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Introduction

Let me begin by stating clearly and unequivocally that preemption in the use of force is neither illegal nor unethical per se. An analysis of a concrete case in terms of norms – both legal and ethical – will be the basis of such a determination. That position may be problematic for some, but for many others what may be much more problematic is an assertion that preemption that is not for the purposes of self-defense is neither illegal nor unethical per se. That is, preemption, the use of force against a sovereign state by another state or set of states, for humanitarian reasons is neither illegal nor immoral. Again, what will determine the illegality or the unethical character of the act will be the way in which the analysis of a case conforms with certain legal and ethical norms. Before getting into those legal and ethical norms, and the case study of Iraq in terms of them, let me begin with a prolegomena that puts the argument within a larger philosophical context.

Philosophical Premises

It is possible for any action to be: 1) both legal and ethical; 2) illegal but ethical; 3) legal but unethical; 4) both illegal and unethical. The Korean and Gulf Wars were both legal and ethical. The Soviet invasions of Hungary in 1957 and of Czechoslovakia in 1968 were both illegal and unethical. The Soviet invasion of Afghanistan, however, was legal but unethical as, I believe, was the American war in Vietnam. On the other hand, I would argue that the Kosovo war was illegal but ethical. So there are actual cases that I would argue that fall within each of the four possibilities.

I think the Iraq war initiated by the United States was legal but unethical, or, at least, a reasonable though perhaps weak case can be made for its legality. I think the United States and its allies could have conducted a preemptive war that would have been ethical whether or not it was legal or illegal. Further, I argue that though it could have acted preemptively on ethical though perhaps illegal grounds, at this time it should not have done so. Since this case very much depends on differentiating and relating law and ethics, I must begin there.

Now if one is a realist in terms of international political theory, ethical considerations are either irrelevant or the only actions that are ethical are ones governed by national interests. Further, the only international laws of any relevance are those laws that also serve state interests. Thus, law and ethics can never be incongruent. Actions are both legal and ethical when they serve state interests. Realism would rule out my claims to the use of force being either legal but unethical or illegal but ethical in advance.

But so too would pure idealism. From the idealist point of view, international law is simply one expression of ethics. Just as in realism, there is no radical distinction between legal and ethical norms; legal norms express ethical norms.

2 This essay is primarily about intervention in its extreme form as the direct use of coercive force (as distinct from sanctions, covert action, or logistic support for rebel forces) by one state or set of states against another sovereign state; in humanitarian intervention, the primary rationale (as distinct from motive) for that intervention is for the benefit of the citizens of the state in which the intervention takes place rather than primarily for the benefit of the members of one’s own state or states.
3 For essays arguing that the intervention was both illegal and unethical, cf. Lessons of Kosovo: The Dangers of Humanitarian Intervention, ed. Aleksandar Jokic (Broadview Press, Peterborough, ON, 2003), and the essay in the companion volume by Burleigh Wilkins, “Humanitarian Intervention: Some Doubts” in Humanitarian Intervention: Moral and Philosophical Issues, ed. Aleksandar Jokic (Broadview Press, Peterborough, ON, 2003). Wilkins takes the radical view that the duty of non-intervention, not just in the Kosovo case, is “a moral duty binding upon all states.” (p. 42)
4 “There are two separate, but connected, sets of questions…One is about what the legal status should be of war, revolution, and humanitarian intervention. The other is concerned with the moral status of those actions.” Anthony Ellis, “War, Revolution, and Humanitarian Intervention,” in Aleksandar Jokic, Humanitarian Intervention: Moral and Philosophical Issues, Peterborough, ON: Broadview Press, 2003, 17. I use ‘ethics’ where many authors use “morals” without taking the time in this essay to explicate the reasons for the choice of terminology.
Therefore, just as realism rules out the position I take that a war can be assessed as legal but unethical or illegal but ethical, so does pure idealism.

Clearly these are not adequate explications of those positions. However, I merely depict them to make the point that the philosophical grounds for the use of force as ethical but illegal or legal but unethical requires that one can neither be simply a realist or an idealist if one takes such a position. The theory justifying humanitarian intervention (as distinct from non-humanitarian intervention) that I have been working on for over a decade has been called either pragmatic idealism or moral realism and depends on avoiding either reductionism in which ethics are assessed independently of interests or where interests alone are used to evaluate the appropriateness of the use of force against another state.

