

The Costs of War

International Law, the UN, and
World Order after Iraq

Richard Falk

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For Hilal

Life partner in love and all else that matters

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Acknowledgments

Most of my professional life has involved a struggle with political realists who viewed the world through a prism of power, with morality and legality assigned to the outer margins of policy and decision. It has also led to tensions with many in the international law community who shared this realist vision, although often calling themselves liberals due to their abstract enthusiasm for international law and the United Nations. Concretely, for such liberals this meant accepting a subordinate role for law and the authority of the UN Charter when it came to matters of war and peace engaging the United States. The debates surrounding the lawfulness of the Vietnam War was the most illuminating test of this fundamental normative tension, and was the maturing moment for my own approach to world order.

With the rise of the neoconservatives to governmental ascendancy in this country, especially in the period following the 9/11 attacks, the locus of debate and concern has moved so far to the right as to make me feel unexpectedly nostalgic about the good old days when the primacy of realism shaped American foreign policy. At least realists acknowledged the limits of power, and prided themselves on the geopolitical virtue of prudence, regarding their main undertaking the maintenance of countervailing military capabilities with the goal of *avoiding* war. In contrast, neoconservatives conceived of their mission as the global spread of American values, expressed to be sure in self-serving terms relating to the interests of big business, military dominance, and energy geopolitics, with centrality accorded to unilateral war making conceived as a necessary and appropriate enterprise. International law was treated as irrelevant, indeed law in general was so treated, with limitless and supposedly unaccountable power to play the security card allegedly vested in a post-9/11 wartime presidency of imperial pretensions. While law was made irrelevant, lawyers were not. Lawyers of neoconservative persuasion twisted and turned respected constraints of law to such an extent as to shock even the hardened sensibilities of realists, and to make

liberals previously compliant with the ways of the power into radical critics of government policy.

It is against such a background that this book looks at international law and UN authority in the twenty-first century within the context of the American debate on security policy after 9/11. In fundamental respects, my central argument is that historical circumstances, correctly interpreted, are such as to reverse relations between power and law, making adherence to international law the most reliable discipline for the exercise of power even if the dominant criterion for policymakers is the pursuit of national interests. Such a view is especially persuasive in the current global setting where American power is unchecked by countervailing power, but is still subject to the sorts of resistance that makes its use productive of national ordeals (such as Iraq) rather than occasions of political and military victory. In short, geopolitical wisdom in this new century counsels a law-oriented foreign policy for the United States. This is the main message of this book.

The writings in this volume are anchored in responses to the somewhat contradictory challenges posed by the Kosovo War in 1999 and the Iraq War that started in 2003. Most of the chapters draw on previously published material written during the first years of this new century. There is some overlap because of the attention given to these two wars from a variety of perspectives. No undertaking of this sort would be possible without the support, insight, and inspiration of colleagues throughout the world. I want to acknowledge and thank only those few who were particularly influential in this recent period: Georges Abi-Saab, Asli Bali, Upendra Baxi, Amy Bartholomew, Alison Brysk, Hilary Charlesworth, Fred Dallmayr, Ahmet Davutoglu, Michael Doyle, Howard Friel, David Ray Griffin, Irene Gendzier, Stephen Gill, Mary Kaldor, David Krieger, Lisa Hajjar, Robert Jay Lifton, Saul Mendlovitz, Chandra Muzaffar, Balakrishnan Rajagopal, Amin Saikal, Andrew Strauss, Rob Walker, Paul Wapner, and Burns Weston.

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Finally, my wife, Hilal, to whom this book is happily dedicated, has shared all of these concerns with grace and humor, while making me feel more than

ever that life is a sacred gift and that the future needs to be preserved for the sake of our precious children and grandchildren, and for the benefit of the born and unborn peoples of the world. It will take more than law and morality, but it cannot be done without a dramatic deepening of this collective normative consciousness of humanity.

Introduction

By now there are many valuable books about the Iraq War. There are several excellent accounts of how and why the United States government decided to invade Iraq, including Tom Ricks's *Fiasco: The American Military Adventure in Iraq* (2006) and the Woodward bestsellers, *Plan of Attack* (2004) and *State of Denial* (2006). There are also some convincing books on how and why to get out. One of the best written from an antiwar perspective is Arnold Arnove's *Iraq: The Logic of Withdrawal* (updated 2007). A more mainstream set of proposals aimed at ending the war was published under the title of *The Iraq Study Group Report* (2006). It was the work of a bipartisan commission of eminent persons chaired by James Baker and Lee Hamilton.

