

International Law and the War on Iraq

The US and UK governments have claimed the right to invade Iraq even without a second UN resolution. They claim Iraq is a threat to world peace and security and that they are entitled to take preventive unilateral military action. Contrary to these claims, international legal experts from around the world are arguing that without a further Security Council Resolution specifically authorizing the use of force such an attack would be illegal.

Furthermore the 'preventive' use of force currently being considered against Iraq is against both the spirit and letter of international law; the United Nations would be well-advised not to allow such a dangerous precedence to be established. Already it has been reported that North Korea is considering a preventative attack against American forces in South Korea. The claimed doctrine of preventive war is not only illegal; it is, dangerous and destabilising and destructive of international peace and security.

Background:

After World War II, the UN was created to keep international peace and security, because the old system of collective security had failed to prevent devastating world wars. The old system, based on shifting alliances between states, had not prevented nationalistic governments of powerful economies using force to achieve their economic and political aims. The Charter which established the UN is a treaty which binds all member states to maintain international peace and security, through the peaceful settlement of disputes, collective measures for the prevention and removal of threats to the peace, and most importantly through international cooperation.

This attempt to increase international cooperation has been increasingly undermined by the US government in recent years. It has pulled out of the Kyoto Protocol on climate change, failed to ratify the Comprehensive Test Ban Treaty despite clear promises made under the NPT (Non Proliferation Treaty), pulled out of the ABM Treaty, pulled out of the International Criminal Court and refused to sign the Biological Weapons Protocol.¹ Numerous other examples were presented to the World Summit on Sustainable Development in 2002 in which US delegations to international negotiations worked hard to weaken treaty language, and then failed to ratify them anyway. All of these unilateral actions by the United States are undermining the power and authority of the UN, discouraging international cooperation and breaking down the rule of international law.

Preventive unilateral attack not legal: The US has recently claimed a right to take preventive military action, including against Iraq, saying '*if we wait for threats to fully materialise, we will have waited too long*' and that '*Iraq is a clear threat to international peace*'. While the US and UK claim that Iraq is already in material breach of Resolution 1441 for a number of reasons, it does not follow that this gives them the right to start an attack – only the United Nations can decide if a material breach exists and only it can decide what to do about it. A further Security Council resolution is therefore needed to authorise the use of force.

The US claim ignores one of the major principles of the United Nations: UN Charter Article 51 gives states a sovereign right to start military action in self-defence only if it has suffered armed attack: "nothing in the present Charter shall impair the inherent right of individual or collective self-defence if

¹ "Implementation of such a protocol would have caused problems, I think, for our biological weapons defense programs, would have risked intellectual property problems for our pharmaceutical and biotech industries, and risked the loss of integrity and utility to our very rigorous multilateral export control regimes": State Department spokesperson Phil Reeker, 25 July 2001.

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."

The right of self-defence exists only where an attack has already been made, or is plainly imminent. In one often cited case involving the *SS Caroline*, there must be "a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation". In the absence of this circumstance, the correct and legal course is to ask the Security Council to deal with the matter. In fact in 1981 when Israel attacked the Osirak nuclear reactor in Iraq, claiming in effect a right of pre-emptive self-defence, the attack was strongly condemned by the Security Council in Resolution 487 (1981), including by the United States, as a "clear violation" of the Charter. Significantly, that attack has since been praised by Secretary of State Colin Powell as a "clear, preemptive military strike. Everyone now is quite pleased even though they got the devil criticized out of them at the time."² The attack was illegal then and a similar attack would be illegal now.

Iraq has not threatened to attack any State at this time, has not mobilised its forces to do so and does not have the military force to attack the United States, United Kingdom or Australia, all of which have sent forces to the region. So repeated claims by those States that a preventive attack on Iraq can be justified by Article 51 have no legal basis.³ Even Henry Kissinger has stated that "[t]he notion of justified pre-emption runs counter to modern international law, which sanctions the use of force in self-defense only against actual- not potential- threats."⁴

Preventive UN-sanctioned Attack Not Justified:

There is no basis in international law for the use of force as a preventive measure when there has been no actual or imminent attack by the offending State or widespread violence or humanitarian emergency. If the Security Council were now, for the first time in its history, to authorise preventive war against Iraq, where there is no imminent threat to peace, it would seriously undermine international restraints on the use of force. This would clearly undermine the United Nations Charter objectives of the maintenance of international peace and security. To authorise a preventive war on the basis that a state may have hidden weapons of mass destruction would set a precedent for other preventive wars against up to 20 other countries. The use of force would constitute a resort to violence at the cost of civilian as well as military lives at a time when threats to international peace and security international proliferate.

There are sufficient international mechanisms available to address the charges against Iraq and the Iraqi leadership. These include, apart from the existing weapons inspection programme, and extending this regime, the establishment by the Security Council of an ad hoc international criminal tribunal, the use of the International Criminal Court for any crimes committed after July 2002, and the International Court of Justice. Mechanisms to ensure compliance include diplomatic pressure, negotiations, sanctions on certain goods with military application or which could be used to produce weapons of mass destruction, destruction of stockpiles of weapons of mass destruction and inspections of facilities with capabilities to assist in production of weapons of mass destruction.

The international community must address the question of weapons of mass destruction through international cooperation, with consistency and non-discrimination. Even the United States and United Kingdom, together with China, France, India, Pakistan, and Russia as nuclear powers, are bound by an obligation to "pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."⁵

² Washington Post, June 17 2002.

³ A legal briefing from the Australian Parliament in December 2002 stated that "there is no basis in international law for the US or any other State using military force to 'implement or enforce' any current UNSC resolution on Iraq. Nor has the case yet been made out that force could be legally employed under so-called 'pre-emptive' self-defence" *Current Issues Brief no 0 2002-03* published by the Australian Parliament's Information and Research Services as information for Parliamentarians in December 2002. The full 14-page text can be found at the Parliament website:

<http://www.aph.gov.au/library/pubs/cib/2002-03/03cib09.htm>

⁴ *Chicago Tribune*, August 11, 2002.

⁵ *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ Reports 226

US war plans under Geneva Convention:

CBS News reported on Jan 24 that the Pentagon intends to start the war with a massive attack on Bagdad, including attacks on electricity and water supplies. Such a plan would contravene Article 54(2) of Protocol I to the Geneva Convention which states that.⁶

It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

During the Gulf war, Iraqi water and electricity infrastructure was destroyed, much of which was said to be 'accidental collateral damage'. In January 2003, over one hundred US law professors and NGOs sent a letter to George Bush warning that recent US battle tactics in Kosovo and Afghanistan indicate concern that international humanitarian law will be broken in any attack on Iraq.⁷

Use and Threat of Nuclear Weapons are illegal:

In 1996, the International Court of Justice ruled that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; but did not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.⁸ The use of nuclear weapons in Iraq in response to Iraqi chemical or biological weapons usage, or to attack command bunkers would clearly be illegal under international law.

⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. While the United States has not ratified Protocol I, the United Kingdom has. Thus, United States responsibilities aside, if the United Kingdom participates in any attack which breached Protocol I, it would be committing a breach of the Protocol.

⁷ See Centre for Constitutional Rights letter to Bush and Rumsfeld at http://www.ccr-ny.org/v2/newsroom/docs/letter_to_georgebush.pdf

⁸ *General Assembly Opinion*, ICJ Reports (1996).