The former depends on an instrumental approach to the problem in which, in the search among different sets of principles on which to justify the use of force against another state, the prime consideration is self-protection or protection of one’s group of which one is a member, and which is defended in terms of promoting reasonable values. The justification in any one case reveals that any assessment is constrained by facts and social realities and the role that the norms play in the regulation of international affairs; the justification is not determined by reason alone according to abstract principles. The norms articulated give witness to the set of values we choose to practice and must be assessed to the degree that they actually serve to promote and protect that way of life.

In contrast, idealist theories tend to depend on a metaphysical approach to ethics rooted in rational reflection alone in which ethics trump interests or, in fact, any other norms such as aesthetics or hedonism or even anyone’s unequivocal commitment to such norms, and certainly the particular or contingent circumstances of any action. Such approaches try to develop universal and self-standing principles to guide even purportedly self-interested actions. We are who we should be and not who we have been.

Unlike the metaphysical approach, my analysis depends on close attention to the empirical realities of each case, seriously takes power, interests, existing law, as well as other values into account as an important part of the analysis, and does not equate what is reasonable with what is purely rational. At the same time, unlike an instrumentalist approach, there is an implicit assumption that I am not just articulating the values of my group, but presume a search for universal values that, while not dependent on reason alone, can be defended on rational grounds and in terms of how it is other as well as self-directed. The norms developed are not merely the existential expression of my values or Western values as a defense of that way of life. Though they make no claim to an absolute definitive statement of a way of life, they are an attempt to articulate a way of life that would be valid for everyone. Because it is neither metaphysical nor instrumental in the senses depicted above, but tries to articulate a position that takes both approaches into account, I call it dialectical rather than strictly instrumental or metaphysical.

With that all-too-brief philosophical introduction, we can plunge into the analysis.

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The Legal Basis for Preemption

We are, of course, concerned here only with the very amorphous area of international law that relates to treaties as well as customary practices between and among states, the charter of the United Nations, regional organizations, and resolutions of the Security Council, precedents of case law established in international tribunals and principles articulated by legal jurists and theorists. In this analysis, I will try to make clear that a legal basis for the use of force against Iraq for humanitarian reasons cannot be defended on the basis of international law, but a legitimate, though certainly not definitive, case for using force against Iraq can be made on the principle of self-defense.

Article 51 of the United Nations Charter permits military action without Security Council authorization where there is an actual military attack against a member state. However, since Article 1, Paragraphs 1 & 2 of the UN Charter commit its member states to using the international organization for the purposes of maintaining international peace and security, and, to that end, to utilize effective collective measures for both the prevention and removal of threats to the peace as well as the suppression of actual aggression, the application of the self-defense doctrine depends not only upon an actual act of aggression, but upon an assessment that the efforts of the international organization to remove the threat have been ineffective.

Who makes that assessment? The state that is threatened! When is that statement considered valid? At the very least, when actions taken in the name of self-defense are not found to be in breach of the principles of the United Nations! Though the definition of aggression is well articulated in General Assembly Resolution 3314 of the 29th session of the United Nations (UN Doc A/6631, 1975), unless the United Nations interprets the application of that principle to be appropriate to a particular use of force by one state or set of states against another, that is, unless there is an actual finding that a particular use of force is in breach of that principle, then the use of force to prevent and remove a threat to its security by the United States can be considered legal on a prima facie basis, though for some Grotians in international affairs, such a determination could only be made definitively if the case were referred to a legitimate international tribunal.

This is true even though Article 2 (7) of the Charter precludes intervening in the internal affairs of another state to bring about regime change and although the protection resolution defending the independence and sovereignty of a state making intervention inadmissible was passed by a unanimous vote in the General Assembly 109-0 (UN Doc A/6014, 1966) and stated unequivocally that, “No state has the right to intervene, directly or indirectly, for any reason whatsoever (my italics), in the internal or external affairs of any other state,” and condemns “armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements.” Though such a clause does not trump the right of using force in self-defense, it does place parameters on the use of force in such instances an considerably greater restrictions on the use of coercion for humanitarian purposes.

