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The crime of war: from Nuremberg to Fallujah

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A review of current international law regarding wars of aggression, and its implications for U.S. policy in Iraq and elsewhere

In September, U.N. Secretary General Kofi Annan told the BBC that the U.S./British invasion of Iraq was illegal under international law [1]. The following week, he dedicated his entire annual address to the U.N. General Assembly to the subject of international law, saying, “We must start from the principle that no one is above the law, and no one should be denied its protection.” So, how was the invasion of Iraq illegal? How does that affect the situation there today? And what are the practical implications of this for U.S. policy going forward, in Iraq and elsewhere?

The Secretary General presumed what the world generally accepts, that international law is legally binding upon all countries. In the United States however, international law is spoken of differently, as a tool that our government can use selectively to enforce its will on other nations, or else circumvent when it conflicts with sufficiently important U.S. interests. For the benefit of readers in the U.S., I therefore feel obliged to preface a review of war crime in Iraq with a look at the actual legal status of international law, both in international terms and in terms of our own national framework of constitutional law.

When the president of the United States signs a treaty and it is ratified by the U.S. Senate, our country is making a solemn undertaking. The seriousness of such commitments is exemplified by the Nuremberg War Crimes Trials and subsequent international trials, in which individual national leaders have been held criminally responsible for treaty violations and, when convicted, have been sentenced to long terms of imprisonment or even death by hanging. In our own constitutional system, Article VI Clause 2 of the United States Constitution, known as the “Supremacy Clause,” grants international treaties the same “supreme” status as federal law and the Constitution itself. It reads:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

You can visit the State Department website to find a complete list of the international treaties to which our country is a signatory, under “Treaties in Force” [2]. These treaties are enforceable by national court systems in each country, but, without an international court system to ensure universal enforcement, the real consequences of violating international law are often political, economic and diplomatic rather than judicial. As we are finding in Iraq, these consequences can nevertheless be substantial.

It is important to understand that war crimes fall into two classes: 1) war crimes relevant to battlefield conduct; and 2) waging a war of aggression. To explain what was at that time an unprecedented focus on the second kind of war crime, war of aggression, the Nuremberg Judgment included the following statement:

"The charges in the indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."

The treaty which outlawed the waging of aggressive war was the General Treaty for the Renunciation of War, otherwise known as the Kellogg-Briand Pact or the Pact of Paris. It was named for U.S. Secretary of State Frank B. Kellogg and the French statesman Aristide Briand, and it was signed by President Coolidge in 1928 and duly ratified by the U.S. Senate. It was the result of a decade of negotiations and lesser diplomatic achievements to prevent war that were motivated by the horror and tragedy of the First World War. In 1932, the new Secretary of State, Henry L. Stimson, made the following statement regarding its significance:

"War between nations was renounced by the signatories of the Kellogg-Briand Treaty. This means that it has become throughout practically the entire world . . . an illegal thing. Hereafter, when engaged in armed conflict, either one or both of them must be termed violators of this general treaty law . . . We denounce them as law breakers."[3]

The convictions of German leaders at Nuremberg for the crime of waging aggressive war were based entirely upon the Kellogg-Briand Pact and the history of lesser treaties that led up to its signing. Once again, I quote from the Nuremberg Judgment:

"The question is, what was the legal effect of this pact? The nations who signed the pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the pact, any nation resorting to war as an instrument of national policy breaks the pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing."

In 1945, the United Nations Charter, Article 2 Clause 4, reiterated the principles of the Kellogg-Briand Pact, stating simply, "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." Article 39 established the authority of the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to "decide what measures shall be taken."

The U.S. Supreme Court was asked in Mora v. McNamara (1967) to rule on the case of a conscientious objector who claimed that the U.S. war against Vietnam was an illegal war of aggression. In this case, the court cited only the Kellogg-Briand Pact, Article 39 of the U.N. Charter and the London Treaty (which established the Nuremberg War Crimes Tribunal) as the relevant body of international law regarding cases of aggressive war, so it is reasonable

to examine the legitimacy of the war in Iraq based on those same treaties.

George W. Bush has avoided citing legal principles in defense of the war, but he has given three quasi-legal justifications at different times in political speeches, and so these would seem to be his arguments:

Preemptive self-defense;

Enforcement of Security Council 1441, which threatened "serious consequences" for Iraq's alleged failure to disarm;

Enforcement of past Security Council resolutions, going back to 1990. A mutable combination of all three has worked well for him with U.S. public opinion as a political justification for war, but does any one of them actually justify the war under international law?

