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0521862809 - International Relations - The Path Not Taken: Using International Law to Promote World Peace and Security

Thomas J. Schoenbaum

Excerpt

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# 1 Introduction: Two Very Different Wars in Iraq

“Because of the scope of the problems we face, understanding International Law is no longer a legal specialty, it is becoming a duty.”

Sandra Day O'Connor, Associate Justice of the U.S. Supreme Court,  
October 27, 2004

## **OPERATION DESERT STORM**

On January 17, 1991, in the early morning before dawn, two U.S. Air Force Special Operations helicopters lifted off from a base in Saudi Arabia, leading a squadron of Apache gunships. As the aircraft flew low over the dark expanse of desert in southern Iraq, two radar sites came into view; they were instantly obliterated along with their unfortunate personnel.

This began *Operation Desert Storm*, a massive air campaign followed by a ground assault that chased the forces of Saddam Hussein out of Kuwait. Despite threats by the Iraqi leader that “the mother of all battles” would be a bloodbath for opposition forces and similar fears expressed by some highly placed U.S. civilian and military officials, the Gulf War of 1991 proved to be a cakewalk. The poorly trained, poorly equipped, and demoralized Iraqi army collapsed and surrendered en masse.

The result was an unalloyed success for the United States and the international community. Saddam Hussein was humiliated, and international aggression was turned back. The U.S. military performed in awesome fashion, overcoming the degradation of the war in Vietnam. Under U.N. Resolution 687, adopted by the U.N. Security Council in April 1991, Iraq was compelled to renounce in a verifiable manner all weapons of mass destruction (chemical, biological, and nuclear) and to pay billions of dollars in compensation for the damage caused by the invasion, including reparations for environmental damage.

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There was widespread and enthusiastic approval of American conduct of the Gulf War both at home and abroad. U.S. prestige in the world soared to heights not reached since 1945. Domestic critics of the war, such as conservative commentator Pat Buchanan, simply admitted they were wrong. In New York City, returning U.S. troops were greeted as heroes by a confetti-showered victory parade attended by more than a million applauding admirers.

### OPERATION IRAQI FREEDOM

On March 20, 2003, at 5:30 A.M. two U.S. F-117 stealth fighter planes dropped four 2,000-pound bombs on a house in a quiet Baghdad neighborhood. Almost simultaneously, Tomahawk cruise missiles launched from U.S. ships in the Persian Gulf scored direct hits on the same site.

These were the opening shots of *Operation Iraqi Freedom*, the second Iraq war, waged for the purpose of regime change, the removal of Saddam Hussein. The first strikes of the war were a (failed) attempt to assassinate Saddam, who was reportedly meeting in the house along with his sons, Uday and Qusay. At first there was guarded jubilation among U.S. war planners that they had gotten their man, but after a few weeks, it was clear this was a Central Intelligence Agency (CIA) miscue (one of many as it turned out).

On that same day began the main offensive as a huge U.S. armored force crossed the Iraq-Kuwait border heading for Baghdad and a British column charged toward Basra, the second largest Iraqi city. Air power and over 600 cruise missiles rained death on preselected targets; U.S. and British Special Forces secured Iraqi oil fields to prevent sabotage.

The conquest of Iraq in 2003 was even easier than ousting Iraq from Kuwait in 1991. In 2003, the Iraqi Army, having learned its lesson, simply melted away. The American and British invaders mainly encountered only light opposition from paramilitary forces in pick-up trucks and from civilians. By April 9, American troops were in control of Baghdad, and, symbolically, a giant statue of Saddam was toppled by a contingent of U.S. marines in Firdos Square. Although attended by a “crowd” of only about 150 people, the TV coverage and news photos beamed around the world made this appear to be a major event. On May 1, President George W. Bush donned a flight suit and landed in an Air Force jet on the returning aircraft carrier, *Abraham Lincoln*. (The carrier, which was anchored off San Diego, was compelled to delay its return for a day in order to accommodate the president’s schedule). As the president landed, a huge banner (the work of the White House Press Office) was unfurled, proclaiming “Mission Accomplished.”

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Two victorious wars against the same brutal dictator and his government were fought by the United States in the space of thirteen years. In both, the American commander-in-chief was a president named George Bush, the father (George H. W.) in 1991 and his son (George W.) in 2003. But the 2003 Iraq War did not achieve the rosy outcome of the 1991 Gulf War.

