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International Law and the Use of Force: The Case of Iraq

Today we turn our attention to a specific case study in international law, the US-led invasion of Iraq in 2003. What can this case teach us about the role of international law in determining whether states can justifiably go to war against other states?

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Yesterday we considered some of the general difficulties associated with applying international law in the 'real world'. Today, we would like to turn our attention to a specific example of this problem – i.e., the US-led invasion of Iraq in 2003. What can this case teach us about the role of international law in determining whether states can justifiably go to war against other states? In theory, international legal instruments place what are frequently known as *ad bellum* restrictions on the use of force, in addition to *in bello* restrictions that govern the conduct of war once hostilities have already begun. But what about actual practice? Today we deal only with *ad bellum* restrictions. To assist our analysis, it profits us to look at Dominic McGoldrick's book, *From 9/11 to the Iraq War: International Law in an Age of Complexity*.

The resolutions

To this day, arguments persist over whether the recourse to war against Iraq by the United States and its allies was consistent with international law. According to McGoldrick and his like-minded colleagues, there are three kinds of justifications for the use of force under international law: 1) self-defense, 2) humanitarian intervention, and 3) authorization by the United Nations Security Council (UNSC). Although all three of these justifications haven't been used to justify the American invasion at some point, the most-invoked at the time was the third one – i.e., that authorization was given by the UNSC under the UN's mandate to maintain "international peace and security." According to the British Attorney-General serving at the time, the authority to use force stemmed from the "combined effect" of three UNSC resolutions: [SCR 678](#), which in 1991 authorized the use of force (as well as "all necessary means") to disarm Iraq and eject it from Kuwait; [SCR 687](#), which, among other provisos of the subsequent cease-fire, required Iraq to eliminate its weapons of mass destruction; and [SCR 1441](#), which determined in November 2002 that Iraq was in "material breach" of its obligations under the 1991 cease-fire agreement.

On the matters above, all parties agreed. Indeed, McGoldrick tells us that "no member of the [Security] Council questioned that Iraq had not complied with its disarmament obligations." Where

they disagreed, of course, was what this permitted individual states to do about it. Although force had been legally used against Iraq in 1993 and 1998, precisely because it was not complying with its cease-fire obligations, the language of SCR 1441 specifically excluded the phrase 'all necessary means' that had been included in 1991. This is significant, McGoldrick reminds us, not only because France and Russia specifically prevented the inclusion of this language this time around, but because it would probably have authorized (at least in most eyes) the kind of "full-scale attack to achieve regime change" which nevertheless occurred. But France and Russia, who both hold vetoes in the Security Council, clearly did not authorize that attack. So how can a case for the legality of the 2003 invasion of Iraq be made by reference to Security Council authorization?

According to McGoldrick, this can be done through the doctrine of 'automaticity'. Basically, automaticity turns on whether the determination of 'material breach' in SCR 1441 *automatically* authorized individual states to use force, or whether another resolution would have been required to decide that question. Because SCR 1441 did not include the crucial language of 'all necessary means,' authorization for a full-scale attack to achieve regime change could only rest on the *revival* of the extensive authority granted in 1991. And this is indeed what the US and (ultimately) the UK argued: by declaring Iraq to be in material breach of the cease-fire agreement concluded in 1991, SCR 1441 *revived* the authorization granted for the *first* Iraq War. This argument, which McGoldrick regards as "tenable and defensible" (if somewhat over-ingenious), means that no second resolution was required in 2003 because SCR 1441 provided more than enough justification for future remedial actions.

Self-defense?

The above argument illustrates that legal rationales given by the respective governments at the time were predicated mainly on specific Security Council resolutions. But they could also have been predicated on self-defense. This was the case, for example, with the invasion of Afghanistan two years earlier, which has been interpreted (and generally accepted) as a legitimate exercise of the right to self-defense in response to the attacks of 9/11. (See, for example, [Christopher Greenwood's convincing analysis](#).) But Iraq had not already attacked any of the coalition countries (as Greenwood argues the Taliban regime in Afghanistan, by way of Al-Qaeda, had done on 9/11). This means that the right of self-defense could only be invoked "pre-emptively." Under international law (as established in the [Caroline case](#) and more recently by the [ICJ ruling on Nicaragua](#)) the use of force in pre-emptive or 'anticipatory' self-defense can be justified only if a violent attack is clearly "imminent."

Traditionally, the test of imminence is that "the necessity of self-defense is instant, overwhelming, leaving no choice of means and no moment for deliberation." Although the circumstances surrounding the invasion of Iraq may not at first appear to pass this test, the highly controversial John Yoo argues that history has passed it by - i.e., that the test is now unfit for the "modern context of WMD, rogue states and international terrorism," where significant threats can materialize more quickly and unexpectedly than ever before. In Yoo's view, the use of force in Iraq was indeed justified under the right of self-defense as articulated by the UN Charter. People such as Tom Franck, however, emphatically disagree, concluding that "the facts of the situation that existed in March 2003 are hard to fit within any plausible definition of *imminence*." Many others, including Richard Falk, further characterized the invasion not as self-defense but as "preventive war" (which is illegal under international law). Indeed, McGoldrick heaps scorn on Yoo's self-defense argument, pointing out that "Iraq could arguably have invoked the US doctrine to justify an attack on the US itself."

Humanitarian intervention?

According to McGoldrick, there is little doubt as to whether Iraq under Saddam Hussein fit the profile of a "tyrannical and totalitarian regime." Moreover, the appalling human rights situation in Iraq at the

time was extremely well-documented (not least in Colin Powell's [infamous presentation to the Security Council](#)). As with the argument for self-defense, however, the legal debates at the time of the invasion did not emphasize humanitarian concerns. Indeed, those came later. Two years after the invasion, the United Nations adopted the Responsibility to Protect (R2P) initiative, which invests the international community with the responsibility to intervene in states that cannot or will not protect their own populations from 'mass atrocities.' But since R2P was obviously not in force at the time of the invasion of Iraq, these and other "retroactive justifications" for the invasion of Iraq on humanitarian grounds "should be treated with much caution," or so McGoldrick argues. Though the same is not necessarily true for moral or political arguments (as Christopher Hitchens' book [A Long Short War: The Postponed Liberation of Iraq](#) perhaps illustrates), legal justifications for the invasion based upon humanitarian intervention continue to be unpersuasive.

Conclusion

Legal considerations obviously do not exhaust nor necessarily trump arguments about the morality or legitimacy of the US-led invasion of Iraq. It is possible to argue, as some international lawyers do, that the recourse to war was "unlawful but morally justified." A counter-argument, subsequently made by none other than Pope John Paul II, is that the invasion of Iraq was, at best, "possibly lawful but *not* morally justified." These debates aside, it is important to acknowledge that, at least for a few months, the morality and legitimacy of the course of action determined by United States genuinely seemed to depend on its legality, as interpreted by the UN Security Council. As McGoldrick points out, for an organ that is "the *locus classicus* of political and diplomatic power" in the world, this was a strange development indeed.

Recommended Reading

"Forcible Regime Promotion, Then and Now" in *The Clash of Ideas in World Politics: Transnational Networks, State and Regime Change*. John Owen, 2011

"Preemption and Law in the Twenty-First Century," *Chicago Journal of International Law*. David Rivkin, Lee Casey and Mark DeLaquil; 2004

"International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq," *San Diego International Law Journal*. Christopher Greenwood, 2003

"International Law and the 'War on Terror'," *International Affairs*. Christopher Greenwood, 2002

Editor's note:

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