Can the US lawfully get rid of Saddam Hussein?

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The concern with the international legality of any action against Iraq that is not authorised by the UN is well placed. Whatever action might be taken will inevitably be seen as a precedent supporting similar action in other cases, by global or regional superpowers. The consequences will, accordingly, extend far beyond the immediate concern with Iraq.

The United Nations Charter is a treaty of the United States, and as such forms part of the "supreme law of the land" under the Constitution, Article VI, Clause 2. The UN Charter is the highest treaty in the world, superseding states' conflicting obligations under any other international agreement. (Art. 103, UN Charter).

Under the UN Charter, there are only two circumstances in which the use of force is permissible: in collective or individual self-defense against an actual or imminent armed attack; and when the Security Council has directed or authorized use of force to maintain or restore international peace and security. Neither of those circumstances now exist. Absent one of them, U.S. use of force against Iraq is unlawful.

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Self-Defence

I take it to be uncontroversial that the United States has not been the subject of any direct attack which could even arguably be linked with Iraq. It is clear that the right of self-defence *in response* to an armed attack does not arise. The only possible justification is as an *anticipatory* form of self-defence against a future threat. Now let us turn to consider whether such a right is known to international law.

Is there a right of anticipatory self-defence in international law?

Article 51 of the Charter is silent about whether 'self-defence' includes the pre-emptive use of force, in addition to the use of force in response to an attack. In order to answer the question, other conventional sources of international law must be used, including state practice and the works of learned writers on international law.

State practice is ambiguous, but tends to suggest that the anticipatory use of force is not generally considered lawful,or only in very pressing circumstances. There are numerous examples of States claiming to have used force in anticipatory self-defence, and being condemned by the international community[1] and by most leading scholars[2]. Still, there are various people who are of the view that States *may* have the right to defend themselves by using force to pre-empt an imminent and serious attack.

Agreeing with the approach found in *Oppenheim's International Law: Ninth Edition*, 1991, p. 412, I believe that the use of armed force and the violation of another state's territory, can be justified as self defence under international law where:

a. an armed attack is launched, *or is immediately threatened*, against a state's territory or forces (and probably its nationals);
b. there is an *urgent necessity* for defensive action against that attack;
c. there is *no practicable alternative* to action in self-defence, and in particular another state or other authority which has the legal powers to stop or prevent the infringement does not, or cannot, use them to that effect;
d. the action taken by way of self-defence is limited to what is necessary to stop or prevent the infringement, *i.e.* to the needs of defence…

Is anticipatory self-defence justified in this case?

The evidence about the level and nature of threat presented by Iraq to other countries is not clear. But what is clear is that the US has not attacked Iraq, nor is there any showing whatever that an attack by Iraq is imminent. Unless Iraqi involvement in the September 11 terrorist attacks could meet the higher standard set out in the *Nicaragua* case, namely something *more* than the provision of weapons, logistical or other support, I do not consider that the attacks of September 11 in themselves justify the use of force against Iraq. Finally, the lack of any effective alternative to force is difficult to demonstrate while Iraq offers to negotiate with the weapons inspectorate.

Security Council Authorized Use of Force

There is only one legal basis for the use of force other than self-defense: Security Council directed or authorized use of force to restore or maintain international peace and security pursuant to its responsibilities under Chapter VII of the UN Charter. Article 42 of that chapter provides:

> Should the Security Council consider that measures [not involving the use of force] provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

It was under Chapter VII that in 1990 the Security Council by Resolution 678 authorized all "necessary means" to eject Iraq from Kuwait and to restore international peace and security in the area. Following the formal cease-fire recorded by Resolution 687 in 1991, there has been no Security Council resolution that has clearly and specifically authorized the use of force to enforce the terms of the cease-fire, including ending Iraq's missile and chemical, biological, and nuclear weapons programs.

Such a resolution is required for renewed use of force. Contrary to what Mr Anthony Aust has argued, I do not think that the UN resolutions adopted a decade ago in respect of Iraq's invasion of Kuwait could provide a legal justification for the use of

force against Iraq that is now contemplated. It is submitted that it is the Security Council that has assumed responsibility regarding Iraq, and it must be the Security Council that decides, unambiguously and specifically, that force is required for enforcement of its requirements. Past Security Council resolutions authorizing use of force employed language universally understood to do so, regarding Korea in 1950 (prior to General Assembly action, Security Council Resolution 83 recommended that UN member states provide "such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area"), and Kuwait, Somalia, Haiti, Rwanda, and Bosnia in the 1990s ("all necessary means" or "all measures necessary"). In all these instances, the Security Council responded to actual invasion, large-scale violence, or humanitarian emergency, not to potential threats.

Any claim that "material breach" of cease fire obligations by Iraq justifies use of force by the United States is unavailing. The Gulf War was a Security Council authorized action, not a state versus state conflict; accordingly, it is for the Security Council to determine whether there has been a material breach *and* whether such breach requires renewed use of force.

