



INTERVENTION SYMPOSIUM

Forum on the American Invasion of Iraq

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“Collateral Damage” from Cambodia to Iraq

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On the Thai-Cambodian border in 1979, a young Khmer Rouge commander recalled the US bombing of his native village eight years before. Two hundred villagers were killed. A twelve year-old survivor, he ran, terrified, into the jungle. Khmer Rouge guerrillas found him and gave him a gun. They said the “killing birds” had come “from Phnom Penh.” This boy soon murdered 200 “enemies.” Asked what that felt like, he patted his right shoulder. “It hurts, here,” he said, referring to the kickback from his rifle butt (Staffan Hildebrand, personal communication).

“Collateral Damage” and War Crimes

When US bombs hit a civilian warehouse in Afghanistan in late 2001, Donald Rumsfeld responded, “We’re not running out of targets, Afghanistan is.” Apparently no reporter questioned such lighthearted destruction of Afghanistan’s civilian property. The bombs kept falling.

Unlike Nixon’s carpet bombardment of Cambodia, the US invasion of Afghanistan had begun as a legitimate, defensive response to the September 11, 2001 attack on US soil and to Osama bin Laden’s threat “to kill as many Jews and Crusaders as possible.” Harbouring al-Qaeda was the vicious Taliban regime, which persecuted Afghan women and ethnic minorities. But the first six months of US bombing of Afghanistan killed as many civilians as had been massacred in the World Trade Center (see eg Herold 2002). The toll continued to rise,

documented over the next year by the *New York Times*, among others (Kiernan 2002a). The removal of the Taliban was legally justified, but the US bombing also caused an excessive number of civilian casualties. What is the legal significance of that?

The Rome Statute (ICC 1998:Article 8[2][b][i]) of the new International Criminal Court (ICC) defines as a war crime "intentionally directing attacks against the civilian population as such." This does not apply to US actions in Afghanistan or Iraq. But the statute (ICC 1998:Article 8[2][b][iv]) also addresses unintentional civilian casualties or "collateral damage," by making criminal "intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians ... which would be clearly excessive" in relation to the military objective.

How could it be proven that such "collateral damage" was intentional? Article 30(1)(b) of the Rome Statute (ICC 1998) says that intent is present where a person "means to cause that consequence or is aware that it will occur in the ordinary course of events." Judging by official US statements that "collateral damage" was predictable in US bombing of Iraq, US actions that caused it could meet the intent requirement. However, the Elements of Crimes (ICC nd:131), adopted by the Assembly of States Parties to the ICC's Rome Treaty, also points out that a court would have to be satisfied that "the perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects" that would "be clearly excessive."

As to what level of "collateral damage" is excessive and the very difficult matter of proving the perpetrator's advance knowledge that it would be excessive, the statute provides that US courts can decide any cases involving Americans. But the US will not submit to that determination, even in its own courts. It has withdrawn from the ICC and tries hard to undermine it. The Bush administration wants to rule out any US war crimes cases in advance. Washington demands impunity in the name of sovereignty. It says the United States does not trust other legal systems, but it does not intend to be subjected to US court decisions on international criminal law, either. The more concessions the ICC Treaty made to American law, the more the case for such US impunity diminished, and the more consternation that caused in Washington. In my view, the United Nations (UN) weapons inspections in Iraq revealed a similar pattern: the closer the inspectors got to finding any Iraqi weapons of mass destruction and having them destroyed (or proved nonexistent), the more panic—not relief—this caused in Washington. Just as the US invasion of Iraq was not propelled by an actual threat from weapons of mass destruction, so the US opposition to the ICC was not fuelled by objections to an alien legal system. It was fuelled by US policies that even American courts might have to rule illegal.

Donald Rumsfeld's military policy is clear: to use, in his words, "the force necessary to prevail, plus some." This advocates unnecessary—that is, excessive—force. Rumsfeld's policy also rejects "promising not to permit ... collateral damage" (*New York Times* 14 October 2002). The policy was written before the invasion of Iraq, in the knowledge that most of the world considers military action causing excessive "collateral damage" to be a war crime. By 20 April 2003, the minimum toll of Iraqi civilians reported killed in the war by US forces was 1,878 dead (Iraq Body Count 2003). As of 3 July, this number had increased to 6,018 (Iraq Body Count 2003), while an Associated Press study (Buncombe 2003:14) concluded that at least 3,240 Iraqi civilians were killed between 20 March and 20 April alone.

