
LAW, MORALITY, AND POLITICS OF THE OCCUPATION OF IRAQ: AN INTERDISCIPLINARY ASSESSMENT

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The most debated, and yet unresolved, conditions regarding the applicability of international human rights laws in armed conflicts relate to the complexities arising out of the U.S. occupation of Iraq. There is nothing new about committing wartime atrocities, especially in the face of insurgency. Even the most humanely oriented, just war traditions are incapable of accounting for some of the ambiguities of political and military conditions surrounding insurgency. In the case of military occupation and counter-insurgency action, numerous moral uncertainties cast their shadow over strategic and tactical plans. It is vitally important that those who make

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strategic choices do not shun tough ethical and moral decisions. Military leaders must bear in mind that not all moral considerations can be overridden by the strategic preeminence and tactical imperatives of winning a war. Abusing, torturing, and hitting civilians deliberately to extract confession fail to withstand the moral scrutiny of the modern laws of warfare.

Gruesome images of the abused Abu Ghraib prisoners dominated the media all over the world. Pictures of American soldiers forcing naked prisoners into compromising positions have certainly caused an embarrassing episode for the U.S. military. Emerging details demonstrate the growing but unregulated role of private contractors and military intelligence officers in the interrogation of detainees in American military activities. These acts of private contractors, who are arguably under no legally binding law or jurisdiction, and thus are not accountable to anyone, have become a subject of an intense debate.

It is becoming increasingly clear that these abuses are not isolated but rather systematic and that these cases are not confined to Iraq or perhaps one or two other instances. It is hard to ignore the widely shared perception that the same brutality and ill-treatment has also occurred in Afghanistan and at Guantanamo Bay in Cuba. The treatment of thousands of prisoners of war in Guantanamo Bay raises many questions about the U.S. legal practices. The U.S. government continues to defy the Geneva Conventions by holding captives in secrecy without disclosing their existence to the International Red Cross and by denying them due process of law.

Educating troops in humanitarian behavior has become an essential training for soldiers involved in modern warfare. Anger and resentment toward the occupying forces, along with the humiliation and shame caused by such mistreatments of Iraqi prisoners, have undermined U.S. credibility throughout the world. As more information about the Abu Ghraib abuses becomes available, the cost of the prison scandal for U.S. foreign policy appears higher than what we realize. It is essential to contemplate ways to reduce moral uncertainties by reconciling living modern rules of warfare, as

enunciated in Geneva Conventions, with new political realities and legal praxis. The moral calculus of pain and torture in Iraqi prisons serve as yet another compelling blueprint for application of the laws of war. It is in the U.S. national interest to recognize and apply these laws and standards.

For the purpose of this paper, we argue that intervention and occupation in the name of humanitarian causes are warranted on the grounds of preventing injustice and human suffering. Preemptive strikes, however, pose different questions and present difficulties hard to tackle. Policies that intend to justify preemptive strikes for the sake of exporting democracy or altering a regional political landscape are difficult to defend. Implanting democracy in other countries has no status as a legal justification for invading them. The process of building democracy in Iraq will be a long, drawn out, and uncertain prospect. If it not accompanied by U.S. withdrawal in the foreseeable future, American presence could potentially lead to further instability in that country. To address these issues, we adopt an interdisciplinary approach that relies on insights from public law, international relations, criminal justice and human rights, legal and normative philosophy, international humanitarian law, and international law.

LIMITS TO THE MILITARY POWER

One of the oldest concerns of legal experts has been the regulation of the conduct of wars and their consequences. The rules of warfare and the legal/political/moral limits to intervention have over the years attained a recognized status in international law. Nonetheless, there is little agreement on circumstances justifying use of force or intervention. Among such circumstances are threats to the safety of nationals of the intervening state, chronic disregard by a state of its international obligations, the needs of self-defense, and collective decisions to put an end to inhumane treatment by a government of all or some of its own nationals (humanitarian intervention). The legal adequacy of most of these arguments for intervention has been

challenged by other experts.⁽¹⁾

Article 2 of the UN Charter sets out two fundamental principles: 2(3): “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”; and 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 any other manner inconsistent with purposes of the United Nations.”

