

# The iraq war and international law



**A critical analysis of the Iraq War of March 2003**

*This paper offers an insight into some of the politico-legal issues arising from the Iraq War of 2003 and the subsequent military occupation of Iraq by coalition forces led by the United States of America and the United Kingdom. The invasion of Iraq is assessed against the subsisting framework of public international law. It is hoped that a detailed, critical and generally objective appraisal is rendered throughout, although subjective angles are offered to present and support a personal view where such is deemed appropriate.*

**Foreword**

The invasion of the oil-rich middle-eastern state of Iraq in 2003 was undertaken by the United States and the United Kingdom on March 20 of that year, with the tacit political and in some cases logistical backing of certain other states. Collectively these supportive states, amounting to fifty in total and including Spain, Australia, Italy, Turkey and Japan, were described as a “coalition of the willing”.<sup>[1]</sup> After approximately three weeks of concerted military operations, the rule of Saddam Hussein and the Ba’ath Party under his dictatorial control was brought to an end and Iraq fell under the occupation of coalition forces.

The fundamental legitimacy of the invasion was disputed since the outset and the question remains one of extreme controversy today. The often promulgated legal justification for the military campaign was that Iraq illegally possessed stockpiles of so-called Weapons of Mass Destruction, including chemical biological and possibly even nuclear weapons, in violation of the 2002 United Nations Security Council Resolution 1441.<sup>[2]</sup> In the run up to the invasion and throughout the campaign United Kingdom Prime Minister <https://assignbuster.com/the-iraq-war-and-international-law/>

Tony Blair and United States President George W. Bush and their respective administrations repeatedly alleged that these putative weapons posed a serious and imminent threat to the West in general. Expert United Nations inspection teams had been searching Iraq for these alleged weapons prior to the invasion and nothing substantial had been found although there was a common suspicion, *inter alios*, in both the United States and the United Kingdom, that the Iraqi authorities, which were often obstructive, were hiding something. The weapons inspectors were willing to continue their work, but were forced out when President Bush lost patience with Saddam Hussein by the onset of war. Scrupulous and unfettered investigations since Iraq's capitulation two and a half years ago have failed to unearth anything that could be described as a *weapon of mass destruction*. [3]

### **Chapter 1: The myths and realities of Public International Law in the context of the Iraq War of 2003**

Public international law, sometimes unconvincingly referred to as the *law of nations*, may be defined as the system of law that regulates the activities of entities possessing international personality. In particular it is said to govern the relationship between independent sovereign states. [4]

It is submitted that nation states derive their autonomy by means of inherent legitimacy or some other socio-political *reality* rather than through a decree granted by the international community. Exactly how is a political, constitutional and even philosophical matter which varies between countries and is largely beyond the ambit of this work. As things stand in 2005 there is no higher or global power. States may therefore *choose* to enter into international commitments voluntarily under the matrix that is referred to as

international law, and sometimes they will accept legislative process outside their own consent. The fundamental problem with the concept of international law is that there is currently no global sovereign authority that enjoys universal recognition and therefore there is no supreme legal entity (such as a Parliament or Crown) to underpin and enforce a system of law. It follows that independent states tend to follow their own counsel and pursue their own national (and ultimately sovereign) agenda, when it comes to the interpretation of their commitments under international law.

Scholars, commentators and political leaders alike have contended that international law has evolved to a point where it exists separately from the mere consent of states, but it is submitted that we are still very far from the crystallisation of that process. There is a trend toward judging the domestic actions of a state in light of international 'law' and 'standards' but the consistent lack of consensus, forceful capacity and machiavellian disabilities of the so-called *United Nations* – even in fields such as the environment, disease and poverty of common interest to the entirety of the world population – amply testifies to this conclusion.

Many states, notably including the hugely significant and influential United States, vigorously oppose the idea of the supremacy of international law, maintaining that national sovereignty remains the dominant legal value. A number of commentators now point to the development of a legislative and judicial process in international law that parallels such systems within domestic law, but this is a nascent process, and far from true maturity. It is submitted that the *status quo* dictates that states only commit to international law with a pragmatic and self-serving view and that they retain

the right to make their own interpretations of its meaning. Moreover, international courts only function with the consent of states and their rulings are often overlooked.

In summary, international law in the early part of the twenty first century better resembles a “Pick and Mix” system more akin to a retail confectionery counter than a supreme, coherent and consistently reliable and enforceable legal superstructure. It is suggested that international law exists and is recognised *only* when each state *wants* it to be, when it suits their national agenda.

