

German court declares Iraq war violated international law

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Just a few weeks ago, a highly significant judicial decision was handed down by the German Federal Administrative Court but barely mentioned in the German media. With careful reasoning, the judges ruled that the assault launched by the United States and its allies against Iraq was a clear war of aggression that violated international law.

Further, they meticulously demonstrated that the German government, in contrast to its public protestations, had assisted in the aggression against Iraq without having any legal right to do so. Although the decision was made three months ago, the judgement and its legal arguments have only just been made available in written form, comprising more than 130 pages.

The decision was made in relation to legal proceedings initiated by a German army officer who had refused to obey an order following the invasion of Iraq by the US-led coalition of forces because he feared that he would in effect be supporting the war. As a result, he was demoted from major to captain and the army filed a criminal complaint against him for insubordination. In its latest judgement, the Federal Administrative Court reversed the demotion and said the charges against the officer contravened Article 4, Paragraph 1 of the German Constitution, which guarantees the right to freedom of conscience.

The 48-year-old career soldier was assigned to work on the development of a computer program that he feared could be employed in the war against Iraq. He informed his superior that he could not carry out the order. He then sought the army chaplain and his unit's doctor and informed them that, in his opinion, based on what he had read in the German press, the war contravened international law. The doctor then sent him to a psychologist and even arranged for him to be examined to determine his mental sanity in an army hospital—a reaction that reminds one of Franz Kafka's novels and the actions taken by Stalinist regimes against dissidents.

His superior also sent him to the army unit's legal advisor so that "the legal background could be explained" to him. The advisor threatened him with dishonourable discharge and demotion. The soldier challenged the legal advisor over the war's legality under international law, prompting the advisor to turn to the German defence ministry.

The advisor received a written reply stating that although the German government rejected the war, it had given permission to the US and Great Britain to use its airspace and their military bases in Germany, as well as agreeing to the operation of German AWACS airplanes for the surveillance of Turkish airspace.

The defence ministry defended its stance by citing Germany's obligation as a member of NATO to assist the US and Great Britain, and United Nations resolution 1441, which threatened Iraq with serious consequences unless it proved that it had destroyed its weapons of mass destruction. It was "an open question" whether the employment of military measures required another UN Security Council resolution, the ministry said.

In other words, the German coalition government of the Social Democratic Party (SPD) and the Green Party used exactly the same legal reasoning as the Bush administration. As the officer was not prepared to accept these arguments and maintained his refusal to obey orders, he was demoted and a complaint filed against him. The German Federal Administrative Court has now pulled this argument to pieces and overturned it juridically.

Grave concerns for international law

Due to strong public resistance to the remilitarisation of Germany after the Second World War, under conditions in which the army leadership initially consisted largely of former members of the Nazi Wehrmacht, the rebuilding of the German army in the 1950s was tied to a series of democratic provisions. This included the right to not follow orders that contravened human dignity, the constitution or German law, or that violated international law.

The Constitutional Court, however, left open whether such criteria applied in this case. It said a decision on this issue did not have to be made. The defendant's complaint was upheld because he made a difficult decision based on his conscience under special circumstances.

The court left no doubt, though, that it had "grave concerns for international law" arising from the Iraq war and Germany's support for it.

The court referred to Article 4, Paragraph 4 of the United Nations Charter, which classifies "every" threat and use of military force against another nation as an act of aggression. It specifies only two exceptions: a formal resolution of the UN Security Council and for self-defence purposes. Neither of these was the case with Iraq.

In particular, the United States had no legal basis for attacking Iraq based on previous UN resolutions that it itself had introduced. UN Resolution 678 in 1990 had only authorised the expulsion of Iraq from Kuwait. The ceasefire Resolution 687 in 1991 certified that this aim had been realised. This resolution also threatened Iraq with "serious consequences" if it used poisonous gasses or other biological weapons and renewed the demand for Iraq to maintain a clear distance from "international terrorism." This resolution was accepted by Iraq.

The court stated that UN Resolution 707 in 1991 did not revoke the ceasefire nor has it since been repealed. No subsequent resolution contained a justification for military operations, not even in relation to forcing Iraq to cooperate with weapons inspectors.

This fact was seen by the court as particularly valid in relation to Resolution 1441, passed on November 8, 2002, which was later used by the US and Great Britain to justify war.

This resolution gave instructions to the chief weapons inspectors, Hans Blix and Mohamed El-Baradei, to report any lack of cooperation from Iraq to the UN Security Council, so that it

could properly assess the situation. The decisions that the UN Security Council would then take in such a situation were left open, according to the court.

Although the Security Council threatened “serious consequences,” it did not make explicit what form they would take. On the contrary, Resolution 1441 expressed “unmistakably,” according to the court, that the matter had yet to be determined by the Security Council. The court argued that the resolution did not give a free hand for military action, but rather—based on the UN Charter—left the decision about any consequences to the UN.