The language of the Charter is clear in the cases where members believe that another State has violated a UN Security Council resolution, they do not have a unilateral right under Article 42 to use force to secure adherence to it or to punish that State.⁽²⁾ According to the Charter, there are only two situations in which one State can lawfully use force against another: “(1) In individual or collective self-defense (a right under customary international law, which is expressly preserved by Article 51 of the Charter) or (2) Pursuant to a UN Security Council Resolution.”⁽³⁾ Anticipatory actions in self-defense are justified only if they meet the requirements of necessity and proportionality. That is, force is limited to that which is strictly *necessary* and *proportionate* to repelling any attack. Many observers claim that a change of regime in Iraq was not necessary to achieving the Security Council’s legitimate aims.⁽⁴⁾

On balance, since Iraq has not mounted any direct attack on the United States or the United Kingdom, and because no attack by Iraq on either or both of these countries or one of their allies was imminent, the use of force against Iraq must have been based on authorization from UN Security Council. Furthermore, no proof that Iraq had provided “weapons or logistical or other support” to the al-Qaeda was provided. Resolution 1154 granted no automatic right for members to use force in the event of non-compliance.⁽⁵⁾ It is unclear whether material breaches of a cease-fire agreement (Resolution 678) would authorize the use of force in response. In sum, neither the breaches of the cease-fire agreement nor the violations of any other

resolutions authorize the unilateral use of force.⁽⁶⁾ Because of these legal restrictions, no country was entitled under international law to use force against Iraq.

This legal situation is complicated by the addition of modern international human rights law. Since 1864, Geneva Conventions for victims of armed conflict have embodied the central principle that the individual soldier was entitled to at least a minimum degree of humanitarian treatment. Such rights received their most extensive application in the Geneva Conventions of 1949 and the Additional Protocols of 1977. The humanitarian provisions of these conventions cover the conduct of military operations (methods and means of combat) as well as the protection of the victims of armed conflict (wounded, sick, prisoners, civilian populations, refugees, stateless persons, and so on).⁽⁷⁾ The latter entailed two protocols, one extending legal protection to guerrilla fighters as well as to regular army personnel, and the other extending sweeping protection to any person detained in connection with an internal war.

THE LEGAL CONSTRAINTS

Confusion about the war methods applied in Iraq has grown in the United States and abroad. At issue is the question of what qualifies as torture and what is permitted and what isn't. The widespread use of dogs to intimidate and even rape prisoners, the systematic use of rape and electric shock to extract confessions, and the use of nudity for humiliation, where the fear of being exposed in public is an irredeemable cultural embarrassment, have caused serious concerns, particularly over exactly how far military interrogators could go in mistreating prisoners without committing blatant illegality. The most recent revelations about the U.S. government's practice of outsourcing torture—that is, the policy of seizing individuals without any due process and sending them off to be interrogated by repressive regimes known to have regularly practiced torture—point to another abominable

strategy of jettisoning the rule of law to permit torture.⁽⁸⁾

The reports of the International Committee of the Red Cross (ICRC) point out that “Several military intelligence officers confirmed to the ICRC that it was part of the military intelligence process to hold a person deprived of his liberty naked in a completely dark and empty cell for a prolonged period to use inhumane and degrading treatment, including physical and psychological coercion.”⁽⁹⁾ This continuing pattern, ICRC has concluded, surely goes “beyond the reasonable, legitimate and proportional use of force required.”⁽¹⁰⁾

Experts differ on the extent to which torture can be warranted. Some legal scholars have argued for legally sanctioning torture in “ticking bomb” cases, claiming that in such cases torture is justified because it could potentially save many lives. Under such circumstances, the idea that torture in some form will not be applied is deceptive, and the government should not walk away from responsibility for it.⁽¹¹⁾ Others have countered that torture is so extreme that it should remain “tabooed and forbidden,” and that any effort to legitimize torture even under the extreme circumstances or in the rarest of cases “risks the slippery slope toward normalizing it.”⁽¹²⁾

Some U.S. officials argue that Geneva Conventions have become anachronistic after the terrorist attacks of September 11, 2001, in New York and Washington, D.C. They argue for the need to redesign the rules of war. “This is a new type of warfare” the former U.S. attorney general Alberto R. Gonzales argued, “one not contemplated in 1949, when the Geneva Convention on the treatment of prisoners of war was framed—and requires a new approach in our actions toward captured terrorists.”⁽¹³⁾ The U.S. Justice Department has said in the 2002 memo that President Bush could authorize Americans to torture prisoners with impunity by redefining torture to exclude almost any brutality.