There is no better example of the fluid and amorphous nature of international law than that under discussion in this paper. It was a *new world order* that gave rise to the 2003 Iraq War. In the context of the socio-political legacy of the horrific 9/11 attacks on American soil, which caused a seismic shift in global relations and received diplomatic wisdom, and what the Bush administration considered to be the relative success of the subsequent United States-led invasion of Afghanistan in 2001, it was deemed by American President that he had sufficient military justification and general support, certainly among middle American voters and hopefully overseas, for further armed operations against perceived threats in the Middle East. Iraq was unfinished business, and something that had given his father George Bush senior, a bloody nose when he held the Executive. It is submitted that the unanticipated survival of Saddam Hussein as leader of Iraq after his own father's departure from office must have leant a strong and irksome personal angle to George Bush junior's attitude and approach to the Iraq question.

Given Saddam Hussein's continued grip on power, relations between the leading members of the coalition and Iraq had not warmed since the nadir of the original 1991 conflict, which was provoked by the middle eastern state's invasion of its southern neighbour Kuwait. [5] The nations had acquiesced in a state of bitter low-level conflict in the intervening years, characterised by British and American air-strikes, human shields, no-fly zones, an extensive sanctions regime, and other threats against the Iraqi state, which reacted with public belligerence. Iraqi air defences regularly engaged and fired upon coalition airplanes enforcing the longstanding northern and southern no-fly zones, which had been implemented after the 1991 Gulf conflict.

All things considered, by 2003 the stage was set for a stern and high stakes test of the mettle of the framework of public international law and its application in the critically important arena of armed conflict and possible justifications for a military response to real and putative threat. It is submitted that what followed serves only to buttress and underline the opening comments in this paper – namely that the phrase “ public international law” may in harsh reality be a contradiction in terms.

## **Chapter 2: War in International Law, the general prohibition and primary exceptions**

The United Nations Charter [6] establishes a legal framework for the use of military force in international law. Almost all states are signatories to this Charter, including the United Kingdom, the United States and indeed Iraq. The Charter stresses that peace is the fundamental goal of the Charter, and that it is to be preserved wherever possible. The preamble emphasises a determination ‘ to practice tolerance and live together in peace with one

another as good neighbours’, ‘to unite our strength to maintain international peace and security’, and to guarantee ‘that armed force shall not be used, save in the common interest.’

Article 1 of the UN Charter establishes the United Nations’ objectives, the first of which is:

“To maintain international peace and security; and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”

Article 31 of the 1969 Vienna Convention on the Law of Treaties, <sup>[7]</sup> provides that a treaty must be interpreted in accordance with its overarching purposes and objects, including its preamble. It is submitted that those provisions of the UN Charter which are relevant to this paper – namely the prohibition on the use of force and its exceptions – must therefore be interpreted in accordance with these fundamental sentiments.

The Charter thereafter lays down two core principles:

“2(3) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

2(4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the Purposes of the United Nations.”

In *Nicaragua v United States* <sup>[8]</sup> the International Court of Justice described Article 2(4) as “ a peremptory norm of international law, from which States cannot derogate”. The effect of Articles 2(3) and 2(4) is that resort to force can *only* be justified as expressly provided under the Charter, and *only* in situations where it is consistent with the goals of the United Nations.

The UN Charter permits the use of military force in the situations set out in Chapter VII. Article 42 provides that, if peaceful means have not succeeded in deriving conformity with Security Council decisions, it: “ may take such action by air, sea or

land forces as may be necessary to maintain or restore international peace and security.”

In practice this means that states require a breach of a relevant Security Council resolution in order to use military force against another State, <sup>[9]</sup> and such action can only be justified where any and all peaceful means available for resolving the dispute have been exploited to the full. It is submitted that where breach of such a resolution has occurred, states do not enjoy a unilateral right under Article 42 to use force to obtain conformity or to penalise the defaulting state: the question as to what action should be taken remains a matter for the Security Council.



The above is subject to the provisions of Article 51 of the Charter, which reserves states' rights to self-defence. A state does *not* require a Security Council resolution in order to defend itself with the use of military force, but it should be noted that even this right is subject to action by the Security Council. Article 51 stipulates:

“ Nothing in the present Charter shall impair the inherent right of individual or collective self-defence *if* [emphasis added] an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

In line with normal principles of interpretation, exceptions to the fundamental principle of the prohibition on the use of force, Articles 42 and 51 must be interpreted restrictively and narrowly on the facts of the particular case.