With the formulation “serious consequences,” Resolution 1441 only issued a general warning, but had deliberately distanced the Security Council from authorising the use of force by the US and the UK.

The court argued that only if the UN Security Council resolution text had explicitly provided for the use of military force, within the confines of the UN Charter, would military action against Iraq have been permitted. An apparent “silence,” or the position that the meaning of “serious consequences” was left unclarified, did not suffice to justify military action.

The court also did not consider the objection valid that the resolution text was interpreted differently by the US and UK. It stated: “For the determination of what the UN Security Council had decided in one of its resolutions, what is decisive is not what government representatives ‘thought’ about the proceedings and resolutions themselves. It is far more dependent on what was actually laid down in the text of the agreed resolution. If it is not in the text, an appropriate draft resolution is lacking. The mental reservations of governments or their representatives are not valid insofar as international law is concerned.”

The text of Resolution 1441 showed, on the contrary, that an exemption to the fundamental prohibition on the use of force had not been decided on. Nowhere did it contain an endorsement or an authorisation for any government or state to use force according to Chapter VII of the UN Charter. The term “authorisation” in this context did not even appear anywhere in the resolution.

The attempt of the governments in the US, UK and Spain to have a resolution passed immediately before the start of the war that would have authorised military action did not find majority support in the Security Council. To avoid the resolution being defeated, the draft resolution was withdrawn.

German support for the war violated international law

What was particularly noteworthy was that the judges continually referred to a paper published by the scientific study service of the German parliament committee on January 2, 2003, that also concluded that the UN resolutions did not legitimise an attack on Iraq. Even if one assumes that not every parliamentarian read this paper, one has to assume, at the very least, that members of the cabinet and German Chancellor Gerhard Schröder himself must have been made aware that the Iraq war violated international law.

The court said that the US and UK had, in their diplomatic notes to the UN Security Council, nowhere made a substantiated claim that a dangerous situation existed—something necessary if a right to self-defence was being put forward as the justification.

The court devoted much detail to the logistical support provided by Germany to the war—in particular, the use of military bases and the fly-over rights for the US and UK.

It soberly declared: “The support for an illegal military action can not only be expressed through military participation in combat operations, but also in other ways. A breach of international law can be committed through an action or—when an obligation exists under international law—through inaction. Support given to an offence under international law is itself an offence.” Article 26 of the German constitution, which prohibits the “preparation” of an illegal war, prohibits even more forcefully any support of such a war.

The obligations of Germany under international law were sourced to Resolution 3314, passed by a general sitting of the United Nations on December 14, 1974, the works of the International Law Commission of the United Nations, and various international treaties and customs that stem back to the Hague Convention of 1907.

The last-mentioned prohibited states from allowing their territory to be used for the transport of troops or military supplies. The Hague Convention also prohibited third nations from supplying telecommunication services in every form as well as airspace rights. By Article 25 of the German constitution, these general rules of international law, as part of German federal law, take priority over other laws.

The claim of the German government that it had a “partner duty” as a member of NATO did not invalidate these rules. The NATO Treaty refers to the UN Charter and does not compel its member states to support wars conducted by other NATO members that violate international law. In addition, the court stated that the clause that specifies supporting other NATO members only applies in those cases where an “armed conflict” takes place inside NATO territory. Nor did the NATO Council agree to any kind of cooperative action in the case of war with Iraq. In addition, the NATO Treaty contained a clause—inserted in 1949 at the behest of the US—where member states cannot be forced to fulfil obligations to the NATO Treaty or its implementation if this violates their own national constitutions.

The German government also did not have the right to offer its support for the war for political reasons, as it was bound to the rule of law by Article 20, paragraph III of the Constitution and by Article 25 to the general regulations of international law.

At first glance, it is amazing that this judgement did not make larger waves, as the German government has effectively been accused of violating both the German constitution and international law. The government’s claim that it did everything in its power to prevent war in Iraq was proven to be false by one of the highest courts in the land. Not only did the government have the legal possibility, but it also had the responsibility to bar use of German airspace and bases on German soil from use for the Iraq war.

In most of the media, Gerhard Schröder is celebrated for his supposed anti-war stance. Others accuse the SPD-Green coalition government of having damaged the transatlantic alliance with the United States over its handling of the Iraq war. If a coalition government consisting of the Christian Democratic Union, Christian Social Union and Free Democratic Party emerges out of the recent German elections, it will either continue the policy of Schröder or bring Germany closer to the US—and most likely confront decisions similar to those made by Schröder the next time the US attacks a country. As for the recently formed Left Party-Party of Democratic Socialism, one only needs to note that its leading candidate, Gregor Gysi, has praised Schröder’s policy with regard to Iraq.

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