The Ashgate Research Companion to War
Origins and Prevention
Hall Gardner, Oleg Kobtzeff

The Legitimacy of War – Toward a New Principle for Intervention, with its Application to the Iraq War of 2003

Publication details
Troy Davis
Published online on: 28 Jan 2012

How to cite :- Troy Davis. 28 Jan 2012, The Legitimacy of War – Toward a New Principle for Intervention, with its Application to the Iraq War of 2003 from: The Ashgate Research Companion to War, Origins and Prevention Routledge
Accessed on: 31 Mar 2022

PLEASE SCROLL DOWN FOR DOCUMENT

Full terms and conditions of use: https://www.routledgehandbooks.com/legal-notices/terms

This Document PDF may be used for research, teaching and private study purposes. Any substantial or systematic reproductions, re-distribution, re-selling, loan or sub-licensing, systematic supply or distribution in any form to anyone is expressly forbidden.

The publisher does not give any warranty express or implied or make any representation that the contents will be complete or accurate or up to date. The publisher shall not be liable for an loss, actions, claims, proceedings, demand or costs or damages whatsoever or howsoever caused arising directly or indirectly in connection with or arising out of the use of this material.
The Legitimacy of War – Toward a New Principle for Intervention, with its Application to the Iraq War of 2003

Troy Davis

Introduction

One of the major problems of war is how to decide whether it is legitimate. This problem is one of the manifold issues addressed in Just War Theory (JWT). JWT finds its grounding in the general philosophical concepts of natural law used by the ancient Greeks and then Cicero, the great Roman writer, philosopher and statesman, who strived to determine the perfect form of government and to revive the Roman Republic. Early and medieval Christian theologians like St Augustine of Hippo and St Thomas Aquinas further refined these concepts, while the Dutch theologian and jurist Hugo Grotius published in Paris in 1625 the first extensive and detailed discussion of the subject, laying down as his introduction a general theory of international law as emanating from a natural law common to all humanity:

After examining the sources of right, the first and most general question that occurs, is whether any war is just, or if it is ever lawful to make war. But this question like many others that follow, must in the first place be compared with the rights of nature. Cicero in the third book of his Bounds of Good and Evil … proves with great erudition from the writings of the Stoics, that there are certain first principles of nature, called by the Greeks the first natural impressions, which are succeeded by other principles of obligation superior even to the first impressions themselves.2

2 Ibid., 18.
While JWT is therefore a Western tradition and is grounded in Greco-Roman roots and Christianity, other civilizations and religious traditions also have their own versions of the morality of war. Philosophically, JWT is generally opposed to Realism, which says that states only have interests and should not encumber themselves with morality, and to Pacifism which says that wars are intrinsically immoral and can never be justified. It seeks to determine how to reconcile morality and the need for justice (without which it is impossible to have a society worth living in), and the rough reality of a chaotic world. This dilemma was most acutely felt by Christians who are bound to follow the commandment “Thou shalt not kill” (catholic version), hence the predominance of theologians in its definition and development. This is important to keep in mind for the later discussion since ultimately most JWT is based on assumptions of divine will and argued from biblical sources.

JWT is traditionally divided into *jus ad bellum*, the justice and morality of going to war in the first place, *jus in bello*, the norms of justice during war, and the recent *jus post bello*, which determines the justice and criteria for post-war situations, the re-establishment of peaceful government, etc. Thus JWT seeks to make explicit the strict and explicit criteria or conditions under which war might be moral. These criteria have evolved over time but in general are considered to include the following (for *jus ad bellum* only):

1. Having just cause;
2. Being declared by a proper authority;
3. Possessing right intention;
4. Having a reasonable chance of success;
5. Being a last resort;
6. The end being proportional to the means used.

The problem is that JWT is not that easily applicable and its criteria are subject to endless disputes and interpretations, based on one’s underlying assumptions and philosophical theories, and even its practitioners can come to diametrical conclusions on some of its most central elements. A good example is given in the critique Carrie-Ann Biondi makes of the book *Rethinking the Just War Tradition*. She shows persuasively how different authors (Walzer and Kaufman), seemingly starting from the same premises, come to opposite conclusions concerning the so-

---

3 For a discussion of this topic from the viewpoints of Sunni and Shi’i Islam, as well as Hindu, Chinese and Japanese perspectives, see Howard M. Hensel (ed.), *The Prism of Just War, Asian and Western Perspectives on the Legitimate Use of Military Force* Justice, International Law and Global Security (Farnham: Ashgate, 2009).
5 Carrie-Ann Biondi, “‘Dirty Hands’ and Just War Theory,” *Democratiya* 22 (Summer 2008).
called Doctrine of Double Effect which seeks to differentiate between people whom it is legitimate to target and others. She does the same with other pairs of JWT theorists: Spatt and Hoag coming to opposite conclusions about the UN role in authorizing intervention,7 or Lango and Brough coming to opposite conclusions about the moral equivalence of combatants.8 She thus justifiably concludes that

JWT ultimately is unsuccessful on account of its protean nature. It is not really clear that JWT can be re-thought, given that there is not a JWT but rather a number of JWT’s in ‘the tradition’. The one attempt in this volume to rethink what seems to be central to all JWT variants leads one to the conclusion that JWT is perhaps best jettisoned. It does not follow that war should not be conducted justly, but that a new ethic of war is required that can meet the demands of justification, consistency, and justice.9