Therefore, under the UN Charter there are only two situations in which one state can legally resort to force against another:

- (1) In individual or collective self-defence (in this regard Article 51 of the Charter enshrines a right provided by customary international law.)
- (2) Pursuant to a relevant United Nations Security Council resolution.

As for the question of self defence, it is clear that the United Kingdom has not been the subject of any direct attack which could be linked with Iraq. Therefore it is submitted that it is clear that the right of self-defence *responsive* to a military or even terrorist attack does not arise for consideration. Accordingly, the only possible justification is as an *anticipatory* species of self-defence – presumably in contemplation of some real and imminent future threat. Regrettably, Article 51 of the Charter is silent as to whether ‘ self-defence’ includes the kind of pre-emptive strike opted for by the United States and the United Kingdom in 2003.

Internationally renowned commentators have taken different tacks on this question. Oppenheim concludes that while anticipatory action in self-defence is typically illegal, it will not necessarily be unlawful in all circumstances. <sup>[10]</sup> It is argued that the matter depends on the particular facts of the situation including especially the gravity of the threat and the extent to which pre-emptive action is avoidable, and any other options to circumnavigate or mitigate the risk of attack. In fact, it is submitted that the twin requirements of *proportionality* and *necessity* are even more important in relation to anticipatory or *proactive* self-defence than they are in *reactive* circumstances. On the other hand Detter endorses a more straightforward analysis rendering the practice plainly unlawful. In *The Law of War* he argues that it should be conceded that pre-emptive force is covered the prohibition of force in Article 2(4) of the UN Charter and that this derives a simple presumption that such action is illegal. <sup>[11]</sup> In unequivocal terms he concludes that: ‘ the mere threat of attack thus does not warrant a military response.’ <sup>[12]</sup>

### **Chapter 3: A Critical Evaluation of the Legality of the 2003 Invasion of Iraq and United States and United Kingdom justifications for the military campaign**

George Bush junior's administration made no secret of the fact that removing Saddam Hussein from power was a primary goal throughout 2002. It did offer to accept major concessions in Iraqi military and foreign policy in lieu of this, but it is submitted that this would have resulted in what may have been calculated to be an untenable loss of face for Hussein which would thus have presented him with an unacceptable option, while maintaining ostensible negotiations to the world at large. Reportedly, on 9/11 itself, in the immediate aftermath of the strikes President Bush enquired as to whether there were any likely links between the terrorists and the Iraqi dictatorship. When told that none were obvious, President Bush responded by saying " Well, find them." <sup>[13]</sup> As stated, the emphasised justification for the invasion focused on Iraqi production and use of weapons of mass destruction (hereafter " WMD"), but suspected links with terrorist organizations provided the underlying impetus for popular support, particularly in middle-America where attitudes are insular and introspective and the most generous appraisal would find that general knowledge on world affairs is limited to say the least. <sup>[14]</sup> Little if any convincing evidence was presented and has since been accumulated actually linking the government of Iraq to Al-Qaeda. <sup>[15]</sup> That said, the incidence of grotesque human rights violations in Iraq, including state-sponsored torture and mass murder organised under Saddam Hussein leadership, was also cited as a justification for the campaign. <sup>[16]</sup> It is notable however, that it has been suggested that only the WMD ground would have presented a legally defensible ground for

military intervention under the auspices of international law, given the claimed breach of Security Council Resolution 1441. <sup>[17]</sup> The apparent absence of WMDs in Iraq is problematic to say the least in terms of the putative international and national legality of the 2003 campaign.

In summary, Secretary of Defence Donald Rumsfeld claimed that the stated goals for the invasion of Iraq were as follows:

#### *Self-defence*

- To find and destroy weapons of mass destruction, weapons programs, and any terrorists sheltering under the regime;
- To gather intelligence on networks of weapons of mass destruction and terrorist groups.

#### *Humanitarian*

- To bring to an end sanctions and to provide humanitarian support (Secretary of State Madeline Albright claimed that 500, 000 Iraqi children had died because of sanctions.)

#### *United Nations Security Council (UNSC) Resolution*

- Resolution 1205, made in 1999.

