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by

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International law is a mixed bag of treaties, conventions and declarations, which can determine the case or the salvation of certain clashes and conflicts. Under the rules of international law, states should behave with respect to other states’ independence and integrity. Thus, this should lead to international peace and security, which is the primary purpose of the UN charter. The UN charter was therefore adopted under certain rules and regulations to preserve international peace and security, but also to prevent the horror of terrorism threat. The 2003 US-led invasion of Iraq began in a fog of controversy over the issue of the war’s legality, timing and rationale. The legality in this case was determined under the band of self-defense, which was the concern of George W. Bush war on terrorism, after the shock of 9/11. Renowned jurists, statesmen/women and others around the globe have added their voices to the din surrounding the issue of legality vs. illegality, which today remains unanswered and without definitive conclusion. Hence, this essay is examining the general doctrine of Bush administration and analyzing how lawful is the policy of preventive war. Detailed examination of the respective law framework and debates will be evaluated in order to conclude on the topic.

The United Nations Security Council had passed over 17 resolutions dealing with the situation in Iraq prior to the US-led invasion in 2003. The first was resolution 660, which dealt with the initial Iraqi invasion of Kuwait. The following resolution, 661, specifically mentioned Chapter VII of the UN Charter, which states in part in Article 39:

“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 Security Council acting under its obligation to restore international peace and security in the region, ordered a package of measures put in place including comprehensive sanctions to force Iraq to withdraw from Kuwait. Because Iraq did not withdraw from Kuwait and as a member of the United Nations was in violation of international law, the UN Security Council subsequently passed resolution 678, which again stated that the council acting under Chapter VII (Greenwood, p.329):

“Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area”

Following the successful ejection of Iraq forces from Kuwait, the UN Security Council passed resolution 687, which “welcomed the restoration to Kuwait of its sovereignty, independence and territorial integrity.” The resolution also imposed conditions on Iraq for ending the war, most of which concerned Iraqi obligations to end its weapons of mass destruction (WMD) program.

The end of Kuwait war and the chock of 9/11 raised the question of potential threat from Iraq, in terms of terrorism that could possibly reach the boarders of USA. Thus, the invasion proceeds or military intervention to Iraq in 2003 was almost under this condition, although this issue is controversial.

Following a long period of low-level hostility between Iraq and the United States, acting with Great Britain as the armed party responsible for enforcing UN resolutions regarding Iraq, the US began pushing for an additional resolutions arguing that Iraq was in violation of its
obligations under previous UN Security Council resolutions, in particular those named above (Hurd). The result was UN Security Council resolution 1441, which stated the following (Greenwood, p.355):

_Further recalling_ that its resolution 687 (1991) imposed obligations on Iraq as a necessary step for achievement of its stated objective of restoring international peace and security in the area,

1. **Decides** that **Iraq has been and remains in material breach** of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq's failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 687 (1991);

13. **Recalls**, in that context, that the Council has repeatedly warned Iraq that it will face **serious consequences** as a result of its continued violations of its obligations

Many theorists and especially the US secretariat were trying to authorize the Bush administration for the invasion of Iraq under resolution 1441 of the UN Security Council that argued about the Iraqi threat of international peace and security. This resolution was passed on 8 November 2002 under the name of “The United Nations, International Law and the War in Iraq” and the Bush administration was using it as an umbrella to hide from the rain of criticism and blames of other UN member states. Hence, in an interview for BBC (2004), Kofi Annan has said: “I have indicated, it was not in conformity with the UN charter, from our point of view. From the charter point of view, it was illegal.”
Further arguments in opposition to the war exist in a reading of the UN charter. Section 2 (3) and (4) state:

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.

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 in any other manner inconsistent with the Purposes of the United Nations.

These principles, that a state must settle disputes peacefully first, are a matter of treaty law to which all UN members ascribe when they sign and accept membership in the United Nations. Furthermore the principle of settling disputes peacefully could be considered to now be a rule of customary international law.

Nevertheless, the 1970 Declaration on Principles of International Law states the following (Higgins, p. 242):

The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations.

Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State,
Current Issues and Research in International Law

or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

A war of aggression constitutes a crime against the peace, for which there is responsibility under international law (Shaw, p. 1019).

In its war against Iraq, the US operated on the principle that Iraq should be punished through use of force and specifically stated that its goal was to overthrow the regime of Saddam Hussein. While the 1970 declaration is a UN General Assembly resolution (2625) and not one from the UN Security Council it does add to the weight of international opinion.

Under a reading of the UN charter and subsequent UN resolutions dealing with the situation in Iraq, the US-led attack against Iraq was illegal under international law. Moreover, it has violated the UN charter section 2 (3) & (4). The US did not possess the authority on its own to enforce UN Security Council resolutions regarding Iraq.

On the other hand, the US administration had imposed the “Bush Doctrine”, to legalize the invasion and the use of force, as a “preemptively” act to defend US boarders and nation from the imposed threat of Saddam Hussein’s weapons of mass destruction. Another act that gave room for the American invasion to Iraq at that certain time was the Bush announcement that 9/11 crisis was determined by a terrorist networks suspected to be in relation with Saddam Hussein regime in Iraq. Hence, this gave US the right of self-defense in a certain time, but under the authority of the UN Security Council rules and regulations for the use of force. Thus, Bush
Doctrine came into force to extend the meaning of self-defense by which it reflects the importance for use of force before the strike of the enemy occurs. Furthermore, the US congressional joint resolution: “Authorization for Use of Military Force against Iraq Resolution of 2002” - “U.S. House of Representatives Joint Resolution 114” (Representatives-Senate, 2002) legalized and authorized the use of US military force against Iraq threat, because Saddam's regime has been suspected to be aiding international terrorist organizations or networks dealing with mass destruction weapons, following 9/11 crisis and the Iraq aggression act of Kuwait invasion.