It is fundamental that the UN Charter, Article 2(3) and (4), gives priority to the peaceful settlement of disputes and the non-use of force. Article 2(4) barring the threat or use of force has been described by the International Court of Justice as a peremptory norm of international law, from which states cannot derogate. (*Nicaragua v United States*, [1986] ICJ Reports 14, at para. 190) Strained interpretations of Security Council resolutions, especially when opposed, as in the case of Iraq, by a

majority of other Security Council members, cannot overcome those fundamental principles. Rather, given the values embedded in the Charter, the burden is on those who claim use of force has been authorized.

Despite U.S. claims over the years that resolutions subsequent to Resolution 687 have provided the basis for U.S. use of force against Iraq, the Bush administration is now seeking a new resolution authorizing use of force should Iraq continue to fail to comply with Security Council requirements. Practically speaking, then, the Bush administration accepts that existing resolutions do not authorize use of force.

Conclusion

Under the UN Charter, there are only two circumstances in which the use of force is permissible: in collective or individual self-defense against an actual or imminent armed attack; and when the Security Council has directed or authorized use of force to maintain or restore international peace and security. Neither of those circumstances now exist. Absent one of them, U.S. use of force against Iraq is unlawful.

The intention seems to be to resort to force in order to compel "regime change" and disarmament in Iraq. The use of force against a state in pursuit of such aims is clearly unsupported by international law, and would mark a regression beyond the outlawing of the use of war as an instrument of national policy that was secured generations ago (in part as a result of the beneficent influence of the US Secretary of State of the time) in the Kellogg-Briand Pact in 1928.

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my article:

1. ‘ Legality of use of force against Iraq’, Rabinder Singh QC Alison Macdonald-
http://www.lcnp.org/global/IraqOpinion10.9.02.pdf

2. THE UNITED NATIONS CHARTER AND THE USE OF FORCE AGAINST IRAQ, Michael Ratner, President, Center on Constitutional Rights, New York
Jules Lobel, Professor of Law, University of Pittsburgh School of Law-
http://www.lcnp.org/global/iraqstatement3.htm

3. Letters written to the editor of *The Times* (23-24 September 2002) by Professor Vaughan Lowe and Mr Anthony Aust.

Notes

1 Examples of state practice are given by Professor Antonio Cassese, former President of the International Criminal Tribunal for the Former Yugoslavia, in *International Law*, (Oxford, 2001) at 309-31. One particularly relevant example is the international reaction to an Israeli bombing attack on an Iraqi nuclear reactor: 'When the Israeli attack on the Iraqi nuclear reactor was discussed in the [Security Council], the USA was the only State which (implicitly) indicated that it shared the Israeli concept of self-defence. In addition, although it voted for the SC resolution condemning Israel (resolution 487/1991), it pointed out after the vote that its attitude was only motivated by other considerations, namely Israel's failure to exhaust peaceful means for the resolution of the dispute. All other members of the SC expressed their disagreement with the Israeli view, by unreservedly voting in favour of operative paragraph 1 of the resolution, whereby '[the SC] strongly condemns the military attack by Israel in clear violation of the Charter of the UN and the norms of international conduct.' Egypt and Mexico expressly refuted the doctrine of anticipatory self-defence. It is apparent from the statements of these States that they were deeply concerned that the interpretation they opposed might lead to abuse. In contrast, Britain, while condemning 'without equivocation' the Israeli attack as 'a grave breach of international law', noted that the attack was not an act of self-defence. Nor [could] it be justified as a forcible measure of selfprotection.''(p310).

2 Cassese concludes that, '[i]f one undertakes a perusal of State practice in the light of Article 31 of the Vienna Convention on the Law of Treaties, it becomes apparent that such practice does not evince agreement among States regarding the interpretation or the application of Article 51 with regard to anticipatory self-defence.' (*International Law* (Oxford, 2001) at p309).

Oppenheim states that:'while anticipatory action in self-defence is normally unlawful, it is not necessarily unlawful in all circumstances, the matter depending on the facts of the situation including in particular the seriousness of the threat and the degree to which pre-emptive action is really necessary and is the only way of avoiding that serious threat; the requirements of necessity and proportionality are probably even more pressing in relation to anticipatory self-defence than they are in other circumstances.' (R Jennings QC and A Watts QC (eds), *Oppenheim's International Law: Ninth Edition* 1991 pp41-42)

Detter states that, 'it must be emphasised that anticipatory force falls under the prohibition of force in Article 2(4) of the Charter entailing a presumption that it is illegal. A mere threat of attack thus does not warrant military action...'
(*The Law of War*, Second Edition, (Cambridge, 2000), p86).

Cassese also considers that, '[i]n the case of anticipatory self-defence, it is more judicious to consider such action as *legally prohibited* while admittedly knowing that there may be cases where breaches of the prohibition may be justified on moral and political grounds…' (*International Law*, (Oxford, 2001), p311).