

THE LEGALITY OF THE IRAQ WAR OF 2003

Aryan Ghosh

University College London

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ABSTRACT

This paper discusses the legality of the Iraq War of 2003 by examining the ethical and legal nature of the American led intervention and the consequent actions of the United Nations. The essay structures its arguments over the two fundamental legal principles of *Malum Prohibitum* and *Malum in Se*. It also analyses the overall impact of the war on Middle Eastern geopolitics and domestic American political landscape using historical analysis to understand the ethical conundrums behind the war. The result of this analysis was an formation of an overarching epistemological debate between Law and Ethics.

Keywords : Iraq War, America, Legality, United Nations, Historical Analysis.

1. Introduction

The Iraq War was an extensive armed conflict, often referred to as the Second Persian Gulf War, that began in 2003 with the invasion of Iraq by a United States-led coalition that overthrew the government of Saddam Hussein. The conflict continued for much of the next decade as an insurgency emerged to oppose the occupying forces and the post-invasion Iraqi government.

Several historiographical debates surround the grounds for the American intervention. The invasion of Iraq raises a variety of questions not only regarding the applicability of the *jus ad bellum* (Justice of Resorting to War) but also with regarding previously codified legal definitions such as that of pre-emptive force, by the Nuremberg Trials, and the principle non-intervention, by the International Court of Justice during their case *Nicaragua v United States of America* (1986). The American party argued that their intervention adhered to international law by claiming for it to be a matter of self-defence and in defence of other nations due to the Iraqi regime's "history of reckless aggression in the Middle East" and "deep hatred of America". The party also argued that their intervention was justified as they did so to protect innocent civilians against their state that "aided, trained and harboured terrorists, including operatives of al Qaeda" and used chemical and biological weapons against their civilians, as done during the Al-Anfal

Campaign, where chemical weapons like Mustard and Sarin gas were used in the town of Halabja and Kurdish villages .

The opposing party, however, presents alternative perspectives citing the United Nations General Assembly Resolution 2625 and Articles 1, 36, 51 of the Charter of United Nations claiming that the America-led coalition did not follow all the necessary guidelines stated in the previous articles which were necessary to intervene and undermine the sovereignty of a legitimate state as mandated by Chapter 7 of the United Nations Charter.

This essay does not only focus on the legal arguments but also emphasises itself on the multitude of historical pieces of evidence available, that could be used to support or criticise arguments raised by both parties. This legal interplay made me formulate the research question:

"To what extent was the US-led operation in Iraq, in 2003, legally justified?"

2. Background

To understand the situation in the Iraq in the 21st century an insightful understanding of Middle Eastern politics is preliminary more specifically of the tension in Kuwait post the First Gulf War. The Iraqi annexation of Kuwait triggered the first American intervention catalysing the Shia and Kurdish uprisings against the Saddam Hussein regime. These uprisings were successfully suppressed by then standing government however, the suppression brought with it the allegations of use of chemical weapons against masses of civilians and a subsequent threat of possession of nuclear capable ammunitions. All leading to multiple United Nations deliberations and meditation and ultimately to the foundation of the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) by the United Nations Security Council (UNSC).

The threat of the presence of both above mentioned illicit warfare techniques hampered the anticipated political equilibrium in the region and incited in the western nations a fear of global disruption. The American party along with the North Atlantic Treaty Organisation parted nations saw the armaments and change in political dominance as a threat to their sphere of influence, a region that served as a vital oil and energy resource provider sustaining a multitude of global economies. One argument believes that the Bush administration used these developments to drive their policies during the 2001 Presidential Elections, manipulate both Presidential and Congressional approval ratings and later formulate the Emergency Wartime Appropriations Act of 2003. These Acts and legislations in turn allowed the Bush administration to secure critical policy promise such as those of fighting against the 'Axis of Evil,' increased military spending and increase presence of American troops overseas. Making the American led operation in Iraq beginning on the 20th of March, 2003 a controversial historical event.