There is actually an internationally accepted standard in international law for "preventive" or "preemptive" military action, known as the Caroline case. In 1837, an insurgency was raging, not in Iraq, but in Canada. A small, American-owned steamer named the Caroline was being used to smuggle anti-British insurgents and shipments of arms across the Niagara River. One night, British forces crossed the river in small boats and attacked the Caroline as it was moored on the American side of the river, killing many of its passengers and crew, and setting the ship on fire. The British then towed the Caroline away from the shore and set it adrift to plunge over Niagara Falls in a fiery spectacle.

This incident raised warlike passions on both sides of the border. Americans regarded it as an act of aggression, while the British argued that it was an act of preemptive self-defense. The matter was eventually resolved peacefully after an exchange of letters between U.S. Secretary of State Daniel Webster and British Foreign Secretary Lord Ashburton, in which both countries accepted the principle that "Respect for the inviolable character of the territory of independent nations is the most essential foundation of civilization," and that this can only be legally overridden by "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation," and "the act . . . must be limited by that necessity, and kept clearly within it."

This became the accepted international standard for "preemptive" military action, and was cited as such by the judges at Nuremberg using Webster's precise wording. The German defendants at Nuremberg defended their invasion of Norway on grounds very similar to those cited by Bush today, claiming a reasonable fear that Norway would become a base for an Allied attack on Germany. The judges rejected this argument, writing that the plans for an attack on Norway "were not made for the purpose of forestalling an imminent Allied landing, but, at the most, that they might prevent an Allied occupation at some future date." The court likewise rejected German claims that "Germany alone could decide . . . whether preventive action was a necessity, and that in making her decision her judgment was conclusive," ruling that this "must ultimately be subject to investigation and adjudication if international law is ever to be enforced."

Based on the principles established by the Caroline case and cited at Nuremberg, preventive or preemptive self-defense was not a legitimate rationale for invading Iraq, which posed no imminent threat to the United States. The facts that no "weapons of mass destruction" were found, and that their absence was suspected all along within the U.S. government, only

serve to demonstrate the sound rationale behind these principles.

Resolution 1441 was passed unanimously by the U.N. Security Council in November 2002 precisely because it kept the Security Council firmly in charge of the international response to the U.S.-Iraq crisis, and because it did not authorize the use of force. The resolution "recalls" previous warnings that Iraq would face serious consequences if it continued to violate its obligations, but it does not threaten "all necessary means," or any other diplomatic term for military force.

This brings us to the whole history of U.N. Security Council resolutions dealing with Iraq. Resolution 678 (1990) authorized "Member States co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent resolutions and to restore international peace and security in the area," an explicit authorization for the use of virtually unlimited military force to restore Kuwaiti sovereignty. This sweeping authorization was terminated four months later, when S.C. Resolution 687 (1991) declared a formal cease-fire. Unlike Bush, British Prime Minister Blair was forced into making a legal justification for the second war on Iraq. While its text has been kept secret, it was apparently based upon the tenuous argument that Iraq's alleged non-compliance with other provisions of S.C. Resolution 687 (1991) could be viewed as voiding the cease-fire, so that any of the members allied with Kuwait 13 years earlier could now use "all necessary means" against Iraq at their own discretion and for a different purpose.

Britain's Attorney General Lord Goldsmith had initially ruled that a new Security Council resolution that explicitly authorized the invasion of Iraq would be required under international law. When it became clear that there would not be one, Admiral Sir Michael Boyce, the Chief of the British Defense Staff, told the Prime Minister that he could not order his troops into Iraq without a written document stating that this was legal under international law. His forces then waited in limbo on the Iraq-Kuwait border for five full days before he received a single paragraph from Lord Goldsmith giving him the green light, and the rest is history.4

It is now clear that those were five very strange days for the British government, as no one within the government, either in the Attorney General's office or at the Foreign Office, was prepared to reverse the earlier ruling. The impasse was finally broken when Blair turned to a London School of Economics law professor, who was known to favor a war, to write a new opinion that contradicted every legal expert within the government. Elizabeth Wilmshurst, the Deputy Legal Advisor at the Foreign Office, resigned, together with two of her colleagues, and she has since stated publicly that the war is illegal. [5]

A number of court-cases have sought to uncover Blair's secret rationale for war. In one of them, Katharine Gun, a whistleblower at Britain's GCHQ, its intelligence headquarters, had leaked a memo to the press that exposed U.S. National Security Agency wiretapping of Security Council diplomats. She was arrested and tried under Britain's Official Secrets Act, and could have faced a long term in prison. However, as soon as her lawyers announced their intention to challenge the legality of the war in her defense and to call Lord Goldsmith as a witness, the government dropped its case against her. [6]

A précis of the government's case was revealed in a specific answer to a question in parliament, and it does indeed seem to hinge on the notion of a breach of the 1991 cease-fire resolution. Crucially, the "breach" in question is the specific allegation that Iraq had not

fulfilled “its obligation to disarm.” As former Foreign Secretary Robin Cook wrote in the Guardian on October 15, “There is a logical, inescapable conclusion from this chain of reasoning. If Iraq had in reality fulfilled its disarmament obligation, there was no legal authority for the invasion.”