A New Principle: “No intervention without legitimacy”

Biondi’s well argued conclusion is a major challenge. How do we address it? I would like to offer one element of response by digging deep into one of the criteria, and suggesting that if we can maximize it, then we can solve several problems at once, without changing the overall superstructure. That criterion is the criterion of legitimate authority. I argue that in an increasingly interconnected, democratic and transparent world where individuals expand the boundaries of their “moral bubble” to other nations, peoples or even to the entire world and to all its citizens (thus emotionally or philosophically connecting as “world citizens”), where they base their decisions of endorsement, allegiance or action on their perception of whether a particular decision is moral or legitimate, that the criterion of legitimate authority should be the major criterion. But this is only possible if it becomes much stricter and more specific. In adopting a much stronger legitimacy principle, one truly based on the corollaries of the natural law of the fundamental equality of the human dignity of all,10 we will solve at one stroke several of the problems associated with the variability of interpretation of several other criteria. By doing so, we will see that existing criteria of legitimacy, in particular following the UN charter, are not good enough, and even harmful as they waste precious time and by

10 The statement that all humans possess equal dignity is one of the two axioms of democracy engineering theory, and comes from a variety of historical sources, including the American Declaration of Independence of 1776, the Déclaration des Droits de l’Homme et du Citoyen of 1789 and Article 1 of the Universal Declaration of Human Rights of 1948. See note 23 for more details.

171
preventing principled and creative thinking, actually encourage war (this is exactly what happened with the Iraq war and occupation, which could have been avoided).

Focusing on this criterion, we are led to formulate a new principle about the criteria for intervention. The new principle, logically and conceptually equivalent to the well-known principle of “No taxation without representation,” is “No intervention without legitimacy.” It should therefore appeal to a wide range of people who accept the first sentence, people from different political persuasions. It is equivalent to “No taxation without representation” because taxation is a definite “intervention” (by the state) in one’s pocketbook, and representation by definition creates legitimacy, so the statement “No intervention without legitimacy” is a more abstract and general way of saying “No taxation without representation.”

First we will see why it is so important that we focus on legitimacy, then explain some problems with the present situation, then finally apply this new principle to the case of the Iraq war in 2003, or rather, to the pre-war situation with Saddam Hussein still in power, using the technique of democracy engineering to create a maximally legitimate authority.11

Why is Greater Legitimacy Necessary for Human Survival?

It is claimed that by having a true, maximal legitimate authority, we obviate many of the problems associated with other criteria of JWT, and are even able to eliminate one altogether: the principle of having a reasonable chance of success. This is because this principle is the most subjective one and the one whose real-world variability is the highest; and it also happens to be, in the increasingly transparent world we live in, the one most directly correlated with the recognition of the intrinsic legitimacy of the authority declaring war.12 In other words, a maximally legitimate authority will automatically create the highest chance of success because people will adjust their behavior and will follow the line of action which is perceived as having maximal legitimacy, even in the face of large odds. Why would people do that? A reasonable hypothesis would be that people wish to live their lives in a

11 Note that at times this principle would not work fast enough to justify intervention in extreme cases like the Rwanda genocide, therefore quick intervention in that case must be grounded on other principles. In the long run, a maximally legitimate authority must be built globally to deal with potential genocides.

12 The criterion of success in JWT is even less useful than here stated because even if success is not attained quickly, action justified on the other criteria very possibly could create a dynamic that undermines the murderous regime, and in any case, it creates at least some positive political capital because politicians followed principle instead of convenience. Just as activists such as Gandhi, Martin Luther King, Nelson Mandela may not win immediately, the fact that they are widely perceived as being on the side of political morality means that their cause usually wins in the long run. States could benefit from the same phenomenon of the ordinary man adhering to politically moral actions if they followed the same logic of moral behavior.
coherent fashion, and to see the same values applied in the political sphere which they have been told apply in the private sphere. This reduces cognitive dissonance and helps to provide meaning to the world, to society, to life in general. With the decline of organized religion in most industrialized countries, with the advance of technology and the dominance of economic thinking, the lack of meaning in people’s lives is one of the greatest challenges of society today, and politics should strive to provide meaning, rather than wantonly destroy it.

If I can see with my own eyes that politics is amoral or immoral, while I have been taught since I was a child that I should not hit my schoolmates, I should not lie, I should not cheat, I should not steal etc., why should I care about the good of society, the good of Mankind? If politicians lie or cheat on the most important issues, why should I behave well? Why should I vote? Just as people care in their private dealings about the legitimacy of decisions, it is logical that they would care even more about the legitimacy of decisions when it comes to going to war. One can probably find the origin of the widespread reduction of electoral participation (especially for distant elections like elections to the European Parliament), and the increasing cynicism about politics and politicians, in the “disenchantment” of people for politics. This is all the more worrisome because solving global problems requires global cooperation and global governance. But if people do not trust politics (and since the level of trust is inversely proportional to political distance), by not behaving in a way that maximizes the trust of the public we are endangering the needed global cooperation to solve Humanity’s problems.

