
The Iraq Invasion as a Recent United Kingdom 'Contribution to International Law'

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Kampfner, John. **Blair's Wars**. London: Free Press, 2004. Pp. I-xiv, 401. ISBN 0743248309. Curtis, Mark. **Unpeople, Britain's Secret Human Rights Abuses**. London: Vintage Original: 2004. Pp. 377. ISBN: 0099469723. Cooper, Robert. **The Breaking of Nations**. London: Atlantic Books, 2004. Pp. 180. ISBN: 080214161.

Abstract

The UK (as indeed the US) gave as its formal legal ground for the invasion of Iraq reliance upon interpretations of Security Council resolutions. In other words, there was no open admission by official legal advisers that the British invasion of Iraq created a new precedent for the development of international law, in particular a doctrine of pre-emptive attack. However, an understanding of state practice as a source of customary international law requires that one challenge the view that a state's contribution to practice must be taken to be its stated legal position. Instead, one has to engage in an in-depth study of the motivations of state officials that move the institutions of the state. These need to be pieced together from official declarations and also from the work of known government advisers who are systematically developing policy with legal implications. Furthermore, one needs to consider the practice of a state as embedded in institutional continuities, including especially institutional planning for the future. This can be gleaned from a variety of official documents, such as White Papers, which set out the purposes for which institutions of the state, especially the armed forces, are being shaped. On this basis it is clear that the UK has committed itself to set a precedent for pre-emptive attack through its invasion of Iraq. That is clear from the studies considered in this essay.

There is a serious need to place British, and of course American, state practice, as represented by the invasion of Iraq, in the wider context of the development of international

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law. To do this it is necessary to do a lot more than consider the legal advice tendered, whether by the Attorney General or by the Foreign Office lawyers, to justify the war. The arguments used by leading British politicians, especially Blair, to convince Parliament and obtain consent for the invasion are more central to the creation of a British *opinio juris* concerning the material element of state practice, i.e. the actual invasion. This is because official, even legally formulated, positions are not as decisive in constituting the action of a state as the arguments used by political elites to drive the institutions of the state into motion. Perhaps Kampfner, in his recently published *Blair's Wars* (hereinafter BW), affords the most authoritative survey of the development of elite political thinking, based on selected interviews, from Blair's commitment to Bush to go to war given on 6 April 2002 at Crawford, Texas, until the actual outbreak of war (BW, at 152). In *Unpeople, Britain's Secret Human Rights Abuses* (hereinafter UP), Curtis, in his turn, presents a key officially documented review of the place of the invasion from within the history of British institutional practice, particularly in terms of the rather overlooked review which the British state is itself making of the invasion. However, for the international lawyer, really central is Cooper's study, *The Breaking of Nations* (hereinafter BN) for an understanding of just how deliberate and systematic is the present British Government's rejection of the international law of the United Nations Charter on the use of force. As a key adviser to Blair, who articulates the Government's thinking, Cooper reveals how there is now a commitment to a doctrine of preventive attack, or pre-emption. What it is crucial to understand about this doctrine is how it conceives the threat that Britain is supposed to face in terms of an enemy that has rather familiar overtones from Britain's colonial heritage.

Official accounts of the legal justification for the Iraq invasion are very well rehearsed. They concern supposed material violations by Iraq of its disarmament obligations under Security Council resolutions. These violations were supposed to lead to a revival of the force of SC Resolution 678, on the right to use all necessary means to restore peace and security in the area. So SC Resolution 687, merely setting out the cease-fire conditions, only suspended Resolution 678. A proposal that the famous 2002 SC Resolution 1441 should contain a requirement for a further decision by the Council before 'action was taken' was not adopted.¹

However, these opinions came at the very end of a process, already in the weeks of March 2003. It is much more illuminating to explore the nature and style of the argument and charge that Iraq had not complied with its disarmament obligations. The entire weight of British Government strategy, to obtain the consent of Parliament and the acquiescence of public opinion to the invasion, was directed to the nature and conduct of Saddam Hussein's Government with respect to weapons of mass destruction (WMD). This is the crucial area of activity to explore. The British Government believed that the way to justify war was to show that there was a serious threat coming from the Iraqi regime.

¹ 52 *ICLQ* (2003) 811: The Attorney General's Answer and a Foreign and Commonwealth Office Paper. See also, D. McGoldrick, *From '9–11' to the Iraq War 2003* (2004), at 54–57.

