



The Association of the Bar of the City of New York

The Honorable George W. Bush
The White House
Washington, DC 20500

Re: United Nations Charter Obligations Regarding Iraq

Dear President Bush:

On behalf of The Association of the Bar of the City of New York, I write regarding the international law issues that underlie a possible large-scale military action by the United States in Iraq. We assume that the purpose of such action would be to enforce Iraqi compliance with several United Nations Resolutions and, in particular, to ensure the disarmament of Iraq's weapons of mass destruction.

The Association does not take a position on the issue of whether, as a policy matter, Iraq's violations of these resolutions are most wisely responded to by military action, or by a rigorous policy of containment and inspections. The purpose of this letter is to urge, respectfully, that the United States abide by its international obligations and act in accordance with the United Nations Charter.

Security Council authorization of the use of military force is required under Chapter VII of the UN Charter absent circumstances triggering a nation's inherent right of self-defense, as preserved by Article 51 of the Charter. By its terms, Article 51 permits the use of force in self-defense only in response to an "armed attack." It is generally accepted, however, that this right encompasses traditional definitions of self-defense permitting the use of force against the threat of imminent attack, where, as succinctly stated by Secretary of State Daniel Webster in 1837, the "necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."

We recognize that what constitutes an imminent threat today cannot be limited to what constituted an imminent threat in Secretary Webster's day. We do not presume to pass judgments regarding the significance of any military threat. Nor do we address at this time the broader issues under applicable international legal principles of the standards articulated under the new and recently-released National Security Strategy.

Nevertheless, with regard to Iraq, we believe that the United States, through the information so far made publicly available, has itself not appeared to present the case of an actual or imminent Iraqi attack. In our view, the distinction is not simply a question of uncertainty as to "the time and place of an attack." More fundamentally, the United States has so far not publicly made a claim of any certainty or even probability of an Iraqi attack against the United States that rises to a level of imminence justifying unilateral action at the present time. If there exists information of such a threat, we respectfully urge the administration to demonstrate this case to the international community in connection with any unilateral military action, in order that the United States may proceed within the parameters of international law.

We do not question the grave danger posed by an Iraqi weapons development program, and its threat to international peace and security, particularly in the Middle East. In the absence of an imminent threat, however, it is the Security Council under Chapter VII of the UN Charter that must address this grave danger, not the United States under a claim of unilateral self-defense.

The Security Council expressly found in Resolution 707 that Iraq was in “material breach” of the disarmament Resolution 687 as early as April 18, 1991—only 15 days after Iraq accepted the Resolution. Some could argue that as a result of this “material breach,” Resolution 678, which authorized the use of military force in the Gulf War, remains in effect and continues to authorize the use of military force against Iraq.

Nevertheless, existing Security Council resolutions with regard to Iraq do not authorize the use of force by nations to enforce those resolutions. In November 1990, the Security Council adopted Resolution 678 to authorize the use of force against Iraq in response to the invasion of Kuwait. Resolution 678 expressly authorized member states to “use all necessary means to uphold and implement Resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area.” After the coalition forces and Iraq entered into a provisional cease-fire, the Security Council by Resolution 687 declared a formal cease-fire to be effective upon acceptance of the terms of such Resolution by Iraq. The Security Council affirmed prior resolutions, including Resolution 678, subject to this significant limitation: “except as expressly changed below [in this Resolution] to achieve the goals of this Resolution, including a formal cease-fire.”

It remains the province of the Security Council to determine what enforcement action is necessary. Under Resolution 687, the Security Council “remain[s] seized of the matter” and may determine “such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area.” Subsequent resolutions have condemned Iraq’s non-compliance and have imposed additional enforcement measures, but the Security Council has not reauthorized the use of military force under Chapter VII.

The United States helped create the current legal framework governing the use of force by substantially designing, and by signing and ratifying, the United Nations Charter. Under Article 103, the Charter is the cornerstone of international relations, superseding “obligations under any other international agreement.” The United States and the member states of the United Nations sought to secure a stable international system based on legal principles. In deference to these principles, President George H. W. Bush revitalized the role of the Security Council when he sought UN authorization to attack Iraq in 1990, in the wake of Iraq’s invasion and occupation of Kuwait. The Security Council was finally charged with performing the task signified by its very name – ensuring international peace and security.

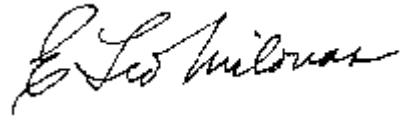
To sidestep the Security Council’s responsibility at this time would be a setback to the international legal system painstakingly developed since the Second World War. In a conflict to enforce Iraqi compliance with international law, the United States should avoid the risk of being perceived as itself violating generally accepted international legal principles. Moreover, we are concerned that a loose application of these principles by the United States will set a bad precedent for other nations to exploit elsewhere.

The Association supports the Administration’s current efforts to work within the United Nations system by seeking adoption of a Security Council resolution to ensure the effective disarmament of Iraq. We agree with your statement to the General Assembly:

The United States helped found the United Nations. We want the United Nations to be effective and respect[ed] and successful. We want the resolutions of the world’s most important multilateral body to be enforced. And right now those resolutions are being unilaterally subverted by the Iraqi regime.

In the absence of further facts justifying the use of force in self-defense under Article 51 of the United Nations Charter, the Association of the Bar of the City of New York respectfully urges the government of the United States to obtain authorization of the United Nations Security Council prior to the commencement of any military action in Iraq.

Very truly yours,

A handwritten signature in cursive script, reading "E. Leo Milonas". The signature is fluid and elegant, with the first letter of each name being capitalized and prominent.

E. Leo Milonas