After the 2003 war, the United States – virtually alone – became an occupying power in a faraway land fighting a brutal insurgency consisting of Saddam Hussein loyalists, religious fundamentalists, and foreign terrorists. Although the formal end to U.S. occupation came through naming a hand-picked interim Iraqi government followed by elections in January 2005, the ultimate outcome in Iraq remains unclear. Some have described Iraq as a quagmire; General Tommy Franks, who led the invasion, called it a “catastrophic success.”

**THE COSTS OF WAR**

In contrast to the 1991 Gulf War, in which casualties and collateral damage were minimized, the costs of the 2003 invasion of Iraq continue to mount. The human cost can be tallied, at least on an interim basis. American casualties (as of January 2006) stand at more than 2,100 dead and 16,000 wounded, coalition forces (chiefly British) have suffered more than 300 dead and over 1,000 wounded, and Iraqi casualties – overwhelmingly civilian – are estimated to be well over 100,000. The insurgency continues against the coalition and the new Iraqi government with no end in sight.<sup>1</sup>

The economic burden on the United States continues to be huge. In contrast to the 1991 Gulf War, which was paid for largely by U.S. allies, America must shoulder the cost of the 2003 war and its aftermath virtually alone. (It appears to have come as a surprise to Bush administration officials, as well as to Congress, that invading and conquering an entire country make the victor responsible for its economic future.<sup>2</sup>) The United States must not only pay the cost of its continuing military operations in Iraq but it must also rebuild a shattered country of 26 million people. A Rand Corporation study commissioned by the Pentagon found in April 2005 that stabilization and reconstruction

<sup>1</sup> A leaked secret CIA report on December 8, 2004 warned that the situation in Iraq was deteriorating. *Washington Post*, Dec. 9, 2004, p. A1.

<sup>2</sup> International humanitarian law and the Hague Regulations of 1907, to which the United States is a party, require an occupying power after a conflict to “take all measures . . . to insure public order and life” in the occupied territory.

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issues “were addressed only very generally” and that “no planning was undertaken to ensure the security of the Iraqi people” by the Bush administration in advance of the invasion.<sup>3</sup> No one knows the true cost of Iraqi reconstruction, but this item represents a significant portion of the \$413 billion budget deficit of the United States in 2004 and will continue to be a drag on the U.S. economy far into the future.

Equally serious was the political cost of the 2003 Iraq War. The decision to go to war produced an unprecedented upsurge in anti-American sentiment around the world and the deepest split in history between the United States and many traditional friends and allies. France and Germany in particular antagonized Bush administration officials by their vocal opposition, but the debates at the United Nations in early 2003 clearly showed that a vast majority of states – including most pro-Western democracies – joined them in urging patience and restraint. The French Foreign Minister, Dominique de Villepin, received a rare standing ovation from fellow U.N. Security Council delegates on February 6, 2003, when he spoke out against a precipitous American invasion.

George W. Bush, in defense of the war, continually referred to a “coalition” of forces in Iraq and the “widespread” support his war policy received from “thirty or forty” governments. Indeed, some thirty-five nations sent troops to Iraq, and other nations, such as Japan, contributed humanitarian aid and personnel. All but five of these nations, however, contributed only a few hundred troops to the coalition; these were without exception small states that desired to show solidarity with the United States in return for past or future favors. The weakness of their commitment made them vulnerable to terrorist threats. Spain withdrew its support after terrorist bombings occurred aboard commuter trains near Madrid’s Atocha Station in March 2004. Italy announced its withdrawal plans in March 2005 after an Italian security guard was mistakenly killed by American troops. Many states, such as Poland, Thailand, the Philippines, and South Korea, reduced or withdrew their forces in the face of terrorist threats. Commitments such as these are worse than no support at all because the action of withdrawal under pressure only serves to encourage future terrorism and hostage taking. Even governments that had associated themselves with the Iraqi invasion and occupation – Britain, Italy, and Poland – did so against the wishes of the vast majority of their population. Consequently, their support of the United States carried adverse political consequences for their leaders. For all practical purposes, the United States stands alone in Iraq.

<sup>3</sup> “Pentagon Blamed for Lack of Postwar Planning in Iraq,” *Washington Post*, April 1, 2005, p. A3.

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Why such different consequences and reactions with regard to the two Iraq wars? There is no gainsaying that Saddam Hussein was a brutal, cruel ruler; that he desired to acquire weapons of mass destruction; that he attacked his neighbors, Iran and Kuwait; and that he used poison gas against the Iraqi Kurds and killed and tortured thousands. Why did the 2003 Iraq War inspire widespread international opprobrium for America?