Although the Bush administration denies the use of torture as either policy or practice, it has actively worked to narrow the definition of torture so as to elicit information from terror suspects in American custody. This

approach raises one key question: “what is the definition of torture?” According to an August 2002 Department of Justice memo, the only treatment that would count as torture would have to be “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment forbids torture under any circumstances and does not allow the prohibition to be derogated even in conditions of national emergency.

The Torture Convention provides a clear definition: “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”⁽¹⁴⁾

Since 2002, the Bush administration has redefined torture and defied the Geneva Conventions, arguing that members of the al Qaeda and the Taliban in Afghanistan have been properly imprisoned as “unlawful combatants.” As such they were not subject to the full protections of the Geneva Convention.⁽¹⁵⁾ As Assistant Attorney General, Jay S. Bybee argued in another memo that all applicable statutes and treaty obligations, including those pertaining to the International Convention against Torture, can be read in such a way as to define torture very narrowly. For an act of abuse to be considered torture, Bybee noted, “the abuser must be inflicting pain “of such a high level of intensity that the pain is difficult for the subject to endure.”⁽¹⁶⁾ Bybee goes on to argue that “full-fledged torture of inmates might be legal because it could be construed as “self-defense” on the grounds that “the threat of an impending terrorist attack threatens the lives of hundreds if not thousands of American citizens.”⁽¹⁷⁾

Arguing that the Bush administration has shown little sign of willingness to put the prisoners on trial, some members of Congress have questioned whether there is sufficient legal basis for their indefinite detention.⁽¹⁸⁾ The U.S. Justice Department has also issued a legal opinion saying non-Iraqis captured by American forces in Iraq are suspected of having links to al-Qaeda or the related terror networks supporting insurgency in Iraq. These prisoners are, therefore, not entitled to the protection of the Geneva Conventions.⁽¹⁹⁾ On March 8, 2008, President Bush vetoed the interrogation policy legislation that would have enforced torture ban. By sending legislation to the President that would require all U.S. interrogators to adhere to the Army Field Manual, Congress made it abundantly clear that it did not support the C.I.A.'s use of secret coercive interrogation methods or tactics. The President's veto has surely weakened counterterrorism efforts worldwide and has done considerable damage to efforts to restore U.S. credibility on human rights.

In a recent study, conducted by Foreign Policy and the Center for a New American Society, more than 3,400 active and retired officers at the highest level of command were surveyed about the state of the U.S. military capabilities and preparedness. When asked if they agree or disagree with the statement: "Torture is never acceptable," opinions were split. Fifty-three percent agreed, and forty-four percent disagreed. About 46 percent said that they agreed with the statement: "Waterboarding is torture," and about 43 percent said they disagreed. These results suggest that the military itself is divided over the use of torture and what constitutes it.⁽²⁰⁾

MILITARY INTERVENTION WITHOUT UN APPROVAL

The debate over whether the UN retains a legitimate role in using force has assumed a new centrality among political, criminal justice, and legal scholars. Some scholars argue that the UN is certainly needed for the necessary legitimization of the post-war situation in Iraq.⁽²¹⁾ Others warn that

the UN needs to recognize that the Charter was right to provide for a balance between self-defense and collective military action under UN auspices, but wrong to imply that the UN could have a key role in more than a very small number of crises. They argue that it is important to recognize that “occasionally there is a need for, and a possibility of, an approach which is conceptually distinct both from impartial peacekeeping based on consent of the parties and from a simple enforcement action on behalf of an attacked state.”⁽²²⁾

In general, however, the use of force without UN approval is widely regarded as a violation of international law. This was especially true of the U.S. invasion of Iraq (2003). UN Security Council Resolution 1441, adopted in the fall of 2002, ordered Iraq to begin disarming. Despite evidence to the contrary, the United States and Britain claimed that Iraq was in “material breach” of 1441 and claimed the right to forcibly disarm Iraq.⁽²³⁾ A statement by the then UN Secretary General Kofi Annan made this point abundantly clear: “This invasion was not in conformity with the UN Charter. From our point of view and from the charter point of view, it was illegal.”⁽²⁴⁾

