

To what extent was the use of force against Iraq in 2003 compatible with international law?

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*"I have indicated it [the invasion of Iraq] was not in conformity with the UN charter from our point of view, from the charter point of view, it was illegal."*¹

Kofi Annan

*"Yet it is now undeniable -- undeniable -- that Saddam Hussein was in clear violation of United Nations Security Council Resolution 1441. It is undeniable that Saddam Hussein was a deceiver and a danger. The Security Council was right to demand that Saddam disarm. And America was right to enforce that demand."*²

George W. Bush

The use of force in the invasion of Iraq in 2003 has been hotly debated by many lawyers and academics across the world. Use of force may only be employed by the United Nations Charter under two circumstances, in an act of self defence or if has been sanctioned by the United Nations Security Council. The overriding factor is that all other avenues must be exhausted, and use of force must be the last and only option remaining.

¹ Verne McDonald. (2004). *Annan's Iraq Views Raise Tough Questions*. Available: <http://www.straight.com/article/annans-iraq-views-raise-tough-questions>. Last accessed 11th February 2009

² George W Bush. (2003). *Did Saddam Hussein's violation of UN Security Council resolutions justify Iraq's invasion?*. Available: <http://usiraq.procon.org/viewanswers.asp?questionID=960>. Last accessed 5th March 2009.

*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain inter- national peace and security.*³

Art. 51 UN Charter

In terms of the 2003 invasion of Iraq, the question of self defence as sound reasoning must be explored. It is clear that the United States and United Kingdom were not under any immediate threat of attack, but the idea of “anticipatory self defence,” the idea that the United States and the United Kingdom acted to prevent a future threat of territorial or political integrity has been used to justify the invasion. Anticipatory self defence has yet to be defined in international law. Oppenheim’s International Law goes some way to explain anticipatory self defence:

*“While anticipatory action in self defence is normally unlawful, it is not necessarily unlawful in all circumstances, the matter depends on the facts of the situation including in particular the seriousness of the threat and the degree to which pre-emptive action is really necessary and is the only way of avoiding that serious threat; the requirements of necessity and proportionality are probably even more pressing in relation to anticipatory self defence than they are in other circumstances.”*⁴

³ Article 51 of the Charter of the United Nations (1945) Available:
<http://www.nato.int/docu/basic/txt/bt-un51.htm>. Last accessed 11th February 2009

⁴ R Jennings QC, A Watts QC (eds), Oppenheim’s International Law, Ninth Edition, 1991, p41-42.

The presumption of a threat does not constitute sufficient grounds for use of force, and the use of force under the grounds of anticipated threat would be illegal. Ingrid Detter substantiates this in her publication, *“The Law of War:”*

*“It must be emphasised that anticipatory force falls under the prohibition of force in Article 2(4) of the charter entailing a presumption that is illegal. A mere threat of attack this does not warrant military action ...”*⁵

Antonio Cassese dissects this view further, agreeing that currently international law does not condone pre-emptive action with regards to self defence. However is it possible to, on occasion consent to the pre-emptive use of force? Cassese believes in times where moral and political grounds are potentially under threat then yes, anticipatory use of force may be acceptable.⁶ In some instances it may be acceptable to use force to pre-empt an attack, but the use of force must adhere to the rules of self defence, which are instances where:

- An armed attack is launched or immediately threatened, against a state’s territory or forces.
- There is an urgent necessity for defensive action against that attack.
- There is no practicable alternative to action in self defence, and in particular another state or other authority which has the legal powers to stop or prevent the infringement does not, or cannot, use them to that effect.

⁵ I Detter “The Law of War” Second Edition, Cambridge, 2000, p86

⁶ A Cassese, “International Law,” Oxford, 2001, p311

- The action taken by war of self defence is limited to what is necessary to stop or prevent the infringement i.e. to the needs of defence.⁷

To relate the above criteria to the invasion of Iraq in 2003, the use of force would have to be in a situation of great emergency if it were to be deemed legal. As it stands, the nature of the threat posed by Iraq is somewhat confusing, as authorities have been reluctant to release the true reasons for their involvement in the invasion. The risk posed to the United Kingdom has never been truly clarified, thus making any debate regarding the legality of the invasion somewhat complicated. Not only does the government need to provide proof that Iraq was a direct and imminent threat but also that there was no other option than the use of force. It becomes harder to prove that use of force was the only option when Iraq was openly negotiating with the UN weapons inspectors.

Evidently, the capacity to attack in the future is not sufficient evidence to rationalise pre-emptive use of force. The threat must be imminent. However, the immediacy of the force must be proportionate to the severity of the threat. The potential threat of nuclear weapons may justify pre-emptive force. But the overriding factor in initiating the use of force, there must be credible evidence of a threat, and, thus far in terms of the United Kingdom, this has been the missing criteria that would allow a justification for the use of force as self defence.