**CONTRASTING STATECRAFT**

The 1991 Gulf War was preceded by scrupulous adherence to legal and institutional norms of behavior. On August 2, 1990, the very day of Saddam's invasion of Kuwait, the United States convened an emergency session of the U.N. Security Council and obtained a resolution establishing a violation of international law by Iraq and a condemnation of the Iraqi action. Working closely with allies and diplomats from member states of the United Nations, the Bush administration obtained eleven additional U.N. Security Council resolutions condemning Iraqi actions in Kuwait, including Resolution 678 of November 29, 1990, which set a deadline for Iraqi withdrawal from Kuwait and unequivocally authorized military force, if necessary.

By contrast, the George W. Bush administration first resolved in secret to go to war in Iraq and then went to the United Nations – primarily because of the urging of Prime Minister Tony Blair – only as an afterthought. Published memos from the U.K. Foreign Office show that Bush's National Security Advisor (now Secretary of State) Condoleezza Rice solicited U.K. participation in the war as early as March 2002. Foreign Office lawyers warned almost a year before the war started that the war would be illegal under international law. In a secret March 2002 memo, Foreign Office Political Director Peter Ricketts expressed doubts about the Bush administration's war rationale: "US scrambling to establish a link between Iraq and al Qaeda is so far frankly unconvincing," he wrote. "For Iraq, regime change does not stack up. It sounds like a grudge between Bush and Saddam."<sup>4</sup>

Instead of negotiating at the United Nations, Bush simply presented demands with undisguised arrogance in a speech to the U.N. General Assembly on September 12, 2002. As preparations for war proceeded, the Congress in October 2002 passed a joint resolution authorizing the use of armed force in Iraq, but calling on President Bush "to obtain prompt and decisive action

<sup>4</sup> This information is contained in eight U.K. Foreign Office memos all labeled "secret" or "confidential" that were obtained by British reporter Michael Smith and published in the *Daily Telegraph* and the *Sunday Times*. *Japan Times*, June 20, 2005, p. 5.

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through the United Nations Security Council.” A principal purpose of this joint resolution was to strengthen the president’s diplomatic efforts at the United Nations.

The support in Congress and a belated diplomatic offensive – again at the urging of the British – bore fruit when the U.N. Security Council adopted Resolution 1441 (2002), which found unanimously (both France and Germany voted in favor) that Iraq was in “material breach” of U.N. Security Council resolutions, called for verifiable disarmament, and warned that enforcement action was inevitable if Iraq did not immediately come into compliance.

As a result, by January 2003, the situation in Iraq was fully under control. U.N. Resolution 1441 and the American and British show of force had induced full, if grudging, compliance by Saddam. U.N. weapons inspection teams headed by Hans Blix were able to go everywhere they desired without restriction. Over 70 percent of Iraq was a “no fly” zone, patrolled by American and allied planes. It was checkmate.

But Washington was intent on going to war. As we now know from several memoirs, the Bush Administration had secretly determined to go to war as early as November 2001.<sup>5</sup> This decision had long been advocated by a group of foreign policy experts known as neo-conservatives or “neo-cons” for short. These men believed that it had been a mistake to leave Saddam Hussein in power in Iraq in 1991. They lobbied for regime change. When the Bush administration came to power in 2001, these neo-cons gained key policy positions.

So the Bush administration ridiculed the U.N. inspection teams and proceeded with its war plans. On February 5, 2003, Secretary of State Colin Powell, to his later regret, put before the assembled U.N. Security Council what he described as specific evidence of Iraqi chemical and biological weapons facilities, as well as links with Al Qaeda terrorists. Not only was this information false (the product of CIA errors), but it was also effectively rebutted at the time by France’s Foreign Minister, Dominique de Villepin. (CIA mistakes should not be a surprise; this is the agency that failed to foresee such events as the collapse of the Soviet Union and the terrorist attacks of 9/11). So in March 2003, the invasion of Iraq went forward. In a clear demonstration of its contempt for the United Nations, on March 20 the Bush administration simply sent a one-page letter to the president of the U.N. Security Council informing him that “military operations had begun in Iraq to secure compliance” with Security Council resolutions and that “these operations are necessary.”

<sup>5</sup> The sequence of events is summarized in the book by Stefan Halper and Jonathan Clarke, *America Alone* (2004), and in Bob Woodward’s book, *Plan of Attack* (2004).