Although the conflict in Afghanistan generated an overwhelmingly positive response from the U.S. allies, that global support faded away with the second invasion of Iraq. After an unprecedented diplomatic blunder in which U.S. officials failed to rally support within the Security Council, even from countries that have traditionally been its allies (Mexico, Chile, and Pakistan), the United States had another huge setback when Turkey, an old ally, refused to allow US troops to cross through its territory.⁽²⁵⁾ The UN Security Council held that Iraq was not presenting a clear and present danger of the kind that would justify an immediate war and that “legitimate preventive defense” is not permitted under international law.⁽²⁶⁾

Some top-ranking officers in the U.S. military have raised formidable worries about the effectiveness of preemptive strikes and interventions of this sort. They have begun to doubt the legitimacy of the U.S.-led mission in the face of rising Iraqi nationalism, persistent resistance, and widespread

prison scandals. Unless the United Nations is given a wider role in running the country, the glue that held the U.S. military and civilian leaders together in the Bush administration may gradually unravel.

EXCEPTIONALISM IN U.S. FOREIGN POLICY

The first Bush administration saw the neo-conservatives' rise to the pinnacle of running American foreign policy. In this new era, in the words of one analyst, the United States has taken the role of setting new international standards, determining threats, using force to contain global terror, and meting out justice.⁽²⁷⁾ The continued American hegemony and imperial behavior have generated various forms of opposition, none more extensive and intense than its unilateral foreign policy vis-à-vis Iraq.

The “war on terrorism,” declared on September 20, 2001, has renewed discourses over U.S. exceptionalism and civilizational impulses. In this rhetorical strategy, the relevant actor is no longer the United States but the “civilization.”⁽²⁸⁾ The new enemy—Islamic terrorism—is supposed to occupy the rhetorical place once occupied by communism. The United States has now assumed the role of the guardian of human civilization in the war against terrorism. Others will join this struggle against evil or suffer the consequences.

With “Islam” and “Islamic terror” taking the place of “communism,” attention is focused on civilization to the detriment of alternative logics of identity. Attempts to depict Islamism as a threat to Western civilization are dangerously distorted and counterproductive. Some Western scholars have employed core notions of “binary oppositions” that contrast the “other” with “us,” thus painting a picture of an uncultured Islam with a predilection for conflict with the West.⁽²⁹⁾

Such commonplace rhetoric was evident in the national security strategy document of the Bush administration: “America will hold to account nations that are compromised by terror, including those who harbor terrorists—

because the allies of terror are the enemies of civilization.”⁽³⁰⁾ Reiterating the importance of multilateralism as well as the “coalition of the willing” from time to time have become empty rhetoric, in view of the fact that the United States has already reserved the right to determine who is civilized and who is not, and thus who has to be supported and who has to be vehemently opposed in the name of civilization.⁽³¹⁾

The risks of unilateral military interventions are simply too high and rewards too uncertain to treat a preventive war doctrine as a cure-all for the campaign against the global terror. The continuing insurgency in Iraq and the so-called “war on terror” in unconventional warfare have merely made U.S. troops more vulnerable. The occupation has turned a contained dictatorship and the secular country of Iraq into an epicenter of fundamentalist-inspired insurgency. The occupation of another Arab land by another imperial power has resurrected anticolonial sentiments reminiscent of the fierce resistance to the British and French mandates of the interwar period. Occupation has also stimulated a new generation of Islamic young radicals with a safe harbor.

There are significant long-term implications for the United States if its actions in Iraq undermine the base of the Atlantic alliance. If the Iraq war leads to the expanding breach with its NATO partners and the demise of a reinvigorated Atlantic Alliance, this occupation will prove to be “a strategic blunder of immeasurable consequence.”⁽³²⁾ If, however, the United Nations, NATO, and interested Muslim nations could be given an important role in the reconstruction of Iraq, some of the divisions between the United States and its allies might erode with an emerging measure of success.⁽³³⁾

Similarly, there are important implications for the United Nations Charter system. In the cases of Kosovo (with an impending humanitarian crisis on hand) and Iraq (putative future terrorist attacks), a pattern of circumvention of Charter rules combined with the reluctance of the United Nations Security Council to seek censure for violations of the non-intervention rule has raised a myriad of concerns for the future of

international law.⁽³⁴⁾ In Afghanistan the security considerations were sufficiently convincing as to make the humanitarian benefits of the war both politically and morally rewarding. In Iraq, by contrast, the security considerations and related anti-al Qaeda arguments were utterly unpersuasive, and the claimed humanitarian benefits resulting from the war were viewed by the international community as a way to bypass the “illegality of the American-led recourse to force.”⁽³⁵⁾