The clause means that even when the self-defense provision is invoked, it cannot be used to alter state boundaries, seize territory or, more importantly, change its political, economic or cultural character. Yet the invasion of Iraq is explicitly permitted by Article 2(4), even allows it to be employed as a preemptive norm.

Thus, in spite of the clauses requiring states to settle disputes peacefully and to refrain from the use of force in international relations, as long as the alternative of negotiation and enquiry, mediation and conciliation, or any other alternative mechanisms have been tried and found to be ineffective – on which, as everyone will recall, there was considerable debate – and as long as states using force operate within the parameters of the norms of necessity and proportionality, states reserve the right to determine themselves when threats to their own entities exist. Further, not only must alternative mechanisms of resolution be deemed to have been exhausted, but the use of force must be employed to secure the rule of law and bring about greater justice to justify the recourse to the use of force. Surely, the removal of the regime of Saddam Hussein, renowned for its abuse of the rule of law and massive injustices, would satisfy these criteria.

Of course, there are other exceptions that allow force to be employed in this way without UN sanction, such as in cases of wars of national liberation, or for the purposes of law and justice alone if a state intervenes to stop or mitigate genocide, or to counteract overt aggression, as under Article 51 as in the case of the Iraq aggression against Kuwait when an armed attack actually took place against another member state, but neither of these three alternative justifications are relevant here. The only legal justification to the use of force by one set of states against another – Iraq – is self-defense that, under Article 2(4), even allows it to be employed as a preemptive norm.⁹

⁹ For a much more extensive elaboration of these principles and the use of the self-defense arguments for the use of force, see O. Schachter’s articles: “The Right of States to Use Armed Force,” (82 Michigan Law Review 1620, 1984), “In Defence
In light of 9/11, in light of the widespread belief that Saddam Hussein possessed biological and chemical weapons of mass destruction and was actively pursuing a nuclear program (though the latter belief was less widespread), in light of the possibility that those weapons could be employed by Saddam Hussein, or fall into the hands of Islamic extremists, and in light of the belief that Saddam Hussein had been successful in hiding his activities from the international UN inspection team, the case was made for preemption to counter that threat, even though many argued that alternative courses of action had not been fully exhausted and that the minimum hurdle for justifying the use of force had not come close to being met. (Michael Quinlan made such a case before the British Parliament even though he believed that Saddam Hussein possessed biological and chemical weapons in a deliverable form and was indeed active in pursuing the nuclear option, though the evidence for the latter proved to be bogus.)

The issue is not whether the legal argument for self-defense was solid but whether it was at least a plausible defense. In the absence of any ruling otherwise, and in spite of flimsy grounds of such a legal justification, the legal defense of the use of force against Iraq on grounds of self-defense, however weak and possibly unsound one can claim it to be, in the absence of any finding of its invalidity in an international legal or political forum, self-defense is a plausible legal rationale for the use of force against Iraq in 2003.

Other Possible Legal Grounds for Preemption

Such a legal justification was made on the grounds of countering aggression in the first Gulf War, on the backs of which a legal basis on humanitarian grounds was erected for limiting Iraqi sovereignty but not for using force against the Saddam Hussein regime for these purposes. On 2 August 1990, UN Resolution 660 mandated sanctions and a trade embargo against the Saddam Hussein regime following the aggression and annexation of Kuwait. Iraq’s annexation of Kuwait was ruled to be illegal and to be null and void. On November 29, 1990, Resolution 678 authorized member states to use force to counter the illegal action and the use of force by Iraq in its aggression against Kuwait, though it is a matter of legal dispute whether that resolution also authorized the elimination of Iraqi military capability or, even more radically, the removal of its government.