#### *Regime Change*

- To terminate the administration of Saddam Hussein;
- To facilitate Iraq's transition to democratic self-rule

#### *Other*

- To secure Iraq's oil fields and other resources [18]

Certain members of the Republican camp had even higher hopes for the war. The Bush administration claimed that the war could serve generally as a catalyst to facilitate democracy and peace in the Middle East, on the assumption that once Iraq became democratic and secured new influence, friends and prosperity there would be pressure and incentives for other states in the region to pursue the same route (presumably due to the so-called *demonstration effect*), and that the socio-political environment that previously had nurtured terrorism would be destroyed. Hamzeh defines the term demonstration effect as “ a revolutionary event in one place [that] may act as a catalyst for a revolutionary process in another place at approximately the same point in time.” [19] That said, it is submitted that for diplomatic and bureaucratic reasons these goals were de-emphasised to allow stress to be put on justifications based on the allegation that Iraq represented a specific threat to the United States and to upholding the rule of international law.

There is of course a popularly held counter point of view which argues that the reasons promulgated to justify pre-emptive war were either inadequate, specious or just plain falsehoods. A summary of critical opinions as to the true motivations that provoked the 2003 military campaign features below:

#### *The Oil Issue*

- To seize control of Iraq's hydrocarbon deposits and in so doing preserve the United States' dollar as the monopoly currency for the

hugely important international oil market (Iraq had been using the Euro as its oil export currency since 2001);

- to reduce the price of oil for the high-consumption American market;
- To assure that American interests would be primary beneficiaries of Iraqi oil;
- To guarantee that the United States exercised military control over the middle east's hydrocarbon reserves, and thus secure a lever to control other countries depending on that market for supplies.

#### *Military and Construction Interests*

- To divert vast amounts of money to the American defence and construction industries as a consequence of the campaign and subsequent occupation.

#### *Public Popularity and Executive Re-election (Falklands Factor)*

- To buttress and enhance the 'crisis' popularity enjoyed by the President as a result of his stern response to the 9/11 attacks, and moreover to distract attention and dilute critical comment on other domestic political issues – where President Bush was palpably vulnerable politically (In this regard it should be noted that George Bush junior's father saw his own wartime popularity quickly eroded when the electorate began to focus on the economy in the aftermath of the 1991 conflict. It is submitted that this cannot have gone unnoticed in the political think-tanks of Washington DC, or indeed by Prime Minister Tony Blair's advisors in London, where reference is so often made to the so-called *Falklands Factor* which boosted Margaret

Thatcher's ailing popularity and secured her re-election and subsequent political dominance in the 1980s.)

### *Revenge and Ideology*

- To obtain retribution. It is said that revenge is a dish best served cold and for over a decade George W. Bush junior had waited to seize revenge against Saddam Hussein for the humiliation of the dictators survival after the first Gulf conflict and for allegedly attempting to have his father, President George H. W. Bush, assassinated during a 1993 visit to Kuwait. It may also have been a temptation to secure closure for other members of the United States' Administration, including the influential Richard Cheney, who was both infuriated and humiliated by the continuation of the Hussein dictatorship after the 1991 American action. [20]
- To pursue the fundamental strategic goal of " unquestionable American geopolitical pre-eminence" – as promulgated, *inter alios* , by the Project for a New American Century. [21]

Under pressure from its vociferous critics, in April 2005 the United Kingdom government published the full text of the advice provided by the Attorney General Lord Goldsmith on 7 March 2003 on the legality of the war. [22] In his advice, the Attorney General evaluated the various arguments on whether military action against Iraq would be legal without another specific United Nations Resolution. Lord Goldsmith was equivocal on many points but he firmly concluded that regime change was not a lawful goal of military action,

indeed, he expressly stated that invasion for the purpose of usurping Saddam Hussein was an illegal endeavour. [23]

A document that has come to be known as the *Downing Street Memo*, which details the minutes of a United Kingdom government cabinet meeting on 26 July 2002, was leaked to newspaper *The Times* on 1 May 2005. [24] The document corroborated the Attorney General's advice, and restated Lord Goldsmith's opinion that the desire for regime change was not a legal ground for military action under international law. The memo stated were three possible legal routes: self-defence, humanitarian intervention, or United Nations Security Council authorisation. It was found that the first and second grounds could not be the justifications in this case, and that reliance on United Nations Security Council Resolution 1205, which was, at the relevant time, some three years old, would be a tenuous and pregnable stance. The weakness of the argument is exacerbated by recognition of the fact that the cabinet were not discussing a new trade pact or esoteric diplomatic relations, but the single most important decision that a government can take, namely a pre-emptive war.

