

STATEMENT OF JOHN QUIGLEY TO THE COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

Forum

Preserving America's Global Leadership through International Law and Justice
November 1, 2007

I am John Quigley, President's Club Professor in Law at the Moritz College of Law of The Ohio State University. My degree in law is from the Harvard Law School. My field is international law. I have taught international law at The Ohio State University since 1971 and have devoted considerable attention in scholarly publications to the law of war and peace. I am author of a book titled "The Ruses for War: American Interventionism since World War" (Prometheus Books, revised edition, 2007). In this book, I analyze the Administration's public rationale for the 2003 military action in Iraq.

I make this statement to the Committee to provide detail on what I perceive to be serious flaws in that rationale. The Administration provided its rationale in a letter to the United Nations on March 20, 2003. It justified the action it was commencing in Iraq not as self-defense, but on the basis of resolutions the UN Security Council had adopted in the 1990s concerning Iraq, most prominently Resolution 678 (UN Doc. S/INF/46, November 1990) and Resolution 687 (UN Doc. S/INF/47, April 1991).

In my view, the prior resolutions did not justify the military action in Iraq. Curiously, the Administration made no effort to publicize this letter. The letter was not analyzed, or even mentioned, in the media. My surmise about the Administration's reticence to publicize the letter is that had the press scrutinized it carefully, it would have been evident that the Administration had no legal basis for what it was doing in Iraq.

The letter (UN Doc. S/2003/351) was signed by John Negroponte as US representative at the UN and was addressed to the President of the Security Council. It read, "The actions being taken are authorized under existing Council resolutions, including its resolutions 678 (1990) and 687 (1991). Resolution 687 (1991) imposed a series of obligations on Iraq, including, most importantly, extensive disarmament obligations, that were conditions of the cease fire established under it. It has been long recognized and understood that a material breach of these obligations removes the basis of the cease fire and revives the authority to use force under resolution 678 (1990). This has been the basis for coalition use of force in the past and has been accepted by the Council, as evidenced, for example, by the Secretary-General's public announcement in January 1993 following Iraq's material breach of resolution 687 (1991) that coalition forces had received a mandate from the Council to use force according to resolution 678 (1990). Iraq continues to be in material breach of its disarmament obligations under resolution 687 (1991), as the Council affirmed in its resolution 1441 (2002)."

Security Council Resolution 678, adopted in November 1990, authorized military force to remove Iraq from Kuwait, if Iraq did not depart before January 15, 1991. Resolution 678, as the

letter explained, was followed by a cease fire in April 1991, whose terms were embodied in another Security Council resolution, numbered 687. One of the terms of the cease fire was that Iraq would eliminate chemical, biological, and nuclear weaponry and permit inspection to that end.

The Negroponte letter recited that Iraq had not lived up to that obligation. By Resolution 1441 (November 2002), indeed, the Security Council had said that Iraq had not complied. The non-compliance, however, related to disclosure of evidence of destruction, not to building or maintaining weaponry. What was learned after the fact was that the discrepancy between the number of weapons Iraq had at one time had, and the number it could account for destroying, was explained by the circumstance that Iraq had apparently over-reported the number that it at one time had.

In any event, Iraq's non-compliance, the reasoning of the letter ran, nullified the cease fire embodied in Resolution 687. On that basis, so the reasoning continued, any individual member state was free to implement the resolution that preceded the cease fire, namely, Resolution 678.

The position that breach by Iraq would re-open the authorization represented by Resolution 678 was not new for the United States. It had been recited in the Joint Resolution whereby Congress in October 2002 empowered the President, under certain circumstances, to use military force in Iraq. This same view had been expressed by Mr. Negroponte when the Security Council adopted Resolution 1441 in November 2002. At that time he told other Council members, "If the Security council fails to act decisively in the event of further Iraqi violations, this resolution [Resolution 1441] does not constrain any Member State from acting to defend itself against the threat posed by Iraq or to enforce relevant United Nations resolutions and protect world peace and security." (UN Doc. S/PV.4644)

After receiving the Negroponte letter, the UN Security Council did not discuss or examine it. Once the military action began, Council members focused instead on the post-military situation. Nonetheless, most Security Council members did not accept the reasoning of the letter, as indicated by their positions both prior to, and after, the initiation of military action against Iraq. In their view, a new resolution authorizing use of force would be required before the United States, or any other state, might lawfully take military action against Iraq. It was because most Security Council members held that view that the United States attempted, at the Council meeting of February 5, 2003, through the statement of Secretary of State Colin Powell, to convince the Council that Iraq possessed weapons of mass destruction. Other states thought that further inspection efforts might clear up the questions about whether Iraq had destroyed weaponry during the 1990s.