While US forces did not founded any weapons of mass destruction or terrorist networks in Iraq (as it was frailer information from the CIA), a new government had to emerge in Iraq to allow order and security in the region, hence to end Saddam’s regime.

Although the legality of the American invasion to Iraq in 2003 is questionable, it lies under some aspects and reasoning - the UN charter and article 2(4) prohibits the use of force against other state sovereignty or independent states. However, in self defense context, article 51, allows the use of force against any armed action, even though US did not wait till it get stroked by Iraqi's MDW or other terrorist organization that is allied with Saddam's regime. Therefore, the Bush doctrine came up with an ideological meaning for the use of force under self-defense context in action of any threat to the national security and integrity of states. Thus, US as member of UN role was to keep world peace and security. As Iraq violated international law according to UN charter article 2(4) when invading Kuwait 1990, it was suspected that they will act with the same aggression method by attacking USA on the long run and threaten international peace in the region. Furthermore, the American invasion of Iraq in March 2003 was not legally justified under international law, but evidence of Saddam’s totalitarian system and the
American idea of the war on terror enabled the US forces to exercise their power to end Saddam’s regime.

According to Kaldor (2006), “In the period before the invasion, the best justification for war was regime change”, on the other hand the anarchic nature of the international system, gave US room for the invasion. “The invasion of Iraq was not really a war; It was more like an exercise”, since Bush himself described the invasion as “one of the swiftest advances in History”.

Arend (2003) argues that “Under the United Nations Charter paradigm for the use of force, unilateral preemptive force without an imminent threat is clearly unlawful. But if the charter framework no longer accurately reflects existing international law, then the Bush doctrine of preemption may, in fact be lawful - even if it is politically unwise”.

Tom Farer further argues that “there is simply no cosmopolitan body of respectable legal opinion” that supports the Bush position. Similarly, international lawyer Abdullahi Ahmed An-Na’im (2002) (who has emphatically condemned the September 11 attacks against the United States and who acknowledges the American right to defend itself) has concluded “I am unable to appreciate any moral, political or legal difference between this “jihad” by the United States against those it deems to be its enemies and the “jihad” by Islamic groups against those they deem to be their enemies. Whatever legal justification(s) may be claimed for the actions of the United States, they can never authorize it to act as prosecutor, judge, jury and executioner in its own cause and still claim the legitimacy of international legality.” An-Na’im further argues, that American behavior constitutes “a fundamental challenge to international legality. To those who
Current Issues and Research in International Law

wish to promote a law-based international order, the willingness of the world’s most powerful state to act in a manner they regard as lawless is a great disappointment”.

The invasion begun and was based upon the intentions for detecting weapons of mass destruction or terrorists networks, while after it turned to fail its core aim. However, some argue that the invasion played its role in proving new concept which is to create a “Democratic Iraq” or government in Iraq (Strawson, 246-259). If there was no threat from Iraq, the invasion would not happen, hence some theorist argue that the invasion was illegal and unprovoked to UN before it began. On one hand, the invasion issue cannot determine the legality or illegality due to the uncertainty and the anarchic nature of the international system.

However, there was no evidence linking Saddam Hussein to any attack on the United States immediately after 9/11 or before the invasion of Iraq in March 2003. Nor has there been any evidence presented since the invasion linking Iraq to 9/11 or any terrorist attack on the United States or its citizens.

Saddam Hussein was in violation of his obligations under UN Security Council resolution 687 by supporting 9/11 attacks as well as providing support to those carrying out terrorist attacks in Israel or the occupied territories. Nonetheless the US was bound by customary international law in responding to these acts – specifically the principle of proportionality. The International Court of Justice (ICJ) ruled in the case Nicaragua vs. US there exists “a specific rule whereby self-defense would warrant only measures, which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law” (Shaw, p.1031).
The attack on Iraq by the US-led coalition could never be justified using the rationale that Saddam Hussein was supporting international terrorism. The US could show no direct injury from this support and even if it could, its response would be constrained by the principle of proportionality, which is an established rule of customary international law (Goldsmith, p. 11). An invasion of Iraq using the rationale of Iraqi support for terrorism would also be illegal under international law.

In conclusion, this essay has focused on the legal basis for and against the US-led attack on Iraq in 2003. It examined the general doctrine of Bush administration and analyzed how lawful is the policy of preventive war. Further examination of the respective law framework and debates were also evaluated in order to justify the legality of the Iraq War 2003. The issue of the non-discovery of Iraq’s WMD program has deliberately been left out because that issue does not relate to illegality of the war, rather bad or forged intelligence on the part of the US and its allies, however it was analysed as a spectrum for the initial reasoning and aim of the war. Whether Iraq was in possession of WMDs, which it was not, is insignificant to the root issue of legality. As stated previously – the US and its coalition did not posses the legal authority under the UN charter or relevant UN Security Council resolutions to invade Iraq. Nor could a persuasive and legally defensible case for invasion be made under customary international law – specifically self-defense or using the doctrine of imminent threat. A case for invading Iraq also does not exist under the threat of terrorism, pre or post 9/11.

While defenders of the US invasion can gather imaginative and varied arguments to support their case, at the heart of every argument, they are incorrect. Thus, according to all the evidence and legal framework, the Iraq invasion was not legal. Although subsequent UN Security Council resolutions, the Bush administration doctrine and other resolutions have authorized coalition forces in Iraq, that does in no way change the fact that the war as carried
Current Issues and Research in International Law

out by the US-led coalition was illegal under both treaty law - UN charter and customary international law.
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Online Resources


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George Fareborther and Nicholas Kollerstron, “The Case against war – the essential legal enquires, opinions and judgments concerning war in Iraq, 2nd Ed. (2004)