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## The War Against Iraq: On Legality and Legitimacy

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**Summary.** The US has been accused of double-standards in its adherence to international law in conducting the war against Iraq. Pointing out the distinction between legality and legitimacy, this analysis examines the key issues of the war on which international law impinges: the conduct of the war, and the post-war settlement in Iraq. Finding that both the US and Iraq are liable to commit crimes of war, it argues that in order to truly win the peace eventually, the US must seek to act in ways which are not only lawful, but also legitimate in the eyes of the international community.

### Introduction

On Day Five of the war against Iraq, American sensibilities were rudely shaken by the images of five US prisoners of war (PoWs) beamed into their living rooms. Washington immediately castigated the Iraqis for violating the Geneva Conventions and demanded that PoWs be treated according to international laws on the conduct of war. This has, in turn, ignited arguments about whether, given its own treatment of prisoners from the war in Afghanistan, Washington is once again applying 'double-standards' in its recourse to international conventions.

What implications does this have for the conduct of the war, the sanctity of international law, and the nature of US power? In thinking through this complex of issues, it is essential to keep two key points in mind. First, while the two concepts are inter-related, there is a difference between legality and legitimacy. Legality refers to conformity with established rules that have been codified in law. Legitimacy, on the other hand, is a more nebulous value, broadly understood as the perceived right to exercise the power of leadership or governance. This right is based on mutual consent derived from an agreement on shared values, and also implies accountability and responsibility on the part of the governor.

Second, international law suffers from the central weakness of having no guaranteed enforcement. The absence of a world government that can subject states to international law is accompanied by the lack of a world police force which may compel their compliance through the credible threat of punitive measures otherwise. We live in a world of sovereign nation-states which may decide individually if they will sign up to certain international rules, and which often base their compliance decisions on considerations other than criminal punishment. There are limited instances in which the international community may act collectively against states that violate international law – for instance, sanctions in the 1980s against South Africa because of its apartheid policies; and US-led UN military operations

against North Korea in 1950 and Iraq in 1990, for invading another state. However, these cases represent selective, rather than universal, enforcement of international law, and highlight the importance of political considerations, such as the leadership of a major power in the campaign.

Now that the war against Iraq has commenced, key questions of legality and legitimacy arise in the following areas.

### The means by which war is waged

The legal conduct of war is governed by international humanitarian law or the law of armed conflict, which are codified in the Geneva Conventions of 1949 and two additional Protocols of 1977. These set out the duty of warring parties to protect civilians in various ways.

At the most extreme end of the scale is the use of weapons of mass destruction [WMD]. The 1975 Biological Weapons Convention and 1997 Chemical Weapons Convention prohibit the development, production, acquisition, and stockpiling of such weapons, while the 1925 Geneva Protocol prohibits their use in war. Human Rights Watch has declared that “no party in this conflict would be legally justified in using any weapon of mass destruction under any circumstances”. Saddam used chemical weapons against Iranian soldiers and Iraqi Shi’as in 1983 and 1988. But US Defense Secretary Donald Rumsfeld is also reported to want to use ‘non-lethal’ chemicals in this war. These chemicals, used for riot control, are supposed to cause temporary incapacitation, but they can be lethal in confined spaces. Such weapons are not only illegal under the Chemical Weapons Convention, but their first use by the US would allow Iraq to retaliate in kind, because the Geneva Protocols prohibit only first use of such weapons.

Of greater concern is the possibility that the US might use nuclear weapons. In its December 2002 National Strategy to Combat Weapons of Mass Destruction, the Bush Administration reserves the right to respond to any WMD attack with the “full range” of US military capabilities. Under international humanitarian law, the use of nuclear weapons is illegal except under exceptional circumstances. But this is open to interpretation: in 1996, the International Court of Justice was unable to reach a definitive ruling about the lawfulness of using nuclear weapons even in the “extreme circumstance of self-defence, in which the very survival of a State would be at stake”. Since there is no evidence to date that Iraq possesses nuclear weapons and it does not have the capability to threaten the survival of the US, the circumstances would probably not justify US use of these weapons. If Israel were to launch a nuclear strike in retaliation for a chemical or biological attack by Iraq on Israeli territory though, the legal case would be less clear.

*Prisoners of War [PoWs]* have already proven to be a sensitive and high-profile issue in this campaign. The Geneva Convention obliges PoWs only to provide information about their name, rank, date of birth and serial number. They must be treated “humanely”, “with respect for their persons and their honour”, and not subject to violence or intimidation. They cannot be detained in the combat zone or be used as human shields, and must be protected from “insults and public curiosity”. It is generally agreed that the parading of PoWs flouts the Convention.