3. Malum Prohibitum

This section of the essay will deal with the technicalities of jurisprudence and revolves around the principle of *malum prohibitum* wherein the offence is wrong due to statutory codification but not inherently evil or wrong. The deliberation encompasses various technicalities of legality including the Laws of War, United Nations Security Council Resolutions, American domestic law, International Humanitarian Law and precedents set by the International Court of Justice, Permanent Court of International Justice and the Nuremberg Trials.

Grounds For The American Aggression

On the 17th of December, 1999 the United Nations Security Council (SC) established the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) which along with the International Atomic Energy Association (IAEA) was mandated with the task of investigating and disarming Iraq's possession of Weapons of Mass Destruction (WMDs) under Security Council Resolution 1284. The commission submitted reports back to the Security Council detailing the situation in Iraq and, in its Twelfth Quarterly Report (2003) stated "UNMOVIC has not found any such weapons (...WMDs), only a small number of empty chemical munitions, which should have been declared and destroyed". However, this was followed by the Security Council Resolution 1441 which, in its eighth clause, denied Iraq – *'the right to aggress against any state that took action to uphold any of the Security Council's resolutions'*. This later continued to become the most relevant clause in this historic timeline of the situation in Iraq when, on 16th of October, 2002 the 107th United States Congress adopted, into Public Law, H.J. Resolution 114 – "To authorise the use of United States Armed Forces against Iraq". H.J. Res 114 stated that America would use force in Iraq to "defend national security" and "enforce all relevant United Nations Security Council Resolutions," translating to mean self-defence and re-enforcement of clause 8 or SC Resolution 1441.

Aggression induced to achieve security before facing any hostility by the enemy state has come to be known in the world of International Law as pre-emptive use of force and the term was first coined post the Caroline Affair of 1837 and was later codified into International Law post its recognition by the Permanent Court of International Justice in Lotus Case (1927) and later during the Nuremberg Tribunal (1946). The Caroline Test established two grounds for pre-emptive use of force, the first being an imminent threat with no probability for alternative actions and the second being a proportionate response to the threat. The first condition can be considered to have been met due to the exhaustion of multiple UNSC Resolutions including but, not limited to – 678, 687, 1284 and 1441 however, one may argue otherwise as the United Nations had still not shown any signs of invoking Article 51 of the UN Charter, the legal

authorisation for any use of force, establishing the end of grounds for deliberation about the definitive point and when a situation moves beyond diplomatic means.

The second condition comes under the Principle of Proportionality mandated International Humanitarian Law (IHL) which is codified in Rule 14 of the International Committee of the Red Cross, Proportionality in Attack, and Article 51(5)(b) of the Additional Protocol to the Geneva Convention that dictates - any attack which is expected to have a loss and injury to civilian life and, damage to civilian objects, or a combination, excessive in relation to the military advantage is strictly prohibited. Hence, for the proportionality to stand the United States of America had to have anticipated, proportionately, a 100 people killed every day, a third of the population living in poverty, sixty percent unemployed and a critical harm inflicted upon almost every cultural and infrastructural civilian object on American soil.

War Or Intervention

Another contested legal debate surrounding the 2003 aggression in Iraq is the definition of the operation, that is, whether it is considered to be a war or an intervention as both have separate principles that must be adhered by. The debate for the operation not being considered a war is largely structured around Article 1(8)(11) of the United States Constitution which vests in the Congress solely the power to declare war and, this was last invoked by the Congress in 1942 against Rumania, World War Two. However, this argument is rebutted by citing precedent set by the United States Supreme Court in 1800 in the case *Bas vs Tingy* setting separate definitions for “perfect” and “imperfect” war. It defined an imperfect war as one which is “limited as respects to places persons, and things” and doesn’t require the approval of the Congress, in accordance with *jus belli* (Law of Wars).