Therefore the future of Humanity is in even greater danger than it would otherwise be because of short-term thinking by politicians who do not realize that they need to build a “surplus” of political capital to build a trusted structure of global governance. This political capital surplus can only be built by systematically choosing the path of greatest legitimacy for every important political decision (like creating a constitution for Europe, solving the Israeli-Palestinian conflict, creating global governance, and of course, going to war or intervening militarily), which in practice will often mean to deliberately design/create a novel process. Following this line of thought, if we underwent catastrophic environmental collapse this century, which with hindsight we trace back to the inaction in the 2000s, historians may ascribe one more cost to the Iraq war and occupation of 2003–2010 (in addition to the trillion dollars so far): the incalculable cost of billions of lives disrupted because the USA was too busy with a minor war and obsessed with Islamist terror that it did not cooperate with the rest of the world to deal with truly important global problems. Hence another complication today compared to the past when one applies JWT in the age of globalization: we need to think of the opportunity cost in an interconnected and interdependent world. That opportunity cost may in some cases be the greatest factor, and obliges us to think more creatively to apply our principles, rather than follow the easy path of war.

13 All the specific political problems mentioned are real case studies that can be solved by democracy engineering theory.
If the opportunity cost becomes so high so as to affect the future of Humanity as a whole, which is a distinct possibility today, then we have the moral imperative to find a way to reconcile people and politics. Since necessity compels us to create some sort of global governance, if we fail to create a democratic version of it early enough, the “perfect storm” of dire global problems, disenchantment and mistrust of citizens toward politicians and the severity of measures needed to deal with global problems means that we could end up with global tyranny\textsuperscript{14} instead of global democracy. And since global problems are likely to last longer the later we start addressing them, global tyranny (instead of being a short-lived phenomenon like it was in ancient Greece and Rome when tyrants were elected for a short period of time to deal with emergencies like war) could last for generations, leading to the permanent enslavement of Mankind. The final aggravating factor is that since large numbers of people would be likely to revolt, the global ruling elite would be forced to resort to violence, hence deepening the mistrust of citizens, and creating a vicious circle of control and repression.

Hence we connect JWT to globalization and show that the problem of legitimacy is a crucial one to solve if we want to avoid nightmare scenarios of Mankind living in the sort of dystopia so popular in SF novels.

The Present Situation: Conflicting Paradigms

A first general observation is that most scholars embrace, no matter their origin or ideology, the general idea that law shall provide the guide by which wars are to be decided. While it seems to make sense, it also causes a major problem, because it treats law nearly ahistorically, as if the present state of law reflected some sort of ideal state, disregarding the bloody history of the establishment of laws, both domestically and internationally.\textsuperscript{15}

This emphasis on law, meaning whatever law happens to be at the present moment, has obvious weaknesses and has the major flaw of being too static (despite

\textsuperscript{14} This nightmare scenario in the case of global environmental collapse is called “global green fascism.” The alternative is a return to a world of warring nations, as well as the collapse of global trade, and thus of consumption and of environmental impact, thus correcting the growing environmental impact of present world society though at the probable cost of hundreds of millions of lives.

\textsuperscript{15} I will use here for simplicity’s sake the traditional term of international law, though the use of the noun “law” to describe the set of treaties that rule international behavior is misleading, since law requires a legislature, which exists neither internationally nor globally. The terms used in other languages represent reality more accurately: in French “droit international,” in German “internationales Recht,” in Italian “diritto internazionale,” etc. It is unfortunate that the English language, which possesses the world’s largest vocabulary, uses the same term for two totally different concepts, when an accurate understanding of those differences is of vital import to the pursuit of world peace.
lip service to the dynamic nature of the world system, which evolves at glacial speed compared to the evolution of technology and threats). It is as if present law represented the ultimate accomplishment of what is possible, notwithstanding the fact that it may enshrine a previously “unlawful” situation which has only become lawful by the chance of war and history.

This is most obvious in the quasi-universal deference towards the UN Security Council (UN SC), whose composition has nothing to do with the natural law principles which found JWT, but everything to do with the vagaries of force and of victory in war. There is therefore a clear contradiction between the paradigm that undergirds JWT and the paradigm that gave birth to the UN Security Council.

David Kennedy underlines this: “Legality is almost always a matter of more or less, and legal legitimacy is in the eye of the beholder. Indeed, as law has become an ever more important yardstick for legitimacy, legal categories have become far too spongy to permit clear resolution of the most important questions.”16 That is why we cannot hide systematically behind existing international law, but must follow clearly stated principles. Yet many scholars still reflexively hide behind international law, and in practice the UN Security Council, when it comes to determining what that law is, even though they also recognize the inherent shortcomings of the international system.

An extreme view of what I call the absolutist legalistic position is expressed by Jianming Shen, who concludes an article about the principle of non-intervention and the issue of humanitarian intervention under international law by stating that: “both within and outside the context of the United Nations, no state may engage in so-called humanitarian intervention by resorting to the threat or use of force without the Security Council’s authorization” and “The principles of non-intervention and respect for State sovereignty are so fundamental to the maintenance of peace and justice and so inseparable from one another that they constitute jus cogens principles both as a matter of treaty and customary international law.”17

An obvious confusion here is made about the fact that States have no intrinsic purposes but to protect real human beings, and hence their sovereignty is only valid insofar as they protect the sovereignty of their own citizens. In addition, peace and justice are concepts which are irrelevant to “States” as abstract entities but are only valid as to their application to real flesh-and-blood humans. A State is a legal fiction which is composed of and lives for and by the people, for which peace and justice exist or are sought after.

