The Invasion of Iraq in 2003

AUTHOR
Burak GÜNEŞ

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Discuss with reference to the legality of the US led invasion of Iraq in 2003

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I) Introduction

It is essential to deal with the concept of the apologist function of international law. As Koskenniemi mentioned, international lawyer are at the brink of the major mistake of being state apologist.¹ In this sense, in social sciences, the consequences of being apologist to state can be seen clearly. The invasion of Iraq is one of the most important cases that indicates how international lawyers take their position besides their national state in order to justify the actions of these states. Indeed, it is easy to understand how international law can be used as a tool just by examining the language that these kinds of international lawyers use.² By way of illustration, Prof Greenwood’s words in order to justify the Iraq war is meaningful. According to Greenwood, military action against Iraq would be justified if “…The Security Council indicated that Iraq was in material breach of Resolution 687 (1991) and that breach entailed a threat to international peace and security, in which case action would be justified within the framework of Resolution 678 (1990)”³

The issue of the legality of the invasion of Iraq has been a controversial and much disputed subject within the field of international law. In order to examine the legality of the invasion, in this paper, the USA’s claims will be debated. First of all, the automatic authorization of use of force under chapter VII of the UN Charter will be analysed by applying various resolution related to Iraq. Secondly, the aim of this paper is to determine whether pre-emptive self-defence is legal or not.

II) Legal Basis of the Invasion of Iraq 2003

a) Authorization of the UNSC

In order to wage war, there should be something concrete to justify the action and intention as well. In the field of international area, states try to demonstrate the legal validity of their action by applying to international law. The USA, although was declared as a unique superpower particularly after the collapse of the Soviet Union, needs to put forward legal basis for its international acts. Supporting this, “… President Bush was focused on trying to build domestic and international support for a final effort to disarm and dislodge Saddam Hussein.”4 But on the other hand, legality does not always reflect the legitimacy of this actions.5 These state interests can be justified by applying international law, but on the contrary this kinds of justifications do not always find an acceptable place in the public eye.

In particularly, the USA consulted two main points of support in order to wage war against Iraq. These points of support are codificated in the UN Charter. According to the UN Charter article 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 in any other manner inconsistent with the Purposes of the United Nations.”6

But on the other hand, the UN Charter allows to use of force in international relation only a few conditions. One of them is the authorization of the UN Security Council under Chapter VII. According to this chapter;

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“"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."" 7

In this frame, the USA tried to justify its action by applying some of the UNSC previous resolutions. The USA asserts that the resolutions which were adopted during and after the first Gulf War, have an automatic effects to the situation in 2003. 8 After Iraq had invaded Kuwait, The UNSC adopted the resolution 660 in August 1990. The Security Council determined a material breach of international peace and security. 9 To continue with this resolution, Iraq was wanted to withdraw from Kuwait immediately and unconditionally.10 This demand illustrates the intendment of the resolution. The authorization of the Security Council was clearly seen in the resolution 678 aiming to put the resolution 660 in practice.

Furthermore, the resolution authorizes

“"Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements,...., 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."” 11

Apart from resolution 678, in April 1991 resolution 687 ,which established the conditions for a formal cease-fire suspending hostilities in the Persian Gulf, 12 was adopted. This resolution depends on terminating of the Weapon of Mass Destruction owned by Iraq. Furthermore, the resolution created United Nations Special Commission to cooperate with the International

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7 Ibid., the UN Charter article 39.
10 Ibid.
12 Yoo, op.cit., p.564.
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Atomic Energy Agency (IAEA), which was to take custody of all of Iraq’s nuclear-weapons materials.\textsuperscript{13} By the time passed, the UN Security Council has adopted several resolutions which determined the material breach of Iraq’s obligations by not complying with IAEA. By the USA’s side one of the most important resolutions which can justify to recourse war against Iraq is resolution 1441, adopted in 8 November 2002. In this resolution, the UNSC gives Iraq “…a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council.”\textsuperscript{14} Iraq had to comply with the resolution, otherwise “…it will face serious consequences as a result of its continued violations of its obligations.”\textsuperscript{15}

As a consequences, Iraq threatens international peace and security and violated the conditions of cease-fire adopted by resolution 687. This alleged condition triggered the past resolutions which authorized the use of force under the demand of Security Council. Moreover, some of the writers had already determined that Iraq had nuclear weapons and stockpiles before the war was commenced.\textsuperscript{16}

\textbf{b) Critics Of The UNSC Authorization Of Use of Force}

One major drawback of this approach is that it is not easy to assert that there is an automatic authorization of use of force according to the UNSC’s various resolutions. First of all, ‘ the U.S. administration attempted to rely upon Resolution 1441 for the authority to attack Iraq.’\textsuperscript{17} But as it was expressed before, resolution 1441 was adopted towards Iraq’s failure to comply

\begin{itemize}
\item \textsuperscript{13}Ibid.
\item \textsuperscript{15}Ibid.
\item \textsuperscript{16}Yoo, \textit{op.cit.}, pp.566-567.
\item \textsuperscript{17}Scott and Ambler, \textit{op.cit.}, p.20.
\end{itemize}
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with the conditions of cease-fire which was determined in resolution 687. Furthermore, the UNSC opted the phrase ‘serious consequences’ instead of ‘use all necessary means’. One major problem was occurred by not defining the significance of ‘serious consequences’.¹⁸