The first of two key resolutions related to the current Iraq war was Resolution 687 of April 3, 1991 (SC Res. 687) that settled the international boundary, and, most importantly for our purposes, demanded the destruction under international supervision of all weapons of mass destruction, including missiles that could travel over 150 kilometers that could be used to transport such weapons, but did not authorize the use of force to eliminate the Iraqi WMD program. This was particularly important when, in the summer of 1991, Iraq’s secret WMD program was uncovered. The second was Resolution 688 of April 6, 1991 that condemned the suppression of the civilian population by the Saddam Hussein regime and deemed that the production of refugees as a result of this abuse of human rights had led to a large refugee exodus that tended to destabilize the region and was, thereby, a threat to international peace and security. That resolution called on Iraq to cease its repression but did not invoke Chapter VII but Article 2 (7). It thereby defined the domestic repression as not within the domestic jurisdiction of Iraq exempt from intervention, but again did not authorize the use of force to counter that repression.

In sum, a legal justification for eliminating WMD as a threat to international peace and security could not be made, nor could a case for the use of force against Iraq be made on humanitarian grounds, such as Saddam Hussein’s gross violations of human rights. The only legal grounds for the use of force in the 2003 war against Iraq was the grounds of self-defense against a perceived threat.

Ethical Grounds for Preemptive Use of Force

If a legal case could not be made for the use of force against the Iraq regime in 2003 on grounds other than self-defense, could a case be made on ethical grounds? After all, most – at least, this is my estimate - observers of the war against Serbia over Kosovo considered the use of force to be illegal, but many who argued it was illegal also argued that it was ethical and the right thing to do. Was the war against Iraq such a case?

Well an ethical as well as legal case could have been made on security grounds, namely, on the basis of the violation of the nonproliferation protocols with respect to weapons of mass destruction, for although the legal basis did not sanction the use of force to counter such proliferation, an ethical basis could have been used, especially when coupled with a second ground, the potential of terrorists to gain access to such WMD that could be used to target one’s own country. In other words, if there were insufficient international legal grounds to sanction the use of force, except self-defense, there could have been ethical grounds to justify such actions.

Before I get into the ethical grounds rooted in the believed existence of WMD and the prospect of terrorists accessing such weapons, it is first necessary to sideline two other ethical foundations related to gross violations of human rights. The latter case could have been made, though it was not, even though the references to Saddam Hussein’s repression and atrocities against his own people multiplied as the prospect of finding any solid evidence of Saddam Hussein’s renewed program for WMD receded. What would have been required to make such a case?

First, the use of force for humanitarian purposes, unlike an action in self-defense or to counter aggression, is not one done under the rule of necessity. The use of force to counter gross violations of human rights is a matter of choice. The humanitarian use of force against another country is an expression of freedom and not a demand of necessity. The only obligation compelling a state to act was a moral injunction. Thus, humanitarian intervention is a supererogatory act and not a duty or obligation.  

Secondly, human rights abuses have to be gross, that is, rise over a minimal threshold in which there is either a systematic attempt to expel large numbers of people such that the exodus threatens the peace and security of neighboring states, in which case the traditional peace and security clauses can be invoked to justify the use of force legally and ethically against the Saddam Hussein regime, or there are threats or an actual program to exterminate minorities who have no means of defending themselves. Neither of these situations existed in 2003, though such a case could have been made at the time atrocities against the Kurds or against the marsh Shiites were committed in the early nineties or certainly earlier in the late eighties. Thus, even though governments have no right to oppress their people, even though governments ought to express the will of the people and represent their interests, an ethical case cannot be made for intervention on such grounds. There must be actual and overt persecution on a wide scale, not only because of international rules in defense of sovereignty and non-intervention, but because of the ethical importance in the international system of respect for self-determination, even when self-determination is clearly absent, and consequentialist fears of what would happen to the international system if more permissive norms of intervention became widespread.

Thus, the only ethical case that could have been made in 2003 related to the alleged weapons of mass destruction and the prospect of terrorists gaining access to such weapons. What would have been required to make such a case, not simply for the use of force, but for the preemptive use of force? First, the level of threat would have had to reach a certain level, one articulated by the authors of the war as threatening not just simply large numbers of civilians but all Western populations as a whole. From our knowledge of chemical and biological weapons, the threat certainly met the minimum threshold.