Far less attention has been devoted to the normative costs of the Iraq War. We do have several studies written from the perspective of international law, including the highly readable *Lawless World*, by Philippe Sand. But there is little in print on the broader costs to world order that are associated with the Iraq War, and more generally an evaluation of the neoconservative blueprint for U.S. foreign policy from the perspectives of world order. Despite all that has gone wrong in Iraq, the neoconservative "fix" seems to involve "staying the course" in Iraq, and possibly expanding the war zone to include Iran and maybe Syria and Lebanon. So far, despite the opportunity for a graceful reversal of policy in Iraq provided by the Baker–Hamilton report, President Bush has given every sign of keeping faith with the now wildly unpopular neoconservative game plan. Its latest phase, announced early in 2007, combines a "surge" of troop strength in Iraq, especially Baghdad, and an escalation of war talk relating to Iran.

This book's main concerns relate to the fraying of world order: the weakening of international law and international morality; the eroding of the authority of the United Nations; the disappearance of respect for and the legitimacy of American global leadership on matters pertaining to the global public good (e.g., global warming). Beyond critique is an implicit argument that respect for

international law matters more and more in our globalizing world, which is experiencing growing pressure to make fundamental behavioral adjustments. I also believe that strict adherence to the guidelines of international law, especially with respect to war, serve the national interest in the twenty-first century, and definitely the human interest as well. The guidance of law in any political setting can never be treated as absolute, but in relation to international law, departures should be convincingly justified by special facts and sustained by principled reasoning without any reliance on deceptive manipulation of intelligence reports.

Among the many disturbing features of the Iraq experience has been the absence of debate on these facets of American foreign policy. The American people, with eyes wide closed, passively stood by watching the decisions to wage aggressive war against Iraq take shape during 2002 and the first months of 2003. The media, including its most trusted organs of news and editorial opinion, basically orchestrated support for the war, seriously questioning only issues of cost and feasibility. The cautionary lessons of Vietnam were completely ignored. The lingering trauma of 9/11 was allowed to make the Iraq War into a street-corner shell game with no one daring to look at the emptiness underneath the counterterrorist card. War was undertaken in violation of international law and the United Nations Charter, in defiance of world public opinion, and without a proper mandate as required by the U.S. Constitution. It was precisely recourse to aggressive war of this character that was punished at the Nuremberg Judgment after World War II, and declared the supreme crime in international law as well as constituting the core commitment of the UN Charter.

But times have changed. The instrument of war was cut loose from a legal net of constraints. The United States government situated its policy choices relating to the use of international force in a realm above law. Mainstream opinion followed rather blindly. Such respected journalistic voices lent their support. Tom Friedman influentially endorsed an attack on Iraq as an example of what he called “wars of choice,” which were to be distinguished from “wars of necessity,” defensive wars impelled by an enemy attack. Although such voices have been temporarily muted by the failure of the Iraq undertaking, similar arguments are again being made, this time with Iran in the gun sights, by such hardcore neoconservatives as William Kristol and their academic henchmen such as Bernard Lewis. And once more the only arguments against such war that reach the general public address consequential concerns about Iran’s retaliatory options and the extent to which the United States can bear the financial and military burdens of an expanding war zone. There seems surprisingly little willingness to ask whether recourse to war against Iran is consistent with international law and morality. The argument of this book is that the exclusion of these normative objections from debate and decision diminishes the quality of American democracy, undermines American legitimacy on the global level, and makes hypocritical American promotion of

the rule of law for foreign societies. Additionally such war talk implicitly advocates killing others without weighing the human costs of war.

A young U.S. Army officer, Lt. Ehren Watada, refused in 2006 to be deployed in Iraq, and was prosecuted under the Uniform Code of Military Justice for deliberately missing the order to deploy (Art. 88) and, by making public antiwar comments, for conduct unbecoming an officer and a gentleman (Art. 133). In the court-martial proceeding held at Fort Lewis in the State of Washington, Lt. Watada's attempt to present testimony that supported the reasonableness of his belief that the war was illegal was disallowed, as was any judicial consideration of his claim that speaking in public against the war was within his rights to free speech as an American citizen. Such penal charges confronted this military officer, and indirectly all military personnel, with a dilemma. According to the Field Manual 27-10 that governs behavior of members of the Army, an aggressive war is a Crime Against Peace (Art. 498), and military personnel are instructed to realize in this setting that "members of the armed forces are bound only to obey lawful orders." (Art. 509(b), with reference to Art. 92). Whatever Lt. Watada might have done, he would be in violation of the law: either he engages in the Iraq War and knowingly contributes to what he believes to be an illegal war of aggression, or he refuses such an unlawful order and faces punishment for disobedience. This puts Lt. Watada deep in Catch-22 territory.