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**REASONS FOR GOING TO WAR**

The two wars in Iraq were conducted for very different reasons. The reason for going to war in 1991 was clear from the beginning: to expel the Iraqi army from Kuwait after the illegal invasion of that country on the orders of Saddam Hussein. When this mission was accomplished by the international coalition, President George H. W. Bush ceased military operations. Although U.S. forces alone could have easily taken Baghdad and ended the tyranny of Saddam, President Bush refused, saying that this action was beyond the mandate of the U.N. Security Council.

In contrast, the reasons for the 2003 Iraq War are somewhat unclear. The reason given at the time of the invasion was the necessity to eliminate Iraqi weapons of mass destruction (WMD) – Saddam’s chemical and biological arms and his suspected nuclear weapons program. However, we now know that U.S. intelligence agencies were – in the words of President Bush’s own investigative commission – “dead wrong”<sup>6</sup> in their prewar assessments of Iraq’s WMD programs. It has also come out that, before the 2003 war, the Bush administration routinely brushed aside or ignored what turned out to be the correct assessments of the U.N. arms inspectors and the International Atomic Energy Agency that Saddam’s WMD programs had been dismantled.<sup>7</sup>

A second reason for the war that was equally without foundation was that Saddam was connected with Al Qaeda and Islamist terrorism. But Congressional studies have turned up no evidence of any prewar connection between Saddam and Al Qaeda, and paradoxically, the American-led invasion in 2003 opened the way for associates of Osama Bin Laden, such as the cruel and infamous Abu Musab Al Zarqawi, to operate in Iraq. Bin Laden was reportedly surprised by the success of the Iraqi insurgency and offered his support.

Faced with the necessity to justify the 2003 war after the fact, the Bush administration cites Saddam’s brutality and tyranny. This is certainly correct, but the question remains whether the United States has a right to invade any country that is ruled by a brutal tyrant. And much of Saddam’s brutality – such as his chemical weapons attack on the town of Halabja in 1988, which killed 5,000 Iraqi Kurds – occurred in the 1980s when the U.S. government was secretly helping Saddam.

<sup>6</sup> “Data on Iraqi Arms Flawed, Panel Says,” *Washington Post*, April 1, 2005, p. A1. The Presidential Commission further called the intelligence data on Iraq “either worthless or misleading” and “riddled with errors.” This resulted in “one of the most damaging intelligence failures in recent American history” in the words of the Commission.

<sup>7</sup> “Work of U.N. Arms Inspectors Was Ignored by U.S. before Iraq War,” *Washington Post*, April 4, 2005, p. A3.



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A final reason advanced for the 2003 Iraq War was the need to introduce democracy into the Middle East—part of President Bush’s effort to shake up the undemocratic regimes in the region and to free up the democratic impulses of the Muslim world. Certainly the spread of democracy and freedom is a noble cause, but the question remains whether invasion is the proper or even the most effective method.

### INTERNATIONAL LAW AND INSTITUTIONS

Should international law play any role in important foreign policy decisions, such as the resort to war? In 1990–1 President George H. W. Bush scrupulously adhered to international law in his decision to use force. From the beginning, the U.N. Security Council was engaged, and legal norms were considered and kept.

By contrast, international law and institutions were largely bypassed in the Iraq War of 2003. The U.N. Security Council was ultimately brushed aside, and as reported in the British press, when Lord Goldsmith, the U.K. Attorney General, raised legal objections to the war, the head of British intelligence, Sir Richard Dearlove, told him that war was “inevitable” and that the legal case for war was being “fixed ‘round the policy” by the Americans. In other words, the legal case for war was assembled after the decision to invade had been taken.<sup>8</sup>

Many people, including the vast majority of international lawyers as well as U.N. Secretary-General Kofi Annan, judged the 2003 Iraq War to be contrary to international law.<sup>9</sup> The U.N. Charter states the basic rule that the international use of force is illegal except in self-defense (broadly defined and including collective self-defense) or under Security Council authorization. Should that make any difference?

President Bush does not believe so. On October 9, 2004, the President said:

We did not find the [weapons of mass destruction] stockpiles we thought were there. But . . . Saddam Hussein was gaming the oil-for-food program to get rid of sanctions. And why? Because he had the capability and knowledge to rebuild his weapon programs. And the great danger we face in the world today is that a terrorist organization could end up with weapons of mass destruction. Knowing what I know today, I would have made the same decision. The world is safer with Saddam in a prison cell.