Second, and more significantly, to reach the ethical threshold, the evidence for the threat did not have to be overwhelming or even strong and clear. Murky but cumulative evidence could have been sufficient, although quite aside from the validity of the evidence, there were strong arguments put forth that the minimal hurdle for the threat had not been met, for even if Saddam Hussein possessed such weapons, as many beyond the advocates of war believed he did, there was very little evidence that Saddam Hussein would use such weapons against Western states, with the possible exception of Israel, except if he was attacked. There was even less evidence and a great deal of counter evidence that he would make such weapons available to radical Islamic extremists. However, whatever the degree of evidence available and however cloudy it might have been, it is incumbent in an ethical rationale to articulate the degree of certainty and uncertainty that both existed and that would have been necessary to trigger pre-emptive action. Neither was done.

In addition to ensuring that evidential norms, including those governing the presentation of evidence, were followed, there are other ethical norms that impact on the decision to use force in a preemptive way for such purposes. For example, it is incumbent that one not lie in the presentation of evidence. In the case of the alleged effort to acquire nuclear weapons, evidence emerged that revealed that the United States knowingly used fraudulent documentation to support this argument, though it is unclear that Colin Powell knew the evidence was fraudulent when he presented his case to the United Nations. There are more subtle ethical norms governing the presentation of the evidence that were applicable. When one examined the rationale, it was clear that the US administration was really concerned about a possible and not even a probable threat let alone a real and imminent one, but the case put forth suggested the latter.

A small side window is necessary. As indicated above, I am not a metaphysical ethicist who argues that the presence or even predominance of self-interest motives – such as securing American economic interests and imperial hegemonic power in the region - undercuts the ethical case. An ethical case can be made quite aside from the economic and political interests that motivate an act and that may even be primary motives.

What about the fear that preemptive use of force in such cases will set a bad precedent and enhance the fears of smaller states that Western states will arbitrarily use the superior power to use coercive force to change the government in

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10 For the argument that humanitarian intervention, if it is a right is also a duty in cases where permission is parasitical on an antecedent prohibition, cf. Babic 2003: “if in some concrete case there should exist the right of intervention, then it ought to be the case that there is a concurrent duty to intervene.” (p. 51) I personally cannot follow the logic of his claim that the right to intervention entails a duty to intervene precisely because there is a prima facie duty of nonintervention.
other states? After all, small states have a legitimate fear that powerful states, under the cover of either humanitarian intervention or intervention for purposes of self-defense, could attack such states. To counter such fears is there an ethical requirement that the legitimacy for such actions only be established in a multilateral forum such as that of the Security Council? No. In ethically weighing the fears of other states that your state may use its power illegitimately, and the fear of one’s own state of someone else using its weaponry to secretly launch an attack against your own civilians on a massive scale, the fear for one’s own citizens trumps the fears of setting a precedent and the fears of smaller nations. This is not absolutely the case. If the large state had a record of intervention on spurious ground, and the United States provides some grounds for such fears, and if the fear for one’s own citizens was farfetched, then grounding one’s action in the relatively higher importance of the fears of one’s own citizens would be ethically suspect. However, in this case, the fears for one’s own citizens were legitimate and very significant, even if the grounds for those fears may prove to be misplaced, while the fears of smaller states, though legitimate, was very small and, even when real, affected very few of the member states.

An even more important ethical issue than the clarity and honesty in stating the goal and the criteria and substantive evidence for supporting the use of preemptive force, are the ethical norms governing the use of that force. It is on this issue that the most fundamental ethical failure emerged. I am not speaking of the Rumsfeld doctrine of smart war using guided weaponry and flexible and fewer forces launched behind enemy lines while attacking the nerve and communication centers absolutely the case. If the large state had a record of intervention on spurious ground, and the United States provides some evidence for supporting the use of preemptive force, are the ethical norms governing the use of that force. It is on this issue that the most fundamental ethical failure emerged. I am not speaking of the Rumsfeld doctrine of smart war using guided weaponry and flexible and fewer forces launched behind enemy lines while attacking the nerve and communication centers

Andrew P.N. (Drew) Erdmann, a 36 year-old American with a PhD in History from Harvard in 2000 for a thesis on “America’s Search for Victory,” who served as Iraq as Acting Minister of Higher Education, wrote in that thesis about, “America’s growing realization that in a military intervention a careful transition from war to peace is as crucial as battlefield success.” In his 2002 report for Richard N. Haass, Director of Policy Planning in the State Department on postwar reconstructions, he concluded that the most important ingredient in the peace process after the war was over was security. In the short run, everything depended on security.