The arguments about whether there were WMD in Iraq are known to be slippery. It is, however, widely accepted, after the Butler Report,² that the British Government put a weight on available intelligence that it could not bear. This can be understood to be deception. However, that is not a central matter for the present argument. Rather more important is to follow closely the types of formulations of the 'threat from Saddam Hussein' that had to be met. It is in fact the nature of their definition of this threat that gives the first indication that the British Government is operating within a framework of preventive or pre-emptive attack, a fact that will be seen even more clearly in official pronouncements after the invasion.

The context for the definition of the threat was provided by Saddam Hussein's 'non-compliance' with paragraphs 3 and 4 of SC Resolution 1441. He had to produce tangible evidence of his actual programmes to develop chemical, biological and nuclear weapons. 'Non-compliance' meant false statements or omissions in the declarations Iraq made pursuant to the resolution. It is in such a context that Kampfner pinpoints the technical aspect of the danger Iraq is supposed to represent. The British Government Intelligence Dossier (of September 2002) contains, in Part 1, Chapter 3, a statement that Iraq retained some chemical warfare stocks which would enable Iraq to produce significant quantities of chemical weapons within weeks. Intelligence about chemical and biological warfare facilities pointed to a continuing research programme. Kampfner comments: 'These observations were hard to prove or disprove. The language was carefully crafted, combining hypothesis and assumption with alarm' (BW, at 205).

It is against this carefully sustained ambiguity of the intelligence base that Kampfner summarized how Blair frequently appeared to say, for instance in the autumn of 2001, that 'the world would face a threat of an altogether different scale if Saddam made his chemical and biological weapons available to terrorist groups', an analysis that Kampfner describes as a hypothesis based upon an assumption (BW, at 157). In September 2002, Blair was saying, of the history of Saddam and WDM, that the present threat is real and the UN has to find a way of dealing with it, not a way of avoiding dealing with it (BW, at 196). Yet later in the same month Blair said to journalists, 'I am not saying it will happen next month or even next year, but at some point the danger will explode' (BW, at 198). The final speeches to the House of Commons were equally vague. On 5 February 2003, Blair stated, 'It would be wrong to say there is no evidence of any links between al Qaeda and the Iraqi regime. There is evidence of such links. Exactly how far they go is uncertain' (UP, at 63).

Immediately the invasion began, on 20 March 2003, Blair announced in a television broadcast, that the goal was to remove Saddam Hussein from power and disarm Iraq of WDM. In other words, comments Curtis, the only way to disarm Iraq was to change the regime (UP 38). While beforehand regime change was recognized as not being in itself a legally permissible objective, now it could be stated openly. It was the regime itself that was the object of the invasion. In June 2003, Foreign Secretary Straw said that neither he nor Blair had ever used the words 'immediate' or 'immanent'

² *Review of Intelligence of Weapons of Mass Destruction*, HC 898, July 2004.

to describe the threat Iraq posed. Instead, they spoke of a current and serious threat (UP, at 54).

In July 2003 the Government made a response to the House of Commons Defence Committee, which treated international law as no absolute: ‘We will always act in accordance with legal obligations, but also effectively to defend the United Kingdom’s people and interest and secure international peace and stability’ (UP, at 39).

Then in March 2004 Blair explicitly set out a full-blown doctrine of pre-emption. The key stage in expanding upon and articulating a doctrine of pre-emption or preventive war, Curtis notes, comes with Blair’s speech of 5 March 2004 (UP, at 40). Blair is responding once again to the controversy surrounding the invasion and endeavouring to put it in a wider context. He questions the UN Charter’s limit on armed intervention to self-defence in the face of armed aggression.

Containment will not work in the face of the global threat that confronts us. The terrorists have no intention of being contained. The states that proliferate or acquire WMD illegally are doing so precisely to avoid containment. Emphatically I am not saying that every situation leads to military action. But we surely have a duty and a right to prevent the threat materialising; and we surely have a responsibility to act when a nation’s people are subjected to a regime such as Saddam’s.³

Curtis highlights how the scene is further developed in the Ministry of Defence White Paper of December 2003, *Delivering Security in a Changing World*.⁴ Curtis places this document in the context of previous Ministry documents, going back to the Strategic Defence Review of 1998, which already said that ‘in the post cold war world we must be prepared to go to the crisis rather than have the crisis come to us’ (UP, at 74). Among the developments highlighted in various official papers, that which emerges from *Operations in Iraq: Lessons for the future* is interesting in the way it places the invasion in an embedded context of British politico-military strategy rather than in some inexplicable submission to American demands: ‘The operation in Iraq demonstrated the extent to which the UK armed forces have evolved successfully to deliver the expeditionary capabilities envisaged in the 1998 Strategic Defence Review and the 2002 New Chapter.’⁵ Curtis elaborates that the December 2003 White Paper takes this argument further. One must now envisage crises across sub-Saharan Africa and arising from the wider threat from international terrorism (UP, at 76).