<sup>8</sup> Prime Minister Tony Blair reportedly agreed to go to war as early as April 2002. “MI6 Chief Told PM: Americans ‘Fixed’ Case for War,” *Sunday Times*, March 20, 2005, p. 5.

<sup>9</sup> See the articles cited in Further Readings at the end of this chapter.



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Is the President's logic persuasive? Is it necessary at times to disregard law?

The decision to go to war is the most important, most fateful decision that can be made by any nation or political leader. From even a cursory study of history, it is evident that warfare has existed since earliest times and can be said to be endemic to the human condition. In an attempt to place some limit on war, Christian writers, such as Augustine and Thomas Aquinas, influenced by the Roman lawyer Cicero, developed the theory of *just war* – that every war must have a just cause, a wrong suffered that must be corrected. This theory of just war was developed into a rule of what was considered “natural law” by European thinkers, such as Francisco de Vitoria (1557), Alberico Gentile (1598), and Hugo Grotius (1624). According to their formulations, warfare is just only in response to a “culpable offense” that endangers social values to an extreme degree.

The imprecision of this rule of just warfare is obvious, and it accomplished little. In the eighteenth and nineteenth centuries, war was considered to be outside the boundaries of law and totally in the domain of politics. The most famous expression of this is Clausewitz's (1832) famous dictum that war is simply “politics by other means.” In its extreme form this was the idea that war is the natural function of a state and a prerogative of sovereignty. Recourse to war was accordingly the way for a powerful state to enforce its will and a preferred method of settling international disputes.

Only in the twentieth century were serious attempts again made to surround the decision to go to war with legal constraints. The first two major attempts were the League of Nations (1919) and the General Treaty of the Renunciation of War (1928), also known as the Kellogg-Briand Pact. Although both were spectacular failures, another attempt was made at the end of World War II with the founding of the United Nations. This time the attempt was made not only to establish norms of conduct but also to create institutional structures for peace enforcement and for the peaceful resolution of international disputes. We still live with these legal rules and institutions. Obviously they are far from perfect, but should they be abandoned or reformed?

**MULTILATERALISM VERSUS UNILATERALISM**

The 1991 Gulf War is a case study in multilateral cooperation, the observance of international law, and the constructive use of international institutions. By contrast, the 2003 Iraq War is an example of unilateral statecraft by the United States as superpower to lay down the law, declare that “anyone who not with us is against us,” and assemble “coalitions of the willing” – allies that agree to go along with a predetermined U.S. policy.

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The statecraft of the two Iraq wars presents contrasting paradigms that vividly depict the fundamental choice the United States must make when it comes to many key policy questions: Should the United States in the conduct of international relations observe international law and work through international institutions, such as the United Nations? Or should the United States decide the best course of action (or inaction), inform the international community, and assemble “coalitions of the willing”? The first of these options is usually termed multilateralism, whereas the second is unilateralism. Although all nations in theory have this option, only the United States, by reason of its sole superpower status, is in the position of having the luxury of consistently ignoring the international community on important questions without suffering serious consequences.

### THE PATH NOT TAKEN

In the conduct of international relations there is no generally accepted authority or criteria by which to judge whether a decision or action is right or wrong. Comparing the decisions to use force in Iraq in 1991 and 2003 raises difficult and puzzling questions. Which decision was correct – the decision against regime change in 1991 or the decision in favor in 2003, the decision to respect international law and the United Nations in 1991 or to override them in 2003?

These paradigm cases show, however, that despite the many complexities of international politics, there is consistently one broad choice to be made in virtually every case: whether to follow the path of international law, international institutions, and multilateralism or whether to ignore or dismiss this path in favor of unilateral action. Of course this is not always a stark either-or choice. Especially for the United States, unilateral action cannot be totally excluded. What matters, however, is the presumption employed and the effort expended. Should there be a broad consensus that unilateralism should be highly exceptional? Or should the United States as the sole superpower rely on unilateralism that uses multilateral institutions only when convenient?

Since the end of the Cold War, American foreign policy has increasingly taken the unilateralist path. International law and institutions are viewed either as obstacles or as follow-on conveniences to be addressed as aids to a predetermined policy. As a result many important international initiatives are proceeding without U.S. participation or are seriously impeded by U.S. policies. Some important examples include the International Convention on the Law of the Sea, the International Criminal Court, the Kyoto Protocol for the control of global warming, many international human rights agreements,