This ethical requirement of providing for peace was not given nearly adequate attention. There were other factors that were ignored or overlooked. As Erdmann also pointed out, long-term success depended on international support even if legally and ethically it was not necessary to launch the war. However, the US administration, in spite of Tony Blair’s advocacy, not only ignored but continually undercut this possibility, even though the UN and international agencies also helped shoot themselves in the foot by ignoring their own security needs and underestimating the degree to which they would be targeted.

Underneath this ethical as well as tactical and strategic failure was a deeper one – ignoring early warning to prevent disaster in the after war period, a requirement that demanded early planning and the employment of those plans not only to provide security but to ensure the continuity of a civil administration and the deepening of widespread political support for the post-conflict phase once the euphoria of the overthrow of the repressive regime had dissipated.

12 It is not as if Erdmann’s memo advocating a long-term and expensive commitment in terms of physical and human infrastructure for Iraq was not circulated to the highest officials such as Dick Cheney. Rather, on 20 January 2003, President George W. Bush signed National Security Presidential Directive No. 24 that handed control over reconstruction to the Department of Defense. Douglas J. Feith, Under-Secretary of Defense for Policy and William Luti, his deputy, were exclusionists and control freaks, they pointedly and deliberately excluded such views as Erdmann’s from their planning. More importantly, they were governed by the belief that since America was entering Iraq as liberators, the reconstruction would be short-lived. They expected the Iraqi civil service, the police force, and even the army to remain intact, the political responsibility handed over to American a group of American imported exiles from abroad led by Chalabi, the economic costs of their empire-lite expedition to be supported by Iraqi oil revenues, and, most importantly, the security to be maintained by a far smaller expeditionary military force than the one needed to win the war. As one official in the State Department said, the planning bordered on self-deception and was not governed by pragmatism or Realpolitik but by theology. As Ghassan Salamé, the late Vieira de Mello’s political adviser in the United Nations operation put it: “This is not the Corps of Engineers, this is not the American pragmatist. They are the new Americans, Americans with an ideology, with a master plan, with interests – missionaries.” (Packer 2003, p. 83)
13 Seven weeks before the war started, management of reconstruction was handed over to General Jay Garner, who had managed the relief effort for the Kurds after the Gulf War, and his new Office of Reconstruction and Humanitarian Assistance (ORHA) that was set up along the lines of UNRWA, the United Nations Reconstruction and Works Agency for Palestine Refugees, but in advance, rather than after-the-fact, on the belief that the main problem would be refugees and the displaced. Though civic administration and reconstruction were the two other pillars in the planning, but they took second place to the emphasis on emergency relief, especially since Donald Rumsfeld had ordered Tom Warrick, coordinator of the State Department’s Future of Iraq Project, to be removed from the Garner team because he raised too many questions about the assumptions, and Warrick never went to Baghdad. His 250-page planning report, including key sections on transitional
What went wrong – groundless assumptions based on a quick-exit strategy\textsuperscript{14}, empire double-lite assumptions that the exercise could be costless, haste and confusion over planning, and the desire to keep everything under control and out of public view. Otherwise, how else to explain why troops were not dispatched to secure the main institutions – such as the national bank and the museum. How else do you explain why martial law was not declared? How else do you explain the tolerance for anarchy and the loss of 12 billion dollars in infrastructure assets? How else do you explain the inexplicable that a Hobbesian scenario ruled in which the message communicated to the public was that freedom = insecurity and disorder?

In addition to adequate force and sufficient political, economic and social planning, it was important to empower the people through ensuring respect for local culture. However, how do you respect the local culture if the vast majority of troops employed do not speak Arabic and are not even Islamic, a scenario that could not be overcome by the use of Turks who were suspect for security rather than cultural reasons. The initial attempts to impose a governing council dominated by exiles who did not enjoy the support of the Iraqi people was clearly a mistake. However, events went from bad to worse, though not in this one respect

In late April, Rumsfeld replaced General Jay Garner with L. Paul Bremer, an intelligent and disciplined technocrat, who promptly dissolved the Iraqi army, putting 400,000 more unemployed and militarily trained Iraqis on the street, dissolved the external’s militias, and, in a wholesale rather than retail operation, removed the top three levels of the civic administration – including 35,000 trained engineers, educators and managers - because, by edict under Saddam, they were all required to be Baathists. Bremer halted the momentum to transfer political authority to the Provisional Iraqi authority, the one move fully justified because you cannot use puppets to empower a people.

