The attorney general's legal fictions

Cover-up for German complicity in Iraq war

Alexander Bahar, Armin Fiand
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On April 1, 2003, Attorney General Kay Nehm once again refused to bring charges against the German government for supporting and preparing a war of aggression in violation of international law. The legal complaint had been submitted by members of the Initiative against the Iraq War. The organisation had also called for charges to be brought against the heads of state of the United States and its "willing" allies.

Even if it were to be expected that the attorney general, as a politically appointed civil servant, would refuse to initiate a preliminary investigation against members of the government—who would bite the hand that feeds him—his "arguments" are a political and legal scandal.

Globally renowned experts in international law have been virtually unanimous in their assessment of the American-British attack on Iraq as an act of armed aggression that violates international law. The Geneva-based International Commission of Jurists (ICJ) has called the war a "flagrant violation of the prohibition of the use of force".

However, the German attorney general said the supposedly convoluted legal situation meant he was unable to decide what constitutes a war of aggression in violation of international law. It is evident that the "preventive war" unleashed by the Bush administration does not fundamentally differ in a legal sense from the decisions and acts for which the Nazi leaders were condemned and hung in October 1946 in Nuremberg. The US government is fully aware of this, and therefore refuses to recognise the jurisdiction of the International Criminal Court in The Hague.

Bowing to the primacy of politics, Nehm, like the Social Democratic Party-Green Party government in Berlin, is trying to avoid making any legal evaluation of what are incontrovertible facts. He knows that on the basis of recognised legal standards—i.e., there were no preceding acts of military aggression by Iraq against the United States, nor against any other member of the war coalition, nor any other state in the world, nor an appropriate resolution by the UN Security Council—the initiation of a preliminary investigation against the German government would be unavoidable.

To avoid this action, Nehm has developed a fictional black hole in international law, which swallows up all legal facts. Thus he claims that there exists in international law "no generally recognised definition for what constitutes armed aggression in violation of international law, only some barely differentiated terms" and proclaims, "whether the use of force by the United States of America would be permissible according to international law without or against the will of the Security Council" cannot be decided "within the context of a criminal investigation."

The decision of the attorney general is dated April 1, 2003, but his reasons do not differ substantially from those he used to reject the submission made by former PDS (Party of Democratic Socialism) parliamentary deputy Wolfgang Gehrcke on March 18. This shows that the attorney general did not take into account the actual events that had occurred between March 18 and April 1. He did not consider the developments that directly preceded the beginning of the war. But these were the crucial days upon which the legal evaluation of the question depends—was this a war of aggression contrary to international law or not?—because they clearly exposed the war against the Iraq as an act of aggression in violation of international law.

The attorney general utters a falsehood when he claims to have considered both the circumstances detailed in the legal complaint as well as "the facts, as far as they have become known in this regard". His examination of the circumstances consists merely of quoting the various resolutions (very probably without ever having read them) that the Security Council adopted against Iraq. He ends by saying that the Allies had concentrated their troops in the Middle East, as if they were still just standing there. Neither the outbreak of the war on March 20, nor the crucial days beforehand are included in the circumstances that the attorney general has taken into consideration in reaching his legal decision.

In essence, the attorney general probably wants to express his view that the UN resolutions already provided sufficient authority in law for the war—a standpoint shared by the

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warmongers in Washington and London.

As if the law had not been perverted enough, in his refusal to launch proceedings Nehm succeeds in distorting and misquoting an important legal text. Thus, he first states: “According to the express and repeatedly declared will of the government and the Chancellor not to take part in a military attack against Iraq, German support for the United States of America is limited to granting over-flight, transfer and transportation rights.” He then goes on: “The granting of such rights, as a mere non-hindrance of aggressive actions, is however not covered by paragraph 80 of the Criminal Code (c.f. Randelzhofer in Simma’s *Charter of the United Nations*).”

In fact, Randelzhofer does differentiate between the “voluntary assignment of national territory to another state” and the “mere non-hindrance of the aggressive actions of another state on one’s own national territory”. Only the second case is not dealt with by paragraph 80 of the Criminal Code, while in the first instance, Randelzhofer regards as equally culpable the state which makes its territory available to a third state committing the aggressive actions.

The attorney general has employed this legal “trick” to turn Randelzhofer’s arguments into their opposite!

Moreover, the premises alluded to by Nehm do not apply. Once the US war machine begins to rage, it does not matter what the German government says, but what it does. Their tangible support for the war was certainly not “limited” to granting over-flight, transfer and transportation rights.

It is well known that:

* German soldiers are not only sitting in Fuchs tanks in Kuwait, but also in AWACS reconnaissance aircraft over Turkey, where they are providing essential logistical support for acts of military aggression;

* German soldiers are protecting American barracks and military bases in Germany, thereby freeing up US forces for the war;

* German weapons are responsible for killing not only proverbially, but in reality, in the hands of American and British troops (according to research by television-magazine *Monitor*, the supply of important weapons components to the US and Britain approved by the federal government clearly breaches weapons control laws).

After initially distancing itself, the German government has since declared its verbal support for the US-British “coalition’s” war aims and expressed hope for its “rapid victory”. In the meantime, Germany is participating alongside the other “opponents of war” in Paris and Moscow in the horse-trading over the sharing of the booty.

According to paragraph 80 of the Criminal Code, the preparation of a war of aggression is punishable insofar as the danger of a war is brought about for the Federal Republic of Germany. The attorney general dealt with this question towards the end of his legal decision, answering in the negative.

However, did German Interior Minister Otto Schily not personally declare that the war in the Gulf had increased the risk of terrorist attacks in Germany? And is the main aggressor, the US, not encouraged by Germany’s indirect support for the war to attack further countries like Syria, Iran and North Korea (threats confirmed by statements from Bush, Cheney, Rumsfeld and Powell) in disregard of national sovereignty and international law? (If a historical comparison with British-French appeasement towards Nazi Germany’s policies of expansion and conquest is at all appropriate, then it is in this case.) Doesn’t the danger of war increase for Germany, if, as announced by federal Chancellor Schroeder, the “lesson” from the Iraq war is for Europe to arm itself militarily, so as to be able to compete with the US on a long-term basis?

According to Herr Nehm’s arguments, the Nazis’ blitzkrieg against Poland would not have been a war of aggression contrary to international law, but possibly a police action or self-defence (as the Führer declared at the time). After all, hadn’t the Poles previously “attacked” the Gleiwitz radio station in Germany and thus provoked the “resistance” of the Germans? (“From 9 o’clock fire will be returned!”) As the Indian author Arundhati Roy wrote recently in the *Frankfurter Allgemeine Zeitung*: “Freedom now means mass murder.”

On April 11, members of the Initiative against the Iraq War filed a counter-submission against the April 1 ruling by the attorney general. This should give the attorney general an opportunity to dispel the justified suspicion that he is responsible for a perversion of justice and abusing his office.

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