Clearly the force of current international law on aggression leaves little doubt that our country is guilty of a serious international crime. As Americans, we are paying for this crime with increasing isolation from the international community and growing opposition to our strategic and economic interests throughout the world.

In the course of waging this illegal war, the United States has also violated specific provisions of other treaties, in particular the Geneva Convention relative to the Protection of Civilian Persons in Time of War, also called the Fourth Geneva Convention. This treaty was drafted in 1949, with the benefit of recent memory of the German and Japanese occupations of Europe and Southeast Asia, and it very specifically catalogues and outlaws many of the tactics that can be used to bend a hostile civilian population to the will of a military occupation force.

For example, it contains detailed rules to prevent the abuse of detainees and prisoners; and it bans reprisals, intimidation and collective punishment (Article 33); the destruction of property (Article 53); creating unemployment (Article 52); and the recruitment of local armed and auxiliary forces (Article 51). The United States has nevertheless employed all these methods in Iraq, and Bush has even cited the recruitment and training of armed forces to fight alongside U.S. forces or in place of them as a centerpiece of his strategy. The illegality of so much of what the U.S. is doing in Iraq is a direct consequence of the illegality of the occupation itself, and a restoration of legitimacy remains the necessary first step to resolving the crisis.

So, if Bush were to take the opportunity provided by his alleged election to seek a new, more rational and law-abiding policy, what steps would international law actually require him to take? How could he actually bring legitimacy to this situation?

The U.S. government has actually already gone through a sort of parody of what would be required in the form of U.N. Security Council Resolution 1546 (2004). However, while this resolution represents a good faith effort on the part of the international community to provide for the welfare of the Iraqi people and for their political future in the face of American determination to “stay the course,” it has succeeded only in prolonging the war by failing to address the fundamental illegitimacy of the U.S. and British position.

The “Interim Government of Iraq” endorsed in the resolution has no credibility or popular constituency within Iraq, and is headed by an acknowledged agent of the C.I.A. who was flown in with the invasion forces. The “multinational force” entrusted with “promoting security and stability” is the same force that unleashed this war on Iraq in the first place and continues to wage it today. The condemnation of terrorism in Article 17 does not, and legally cannot, deprive the Iraqi Resistance of the fundamental right to resist the invasion and occupation of their country that is guaranteed by Article 51 of the United Nations Charter. By its refusal to turn over any real power to legitimate representatives of the Iraqi people or to the U.N., the Bush administration has squandered the legitimacy it sought to gain by this resolution as well as precious time and many more lives.

The reality in Iraq is that the United States has now been engaged in an unsuccessful war

for 21 months to gain control of the country, and that U.S. military operations are killing two or three times as many Iraqi civilians as the Iraqi Resistance and foreign “terrorist” groups put together. [7] In any case, as the aggressors in this conflict, the United States and the United Kingdom are ultimately responsible for “the accumulated evil of the whole.”

Legitimacy is not something that can be conjured out of illegality by finding the right political or military strategy. International law actually requires us to end our offensive military operations, and to submit the crisis we have created to the U.N. Security Council without prejudice, not to win approval of a new American plan for Iraq, but so that we can withdraw our forces, Iraq can regain true sovereignty and the U.N. can offer its assistance as needed or requested by the Iraqis. The legitimate ongoing role of the United States in this process would be the payment of reparations to enable the Iraqi people to recover from the war and to rebuild their country.

The principal lesson for future U.S. foreign policy is that the many diplomats and lawyers who worked so hard to create the current framework of international law deserve our profoundest deference and respect. Our predecessors bequeathed us an international legal code that embodies great wisdom forged from bitter experience in times at least as difficult and dangerous as our own. We can begin to unwind this spiral of uncontrollable violence by renewing our own commitment to international law, by supporting efforts to strengthen judicial enforcement of its provisions in both national and international courts, and by insisting that military and international lawyers be consulted in the formulation of U.S. defense policy.

Sources:

1. “Iraq war illegal, says Annan,” BBC News, September 16, 2004

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3. Quoted in the Nuremberg Judgment

4. “War chief reveals legal crisis,” The Observer, March 7, 2004

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6. “GCHQ case to be dropped,” The Guardian, February 25, 2004

.7 “U.S. attacks, not insurgents, blamed for most Iraqi deaths,” Miami Herald, September 25, 2004

I highly recommend the web site of the Global Policy Forum at the United Nations for additional reading on the subject of war crimes in Iraq.

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