It is quite clear that the threat and use of force are becoming once again an integral part of UK national policy. The Secretary of Defence, Hoon, writes in his Foreword: ‘it is now evident that the successful management of international security problems will require ever more integrated planning of military, diplomatic and economic instruments at both national and international levels’.⁶ In the same vein, the document

³ Available at www.pm.gov.uk/output/Page5461.asp, 5 Mar. 2004, the Prime Minister warns of continuing terror threat. This very substantial speech shows the influence of Cooper in the comprehensiveness with which it rewrites the agenda of international law, and will be considered later.

⁴ Available at www.mod.uk.

⁵ *Ibid.*, at Chap. 3, ‘Lessons From The Operation: Key Lessons’, no.1, quoted in M. Curtis, *Unpeople: Britain’s Secret Human Rights Abusers* (2004), at 76.

⁶ *Supra* note 4, 1.

declares that 'effects-based operations' mean that 'military force exists to serve political and strategic ends. . . . Our conventional military superiority now allows us more choice in how we deliver the effect we wish to achieve'.⁷

Curtis quotes these phrases in order to translate them as: 'we will increasingly threaten those who do not do what we say with the prospect of military force' (UP, at 77). That is the light in which one has to understand the passage in Blair's speech of 5 March 2004, in which he remarks of those who oppose his policies: 'When they talk, as they do now, of diplomacy coming back into fashion in respect of Iran or North Korea or Libya, do they seriously think that diplomacy alone has brought about this change.'⁸

The major intellectual support for the policies described through interviews by Kampfner and through official documents by Curtis, comes from Robert Cooper, who first set out his views in his now infamous *Observer* article of 7 April 2002,⁹ one day after Blair's commitment to Bush to invade Iraq, given at Crawford, Texas (BW, at 152). His central point is that 'outside the post-modern continent of Europe, we need to revert to the rougher methods of an earlier era – force, pre-emptive attack, deception'.¹⁰ Robert Cooper is a diplomat reputed to offer a 'theoretical framework' for Blair's foreign military-security policy. It is clearly and repeatedly reflected in the Defence White Paper and in Blair's speech of 5 March 2004. Cooper's significance is enhanced by the press accolades accompanying the publication of his book, describing him as 'a senior British diplomat who has gone from being one of Tony Blair's closest foreign policy advisers to serving under Javier Solana, the European Union's new putative foreign minister'. The authoritative contemporary Cambridge historian Brendan Simms writes, 'Robert Cooper is widely believed to provide the intellectual super-structure for what the prime minister thinks, but is as yet unwilling to articulate publicly'.¹¹

In *The Breaking of Nations*, Cooper offers a precise paradigm for intervention by a developed country in the internal affairs of a developing country on humanitarian grounds. Humanity must be firmly linked with the needs of security, which Cooper understands ultimately in the post-modern terms of the undisturbed quality of the private lives of individuals pursuing their own development. He recognizes that international law exists but, needless to say, it is out of date, belonging to a time when the modern reigned supreme, thanks mainly to the vigour of Western colonial empires.

Cooper denies the very universality of international society and divides it into three parts, the pre-modern, the modern and the post-modern. The pre-modern world covers an expanding area of the world where the state has lost the monopoly of the legitimate use of force. In language which shows how a surprisingly colonial European international law tradition belongs to present day Europeans, Cooper writes that:

⁷ *Ibid.*, at Chap. 4, 10.

⁸ *Supra* note 3.

⁹ 'Why We Still Need Empires', available at www.observer.guardian.co.uk/worldview/story/0,11581,680117,00.html.