THE POLITICS OF SECURITY AND HUMAN RIGHTS

Since the 9/11 attacks on the United States, the debate over balance freedoms and national security has intensified within the context of the “war on terror,” a metaphor around which no clear or firm consensus has forged. The prevalence of indefinite detention, torture, and other abuses in the post-September 11 era has also posed a major threat to the existing system of human rights protections. The treatment of detainees in Guantanamo Bay, Cuba, has led some governments to assume that the trump card of national security can prevail over human rights concerns.

Similarly, anti-American sentiments have arisen in reaction to the U.S. invasion of Iraq, in part because there was no clear evidence of Iraqi logistical, financial, and intelligence support for al-Qaeda, and partly because this military adventure failed to establish a stable, democratic Iraq. If anything, the desire for a stable democracy has been subjugated to intensifying sectarian tensions, rendering any future compromises and bargaining immensely difficult.

What are the morally appropriate responses to terrorism? To assess and justify responses to terrorism we turn to legal and normative philosophy. In doing so, we articulate two contrasting justifications: consequentialist and justice approaches. According to the consequentialist perspective, protecting innocent civilians against those who use violence is the ultimate goal—or the greater good of the society—and must be pursued at any cost. These

consequences are often justified in exchange for providing the greatest security for the greatest number of the individuals in society. This view renders it appropriate for the government to spy on citizens, rely on secret sources, hold underground detentions, disregard the sovereign rights of other nations, and subject terrorist suspects to torture. This logic is reminiscent of the U.S. foreign policy in Latin America during the Cold War era.

The justice perspective, on the other hand, shows an absolute commitment to the rule of law, human dignity, and social justice. This perspective embraces the idea that people ought to observe specific restrictions on the conduct of war assumed to be in self-defense. According to this view, states are obligated to avert using illegal means to safeguard their security and those of their citizens. It is argued that instrumental justifications are essentially immoral. Political and diplomatic processes, for example, proved far more effective than strictly judicial solutions in the case of national reconciliation (e.g., in the case of South Africa). Examining all aspects of utilitarian and justice approaches is beyond the scope of this essay. Below we turn to post-9/11 period to examine these competing ethical paradigms.

In the aftermath of 9/11, the emergence of the U.S. Patriot Act—justified on the grounds of a consequentialist view—has broadened the use of wiretapping on telephone calls and emails, and also authorized the Attorney General to detain foreign nationals on mere suspicion, without due process and other related legal protections under the U.S. Constitution. The Bush administration's fixation with security has undermined the rule of law, failing to protect due process rights (i.e., habeas corpus) within ordinary criminal justice systems. As a result, several hundred alleged al-Qaeda and Taliban suspects have been held from late 2001 at a U.S. military base at Guantanamo Bay, without trial, charge or access to lawyers. The Bush administration has argued that inmates held there are not "prisoners of war" with rights under the Geneva Conventions, but "enemy combatants."⁽³⁶⁾

International law experts argue that terrorist suspects captured on the

battlefield must be prosecuted according to the standards of the Uniform Code of Military Justice. Bringing accused terrorists to justice according to the procedures of a court-martial will both protect America's security and uphold its values.⁽³⁷⁾ Common Article 3 of the Geneva Conventions, ensuring the barest minimum standard of forbidding commitment of outrages upon personal dignity, is not just a matter of human rights, but, like many laws of war, it is about good war-fighting.⁽³⁸⁾ The bottom line is that denying the application of Common Article 3 to the "war on terror" will have wide-ranging and far-reaching implications for the hard-won and time-tested rules of battle. Although a case can be made that the "new paradigm" of armed conflict, which was never imagined by the drafters of the Geneva Conventions insofar as non-state actors were concerned, the fact remains that the conventions apply to Al-Qaeda suspects. Like combatants, these suspected terrorists—whether planning a new attack or on the lam—are to be treated legally—that is to be captured and tried.⁽³⁹⁾ While some Western scholars have argued that torture is illegal and illegitimate,⁽⁴⁰⁾ others have questioned an absolutist commitment to either security or rights, arguing that rights are both basic and contestable and that the structure of rights must allow room for legitimate security considerations.⁽⁴¹⁾