One finds greater receptivity to the role of international law and the authority of the United Nations among the leading European countries, with the partial exception of Britain. The European Union has itself emerged as a zone of peace in which the member countries seem highly unlikely to consider war as a suitable remedy for any regional dispute. Such a culture of peace has emerged only after centuries of recurrent and devastating warfare. But even Europe, while skeptical about the merits of the Iraq War, is reluctant to insist on the implementation of international law or the Nuremberg Principles in relation to the Iraq War. Only the mobilized forces of civil society seem to be moving toward a genuine commitment that points an accusatory finger at the leadership of the United States and Great Britain. On February 15, 2003, demonstrations of eleven million against the Iraq War were held in some eighty countries. Never before in history had there been such a massive outcry from all corners of the planet to stave off an impending war, but it was to no avail. After the onset of the war, a worldwide set of civil-society initiatives investigated allegations that the Iraq War was an illegal war of aggression and that its architects and perpetrators were criminally accountable. Some twenty separate events were organized in a variety of countries, and the overall endeavor became known as "the tribunal movement." The culminating expression of this movement was the World Tribunal on Iraq held in Istanbul during June 2005. The Declaration of Conscience issued by the tribunal clearly concluded that the American attack on Iraq was a war of aggression and

that individuals and organizations associated with the war, including during its occupation phase, were indictable for war crimes and Crimes Against Peace.

These peoples' tribunals found it particularly dispiriting that even moderate states and the United Nations have maintained a stony silence while the most basic norm of international law is flagrantly violated and a member state is devastated in the course of an unlawful occupation that has unleashed a deadly civil war already responsible for civilian deaths numbering at least 100,000 in Iraq, as well as many more wounded and displaced.

This book argues that we need to appreciate the normative costs of this silence, and that as citizens of democratic societies we have a duty to speak and act, and to insist that elected leaders follow international law in foreign policy or face the consequences of their criminality. An elite, bipartisan political culture in this country resists such an argument and effectively relegates concerns of law and morality to domestic political life or considers such normative arguments as tools sometimes useful for mounting propaganda campaigns against foreign enemies. It is acceptable to criticize foreign policy in public as mistaken or as tragic, but not to contend that it is illegal and criminal. If atrocities come to the surface, as has occurred in Iraq, high-level efforts are made to contain the damage. It is treated as a public relations problem. At most, low-ranking military officials, the supposed "bad apples" of Abu Ghraib, will be singled out for prosecution, while their leaders will continue to be treated as honorable men and women who, even if responsible, should be granted impunity given their service to the country. President Bush's reelection in 2004 was interpreted by many observers around the world as an expression of approval by the citizenry of America for the excesses of Abu Ghraib and Guantanamo. Perhaps such a perception is unfair or exaggerated, but it does illuminate the unwillingness of the leadership cadre in this country to regard U.S. foreign policy as subject to the constraints of international law in relation to issues of war and peace. And so long as that unwillingness is unchallenged, the situation will persist, especially given the huge investment in maintaining an American military presence of global scope, with navies on every ocean, with foreign bases in as many as sixty countries, with control of the entire earth from space a strategic priority, and the entire structure sustained by a powerful military-industrial-academic establishment. It never occurs to such elite institutions as the Council on Foreign Relations to question American foreign policy on grounds of international law and morality, but only to argue about the costs of policy or whether a given course of action can be sold to the American public. Such blinders on discourse are signs of pervasive civilizational decadence at the highest levels of society.