Here we have what is called the New Paradigm, based on human dignity and the sovereignty of the people, in contradiction with the Old Paradigm based on “state dignity” and state sovereignty.18

18 On the face of it, “state dignity” sounds absurd since a state is not a person. But state defenders use that term to justify non-intervention. It is true that some people use the
JWT is obviously based at its roots on the New Paradigm (NP), even though its operational criteria were created using Old Paradigm (OP) concepts, since in practice States are the ones who wage wars (or who have mostly up to the end of the twentieth century). But it is important to always keep in mind the origins of our differing paradigms because the contradiction between differing paradigms in implementing JWT is where many of the problems of interpretation and implementation lie. The conflicting interpretation about UN roles are grounded in such conflicts of paradigms between the stated aim of peace (a NP feature) and the political structure based on States instead of humans (an OP feature). If we systematically tried to apply the NP, we would progress much faster, and much contemporary work in comparative justice, *jus post bello*, etc. is in essence just that, i.e. trying to systematically implement NP principles of human dignity and legitimacy.

So when we speak of law, we should always mean that the only truly legitimate law is not necessarily whatever law happens to exist today (i.e. the UN Charter which enshrines a particular historical outcome), but whatever is compatible with what is commonly considered natural law and the New Paradigm. All descriptions of natural law (whether religious or secular) emphasize the fundamental idea that humans are equal, that they possess equal human dignity etc., so they are a New Paradigm way which is by definition the human dignity-centered paradigm.

A philosophically equivalent way of stating the idea of the New Paradigm is the concept of equal moral regard, used by Jean Bethke Elshtain in her work.19

**Fundamental Axioms**

For clarity’s sake and to avoid the sort of problems that plague contemporary debate about Just War Theory (which is sometimes described as a “moral goulash”20 or as concept at times but this is rooted in old mental habits dating from the time that States were all physically incarnated in a King/Emperor, so the dignity of the King, a person, was identified as and “carried over” to the “dignity” of the State. To see the incongruity of the concept, one only has to apply it to other legal fictions, such as a corporation. No one speaks of the “dignity” of a corporation, even in the worst case when an activist might accuse a corporation of corruption or complicity in murder. Why not? Because we all rightly understand that a company as a legal invention created by humans is not a person and cannot possess dignity, which is a purely human attribute. Dignity is reserved for people, or at most by extension to a specific political position which is occupied by a person (e.g. dignity of the office of the President).


20 Biondi, “Dirty Hands,” 121: “JWT emerges – as the title of the volume indicates – from a specific moral tradition. However, ‘the just war tradition’ encompasses many complex principles, has undergone change over the centuries, and has manifested both religious and secular variants blending deontological and consequentialist approaches.
“the chaos of just war theory”\(^\text{21}\)) and the often contradictory conclusions authors arrive at while using JWT theory, we will state explicitly the assumptions and the theory which will be used: the theory of democracy engineering with its axioms and laws. Here, allow us to remind the reader that an axiom by definition is a statement which one cannot prove, as this will spare us much trouble later.

The often unstated problem in clearly choosing and therefore clearly stating fundamental axioms is that at the very source, one has to either accept a metaphysical foundation, hence which has to be taken on faith, or a physical (i.e. materialistic) foundation, which many people reject instinctively because it leads to the slippery slope of moral relativism and of the justification of the ends by the means.

Part of the problem in JWT is the attempt to ground the theory in some incontrovertible foundation that can somehow be proven from first principles and by a logical chain of reasoning. While principles and logic are necessary, it is impossible to find principles which can be proven absolutely without an act of faith at the very beginning. At root, the most fundamental statements are merely assumptions. No one can “prove” that humans possess dignity (whatever that means), much less that they do so equally. But we assume so because not to do so would leave the door open to the justification of systems based on domination and oppression of one group over another, as has happened throughout history, and of stratified closed societies without freedoms, with different categories of humans, some superior, some inferior.

Traditionally the problem of ultimate authority was solved by reference to religion and scriptures, and recourse to the concept of natural law, without feeling the need to elaborate further. Indeed, since natural law itself is subject to the same impossibility of proof, the use of natural law or of religious references is equivalent to using an arbitrary axiom.

Yet secular philosophers who try to ground JWT in a non-theological context, if they are not extremely clear from the start about this, end up creating circumvoluted and circular references that on the one hand obfuscate and on the other frustrate the very intent of having a JWT theory to start with, i.e. to be able to determine the conditions under which war might be moral.\(^\text{22}\)

We will solve that problem by adopting secular philosophical axioms to guide us, albeit tempered in their potentially absolutist interpretations by a set of pragmatic laws inspired by observations of human nature.

Here are the two fundamental axioms\(^\text{23}\) which we shall assume:

---


\(^{22}\) Khawaja, “Contingent Pacifism,” 107.

\(^{23}\) Readers will recognize that the first axiom finds its source in ancient religious beliefs, in particular Christian beliefs, but that it has been adopted nearly universally as a fundamental political principle, including in the Declaration of Independence of 1776 (“We hold these truths to be self-evident that all men are created equal ...”), in the Déclaration des Droits de l’Homme et du Citoyen of the French Revolution of 1789 (“Les hommes naissent et demeurent libres et égaux en droits.”), in the Universal Declaration
• All humans possess equal human dignity;
• Sovereignty belongs to the people.

The Example of Iraq

How do we proceed to the original problem of creating maximal legitimacy in decisions about war or intervention?