But both key parties in the current war in Iraq have problematic records regarding PoWs. The Bush administration’s treatment of prisoners captured during the war in

Afghanistan is still shrouded in controversy. Washington has insisted that the Taliban and al-Qaeda captives cannot be classified as PoWs under international law, but are instead ‘unlawful combatants’, and has detained many in a US military base in Guantanamo Bay, Cuba, where they are not subject to US laws. However, Article 5 of the Geneva Convention requires that doubts about the status of prisoners should be settled by a tribunal, and the Red Cross, UN High Commissioner for Human Rights, and Amnesty International have challenged US actions and called for an inquiry into allegations of torture and ill-treatment by US personnel against detainees.

The Iraqi regime, on the other hand, has failed to meet its obligations to return captured PoWs after the wars with Iran and Kuwait. In the current war, the Iraqi military has allegedly executed allied prisoners, and has televised images of PoWs for propaganda purposes. Baghdad also employed the tactic of *human shields* in the form of civilians or abducted westerners in the last Gulf war, an action which is a war crime. Some of the guerilla tactics used by the Iraqi army in this war – soldiers dressed in civilian clothes, or faking surrender only to turn on allied troops, also flout the laws of armed conflict.

As the key concern of laws of war is the protection of non-combatants, the issue of *civilian targets* has been the most salient in recent wars. Parties in an armed conflict are obliged to minimize the impact of combat on civilian populations and casualties. As US forces move towards Baghdad, a crucial concern will be the effects of urban warfare on civilians. By law, defending forces must avoid locating military objectives near populated areas, but there are indications that this is in fact an integral part of Iraqi military strategy. Attacking forces, on the other hand, must provide adequate warnings and escape routes to civilians. The allied forces issued general warnings to residents of Baghdad to stay indoors as the air bombardment campaign began. However, as the battle intensifies, they are obliged to do more in terms of advance warnings through radio transmissions and guaranteed passage for civilians fleeing to non-military areas. These will be problematic given the necessity for the element of surprise in such offensives, and the need to coordinate with the Iraqi military to assure safe routes.

Human rights groups also contend that attacks aimed at undermining civilian morale are illegal. While moves to deny populations electricity, water and other amenities serve to undermine support for the enemy, the attacking forces also have a legal obligation to minimize the adverse effects of combat on civilian populations. For instance, as Amnesty International observed regarding the bombing of Serbian radio and television headquarters during the NATO war in Yugoslavia in 1999, “it is difficult to imagine how disrupting transmissions for three hours – at the cost of the lives of 16 civilians – provided any military advantages to NATO”. Extensive damage is also often inflicted on dual-use targets such as electricity generation and distribution systems (roads, bridges, airports). Article 54 of the Geneva Convention prohibits the attacker from undermining “objects indispensable to the survival of [the defender’s] civilian population”. During the 1991 Gulf war, US attacks on Iraq’s eight multi-purpose dams crippled electricity generation, flood control, water distribution, sewage treatment, and hospital facilities in Iraq used by civilians. Declassified US government documents show that the Bush Snr. Administration was aware at the time that of the civilian security and health consequences of destroying these systems, and also knew that subsequent sanctions would prevent the Iraqi government from repairing the damage. The US also attacked bridges used by civilians during the daytime in Iraq 1991 and Yugoslavia 1999, killing scores of civilians.

Other issues here include accurate target identification – mistakes in the air war in Yugoslavia famously destroyed civilian convoys – and the obligation to use precision munitions in populated areas rather than more indiscriminate weapons such as cluster bombs, which might help to limit civilian casualties. Finally, international humanitarian law makes it a duty of the occupying power to provide security and humanitarian services for civilians in the territory that it controls. The humanitarian supplies promised by the Bush administration to Iraq – where it is estimated that 60% of the population relies on external food aid – has begun arriving in southern Iraq, but how such aid can be safely conveyed to other parts of the country is less certain.

