 'to establish a program to support a transition to democracy in Iraq.' Specifically, Congress made findings of past Iraqi military actions in violation of international law and that Iraq had denied entry of UNSCOM inspectors. Congress found: "It should be the policy of the United States to support efforts to remove the regime headed by Saddam Hussein from power in Iraq and to promote the emergence of a democratic government to replace that regime."
- In 2002 the *Authorization for Use of Military Force against Iraq Resolution* of 2002, a joint resolution passed by the US Congress in October 2002 as PL 107-243. The resolution 'supported and encouraged' diplomatic efforts by the President to 'strictly enforce through the UN Security Council all relevant Council resolutions regarding Iraq' and 'obtain prompt and decisive action by the Security Council to ensure that Iraq abandons its strategy of delay, evasion, and noncompliance and promptly and strictly complies with all relevant Security Council resolutions regarding Iraq.' The resolution authorised the President to use US armed forces 'as he determines to be necessary and appropriate' in order to 'defend the national security of the US against the continuing threat posed by Iraq; and enforce all relevant UN Security Council resolutions regarding Iraq.'
- In March 2003 the three invading States reported to the Security Council (UK letter S/2003/350, US letter S/2003:351, Australia's letter S/2003/352) that military action had been undertaken to enforce the Security Council's WMD disarmament resolutions of 1991.

#### *Legal Position of New Zealand*

- On 19 February and again on 13 March 2003, the NZ Foreign Minister stated that it 'did not support' military action against Iraq without a UN Security Council mandate, and that Council would not be justified in giving such a mandate 'at this time'. The use of force could be authorised by the Security Council 'as a last resort' to uphold its resolutions, but in view of the UNMOVIC and IAEA reports it was not a 'time of last resort'. New Zealand therefore urged the Security

Council to continue the inspection and disarmament process. If the point came where that process could no longer be progressed because of lack of Iraqi cooperation, then a further Council resolution should be adopted authorising the use of force. Such a further resolution would most clearly provide the authoritative and sound legal basis for direct action.

- In 12 May, following the coalition invasion and overthrow of the Iraq Government, the NZ Foreign Minister reiterated that NZ had not been persuaded that the point had been reached where force could be justified as a last resort. Nor could it agree with military action unsupported by a specific UN mandate. New Zealand was concerned over the precedent-setting of pre-emptive military action to effect 'regime change' in the absence of any clear and immediate danger. Now, responsibility for public order and safety in Iraq, and the public's well-being, fell on the coalition nations as the 'occupying power', as set out in the Fourth Geneva Convention and The Hague regulations. That had now become the principal role of the occupying military forces.
- On 9 June, eighteen days after the UN Security Council appealed for assistance from UN Member States (SCR 1483), the NZ Prime Minister announced that a NZDF engineering group of up to 60 personnel would be engaged in Iraq on reconstruction work. The group would 'operate with' a British unit. The NZ Government was 'pleased to operate once again with the British on humanitarian work'. The NZG had consistently stated that it would look to assist in the rebuilding of Iraq once the conflict was over and 'the necessary multilateral cover' had been provided. UN SCR 1483 now made it clear that the UN should play a 'vital role' in humanitarian relief and reconstruction in Iraq. There was a 'very clear differentiation' between the occupying powers and their unified command (the Authority) on the one hand, and countries working with the Authority on the other. It was clear that New Zealand could provide such assistance 'without in any way becoming an occupying power'.

### ***Personal Judgement on the Legal Merits***

#### ***New Zealand and the Invasion***

It is generally acknowledged among jurists world-wide that the invasion of Iraq was *ultra vires* the UN Charter and thus an illegal action, amounting to aggression against a sovereign UN Member State. The internal US legislation of 1998 and 2002 authorising US use of force for regime change in Iraq has no bearing on the international legal rights and obligations of all 191 other UN Member States.

The closest to an official objective legal view comes from the UN Secretary-General whose responsibilities are of an 'exclusively international character' and who may not seek or receive instructions from any government of external authority (Article 100). The UN Secretary-General's view that the invasion was 'illegal' must be regarded as definitive. It follows that the US, UK and Australia committed aggression against Iraq on 21 March 2003. The NZ Government's view that such action was not justifiable and could not be supported was legally sound.

#### ***New Zealand and the Occupation***

The occupation of Iraq by the CPA commenced *de facto* with the invasion of 21 March 2003 and was acknowledged as *de jure* by the UN Security Council on 22 May. The CPA's occupation was terminated on 28 June 2004 (acknowledged by the Council on 11 November). During this 15-month period, Iraq was under occupation.

Two months into this 'occupation period', the UN Security Council appealed to UN Member States to provide humanitarian relief to Iraq. NZ defence group arrived in June 2003, and was effectively an integral part of the British engineering group in Basra, Southern Iraq.

On 16 October 2003, the occupying forces, until that moment the military component of the CPA, were transformed into a 'multinational force' authorised by the Security Council.

It follows that, from June to October 2003, the NZDF group was part of the British component of the coalition military force of the CPA. As such, it can only be regarded as part of the 'occupying power' in Iraq, for that five-month period. While the New Zealanders may have had an exclusively humanitarian mandate, it was not part of the humanitarian work of UNAMI, but rather a component of the CPA military force.

Whether that force was a legal entity, given that it had entered Iraq illegally, is today a moot point. It raises the question whether it is (a) legally possible and (b) politically sound for the UN Security Council to retroactively authorise an illegal action.

It is concluded that New Zealand became complicit with the illegal invasion through becoming operationally integrated with the British defence group during the final five months of the CPA military force in the 'occupying period' before the UN recognised that force as an authorised multinational force.

New Zealand would have retained a legally-correct position if it had kept its NZDF group available exclusively for UNAMI work or for the MNF, but not for the British armed forces during the occupation.