The implications of the operation being considered a war would be the necessity for it to adhere by *jus ad bellum* and the five principles entailed by the same. The first being – ‘Proper authority and Public declaration’ both having been met by the H.J. Res 114 and its status as Public Law, the second principle is that of - ‘Just cause or Right intention’ satisfied as the operation attempts to uphold UNSC resolutions, the third principle entails – ‘Probability of success’ and this is clearly met by the evident tactical and military advantage of the American coalition, the fourth principle requires – ‘Proportionality’ which has been disproven in previous arguments and, lastly the case must have been one of – ‘Last Resort’ a phrase that in itself lacks a definitive meaning, as mentioned above.

However, if one argues that the operation was that of an intervention the principles determining the legality of the operation would be defined by the precedent set by the case in the International Court of Justice - *Nicaragua vs United States of America* (1986). The case

established the grounds of a legal intervention, adhering by the principle of Non-Intervention under International Customary Law, as any intervention that doesn't curtail a state's necessary freedoms such as economic, political, social, cultural, foreign or judicial capabilities to be legal. In the case of Iraq the American operation did hamper the state's ability to carry out necessary governance as in the long run, the Iraqi operation also led to a shift in the political structure of the country replacing an authoritarian regime with an pro-western democratic government.

4. MALUM IN SE

This section of the essay will debate the *malum in se* aspect of the Iraqi operation, which entails the ethical and non-codified aspects and including the motive gain and the political and socio-economic scenario. The aim of this section is to highlight the ethical arguments revolving around the intervention to provide a more holistic historical argument.

President Bush's Approval Ratings

An important aspect of any foreign actions is its implications on the national socio-political and economic conditions. As in the case of the 2003 Iraq Operation an important aspect of this operation would be its impact on the Presidential and Congressional Approval Ratings. This aspect establishes one of the strongest links between societal anthropology, public psychology and history. Foreign Policy is often considered to be the most efficient tool of propaganda allowing leaders to utilise public sentiments stemming off an inert sense of nationalism to catalyse political agenda and divert attention from national political issues. Simultaneously,

Therefore, while keeping the timeline of the events in mind we can see that there is a sharp increase in approval ratings for the Bush Administration from 58% to 71%. This trend was maintained for one entire quarter with a simultaneous decrease in opposition disapproval from 38% to 25% maintaining the trend throughout the next 16 weeks.

The approval ratings provide a deep insight into post 9/11 American politics and the general trend in structural policies. The increased Presidential approval post the onset of the Iraqi operation depicts a clear shift towards radical sentiments among masses of the American civilians mixed with a strong sense of nationalism. The extremely high Democratic approval for the Republican peaking at 50% is indicative of the severe lack of opposition in the American political environment. These two conditions of extreme nationalism and severe lack of opposition have critical implications on the national political scenario catalysing all legislation in the Houses of American Congress providing an ideal situation for bipartisanship legislations and consequently providing a lack of political scramble to achieve previously promised policies and political agendas.

These ratings provide an even deeper insight when coupled with approval ratings post the 9/11 attacks and Operation Enduring Freedom (2001). Then the attack and the simultaneous operation in Afghanistan boosted the President's approval ratings from 51% to 86% between 7th and 14th of September maintaining an approval rating above 80% till the first week of March, 2002. This shows a trend which exhibits the American public's approval towards military actions in the Middle East a region which in the consequent plays a not only important role in America's foreign policy but also in shaping the American economy.

Emergency Wartime Supplemental Appropriations Act

The Emergency Wartime Supplemental Appropriations Act, H.R. 1559, was enacted into public law on 16th April, 2003. The act as it was supplemental in nature pumped millions of dollars into the Iraqi effort furthering the American involvement in the operation. The Act brought with it a dramatic trend in American defence spending which over the period of 2003-2008, by the end of George W Bush's Presidency, had risen from \$306 billion to \$616 billion. The lack of opposition for the Act for, both by the Democrat Party and the American fourth estate failed to highlight ulterior goals achieved by the Act including a non-Iraq centric increase in American support for Israeli military operations to a tune of \$9 billion and an increased support for the Colombian government under the pretext of the Andean Counter-drug Initiative providing \$20 mil for aircrafts and training to the Colombian Armed Forces.