The rationale expressed in the Negroponte letter made little sense. Resolution 687, the cease fire resolution of 1991, included a final clause (paragraph 34) that recited that the Council "decides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area." This

clause meant that, in the event Iraq did not comply with the terms of Resolution 687, it would be the Security Council that would determine what to do. It would not be open to an individual member state to assume that role.

This conclusion is reinforced by the fact that the 1991 cease fire was between Iraq and the UN, not between Iraq and the states that had taken action against it in January 1991. The terms of the cease fire were spelled out in a Security Council resolution, namely, Resolution 687, not in a document signed by the United States or its coalition partners. Hence, any breach by Iraq was a breach in relation to the Security Council, not in relation to the United States or its coalition partners.

Resolution 678, the 1990 resolution authorizing use of force, pre-dated Iraq's acceptance of disarmament obligations. It makes little sense to say that the Security Council, in Resolution 678, authorized use of force against Iraq for a purpose that was not at issue at the time Resolution 678 was adopted.

When the Security Council adopted Resolution 678 in 1990, it was acting on the basis of action that had recently been taken by Iraq in Kuwait. The circumstances of the year 2003 were far different. Iraq was no longer in occupation of Kuwait. For the US argument to be valid, one would have to say that the Security Council, by authorizing use of force in November 1990, was impliedly authorizing the use of force in the event of future non-compliance with a cease fire that, as of November 1990, did not exist. By Resolution 678, the Council did not authorize military action for the indefinite future.

The Negroponte letter, as quoted above, relied on a statement made in January 1993 by the UN Secretary-General Boutros Boutros-Ghali. The letter's use of that statement was highly misleading. In January 1993 the US and UK had just conducted bombing raids in Iraq in response to a re-entry by Iraq into Kuwait to collect supplies it had abandoned in February 1991. Thus, the breach related to occupying Kuwait, the central issue in Resolution 678. Boutros-Ghali said that this breach by Iraq of Resolution 687 might legalize their unilateral use of force under Resolution 678.

The Negroponte letter mis-characterized Boutros-Ghali's remarks in significant respects. The letter referred to the Secretary-General's statement as being an "announcement." That characterization made it appear that the Secretary-General issued a formal statement. In fact, the Secretary-General was corralled by reporters in Paris, where he happened to be at a conference, and they asked him what he thought about the US-UK raids. He made the statement in response to their questions. (See Toronto Star, Jan. 23, 1993, at D1; Guardian, Jan. 15, 1993, at 8.) Neither before nor after did Boutros-Ghali or any other Secretary-General make a similar statement about US or UK raids into Iraq, even though they took place on numerous occasions throughout the 1990s.

In addition, in referring to the January 1993 statement, the Negroponte letter stated that the rationale based on Resolutions 678 and 687 had been "accepted by the Council," as

"evidenced" by the Secretary-General's statement. This formulation made it appear that the statement by the Secretary-General reflected a view of the Security Council. The Secretary-General, however, does not speak for the Security Council. Members of the Security Council throughout the 1990s, prominently France, Russia, and China, took the position that instances of US-UK use of force against Iraq, as in the major bombing raids of December 1998, were not authorized by existing Security Council resolutions. There is no basis for turning Boutros-Ghali's statement into a view held by the Security Council.

In the weeks immediately preceding the military action in Iraq of March 2003, the Security Council had engaged in intense discussion about the state of Iraq's compliance with the Resolution 687 disarmament obligations. It was unwilling to adopt a new resolution, sought by the United States, to authorize use of force against Iraq. The Council had heard Secretary of State Powell's presentation about Iraq's weaponry and had found it unpersuasive. The Council declined to adopt a resolution authorizing military force in Iraq. By the Negroponte letter, the United States was claiming a right to do unilaterally what the Security Council had just refused. It was plain at the time that a new resolution was needed to render any military action lawful.

The rationale asserted in the Negroponte letter was groundless. There was no basis in prior Security Council resolutions for a new military action in Iraq.