### The post-war settlement

There are two key legal issues for ‘the day after’. The first is accountability for *war crimes*, which may be sought either in a US military court, or a UN mandated war crimes tribunal. Declassified documents indicate that the US Army lawyers have identified more than 500 Iraqis allegedly guilty of war crimes during the first Gulf war, including Saddam Hussein and his two sons, whom they would want to bring to trial, if possible, after this war. However, out of concern for political legitimacy, the US might consider seeking a UN Security Council mandate to convene a war crimes tribunal for Iraq along the lines of the tribunal for Yugoslavia in order to try Saddam and other top Iraqi leaders. As a former US ambassador for war crimes issues has suggested, seeking justice for Saddam’s atrocities in an international court will help to repair the Bush administration’s relationship with the Security Council and world opinion. Also, genocide and crimes against humanity, which are difficult to prosecute fully in military tribunals under the law of war, can be better investigated by a war crimes tribunal.

Ideally, such a tribunal should investigate violations of international law by all parties to the conflict. However, the chances of Iraq being called to account are much higher than that of the US being charged in an international tribunal, simply because of the traditional prerogative of the victor. On the other hand, two ad hoc international “people’s tribunals” were formed in the US to investigate American and allied war crimes in after the first Gulf War and the NATO war in Yugoslavia. These tribunals, organized by ex-US Attorney General Ramsey Clark, collected extensive legal evidence and found the US and its allies guilty of war crimes including the deliberate destruction of facilities essential to civilian life, intentional indiscriminate bombing, the killing of soldiers seeking to surrender and after the ceasefire. While these ‘tribunals’ have no legally-constituted authority, they do bear weight in terms of promoting ideas of public accountability and legitimacy vis-à-vis US actions in combat.

The second key issue is the post-war governance of Iraq. We are now watching a debate unfold between the US and its key ally, Britain, over the shape and form of the transition authority in Baghdad once the war is won. The Bush administration appears to have opted for the model of Japan after the Second World War, by which the US will, as the victorious power, wield its authority to administer the occupied territory, initially under military rule. Then, as envisaged by Secretary of State Colin Powell, “working with the United Nations” and with “international support”, the US will “help bring up an interim authority in Iraq which can then grow into a full government”. Analysts read the implication of this to be that the UN will provide chiefly endorsement of US decisions, rather than being integrally involved in the post-war transition governance of Iraq. The US case is not helped by reports that the Bush administration has already identified armed

forces personnel who will administer post-war Iraq, and certain key large American corporations which will be appointed to lead in the post-war reconstruction of Iraq.

France and – crucially – Washington's war allies, Britain and Spain, have expressed their preference for a somewhat different model, more akin to that of Afghanistan, whereupon the allies would seek a UN mandate to create an international transition authority in Iraq. In this model, UN representatives will operate with more autonomy vis-à-vis their US counterparts. While both models are in accordance with international law, the latter would go further in helping to boost the political legitimacy of the transition authority and the eventual Iraqi government in the eyes of the international community. The UN has been intimately involved in Iraq for the last 12 years, in mandating the war in 1990-1 and the sanctions regime that followed. The UN Secretary-General and the Security Council are still responsible for administering the oil-for-food programme through which Iraq is receiving organized food aid in exchange for its oil revenues. Washington must negotiate with the UN to put in place a new system by which oil revenues can be placed 'in trust' for the Iraqi people in the post-war interim. Furthermore, it is not clear how long it will be before Iraq can resume oil production and trade, and in the mean time, Washington would want to seek international support to fund the reconstruction effort in Iraq. To achieve these aims, the Bush administration will have to look beyond what is strictly legal, to what would help to boost the legitimacy of its rule over an occupied Iraq. While a central US military role will be critical to maintaining post-war security and stability, the crucial question will be whether and how Washington manages to work with and through the UN to bring about a political transition in a postwar Iraq.

### Conclusion

The range of issues which impinge upon both legality and legitimacy concerns in the war against Iraq is complex and there are few straightforward answers. On the other hand, we might note that ultimately, the compliance of most states with international law is determined by concerns about legitimacy, rather than the prospect of punitive enforcement. A state which flouts international law may be made by the international community to feel like a pariah, because international law embodies the corpus of norms and rules which the community has agreed upon to guide international society. A great power which flouts international law may not be liable to being brought to account in an international court, but it will find itself facing an international constituency which harbours growing doubts about its right to exercise influence and power. Such doubts and unease will increase the costs to the great power of maintaining its preferred international order. Conversely, legitimacy concerns transcend the adherence to international law alone. With great power comes great responsibility, and a major power may always be expected to pick the option which is not only most legal, but also most legitimate. Thus, much now depends on Bush's calculation of domestic and international convictions about the right of the US to exercise its unique power in the international system.

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