However, what Yoo fails to draw an objective point of view is that silence does not always mean acquiescence. In addition to this point of view, he claimed that none of the Security Council members put forward the opposite view of automatic authorising of use of force. But on the contrary, France showed its intention by saying that it supported Iraqi disarmament through peaceful means and would veto any Security Council resolution authorizing the use of force against Iraq.¹⁹ In Yoo’s work, he attempted to make clear how the UNSC can terminate its authorization for use of force. In his words there are two ways to do so; firstly ‘… it has only done … by expressly terminating the prior authorization or by setting an up-front time limit on the authorization.’²⁰ But, indeed, resolution 678 only authorized the use of force for the period of time necessary to cause Iraq’s withdrawal from Kuwait.²¹

One of the other problematic areas is that all the legal basis which justify the use of force against Iraq are based on Weapon of Mass Destructions which are seen as a source of danger. Another problem with this approach is that it fails to prove the existing of WMD belongs to Iraq. Both Hans Blix and Mohamed ElBaradeiexplicitly declared that Iraq did not have any WMD which were the main legal basis of the USA to wage war against Iraq.²²

¹⁸Ibid.
¹⁹Ibid., p.77.
²⁰Yoo, op.cit., p.567.
²¹Scott and Amber, op.cit., p.19.
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Nevertheless, the strategy has not escaped criticism from being unlawful. International area was built on state sovereignty and territorial integrity. Moreover, these principles were declared into various resolutions which were adopted against Iraq.\(^{23}\) Today’s world, in Iraq’s constitution also indicates that Iraq was divided into parts and the political regime of Iraq was changed.\(^{24}\)

c) Pre-Emptive Self Defence

Particularly after the terrorist attacks to World Trade Centre, anticipatory self-defence became one of the most important legal debates about use of force. There are several reasons to support this idea, first of all the ultimate development in weapon technology has changed the concept of armed attack and secondly terrorist organizations have spread their danger to all over the world.

Despite to this rapid changes, there are still some questions to be answered. First of all, what is the traditional point of view in the law of self-defence? Moreover, how should pre-emptive strike be analysed? The UN Charter determined the use of force in article 51 and pointed that;

“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 international peace and security…”\(^{25}\)


\(^{24}\) Constitution of Federal Iraq: “Article 1; Iraq is a federal state with a democratic, parliamentarian, pluralistic, republican system that will be called the Federal Republic of Iraq.” Available at [http://www.unpo.org/article/536](http://www.unpo.org/article/536), accessed date, 02.03.2012.

\(^{25}\) The UN Charter, op.cit. article 51.
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But on the other hand, as Ronzitti pointed out that there are two contrasting interpretations on the content of the right of self-defence. One side also accept response to ‘imminent’ threat of armed attack as a self-defence while the others strictly obey the written form of article 51. There is a risk arisen. Some writers also extend the meaning of ‘imminent’ nature of armed attack in very dangerous level.

For instance, Yoo argued that inherent right of self-defence has been existed before the UN Charter was drafted. This anticipatory right of self-defence can be justified by applying the Caroline case. According to the Caroline case, ‘along with the traditional requirement that an exercise of self-defence be proportional, both imminence and necessity have become critical factors in assessing claims of anticipatory self-defence.’ But on the other hand it is impossible to find out that the USA’s intention towards anticipatory self-defence contains imminence and proportionality. As President Bush stated: "[i]n 1 year, or 5 years, the power of Iraq to inflict harm on all free nations would be multiplied many times over.... We choose to meet that threat now, where it arises, before it can appear suddenly in our skies and cities.”

As a consequences, the USA’s new approach to self-defence is declared illegal by various international lawyers. By saying this pre-emptive strike may contain very dangerous future disasters. Due to the fact that this approach depends on more the USA’s national interest’s, it is hard to support the legality of it in international law.

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27 Yoo, op.cit., pp.571-572.
28 Sapiro, op.cit., p.600.
29 Ibid., p.602.
III) CONCLUSION

This paper has investigated how the USA has tried to justify its eagerness to use of force against Iraq. In this sense, international lawyers have divided into different groups. One group of international lawyers supported these actions while the others strictly rejected.

Returning to the questions posed at the beginning of this study, it is now possible to state that both international community and the USA have violated international law. The former has violated international law by not going counter to the USA’s actions in Iraq and on the other side the illegality of the invasion constituted the USA’s grave violation of international law.

To sum up, the findings of this study have a number of important implications for future practice. The more co-operation between states and the more obedience to international law will prevent future grave violations of international law. Moreover, the more obedience to international law will probably bring reliability together.
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