Let us take the concrete example of Iraq in 2002–2003 to illustrate our discussion. Following the embargo and several UN SC resolutions about Iraq, in which the UN took various measures to determine whether Iraq had weapons of mass destruction, the US started to publicly argue for military intervention because diplomacy had “failed,” and tried for more than a year to convince its allies and the world at large that, first, this was the right thing to do (because of the supposed danger of allowing Saddam Hussein to remain in power), and secondly, the legal thing to do (by getting the imprimatur of the UN SC). President Bush even sent his Secretary of State Colin Powell on an (ultimately unsuccessful) whirlwind visit of Arab states to convince them that it was necessary to attack Iraq, and to rally once again a large coalition as had been the case in the first Gulf War in 1991.

The world remained unconvinced, and apart from a few national leaders (most notably from the UK, Spain and Portugal), few agreed to war. Yet independent from what may have been ulterior motives, to have a free democratic government in Iraq is a worthy, even moral aim, since it fulfills both basic axioms: humans who happen to be Iraqi possess the same dignity as any other humans and the Iraqi people are as sovereign as any other people.

Finally, France, a permanent member of the Security Council, objected with its veto,24 so the US retracted the resolution by which it had sought to have UN authorization to attack Iraq. Therefore, according to the UN and standing international law, the Iraq war of 2003 was illegal. But did we really need the UN to tell us that? Was there no better way?

Kofi Annan, then UN Secretary General, stated the obvious according to international law, when he said that the war did not fulfill the requirements of international legality.25 But as we stated before, present international law is not of Human Rights of 1948 where it is the first article, and to give just one example in modern constitutions, in the German Grundgesetz of 1949, the Fundamental Law – chosen because of its solemn beauty – where there too it is the first article: “Article 1 (1) Die Würde des Menschen ist unantastbar” (“Human dignity shall be inviolable,” or literally, “untouchable”).

24 On March 19, 2003, following a memorable speech by Dominique de Villepin, then Foreign Minister of France: http://www.ambafrance-uk.org/Speech-by-M-Dominique-de-Villepin,4917.html.
25 “I have indicated it is not in conformity with the UN Charter, from our point of view and from the Charter point of view it was illegal,” BBC News Interview (September 16, 2004): http://news.bbc.co.uk/2/hi/middle_east/3661640.stm.
The Legitimacy of War

based on fundamental axioms derived from natural law, or on the centrality of human dignity. It is a state-centric system, as is evident from the charter which claims the sovereign equality of States. Note that the legitimacy of UN member States is independent from the consent of their citizens. Therefore the UN is structurally amoral, a superstructure of states which themselves derive their legitimacy not from democratic principles but from the recognition of other states, whether democratic or not. The system itself is based on the historical vagaries of who managed to gain power, since there is no independent standard by which a country is judged to have a “legitimate” government. A state is legitimate if it is recognized by other states. Whether the state being recognized is thuggish, or whether the state doing the recognition is thuggish, has no bearing. Therefore if we seek to find legitimacy in a process which is grounded in our fundamental axioms, we have to look elsewhere than the UN when we think about intervention. Focusing on basic principles possesses a hidden silver lining. It allows us to avoid getting caught up in the power politics of the moment, in pressure politics, in potential corruption, spying, in diplomatic wrangles, etc. In the real case of Iraq, applying this new approach earlier could have reduced by several years the duration of the cruel world embargo which made millions of Iraqis suffer. A truly principled approach does not necessarily waste time, it can make us gain time, as it would have had we followed such an approach in the case of Iraq. A truly principled approach that would have successfully created democracy in Iraq earlier would have helped to resolve other conflicts in the region, and might even have prevented 9/11 and its catastrophic consequences. Thus, acting with principles is not as Realists would have us believe, utopian, but on the contrary, in the real world, often the most pragmatic way to act.

Wavering Principles and a Slippery Slope

Yet the US wavered between a truly principled position of helping an oppressed people (based on some sort of process which we will try to determine), and the position of playing by the amoral rules of the international law system, and therefore the UN. It used the moral rhetoric of getting rid of a tyrant when it spoke to its own public opinion, and more largely to the world, but it got bogged down in the nitty-gritty of UN procedures and lost there despite exerting tremendous diplomatic pressures. The US did not ask the fundamental question: how could intervention in the affairs of Iraq be legitimized in a way that follows the axioms? Or at least, it stopped thinking about the question once it lost the battle inside the UN system.

It then acted unilaterally, because it could, thus following the principle that Might makes Right, which of course must be rejected as a normative principle and

26 Article 2, section 1 of the UN Charter: “The Organization is based on the principle of the sovereign equality of all its Members.”
is incompatible with our axioms (since if all men possess equal dignity, that is contradictory with my imposing my will by force on a fellow human being). Yet, had it understood that the UN as such does not provide any intrinsic legitimacy since it itself is not based on our axioms, it would have gained time and could have implemented a truly efficient strategy. The US did make efforts to justify war using at least one of the traditional arguments of JWT, which is self-defense. To that end, it stretched and sometimes fabricated evidence, made claims that proved to be wrong (the presence of WMDs, Blair’s assertion that Saddam Hussein could launch a WMD attack within 20–45 minutes of ordering it, the assertion of cooperation with Al-Qaeda, the emotional use of images of a mushroom cloud over an American city, etc.).