A critical policy measure that was supported by Republican Party during the 2002 Presidential Elections was a rapid increase in military spending and operations and the Bush Doctrine declaring an 'Axis of Evil' consisting of Iraq, Iran and North Korea. The appropriation allowed Bush to follow through on the first promise of military spending and the Iraqi Operation allowed him to champion the American fight against terror by eliminating a so-called member of the 'Axis of Evil' and replacing the regime with a pro-western democratic institution. Another important impact of the Act was the rapid increase in the overseas deployment of American and NATO troops establishing a secure sphere of influence in the region.

Another possible controversial provision of the Act was the \$9 billion conditional loan to the Israeli with non-specific conditions. The controversial nature of this loan stems off of the Bush administration's highly opposed policy of the National Missile Defence System exploration programme which received severe opposition due to its unjustifiable \$60 billion price tag however, when viewed in hindsight we can observe that the Israeli Iron Dome Defence System was developed parallel to the proposed specifications of the National Missile Defence System allowing us to draw probable links between the initial loan and the final defence system making loan in fact one which would be highly controversial. However, the clandestine nature

of the Act ,and the corresponding loan, allowed it to go unchallenged pushing Republican political interests.

5. Overall Effects

While analysing the overall effects of the American led intervention into Iraq, two perspectives play a major role: the impact of the intervention on Iraq and on America.

On Iraq, the consequences of the American led operation included – severe loss of life and infrastructure, economic disintegration and more importantly a change in regime. The American operation in Iraq led to the shift in governance from a autocratic regime under Saddam Hussein to a pro-western democracy bureaucracy . The most pivotal question that arises is that though the scope of the American operation as determined by H.J. Res 114 was to defend ‘national security’ and ‘enforce all relevant United Nations Security Council Resolutions’ the resolution made no mention of the democratisation of Iraq, the overthrowing of the present regime and aiding in the transition of Iraq into a democratic nation. These actions of America go strictly against the principles of sovereignty laid down by Article 1 of the United Nation Charter. While Iraq under Saddam Hussein was a recognised state under International Law as defined by Article 1 of the Montevideo Convention (1933) as it met all four criteria entailed under the same article of having a permanent population, a defined territory, a government and of having the capacity to enter into relations with other states. Thus making the American operation a clear violation of Article 8 of the same convention which states that – no state has the right to interfere in the internal or external affairs of another, a breach of the sovereignty of the state of Iraq.

On America, the most primary consequence was increased approval ratings for the Bush administration. While the numbers were mentioned above, a thorough analysis and evaluation of the American politics during the period provides greater context to the importance of high approval ratings for the Bush administration. Moving beyond the more obvious ease of bipartisanship legislation and decreased political opposition towards government policy, a deep research reveals that the approval ratings played a critical role in determining the President Bush’s and the Republican Party’s strategy for the 2004 Presidential Race. When President Bush contested for the Republican Primary Presidential (2000), nomination during the 2000 Presidential Race, then Governor George W. Bush won the primaries by 63% followed by the Senator John McCain at 19% . However, in the 2004 Republican Primaries President George W. Bush won the primaries with 98.1% votes and no competitors. His previous competitor Senator John McCain dropped out the 2004 race but, he re-ran running the 2008 Presidential Primaries winning the Republican nomination by 46.7% . This establishes a clear impact of the approval ratings on American politics and thus draws` a link between the Iraq War and domestic

American politics. This link though circumstantial at very best provided grounds for a Congressional Investigation abiding by Article 1 Section 1 of the United States Constitution due to abuse of power by the President through executive order and malfeasance.