¹⁰ *Ibid.*

¹¹ R. Cooper, *The Breaking of Nations* (2004), inside cover pages for both quotations.

we have, for the first time since the 19th Century, a *terra nullius* . . . And where the state is too weak to be dangerous, non-state actors may become too strong. If they become too dangerous for established states to tolerate, it is possible to imagine a defensive imperialism. If non-state actors, notably drug, crime or terrorist syndicates take to using non-state (that is pre-modern) bases for attacks on the more orderly parts of the world, then the organized states will eventually have to respond. This is what we have seen in Colombia, in Afghanistan and in part in Israel's forays into the Occupied Territories. (BN, at 17–18)

The pre-modern refers to the failed state, to the regression of the post-imperial chaos of Somalia, Afghanistan and Liberia. The state no longer fulfils Max Weber's criterion of having a legitimate monopoly on the use of force. Cooper elaborates upon this with respect to Sierra Leone (BN, at 66–69). This country's collapse teaches three lessons. Chaos spreads (in this case to Liberia, as the chaos in Rwanda spread to the Congo). Secondly, as the state collapses, crime takes over. As the law loses force, privatized violence comes in. It then spreads to the West, where the profits are to be made. The third lesson is that chaos as such will spread, so that it cannot go unwatched in critical parts of the world. An aspect of this crisis is that the state structures themselves, which are the basis of the UN language of law, are a last imperial imposition of the process of decolonization.

So Cooper formulates a general principle for dealings with non-Western states, which is incompatible with the international law of the Charter. It is based upon an openly imperialist anthropology that, not surprisingly, he sees to be as much a part of European as of American elite mentalities. In Blair's case, Kampfner supports this point. He insists that Blair regards as a major foreign policy priority the notion that 'Our history is our strength': that we have to draw on Britain's influence as a former colonial power. 'Our empire left much affection as well as deep problems to be overcome' (BW, at 236). The danger of the so-called pre-modern is that, while 'We' (post-modern Europeans) may not be interested in chaos, chaos is interested in us. The rhetoric is blistering, reminiscent of the 'yellow peril' or 'the dark heart of Africa':

In fact chaos, or the crime that lives within it, needs the civilised world and preys upon it. Open societies make this easy. At its worst, in the form of terrorism, chaos can become a serious threat to the whole international order. Terrorism represents the privatisation of war, the pre-modern with teeth; if terrorists use biological or nuclear weapons the effects could be devastating. This is the non-state attacking the state. A lesser danger is the risk of being sucked into the pre-modern for reasons of conscience and then being unwilling either to take over or to get out. (BN, at 77)

While European international lawyers inhabit a post-modern world (of which more later), Europe itself is a zone of security beyond which there are zones of chaos that it cannot ignore. While the imperial urge may be dead, some form of defensive imperialism is inevitable. All that the UN is made to do is to throw its overwhelming power on the side of a state that is the victim of aggression (BN, at 58). So, as presently constituted, it cannot provide a guide for action. Nonetheless, Cooper generally councils against foreign forays. For Europeans to practise humanitarian intervention abroad is to intervene in another continent with another history and to invite a greater risk of humanitarian catastrophe (BN, at 61). However, the three lessons of

recent state collapse in Sierra Leone, etc. cannot be ignored. Empire does not work in the post-imperial age, i.e. acquisition of territory and population. Voluntary imperialism, a UN trusteeship, may give the people of a failed state a breathing space and is the only legitimate form possible, but the coherence and persistence of purpose to achieve this will usually be absent. There is also no clear way of resolving the humanitarian aim of intervening to save lives and the imperial aim of establishing the control necessary to do this (BN, at 65–75). While Cooper concludes by saying that goals should be expressed in relatives rather than absolutes, his argument has really been that the pre-modern, the modern and the post-modern give us incommensurate orders of international society. This is the context of our dilemmas concerning interventions in the chaotic pre-modernity of non-Western parts of international society. Cooper's incommensurability is infused with the anthropological heritage of colonialism.

The United Nations is an expression of the modern, while failed states come largely within the ambit of the pre-modern. Cooper means, practically, that the language of the modern UN does not apply to pre-modern states. This is not to say the Charter is violated in that context. It is simply conceptually inapplicable (BN, at 16–37). The modernity of the UN is that it rests upon state sovereignty and that, in turn, rests upon the separation of domestic and foreign affairs (BN, at 22–26). Cooper's words are that this is still a world in which the ultimate guarantor of security is force. This is as true for realist conceptions of international society as governed by clashes of interest as it is of idealist theories that the anarchy of states can be replaced by the hegemony of a world government or a collective security system. I quote: 'The UN Charter emphasizes State sovereignty on the one hand and aims to maintain order by force' (BN, at 23).