As a result, the army of liberation officially became an army of occupation and Rumsfeld was author of his own worst nightmare of the United States as an army of nation-builders. Empire-double-lite had overnight become empire double-heavy, doubled precisely because of the initial mistakes that had allowed the evil-genie of insecurity to escape the magic lamp at the same time as the issue of legitimacy had been mishandled. Exhausted American soldiers stretched thin on the ground, with little time off for recreation and relief, and with extended deployment, were stuck policing a land in which they “were moving half blind in an alien landscape, missing their quarry and leaving behind frightened women and boys with memories.” (Packer 2003, p. 72) The Rummy doctrine that had won the war – doing more with less – was losing the peace.

In sum, for an ethical rationale for justifying the war, the preplanning and the means used for the peace phase are as important as the propriety of the goals and the conduct of the war itself. Even if the goals had been adequate to satisfy ethical requirements, the means used revealed an ethical incompatibility between the objectives, the means employed, and the actual results. The ethical dimensions are not just window dressing but can provide coherence to a whole operation. The security issue in the post war phase of reconstruction, the preplanning and the respect for local culture and empowerment must all be integrated. The monopolization of coercive force congruent with the rule of law must be able to be implemented by administrative institutions of government rooted in an emerging governing structure that enjoys legitimacy and the support of the people.

However, as Erdmann said, one foundation stone is security. The other is legitimacy.\textsuperscript{15} In the absence of a monopoly on the use of violence, the military begin to suspect everyone. The average Iraqi is “racially profiled”, stripped of his or her identity and regarded as a suspect, while the family, the tribe, the elders and all the local sources of moral authority are made impotent. In an atmosphere of increasing fear, the ordinary citizen must choose between placing his/her trust on the good will and charity of foreigners or relying on local and increasingly militant forces, now made more fiery by militarized and militant spirituality. Poorly targeted military responses based on faulty intelligence become counter-productive, a process that undercuts the desire to enhance individualism, reduce ethnic nationalism and establish norms of tolerance. The combination of insecurity and legitimacy not only enhances the antagonism and suspicion between local residents and foreign soldiers, but ends up placing greater emphasis on ethnic and religious loyalties that undermine the quest for tolerance and support for a unified state, and reinforces two opposite but both undermining processes - the quest for secession – from the south as well as the north – and the desire for one ethnic group to seek hegemony over the others.

\textsuperscript{14} It is only in the after war period and when the troubles in securing the peace became so flagrant that the United States administration vocally denounced any enumeration of an exit strategy.

\textsuperscript{15} Legitimacy is a matter of degree. For realists, it is sufficient if a government controls the state whether or not it represents the will and/or the interests of that state. For liberal internationalists, this is sufficient for minimal legitimacy, but unless the government also behaves in accordance with international rules, international legitimacy can be withheld. For other theorists, external legitimacy can and should be withheld even when the government has control and even when the government acts according to international rules, such as when the government does not express the will and/or represent the interests of the people. However, lack of legitimacy, even in this more extensive sense, need not justify intervention. Cf. Michael Walzer, Just and Unjust Wars, New Oirk: Basic Books, 1997 edition.
How can either scenario be avoided? One path requires reconciliation among the three large ethnic groups. This requires that four foundations be put in place: a) establishing the truth about the past and acknowledgment of responsibility so that a common national narrative can be constructed; b) ensuring justice for the perpetrators of past crimes, a reasonable possibility while the United States retains control over Iraq except for the fact that if the trials for past criminal acts are not carried out properly – which first requires the training of investigators, prosecutors and an independent judiciary – the results will only be viewed as victor’s justice; c) a system of compensation for those who suffered losses under the long tyranny of Saddam Hussein; and, finally, d) a process of forgiveness so that the three dominant ethnic groups can establish a society in which mutual tolerance is an integral element. There is no sign of any effort in this direction. And without such steps, the possibility of following the scenario needed to create a democratic multi-ethnic state based on recollection, truth, justice, fairness and mutual understanding becomes more and more ephemeral.