The abuse of prisoners both in Iraq and Guantanamo Bay, which included such practices as sleep deprivation, water-boarding, and harsh interrogation techniques, has irreparably corrupted the image of the United States. The real danger in adopting an instrumentalist view is that if such abuses go unquestioned, they are likely to become a common state practice. Western governments that used to express human rights concerns in their discussions with Middle Eastern regimes, now more often praise Egypt and Tunisia for anti-terror efforts and cozy up to demands of authoritarian regimes such as Uzbekistan. In these states, government's anti-terrorism has stifled political dissent, marginalizing a wide variety of human rights safeguards.

WHAT ROLE FOR INTERNATIONAL LAW?

As noted earlier, this invasion, without a UN mandate and without the authorization of any other international body, flew in the face of the most basic principle of the UN Charter: the norm of nonintervention. Quite understandably, protecting the sovereign equality of states—not abandoning this norm—may in fact be the most effective shield against such occupation, regardless of motives behind such act.

What lies behind occupation: moral reasons or strategic interests? Some observers argue that a superpower has no moral imperatives; rather, its actions are motivated solely by strategic imperatives/interests.⁽⁴²⁾ It is in this context that maintaining law and order in the new state of Iraq supersedes other objectives, including the creation of democratic institutions and values. Given this argument, the choices facing U.S. military presence in Iraq are complicated and divisive. Keeping U.S. troops in Iraq provokes further resistance, while withdrawing them quickly could provoke a civil war and a regional crisis of incalculable proportions.⁽⁴³⁾ The solution may lie in regional and international cooperation involving the UN, NATO, the Arab League, and the Organization of the Islamic Conference (OIC). To create such a regional dynamic for stabilizing Iraq, it is important to remember that “Iraq cannot be stabilized without Iranian cooperation.”⁽⁴⁴⁾ Similarly, chaos in Iraq could have serious implications for communal unrest in Iran and Syria.

The January 30, 2005 elections of the provisional national assembly, along with the late August 2005 draft of a constitution, generated new hopes among Shi’ites and Sunni Kurds. The Sunni Arabs, who have ruled Iraq since its inception as a nation-state, chose with remarkable consistency to skip these elections. The subsequent referendum on the constitution revealed the Sunni reluctance to play an important role in laying down the foundations of the constitution. Consequently, they had limited representation in the new government, and they found themselves, as a subculture set adrift, in a danger of becoming unconnected to the events now

shaping Iraq.⁽⁴⁵⁾ The question arose: How would Iraq's legislative negotiations and constitutional power struggles unfold?

The elections were undoubtedly a great moral victory for Iraqis, but the crucial test will be whether Iraqis could see through an orderly change of government without the presence of American troops.⁽⁴⁶⁾ The issue of the Kurds' demand for independence did become a part of a referendum, as hundreds of Kurds erected tents at official polling places in Iraq's Kurdish areas and asked voters to take part in an informal referendum on whether Kurdistan should be independent or part of Iraq. The tally turned out to be overwhelmingly (11 to 1) in favor of independence.⁽⁴⁷⁾ Although Kurdish leaders have officially spoken of a democratic, federal, pluralistic, and united Iraq, they have long espoused the notion of an independent Kurdistan. Massoud Barzani, the leader of the Kurdish Democratic Party, has implicitly expressed his aspiration for an independent Kurdistan.

With constitutional negotiations and two elections ahead, the Kurdish leaders will most likely entertain that possibility in the near future. They will surely settle for a constitutional draft that preserves their region's de facto independence and financial autonomy, while granting them full control over the disputed province of Kirkuk. More importantly, the Kurds will insist on a fixed amount of Iraq's national budget and full sovereignty over their region's petroleum, including the right to export it.⁽⁴⁸⁾ The oil fields in Kirkuk represent almost two-fifths of the country's proven petroleum reserves.