Even in the world of the modern the typical threats to security render the Charter rules on the use of force redundant. The modern also presents nightmares for which classical international law is not prepared. The sovereign equality of states means, where all could possess nuclear and other weapons of mass destruction, that one faces nuclear anarchy, with all states capable of destroying one another (BN, at 63). Preventing this nightmare of the modern 'should be a priority for all who wish to live in a reasonably orderly world' (BN, at 64). And so international law is obsolete. 'Following well established legal norms and relying on self-defence will not solve the problem. Not only is self-defence too late after a nuclear attack, but it misses a wider point' (BN, at 64). Weapons affect those not directly involved. The more countries which have them the more likely they will be used. The more they are used the more they will be used. And so on! This means: 'It would be irresponsible to do nothing when even one further country acquires nuclear capability. . . . Nor is it good enough to wait until that country acquires the bomb. By then the costs of military action will be too high' (BN, at 64).

So the doctrine of preventive action in US National Security Strategy is not so different from the traditional British doctrine of the balance of power. For instance, the War of the Spanish Succession was a war to prevent the crowns of France and Spain coming together. No one attacked Britain but if it had waited for the two crowns to

make up a new superpower, it would have been unable to deal with a resulting attack.

Not content to rubbish international law doctrine on the use of force, Cooper strikes at the heart of the rule of law, as a standard of formal equality, by saying that:

if everyone adopted a preventive doctrine the world would degenerate into chaos. . . . A system in which preventive action is required will be stable only under the condition that it is dominated by a single power or concert of powers. The doctrine of prevention therefore needs to be complemented by a doctrine of enduring strategic superiority – and that is, in fact the main theme of the US National Security Strategy. (BN, at 64–65)

This is not to treat American dominance as an optimal ideal. The US is, in any case, not fully effective in the Middle East and is quite absent in Africa (BN, at 81–85). There must be a virtual monopoly of force. At present it is with the US and clearly the US will exercise it in its own interests. This is not legitimate. The power should rest with the United Nations, whose many failures show that it cannot easily lose legitimacy (BN, at 167). The question is how to get there, and anyway the new United Nations would have to be prepared to engage regularly in preventive wars in order to spread democracies and the liberal state, the only form of government which can make the world secure (BN, at 167, 177).

The rest of Cooper's argument explores Europe's post-modern ease. Its motivating force is the primacy of the individual over the collective, the private over the public and the domestic over the foreign. This expresses itself in post-national cooperativeness, transparency (especially in security and military matters), and the priority of the individual's personal development needs over the chimera of the power and prestige of the state. This European quality of life rests upon the US security umbrella, as does a similar lifestyle in Japan and in much of the American Continent (BN, at 161).

All of this hugely confines the prospects for significant European 'humanitarian' interventions, i.e. ones driven, in any case, primarily by the need to secure the quality of European lifestyles. One possibility may be for the post-modern cooperative Empire of Europe to extend itself ever wider (BN, at 78). However, the attractiveness of post-modern Empire as a dream may never happen, and until it does 'the post-modern space needs to be able to protect itself. States reared on *raison d'état* and power politics make uncomfortable neighbors for the post-modern democratic conscience' (BN, at 79).

Will Europe respond to such a traditional challenge? Cooper thinks not. The European post-modern mood has gone too far. Cooper quotes the horrid Nietzsche, himself a painful memory of the early 20th century, in *On the Genealogy of Morals*: 'How much blood and horror lies at the basis of "all good things".' Justice arises not from the desire of the weak for protection but from the tragic experience of the strong. From the traumas of the 20th century Europe has lost the will to power, while from the trauma of September 11, the US rediscovered it (BN, at 164–165).

Curtis' general argument is, effectively, that Blair's Government is not Bush's poodle, precisely because it is continuing an imperial policy largely uninterrupted even by the Suez Crisis. It may have become more or less covert after 1956, but Curtis might say that in a political culture such as Britain's there is really no need for the

Blair Government to conceal its policies. Certainly international lawyers appear to take the Government's 'legal arguments' at face value, without regarding the Government's actual institutional practice, in the sense that Curtis argues one must be prepared to do.¹² That is what makes Cooper's revival of an explicit imperial culture so promising. Blair and his colleagues, at the least, have heard Nietzsche's call, whether tragic or tragicomic.

¹² McGoldrick, *supra* note 1, at 73–74: relying upon a response of Straw to the Foreign Affairs Committee of the House of Commons in 2002, the author appears to say that Britain has no doctrine of pre-emptive self-defence.