There are a set of further second order norms, usually found in just war doctrine, that are historical and prescriptive conditions that must also govern and delimit the pursuit of the goals with appropriate means and which legitimate the grounds for fighting and the means used to execute both the war and the winning of the peace. Just war theorists distinguish between rules governing the just basis for initiating a war in the first place (jus ad bellum) and rules governing the conduct of the war itself (jus in bello). The just basis for war entails just cause, the requirement of a legitimate authority to declare war, the rectitude of the intention, the reasonable prospect of success, and adoption of means proportional to the end task. The final guide of jus ad bellum overlaps with those governing the conduct of war itself - jus in bello – where the principle of proportionality applies to the quantity of force that is ethically appropriate to achieve the objectives. The other jus in bello rule sets forth the legitimate targets of the war.

Since there is little debate on the misuse of targets in the war phase so that the United States and its allies are charged with indiscriminate use of force, and since the debate over the quantity of force relates to insufficiency with respect to securing the peace, I will assume the jus in bello requirements have been fulfilled. Similarly, two of the conditions of jus ad bellum – the prospect of success with respect to the war itself rather than winning the peace, and the proportionality rule of causing less harm - a concern that was a genuine one for many people who feared the prospect of the war really undermining the stability of the Middle East – can also be set aside, even if this simplistic discussion is rather too superficial. I want to concentrate and go back to the concern with just cause, the legitimate authority required to declare war, and the rectitude of the intention.

As I have articulated, fear of weapons of mass destruction is a legitimate ethical rationale for going to war quite aside from the legal rationale. But such an objective requires following certain other ethical norms, including the clarity and honesty in stating the goal and the criteria and substantive evidence for supporting the use of preemptive force. The Bush administration fell down badly, not on the goal itself which most people have stressed because there is increasing evidence that this justification has not been supported, but because the articulation of that goal and the grounds for justifying the intervention were so confused and confusing, that the ethics of the action were seriously undermined. Of course, if it is proven that the fear of the existence and possible use of weapons of mass destruction was not only a false belief, but one that was fraudulent from the get-go, then no ethical justification in terms of objectives would be warranted.

Giving the United States and its allies the benefit of the doubt that though they may be ideologues and missionaries, they are not crooks, the ethical ground for the objective of the preemptive war is not undercut because of the fear of WMD but because of the untruth attached to some of the evidence and the absence of clear and unequivocal articulation of the evidence supporting the goal.

In the case of a defense and preemptive action against weapons of mass destruction, I do not find the action to be unethical because the United Nations was not used to legitimate its preemptive action. Rather, the most important factor undermining the ethics of the action was the way the peace rather than the war was conducted to remove the threat permanently. That is, the poor planning, the failure to provide postwar security or respect the local culture or empower the people appropriately, or facilitate the emergence of a multicultural tolerant state, or, etc., etc., etc. It is not just the legitimacy of an objective or the legitimacy of an authority, but the legitimacy of the means used, not just to counter the immediate threat but to remove the permanent threat that is important to determining whether the action taken was ethical. On the grounds of the lack of integrity and clarity in stating the goal and in the total inadequate approach to securing the peace, and in spite of the ethical legitimacy in counteracting a perceived threat of weapons of mass destruction by the use of preemptive force, the preemptive action of the United States in using force against Iraq to remove the threat of what it genuinely believed to be coming from weapons of mass destruction, made the action unethical.

However, even if those issues had been properly dealt with and the evidence had been presented honestly and clearly, and the criteria for assessment in terms of mere possibility rather than probability or actuality, had been honourably articulated, and even if the proper thought and planning and reasonable effort at execution had been undertaken, there is still the question of the timeliness of the action. The fact is, no evidence was put forth defending the rush to action. So even if an

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ethical case could have been made for the preemptive use of force against Iraq, implementing the conclusions of the ethical justification would not have been appropriate at the time.

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