Aside from oil fields, Kirkuk is a setting for all the ethnic-sectarian conflicts characteristic of Iraq. Kirkuk is home to the Turkmens, who have always looked to Turkey as their protector. While Kirkuk is the center of the Turkmen population in Iraq, the city is seen by the Kurds as "a touchstone of their identity."⁽⁴⁹⁾ The competition for staking a claim on Kirkuk will likely pit the Turkmens against the Kurds, threatening to convert Iraqi internal politics into a regional conflict.⁽⁵⁰⁾ Turkey's long-term interest in preventing the formation of an independent, oil-rich Kurdistan is a familiar subject of

internal debate within Turkey given its own large and rebellious Kurdish minority. The neighboring countries of Iran and Syria have pursued similar interests. The implications of who claims Kirkuk are varied and many, as this ethnic-sectarian conflict could potentially spread beyond the Iraqi borders.

The real danger is that Iraq's transitional assembly and its interim constitution may serve as a purely strategic instrument of the occupiers. Given this possibility, two questions persist: (1) will sectarian grievances be resolved? And (2) will elections translate into a reasonably decent quality of life for the vast majority of Iraqis? The fact remains that crime in many areas of the country is completely out of control. Kidnapping and carjacking are commonplace. Rape and murder are widespread. Electric power is available just a few hours a day. Unemployment rates are high. With many women destitute, prostitution has become a growth industry.⁽⁵¹⁾ Iraq still faces many key issues that could break the country apart, from the issues of Kirkuk and Mosul to that of religious law. The hopes of sustaining a democratic future could prove precocious at best and illusory at worst.⁽⁵²⁾

The United States should create the conditions for an early drawdown and, eventually, for a complete withdrawal. This requires a well-crafted disengagement strategy, including conducting parallel negotiations with the neighboring countries of Iran, Turkey, Syria, Kuwait, Jordan and Saudi Arabia. The risks of such strategy, as some experts argue, are far lower than the alternative of an indefinite occupation.⁽⁵³⁾ The Iraqis' chances of survival and stability will enhance if the influences of pan-Arab nationalists, Islamists, and foreign Islamic radical groups who have entered Iraq are contained by diplomacy and disengagement.⁽⁵⁴⁾

ASSESSING THE IRAQ WAR

The Shia revival following the Iraqi war, as Vali Nasr argues, has empowered Shia majority in Iraq, enhanced Iran's status as a regional power,

and has led to the empowerment of Shias across Lebanon, Saudi Arabia, Kuwait, the UAE, and Pakistan. All this has led to a drive toward a new power distribution/balance in the Middle East, culminating in a momentum unprecedented in nearly fourteen centuries.⁽⁵⁵⁾ The question persists: How are we to gauge progress?

Before we answer this question, we must engage the issue of insurgency, which at present poses a huge challenge to both Iraqi central government and U.S. troops. The Iraqi popular support for defeating the insurgency is as critical as the continuing or eroding U.S. support—either among American soldiers or the American public—for the war. U.S. forces have failed to defeat the insurgency or improve security. Yet the costs of a precipitous withdrawal or disengagement would likely be great. The insurgency could very well turn into a bloody civil war, with the unforeseen consequences of involvement of Saudi Arabia, Turkey, Syria, and Iran. Additionally, Islamic nationalists and particularly Islamic radicals would see the U.S. departure as a victory, and the subsequent chaos would drive up oil prices.⁽⁵⁶⁾

The recent violence points to an intra-Shiite blood feud raged between the cleric's Mahdi Army and Iraqi government, which is allied with Abdul Aziz al-Hakim and his militia, known as the Badr organization, has brought U.S. forces into a direct confrontation with the Madhi Army. This new situations belies the complexity of a conflict that has up until now been described as Shiite-Sunny divide. Shiite cleric Moqtada al-Sadr, the Iraqi religious leader of the Mahdi Army, continues to present a serious challenge to the Iraqi central government, as Iraq's rival Shiite parties are all vying for power and political supremacy in southern and central parts of the country. As one journalist reminds us: "Sadr and his militia—the ones that fought British forces the most until their retreat from the city center in September [2007]—feel their perceived sacrifice has earned them the right to be a mover and shaker."⁽⁵⁷⁾