The US administration argued throughout that the old rules did not apply anymore because of the changed circumstances, and that therefore, preemptive measures, including preemptive war, were necessary. This disregarded the fact that an official doctrine of preemptive war is the ultimate slippery slope. Anyone wishing to convince himself of the necessity of going to war could argue that if he does not do it right away, his neighbor will attack before he does and that then it will be too late. If the US was allowed to successfully defend such a theory of preemptive war in the case of Iraq, which is thousands of kilometers away and had no means to attack the US, then what would prevent India or Pakistan, who share an unstable border, who have already had several wars, and who both officially possess nuclear weapons, from using the same justification? Either country would be on much stronger grounds to justify an all-out preemptive attack on its neighbor than the US was in attacking Iraq which shares no borders with the US, has never attacked the US before and has no nuclear weapons.

Yet comments from JWT experts and from the Catholic Church made clear at the time that this justification of the decision to go to war could not be used in this case, as there was no proven clear danger of imminent attack from Iraq on the US. Yet the argument of the US that Iraq may enable a proxy attack by terrorists is a strong one, so what to do?

**Diplomatic “Oxygen” and Who Legitimately Represents Iraq?**

But all this is ultimately irrelevant if you adopt a principled approach based on our axioms, since the legitimacy for action does not rest anymore on uncertainties, but on the sound assumption of equal human dignity which does not change from day to day. Let us assume we are in the summer of 2002. Ideally, how do we justify intervention in Iraq? According to our principles, the Iraqi people are sovereign, and have the right to decide their political destiny, yet the President of Iraq is a murderous dictator. No one can decide for the people of Iraq but the people of Iraq. But what to do if they cannot express themselves?

The problem is the following: who legitimately represents Iraq? In the present world order based on States rather than people, of which the UN is the epitome,
Saddam is legitimate as long as he is recognized by other States as being the legitimate ruler. Whether he kills his own people is irrelevant. In theory, it would be easy to get rid of him, since his only legitimacy derives from the recognition from other States: simply stop recognizing him as the legitimate authority of Iraq and his legitimacy falls to zero. This is equivalent to withdrawing the diplomatic “oxygen” without which no government can survive for long. But that is also the atomic bomb of diplomacy, since once you have done that, you cannot deal with the government anymore, since doing so would legitimize them again. You might talk to them as the police talk to gangsters or to terrorists who have taken people hostage, but that is all. That is also the reason why this solution is only ever used by diplomats just prior to a war, but even that is unusual. And this only works if everyone does it, if all States withdraw the “oxygen,” but since a majority of States worldwide is not considered democratic, they don’t have any incentive to stop recognizing one of their own.

Competing Legitimacies

But the dynamics of the problem would be completely changed, and much simpler for diplomats, if there were a choice, i.e. if Saddam’s government was not the sole government claiming legitimacy. If somehow there could be another government, a more democratic one that would compete for the claim of legitimacy, then countries of the world would be forced to choose, since it is impossible to recognize more than one government at a time. Hence the problem becomes one of creating a more legitimate competing government than Saddam’s, then convincing the world’s countries to transfer their recognition from Saddam’s government to the new government. This is a tall order, but it is possible. At least, it is something that is better than war, and since war is the last resort, we have a moral duty to try this line of attack. Remember we saw previously that the cost of war is not just the immense direct suffering and trillions spent, but also the still incalculable opportunity cost of not cooperating to solve truly dire global problems.

We also have to remember a fact that makes that idea quite plausible: global public opinion was strongly against the war, and even those in favor of the war were not for war because it was their first choice, but because they believed that there was no other way. Unfortunately no surveys were made at the time, but one can easily imagine that had people been asked in 2002 the following question (assuming the existence of two Iraqi governments, one provisional democratic one and the one in power in Baghdad): “Do you believe that our country should stop recognizing the regime of Saddam Hussein and recognize the provisional democratic government of Iraq?”, the overwhelming majority, well aware of preparations for war, would have agreed. Thus even countries which might be reluctant to recognize a novice government out of power because of Realpolitik considerations might be compelled by their war-adverse public opinions to do so.
Since Saddam was in power and did not allow democratic elections, that government could not, of course, sit in Baghdad. It must be located elsewhere. Where? In theory it could be anywhere, and examples of governments in exile are well known, like the Polish government in London during WWII. In practice, it would be better if it were on some portion of Iraqi territory, and this was possible as at the time Saddam’s air force was forbidden to fly north of the 36th parallel by the imposition of the Northern No-Fly Zone enforced by the US and Great Britain. Thus the Kurdish region of Iraq was a possible location.

Let us first assume this democratic government existed; how might it solve the problem of the legitimacy of war in Iraq? Let us also assume that this government was trusted by global public opinion as being as democratic as possible under the circumstances. We will see later the practical question of how to create it.