Another important impact revolves around American foreign policy and the psychological phenomenon associated with wartime policy frameworks – The Overton Window. The Overton Window depicts a range of political ideologies that can be accepted by the general public, the political normalcy. An extreme shift towards any wing of this window for a prolonged period of time causes a shift in the generally accepted ‘normalcy’ making previously unacceptable policies relatively more easy to accept. The Bush administration capitalised nationalistic sentiment post the 9/11 tragedy to establish Middle Eastern insurgencies as the new normal, starting from Operation Enduring Freedom, critically shaping American foreign policy in the region and having a long standing impact that can be felt to this day and age. This policy development has further repercussions of increased military spending and overseas troop deployment making the policy measures align themselves with the longstanding political ideology of the Republican Party.

6. LAW vs ETHICS

When considering the legality of the American led operation in Iraq both jurisprudence and ethical aspects play critical roles. While aspects of jurisprudence are more structured and inherently easy to deliberate, ethical arguments are extensive and are shaped by context, perspective and interpretation. The decision of legality therefore lie on the principles of *malum prohibitum*, statutory offence and *malum in se*, ethical wrong doings.

Jurisprudence would clearly back the American party’s right to use force and deem the justification of operation legal as it abided by the principles of *jus ad bellum*, pre-emptive use of force and United Nations Resolutions. However, these arguments are based on the assumption that the American operation was that of a war when in reality the nature of the operation lies in the grey area of International Law and can only be determined after further clarification by either the legislative or the judiciary body of the United States of America. If chosen to be called an intervention, the legality of the American operation would become controversial due to its inability to follow the principles set by the International Court of Justice in the case *Nicaragua vs United States of America* (1986). Furthermore, the actions during the American operation, democratisation of Iraq, goes against the rights and duties of a state as established by the Montevideo Convention which was ratified by America in 1933, making its contents legally binding.

The ethical technicalities play a significant role in the case of the legality of the American operation in due to the grey nature of the law, proving for it to be difficult to determine the legality of the operation. The ethical portion of the essay aimed at determining the extent of the legality of the Iraq war using the legal principle of *malum in se*. The arguments aim to deliberate the proportionality of the operation in Iraq and furthermore the motive or intent (*mens rea*) for the accused perpetrator, United States of America. Research into these aspects and the prevalent political scenario in 2003 revealed possible motive for the then, in office, President George W. Bush and the Republican Party. This possible link was revealed by drawing links between positive approval ratings for the American led Middle Eastern operations post 9/11 and the 2004 Presidential Race and, Emergency Wartime Supplemental Appropriations Act, H.R. 1559 and the Republican approved of policies of increased military spending and development, overseas deployment against the ‘Axis of Evil’ and support for favoured nations in foreign relations (Israel and Columbia), all achieved via provisions of the same act. However, these links can only be further examined and developed through an investigation by the Congress or the Supreme Court as mandated by Article 1 Section 1 of the United States Constitution.

Therefore, the legality of the operation hinges the verdict of the accused perpetrator making it a case one of duress requiring third party arbitration such as that by the Permanent Court of Arbitration.

7. Conclusion

In conclusion, the legality of the American led operation in Iraq in 2003 hinges upon decision to choose the limited applications of jurisprudence or the uncodified beliefs of ethics while deliberating the case. Until further clarification is provided by the American party, if one chooses jurisprudence to be the basis of deliberation then with the current information the justification for the American led operation in Iraq can be called legal though the actions within the operation were illegal. However, if ethics forms the basis for the deliberation then current links highlight the *mens rea* of the preparators providing just basis of accusing the American operation of being illegal.

The contrasting results of both schools of thought at the end of the investigation confronts us with critical question in the field of epistemology – should knowledge based on emotions play a higher role than conventionally proven knowledge when the scope of conventional knowledge is limited by external factors.

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