The looming power struggle was almost inevitable given how little

money the southern region was receiving from Baghdad and how poor government-related services were, even in Shiite areas. This illustrates that “incompetence and corruption are not sectarian.”⁽⁵⁸⁾ There is no guarantee that a victory by Dawa Party, led by Iraqi Prime Minister Nuri Kamal al-Maliki, and the Islamic Supreme Council, spearheaded by Abdul Aziz al-Hakim, will serve the cause of political accommodation or lead to fair elections in the future and the creation of legitimate local and provincial governments.⁽⁵⁹⁾ At the urging of U.S. government, for example, the Shiite-dominated central government recently passed a law to give provincial governors wide-ranging powers over security forces and public works. Some observers have estimated that the Sadrists are likely to gain seats in the upcoming provincial elections, which would enable them to control the oil-rich and fertile south. Sadr’s followers argue that Prime Minister Maliki’s recent attacks on Basra were part of an offensive strategy to steal the local elections from them.⁽⁶⁰⁾

These uncertainties are likely to complicate the stabilization process in Iraq for the coming years. Moreover, the Bush administration’s disregard for the UN Security Council and its lack of enthusiasm for working on a transatlantic consensus, when it initiated its preventive war against Iraq, are likely to come to haunt it at some point in the future. The United States, experts concur, is in a global struggle for winning “hearts and minds” of the people around the world, but it is losing. Stephen M. Walt, a Harvard political scientist, poignantly argues that U.S. power is now much more feared than welcomed around the world: “If anti-Americanism continues to grow, Washington will face greater resistance and find it harder to attract support. Americans will feel increasingly threatened in such a world, but trying to counter these threats alone will merely exacerbate the fear of U.S. power and isolate the United States even more.”⁽⁶¹⁾

Other experts argue that the United States lacks the intelligence assets and political capacity to broker a political settlement in Iraq. From a practical standpoint, there is not much in America’s historical experience

with war termination that could prepare it for ending the war in Iraq. War termination is beyond Washington's understanding or capacity at this point. Given this reality, an exit strategy is a far more realistic alternative.⁽⁶²⁾

CONCLUSION

U.S. unilateralism, as demonstrated in an unprovoked invasion of Iraq, has raised several concerns in the international community. One such concern relates to the issue of what constitutes a threat to international peace and U.S. security. Another concern pertains to the rights of the victims of war. The latter concern has been examined in this paper. Waging war in Iraq has amounted to the denial of one of the major principles of the UN Charter: non-combatant immunity.⁽⁶³⁾ The protections of the victims of war have gained the status of customary international law and have long been guaranteed by treaty. The violation of the principle of non-combatant immunity (the victims of war) in the Abu Gharib Prison has also raised another set of concerns.

More importantly, the common article 3 of the Geneva Conventions, which lays out the rule of non-combatant immunity, "is a peremptory rule of war."⁽⁶⁴⁾ This article protects even members of armed forces who have laid down their arms. It makes no strategic sense to violate the rights of enemy non-combatants even as a state confronts a supreme emergency.⁽⁶⁵⁾ The international community would benefit from observing the UN Charter System governing the use of force. This is not to imply that the laws of war cannot be interpreted in accordance with new realities or as new exigencies arise. Fighting insurgency in Iraq and winning the "hearts and minds" of the Iraqis can be successfully pursued if the methods of conducting war and the stabilization of the post-conflict period are humane and designed to appeal to the domestic population. Andrew Sullivan, a senior editor at *The New Republic* and a columnist at *The New York Times*, best captures this flaw in the U.S. intelligence approach toward Iraq: "If the best intelligence comes

from persuading the indigenous population to give up information on insurgents, then the atrocities perpetrated by a tiny minority of American troops actually help the insurgency rather than curtailing it.”⁽⁶⁶⁾

A key task is to distinguish between ‘war-fighting’ and ‘crime-fighting’ logic of countering terrorism. Depending on which logic is pursued, the costs and gains of fighting terror in the long run might be profoundly different. Despite the fact that due process and individual freedoms have been emphasized in the West, counterterrorism strategies have permeated the ‘ordinary’ criminal justice system. Both criminology and law have much to offer us in sorting out tensions between state powers that can be turned against suspects and the decisions that accord with legal precedent and process.⁽⁶⁷⁾ What is needed, in the last analysis, is a new architecture of justice that can articulate a way to reconcile security and human rights concerns by preserving the other two features of the rule of law: non-arbitrariness of government and equality of relations between citizens and state.⁽⁶⁸⁾ Increasingly, our understanding of law, morality, and politics in the aftermath of U.S. occupation of Iraq has come to depend on a multi-disciplinary approach that combines findings drawn from sociological, legal, political, philosophical, and criminal justice approaches. ❖

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