The Downing Street Memo further stated that President Bush wished to remove Saddam, by applying military force, justified by the co-existence of sheltered terrorist factions and WMD. However, it is submitted that the intelligence was being posited around the policy. It was also found that the majority view of the UNSC was not satisfied with the general UN route, and that it harboured no enthusiasm for promulgating additional information on the record of the Iraqi regime. The Memo also indicated that there was little discussion in Washington of the consequences of military action or of the

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impact of the aftermath on the state of Iraq. It is submitted that it must have been quite apparent that the US President had already decided to resort to military action, even if the timing of that action was still to be finalised.

However, at this point the case for invasion remained flimsy. <sup>[25]</sup> Saddam was not posing any realistic threat to his neighbours, nor even posturing to do so. As the Memo suggested, even in the worst alleged case scenario (which has thus far proved to be wrong) his WMD capability fell substantially short of that of Iran, Libya and North Korea. Four days after the leak in London, in a move initiated by John Conyers, a ranking member of the House Judiciary Committee, the US Congress formally requested the President to answer a series of penetrating questions relating to the Downing Street Memo, including whether he or anyone in his administration disputes its accuracy. <sup>[26]</sup> The Bush Administration has to date failed to answer those questions.

Exhibiting similar reticence, on 22 May 2005, the United Kingdom government refused a plaintive request for an investigation into the legality of the war from the families of soldiers that had lost their lives in Iraq. These bereaved families have now sought a judicial review of that decision.

Treasury solicitors were responsible for refusing the request, which they did after Tony Blair had made his own view that a review was unnecessary patently clear. In a Channel 4 News interview he stated: “ We have had inquiry after inquiry, we do not need to go back over this again and again.”

[27]

Seeking to justify their decision, the Treasury Solicitors claimed there were at least five principle reasons to deny the request of the families. These were as follows:

- The European Court of Human Rights has already clarified that decisions on military action abroad are not reviewable under the European Convention of Human Rights (hereafter “ ECHR”).
- None of the fatalities occurred within the jurisdiction of the UK as defined by Article 1 of the ECHR.
- The ultimate decision to pursue military action in Iraq was not the “ immediate and direct operative cause of the deaths of the proposed claimants’ relatives”.
- There was no “ specific and individualised risk of harm” to those who lost their lives, such that could be distinguished from any other members of the United Kingdom armed forces. Dispatching armed forces to Iraq as part of an organised military force fully equipped and capable of defending itself could not be considered on the same footing as sending a helpless individual victim overseas to confront the risk of torture or death.
- The claimants would have to invoke the Human Rights Act in raising an action before the domestic courts, but that Act is not applicable in any relevant sense to any territory beyond the frontiers of the United Kingdom.

The Treasury Solicitors also contended that the fraught question of the legality of the invasion of Iraq was irrelevant to whether there had been any breach of Article 2 of the ECHR. [28]

The legal position in the United States was also both tenuous and pregnable. In conformity with the well known system of checks and balances protected and maintained by the United States Constitution the authority to declare war is granted exclusively to Congress, and there is no provision in the Constitution for its delegation, although it is true that under the provisions of the US War Powers Act of 1973 [29] the President can send troops to a country *without* the consent of Congress for a period not exceeding 90 days. George Bush, therefore, did not have personal authority to declare war.

On October 3, of 2002, US Representative and Congressman Ron Paul submitted a proposed declaration to the House International Relations Committee which stated that a state of war was declared to exist between the United States and (with a careful choice of words) the *government* of Iraq. He said:

“ America has a sovereign right to defend itself, and we don’t need UN permission or approval to act in the interests of American national security. The decision to go to war should be made by the U. S. Congress alone. Congress should give the President full war-making authority, rather than binding him with resolutions designed to please our UN detractors.” [30]

However, this proposal was rejected. Although this would seem to the casual observer a damning outcome, the President was undeterred. To overcome

this obvious setback, drawing on several factors, including unresolved matters still persisting from the 1991 Gulf War, George Bush junior's administration forcefully claimed the intrinsic authority to engage Iraq militarily, and Congress was manoeuvred into circumnavigating fundamental 'technicalities' in transferring what were in substance its war powers to the President. [31]

It is submitted that this policy in itself left the American action on shaky legal foundations to say the least. [32] On this tentative analysis, the invasion and military occupation of Iraq, while to all intents and purposes a war *per se*, may therefore be considered a police action initiated by the Executive, in similar fashion to the Korean War and, notably perhaps, the ill-fated Vietnam War before it.

### **The United Nations: Competing perspectives on the applicable resolutions**