A Plausible Political Scenario: How to Avoid a Unilateral Illegal War

Call the alternative government the Transitional Democratic Iraqi Government (TDIG), and the one in power Saddam’s government (SG). Here a plausible political scenario: the TDIG publicly denounces the SG, declares to the world, via TV, internet, etc. that it is the legitimate government of Iraq, and calls upon Saddam to step down, promising him a fair trial. If he accepts, game over. But he would probably refuse, so the TDIG calls publicly for all officials in the Iraqi government to arrest Saddam, arguing that he is no longer the rightful head of Iraq, is an impostor and is usurping power illegally. The provisional leader of the TDIG can even call the individuals around Saddam by name, ordering them publicly via the media to arrest Saddam. Knowing the psychology of Saddam, who imprisoned or executed anyone far and wide whom he thought might become a threat to him, this would destabilize him, because he would become even more paranoid and trust even fewer people. The TDIG leader would publicly promise great rewards to the man or men arresting Saddam, in effect putting a bounty on his head. Would this threat to Saddam matter at all? Yes, because of the real situation on the ground, with American forces at the ready. Remember this is an example in the real-world situation of 2002–2003, not an ideal model applicable in all circumstances. But even if US forces were not in the Gulf, the threat could be credible. Then if Saddam still did not step down voluntarily and no one arrested or killed him, then the TDIG would issue an ultimatum, backed by the threat of the intervention of its allies. This threat would be made publicly, so as to constantly remind people of the openness of the process. But the key point is that intervention would not occur unless there were a specific request from the TDIG, which, we must remember, at that point is the most representative government of Iraq.

Therefore, in the very worst case, war would still occur, but we would not have a unilateral and illegal war, but a war between two governments competing
The Legitimacy of War

for the same State. If the US then invaded Iraq at the request of one of the
governments, legally it would be a government calling another government for
help, not a unilateral decision. In that way, one prevents the dangerous precedent
of preemptive war and its disastrous consequences for the world. Coming to the
help of someone else is allowed under natural law or international law. War would
have proceeded as it did, for about a month, but the most important outcome
would have been that instead of a foreign occupation, Iraq would immediately
have had an indigenous government. That more than anything would have been
the key historical deal-changer. Before going on, note that the very existence of an
alternative government would probably have shortened the already short war, as it
would have encouraged officials, commanders, soldiers, etc. to switch allegiances
as progress was made. This is a practical application of the hypothesis we stated at
the beginning that increasing legitimacy raises the chances of success, to the point
that it becomes irrelevant to even abstractly consider chances of success if maximal
legitimacy is achieved (except in very rare cases).

Allow us to recapitulate where we are before moving on. Either Saddam stepped
down, was arrested, was killed by someone close, or lost a war. In all cases:

• unilateral war and what some call a war of aggression is avoided;
• the disastrous precedent of preemptive war is avoided;
• most importantly, occupation by foreign powers is avoided, which means
  that we can actually take advantage of the short honeymoon created by the
  fall of Saddam;
• the TDIG can push through unprecedented political reforms and
  compromises because it is composed of representatives of all segments of
  societies, and personal bonds were forged in the adversity of the process of
  replacing Saddam, thus creating the precious personal and political capital
  that is needed to govern a fractious country;
• we reduce the risk of foreign elements, especially ideological ones like
  Al-Qaeda, from streaming into Iraq and getting support from the local
  population;
• security is better, so we can focus on reconstruction faster and get it done
  cheaper, get results faster too, increase the wellbeing of the general public,
  therefore improving security etc., creating a virtuous circle;
• we have lesser overall levels of violence, allowing a more serene political
  process on the one hand, and on the other a more serene judicial process;
• and we can take advantage of the short window of political flux to have an
  unprecedented democratic constitution-making process.

Finally, the benefit side for the helping (rather than invading) power, the USA, is
also tremendous:

• it gains precious time and avoids political squabbles with allies and non-allies
  since it does not have to spend time convincing them go to war unilaterally or
to vote in favor of it at the UN, while at the same time avoiding “making the
UN irrelevant” as was often claimed at the time (since the US went ahead in spite of the lack of explicit UN SC authorization);

- it avoids ridiculing itself by using false information (like the information Colin Powell presented to the UN SC to try to justify the invasion of Iraq);
- it avoids the sterile bureaucratic debates about which excuse is best to support going to war;
- it saves the lives of many of its soldiers;
- it avoids the polarization of politics back home;
- it avoids the tremendous expenditures caused by the war, thereby reducing public debt and the deficit, and reducing the risks of later financial crises;
- it reduces the corruption caused by such huge military expenditures and no-bid or “cost-plus” contracts;
- it reduces the trend toward the privatization of defense in the USA, the use of private contractors and mercenaries, and reduces the global growth of the private army sector;
- and maybe most importantly for the US public, it allows the US to focus on their number one enemy, Osama Bin-Laden and Al-Qaeda, instead of being distracted in the sands of Iraq.

And since the USA would have been asked to help, it would not have needed any coalition partners (since they were only needed to provide a fig leaf of legitimacy), it would not have had to resort to pressure, bribery, etc. to get such allies, and it would have gained time and money here too. No other country would have lost soldiers in Iraq.

All in all, the chances of creating a virtuous circle where an indigenous transitional government takes charge and then creates Phase Two of the process are increased. Phase Two repeats the process which we will now describe: democratic constitution-making, meaning the design and implementation of a democratic and participative process to create a constitution and a government.

An Iterative Democratic Constitutional Process

The overall process of creating a transitional democratic government, demanding Saddam Hussein step down, if necessary calling in allied governments to oust him by force, assuming power and finally creating a democratic government with the entire nation of Iraq can be called “preemptive democracy” as opposed

---

27 Professor Vivien Hart of the University of Sussex has independently described precedents for and examples of democratic constitution-making in Special Report 107, July 2003, of the US Institute of Peace: http://www.usip.org/resources/democratic-constitution-making.