Article 51 of the Charter also preserved the right to collective self defence, and essentially will only be lawful under the same circumstances as individual self defence. However, collective self defence does raise much debate about what exactly

⁷ R Jennings QC, A Watts QC (eds), *Oppenheim's International Law*, Ninth Edition, 1991, p412

collective means. Can states who have not been attacked come to the aid of states who have been attacked? Who must be attacked? All the states involved in the use of force or just one? Judgement passed in the Nicaragua case states that:

'It is the State which has been the subject of an armed attack which must form and declare the view that it has been attacked. There is no rule of customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.'

With this judgement in mind, it remains that collective self defence as the qualification for the use of force in Iraq can only be justified if credible evidence exists that Iraq has carried out, or intends to carry out any kind of armed attack on the United States or any ally of the United Kingdom. As such, no evidence has come to light that suggests Iraq had any involvement with the atrocities that took place on September 11th 2001, in fact, it is widely accepted that the attacks on the World Trade Centre were carried out by Al'Quaeda. Al'Quaeda received funding from numerous countries and Iraq was suspected to be amongst contributors to the Taliban cause. However, returning to the judgment in the Nicaragua case, this does not permit the use of force as self defence.

'In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on

collective self-defence of course does not remove the need for this ... [T]he Court does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support.'

This judgement suggests that even if Iraq had supplied weapons to Al'Quaeda that aided the September 11th attacks, this level of involvement would not justify the use of force against Iraq. In order for the use of force to be justified, Iraq would have had needed significantly more involvement in the attacks. Following the September 11th attacks, the North Atlantic Council of NATO issued a statement in which they stated that if the attacks originated from a foreign country, members of NATO would stand beside the United States. Any action would be covered under Article 5 of the Washington Treaty, which states:

"The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."

The overriding factor with Article 5 is that it still regulated by Article 51 of the UN Charter, and as a result all the restrictions imposed upon collective use of force remain. Article 5 merely states that if the criteria for collective use of force are met and does not breach international law, NATO will provide assistance, if requested. However, sufficient evidence to support self defence would still be required.

As stated above, use of force can be sanctioned by the United Nations Security Council (UNSC). The UNSC must be sure that Iraq poses a serious threat and that the threat cannot be averted only by means of force, as set out in article 39 of the UN Charter:

“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

The two resolutions brought under scrutiny regarding Iraq in 2003 are resolutions 678 and 1441. Resolution 678 authorised the use of force during the 1991 Gulf War. The United Kingdom uses this resolution to argue that their use of force in Iraq has been legal, arguing that Iraq has failed to comply with resolution 687, which sets out the terms of the ceasefire, thus renewing resolution 678.

Resolution 678 authorises member states to “use all means necessary to uphold and implement resolution 660 and to restore international peace and security in the area.” The aim of resolution 660 was to return sovereignty back to Kuwait, and upon this

being achieved, resolution 687 formalised the ceasefire. This ceasefire was dependent upon Iraq upholding certain terms, including the destruction of all chemical and biological weapons, and weapons that had a range of more than one hundred and fifty kilometres. Further to this, Iraq was ordered not to obtain further nuclear weapons and full cooperation with the UN weapons inspectors was paramount.

On November 8th 2002, the UNSC passed resolution 1441, which gave Iraq “a final opportunity to comply with its disarmament obligations.” The disarmament obligations had been previously set out in resolution 687. In no part of resolution 1441 was there any mention of the use of force, with then US Ambassador to the UN, John Negroponte highlighting that there was no “hidden triggers” to use of force. Mr. Negroponte confirmed that if force was required due to any breaches by Iraq, it would first need to be brought before the UNSC for further discussion:

“If the Security Council fails to act decisively in the event of further Iraqi violations, this resolution 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.”

The UNSC have announced that resolution 1441’s aim was to give Iraq a final opportunity to comply with the earlier resolutions to disarm. If Iraq failed to cooperate with the sanctions and resolution 1441, they could expect “serious consequences.” The UNSC has declared that “serious consequences” does not authorise use of force.

Mark Litterman of the Guardian believes the term “serious consequences” is deliberately vague, as the UNSC were unable to agree on the use of force, and the ambiguity would necessitate a further resolution if the use of force was to be authorised.⁸

The language used in resolutions should be examined cautiously; as yet there are very few respected guides to aid the interpretation of UNSC resolutions. Michael Byers highlights the Namibia Advisory Opinion (1971) ICJ as one of the leading authorities:

‘The language of a resolution of the Security Council should be carefully analysed ... having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences...’⁹

Comparing the wording of resolutions 678 and 1441, it is clear that if use of force was intended to be authorised by resolution 1441, the UNSC would have made that clear in no uncertain terms. “All necessary means” has been used in resolutions concerning Rwanda, Bosnia, Somalia and Haiti where intervention was required. “Serious consequences” does not amount to authorised use of force.