This set of circumstances is not new, but it was definitely aggravated by the end of the Cold War and the associated collapse of the Soviet Union. The United States emerged from the long ideological and geopolitical struggle as undeterred,

robust economically, dominant militarily, and psychologically confident. The absence of a countervailing power might have prompted the U.S. government to urge disarmament and other moves to strengthen global governance under the auspices of regional organizations and the United Nations. But instead American leadership mainly promoted an expansive economic mood in the 1990s that focused on spreading the neoliberal gospel to all corners of the earth as “the only game in town.” Behind the emphasis on trade and investment existed a seductive temptation to administer global security from a Washington headquarters. This project was launched somewhat diffidently during the 1990s, lacking sufficient military vigor to satisfy neoconservative zealots. With the election of George W. Bush and 9/11, the climate suddenly became supportive of this global dominance project, rather explicitly set forth in the authoritative document *National Security Strategy of the United States of America*, issued by the White House in 2002, updated in 2006. This document makes clear that international law and the United Nations were only useful to the extent that they could be used to promote these grand strategy objectives. This essentially means that international law and the United Nations are not allowed to limit American discretion, but are to be used to stigmatize enemies and to lend normative weight to whatever the United States undertakes.

This situation of unresponsiveness to law is not likely to change rapidly. Even if the occupation of Iraq is brought to an end and war with Iran is averted, there is no basis for confidence that future leaders of the United States will conceive of American power as constrained by international law and respect for the United Nations. But without such constraints and respect, the United States government is unlikely to rethink its militarist approach to world order, which is likely in the future as in the past to induce extremely wasteful and self-destructive foreign policy initiatives. Such a pessimistic understanding, if correct, means more illegal warfare in the future, as well as a continuation of an overinvestment in the military phases of security and a potentially catastrophic underinvestment in the urgent imperatives of human security (including climate change, alternative energy, disease control). If change is to come about, it will require the cracking of the elite culture, including its bureaucratic hold on what Peter Dale Scott calls “the deep politics” of the state. It will involve struggle and political education. It will depend on the example and awakening impact of many brave individuals like Lt. Ehren Watada. It may require courts in other countries to call American policies into account under the rubric of universal jurisdiction — namely, that Crimes Against Peace and Crimes Against Humanity are indictable and punishable wherever and whenever they occur. As with many struggles against dysfunctional practices and outlooks, the prospects do not now look favorable, but history has a cunning that eludes human comprehension. No one expected the abolition of slavery, the overthrow of colonialism, the end of Soviet oppression,

the overcoming of South Africa's racist regime, when such movements were launched by lonely individuals who most often were ignored or punished until their sun rose and suddenly their roles were appreciated, then celebrated. Nelson Mandela embodies that path that led from prolonged imprisonment to the pinnacles of political eminence and public moral authority. The way forward may seem blocked today, but it is not an option to be discouraged.

The quality of world order at this stage of history is largely determined by the effectiveness of the rule of law with respect to the most powerful political actors. As there can be no enforcement against these actors, the effectiveness of law depends on patterns of voluntary adherence, especially by dominant sovereign states. As matters now stand, the positive law is itself deformed by the extent that it incorporates exemptions and exhibits practice tainted by double standards. The basic criterion of legality for any political order is the equal treatment of equals. The UN Charter, and even more, the primacy of geopolitics in controlling UN practice, by the veto power given to the permanent members of the Security Council and by its unwillingness and inability to move against major states, summarizes the current weakness of the rule of law. Nothing better exemplifies this anachronistic geopolitical logic than the so-called "war on terror." Similarly, the selective implementation of the Non-Proliferation Treaty regime, allowing some countries to retain nuclear weapons while others are precluded, is a tribute to inequality, accentuated by the degree to which the nuclear weapons states ignore their obligation to seek nuclear disarmament in good faith and defy an Advisory Opinion of the International Court of Justice that unanimously endorses such a legal duty. The Iraq War and the coercive diplomacy being used against Iran express the continuing erosion of world order reflecting the priorities of a lawless geopolitics. As this book argues, such lawlessness has become dysfunctional, imperiling even the civilizational and survival prospects of the human species. Recognizing this dysfunction and making suitable adjustments are, as yet, an unacknowledged challenge that makes the deepening crisis of global governance seem impossible to resolve.

This is a time when realism and idealism are increasingly fused in their call for a future world order based on law and justice, but this cannot be made to happen without the engagement of the peoples of the earth acting as detribalized citizens without borders. In a globalizing world, experiencing acute ecological stress, no political actor, including those individuals who act on its behalf, should be above the law. We who are citizens of the United States have a special responsibility to make our leaders accountable to international law and the authority of the United Nations for our own sake and for the sake of others around the world currently victimized by American lawlessness.