28 Not to be confused with another (negative) connotation of the expression used to describe oligarchic tendencies in deliberative democratic processes.
to preemptive war. Of course, the actual details of this process determine the probability of success. The process described below is specific to Iraq and the very real historical circumstances of that time, and could not necessarily be used as such in other situations. Situations are unique even if some general principles apply.

The key factor of success is the actual and perceived legitimacy of the original competing government: the transitional government must be trusted by global public opinion as being the most legitimate possible government under the circumstances. How would that happen? It would have to be seen as the most democratic government possible. How can we create that government?

The general idea is to use an iterative democratic process, an open and transparent constitutional process, that involves as many people as possible under the circumstances of the time, and that culminates in a final democratic constitution-making process and democratic elections in Iraq under the authority of the previous transitional government.

Creating a democratic government when a dictator is in power is not easy. Once again, specific historical circumstances of Iraq made it possible. Saddam Hussein had over the years alienated nearly every group in Iraq, had driven out people from all ethnic and religious backgrounds, including Sunni generals who sometimes barely escaped with their lives because Saddam believed that they were a threat to his absolute power. Millions of Iraqis lived abroad, representing all segments of society, all united by their fear of Saddam, and by at least a nominal and public commitment to working towards a democratic and often federal Iraq. We saw how we needed to create a Transitional Democratic Iraqi Government to actually take on Saddam Hussein with the most potent of weapons: the weapon of legitimacy.

To create that legitimacy, we suggest that the Iraqis outside of Saddam’s direct control, i.e. the worldwide diaspora, possibly with the Iraqis in the No Fly Zones, should have implemented a transparent constitutional process to decide upon a provisional constitution and a transitional government. That process would have lasted several months, under the watchful eyes of the world media, and therefore global public opinion. It would thus have a pedagogic impact as well on the region, doing more for democrats and democracy in other Arab countries than any military adventure could. Iraq had a complicated constitutional history in the twentieth century and we could spend much time discussing it. But this is beyond the scope of this chapter.

The most difficult part of the process would have been the initial selection of the members of the constitutional assembly. The main criterion is that the Assembly possess maximal credibility, meaning that all groups should be represented. The suggested number of representatives is between 300 and 400 people, enough to have wide representation, while still a manageable number.

The new constitution would have been negotiated openly, under the glare of the media. One can imagine the huge media attention given to a group of Iraqi men and women of all political persuasions, ethnic and religious groups, meeting and discussing fundamental questions of basic rights, women's rights, the place of Islam, the issue of federalism, the distribution of power, etc. It is likely that accredited journalists would have outnumbered the constitutional representatives.
Such a public display of political discussion and courage would have been the most riveting political reality show, possibly drawing hundreds of millions of viewers across the world, mostly in Arab countries via Al-Jazeera, Al-Arabiya, and national satellite channels. That in itself would have deflated anti-democracy propaganda from Islamist extremists who brand democracy an evil Western import.

While Saddam would have surely tried to prevent this from happening, including by force, it would have been justified for other countries to provide security. The cost of such security, and of the conference itself, pales in comparison to the huge gain in legitimacy. Hence such expenditure on a transparent political process provides the highest return on investment in terms of later savings in reduced warfare, etc. But the presence of journalists from all over the world and the daily broadcast of proceedings would have been the best protection, as Saddam would have been totally discredited even among his last allies if he acted violently against a peaceful assembly speaking about democracy under the eyes of the world.

It is not better not to go into much detail, since pragmatism dictates the humility of deciding as one goes along and being flexible in managing the process. We have come full circle, by using our axioms centered on human dignity to design maximally legitimate institutions, and therefore reduce as much as possible the risk of war, but if war happens, to ensure that it is legitimate. Thus, we have described another sort of moral war apart from the well known moral wars of self-defense, a war that might be called a war of self-liberation, called as last resort by the people against the tyrant that oppresses it. The validity of this approach is dependent on the existence of mass media hungry enough for novel approaches that by broadcasting far and wide the proceedings, they are least likely to be hijacked by hidden interests. This was absolutely the case for Iraq in 2002.

Midwives of Democracy: A New Profession?

This brings us to one last consideration: how do we maximize legitimacy? How can such processes start? How can they keep their integrity? How do we prevent the participants from falling back into bad old habits? How to minimize the risk of manipulation, or simply errors? To whom can people turn for help in starting such processes? The usual sources, governments and NGOs, do not necessarily have the requisite expertise, but even if they did, there would always be the suspicion that they may possess some ulterior or hidden motives, political, economic, strategic, diplomatic, etc. Since NGOs are mostly funded by governments, and since they have been largely instrumentalized by governments, especially since the Iraq war, they have unfortunately collectively lost much credibility, and the number of murders of humanitarian personnel has rapidly risen in the last few years.

Maybe the solution is to use the power of competition and of free-market principles, and invent a new profession of “midwives of democracy,” independent consultants, like high-level coaches for athletes, who would provide democracy services to anyone wishing to hire them. Such “democracy engineers” would
specialize in designing and implementing with relevant stakeholders maximally legitimate processes. Independent democracy engineers, beholden only to their professional pride in designing and implementing democratic solutions to political problems, would help people find their own solutions.

Just as war spawned an entire class of professional “war-makers” thousands of years ago, maybe it is time to spawn a new profession of democratic peacemakers. The founders of JWT, nearly all theologians, would probably have appreciated the concept.
This page has been left blank intentionally