As self defence has little legal framework to support the use of force in Iraq, relying on resolution 678 is also very dubious. The general consensus is that UNSC resolutions are implemented for a limited time and are specific to a certain

⁸ Mark Littman. (2003). *A supreme International Crime*. Available: <http://www.guardian.co.uk/politics/2003/mar/10/iraq.world>. Last accessed 1st March 2009.

⁹ Michael Byers, “*Terrorism, The Use of Force and International Law after 11 September*” (2002) 51 ICLQ 401, at 402

circumstance, i.e. resolution 678 was unique to Iraq's invasion and attempted secession of Kuwait. If Saddam Hussain had attempted to invade Kuwait again in 2001 there might be some legal argument that resolution 678 had some impact but as he didn't this argument is void. Also, resolution 678 was terminated by resolution 687, therefore rendering the possibility to use force under 678 impossible.

Resolution 1441 found Iraq in "material breach" of the sanctions set out in resolution 687, however, this does not endorse any use of force what so ever. The United States believe that as Iraq is in material breach, the "serious consequences" equates to use of force. But as outlined above, in previous resolutions where the use of force has been sanctioned, the language used has been very clear, and if ambiguity remains about the legality of the use of force under resolution 1441, I believe a second resolution should have been sought before using force in Iraq.

The use of force in Iraq is a fickle subject, but on the face of it, the use of force was illegal, as there was no "imminent threat" from Iraq, and no clear UN resolution sanctioning any use of force. So, from a purely legal perspective, use of force was illegal.

But this particular topic does not just encompass a purely legal point of view. It cannot go unnoticed that one of the worlds most heinous dictators, responsible for genocide was caught and subsequently executed as a result of this illegal use of force. Whether or not he would have been caught if the use of force had not been implemented will remain unanswered but nevertheless, Saddam Hussain's reign of

tyranny over Iraq has been brought to an end. Does this however mean that states have a right to remove dictators by use of force?

This suggestion carries with it severe implications for the future of international law. If states have “right” to remove a dictator, this would effectively give the major states in the international arena the right to invade other states to overthrow these “dictators.” The possible abuse of such power is near incomprehensible. George W. Bush himself has been labelled a “dictator” as a result of his actions during the Iraq invasion. Would this mean that states such as Russia could empower their right to remove dictators and implement their own policies in the United States? In these circumstances, the right to remove a dictator could result in potentially another world war. Such law needs to be considered with great caution, and in any event, I believe a move to legalise the removal of dictators would be catastrophic in terms of international law.

I am not condoning the actions of the United States and the United Kingdom. International law is there for every states protection, and these laws should not be flagrantly disregarded. The major deciding factor as to whether the use of force was legal or illegal remains to be the language used in the resolutions. This is an issue that needs to be addressed to prevent such conflict and controversy in the future. If International law is to keep hold of its importance, there cannot be room for such debate that leads states under the impression that they are legally permitted to invade and use force upon another state. However, if the constraints of International law are loosened too much, the scope for abuse from states would be unthinkable. A review of

the United Nations Security Council resolutions needs to be acted upon, and in future, further instances will hopefully be a thing of the past.

“On October 25... After intensive, behind-the-scenes haggling, the council responded to Bush's challenge on November 7 by unanimously adopting Resolution 1441, which found Iraq in 'material breach' of prior resolutions, set up a new inspections regime, and warned once again of 'serious consequences' if Iraq again failed to disarm. The resolution did not explicitly authorize force, however, and Washington pledged to return to the council for another discussion before resorting to arms. As surely as Resolution 1441 represented a triumph of American diplomacy, it represented a defeat for the international rule of law. Once the measure was passed after eight weeks of debate, the French, Chinese, and Russian diplomats left the council chamber claiming that they had not authorized the United States to strike Iraq -- that 1441 contained no element of 'automaticity.' American diplomats, meanwhile, claimed that the council had done precisely that. As for the language of the resolution itself, it can accurately be said to lend support to both claims.”¹⁰

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¹⁰ Michael J. Glennon . (2003). *Did Saddam Hussein's violation of UN Security Council resolutions justify Iraq's invasion?*. Available: <http://usiraq.procon.org/viewanswers.asp?questionID=960>. Last accessed 5th March 2009.