Saddam Hussein's regime should be brought to justice for its war crimes from 1980 to 1990, as well as crimes it committed in the 2003 war. Its use of chemical weapons against Kurdish populations in the 1980s is well documented (INDICT 2003). These crimes were facilitated by the United States, which backed Iraq against Iran in the first Gulf War. Rumsfeld visited Iraq to shake hands with Saddam. The overthrow of Saddam's regime can only be welcomed. The task is to ensure that the replacement will be significantly better. On this will depend a respect for democracy and law, including a willingness to prosecute all war criminals, not just the losers.

Four questions about the war persist. First, morally, does the end justify the means? A "preventive war"—not, by definition, a war of last resort—cannot be called a just war. Second, ethically, could the same result have been achieved more slowly but with much less suffering, by strengthening international inspections, destroying any weapons of mass destruction Iraq still possessed, and further weakening the regime's grip—with the Kurdish region already out of Saddam's control while no-flight zones and sanctions applied to most or all of the rest of Iraq? Third, legally, the damage to international law and security while violators are selectively punished remains unmeasured. And fourth, the political question remains unanswered: the impact throughout the Islamic world of the invasion and devastation of a sovereign Muslim Arab country. Despite the assertions of the Bush administration, this war could have more than just one outcome. I will now address the third and fourth questions—but not a fifth issue, the McCarthyist campaign by Daniel Pipes and others enjoying Bush's support to vilify as "traitors" people who raise any of the first four questions, and to call for "adult supervision" of university professors by "outsiders" and imposition of new "standards for media statements by faculty" (Gilmore 2003).

US Aggression

Damage to international law results from the waging of an illegal war with impunity. The US-UK-Australian invasion of Iraq probably

constituted aggression. An unprovoked invasion is not only a violation of the UN charter—and therefore of US domestic law—but also a Nuremberg-type “crime against peace.”

The UN’s General Assembly Resolution 3314 (1974:143) described “the first use of armed force” by one state against another as “*prima facie* evidence of an act of aggression,” which it defined as “the invasion or attack by the armed forces of a State of the territory of another State, or any [resulting] military occupation, however temporary.” In 1986, the International Court of Justice in The Hague (the “World Court”) declared this definition to be customary international law, in its 12–3 decision in *Nicaragua v. US*. This was the same decision in which the World Court found the United States guilty of employing “the unlawful use of force”—that is, terrorism.

Washington, which rejected the World Court’s jurisdiction, now asserts that Iraqi support for terrorism may threaten the United States in future, which entitles the United States to act in preventive self-defense. Most legal scholars, though not all, reject this. The United States claims not to be the aggressor in Iraq on the additional grounds that it was simply enforcing UN resolutions. Legally, that depends on whether the invasion was authorized by the UN Security Council. It was not. The war could also be justified as a humanitarian intervention. The United States did not make this case against Iraq to the UN in the 1980s, or after.

In 1999, the World Court found that the United States had violated the 1963 Vienna Convention when the state of Arizona failed to inform a German citizen on death row of his rights to communicate with his country’s consulate. The World Court requested a stay of execution of the prisoner, but the German citizen was executed in Arizona in violation of the convention. In 2003, on the same grounds, the World Court ordered the USA to postpone execution of three Mexican citizens, two of them about to be executed in Texas, among 51 Mexicans on death row in the United States. The Bush administration acts in contempt of international law. An unelected US president imposing democracy by force on other countries while his own country violates international law to execute foreign citizens is not in a strong legal position.

Should the United States, in committing international aggression, be permitted legally to inflict any civilian casualties at all, whether excessive in military terms or not? Why should its argument that it takes extraordinary measures to “minimize civilian casualties” be accepted in the case of an unnecessary, illegal war that it could have avoided by refraining from its own attacks on Iraq? Do civilians killed by aggressors have no legal protection? Unfortunately for them, international war crimes law does not set a higher standard for the conduct of an illegal war than for that of a legal one.

Worse, the US invasion enabled the looting and destruction of Iraq's world-renowned historical treasures, a blow to all humanity. This, too, was in contravention of international conventions, which make it "the duty of an invading army to preserve not only the lives of civilians, but also their cultural heritage" (Michalowski 2003). Rumsfeld described the lawlessness as mere "untidiness." The United States should make reparation to the Iraqi people for the destruction.

A Blunder, Worse than a Crime

In mid-March 2003, when asked whether the approaching US invasion of Iraq would provoke more terrorism, Connecticut Senator Joseph Lieberman replied in the negative, stating that "the terrorists already hate us" anyway. Refraining from invading Iraq will not change that, he implied.

This is childish piety, unworthy of a US presidential candidate. Ever since 9/11, the obvious challenge has been to keep the number of potential suicide and homicide bombers below thousands worldwide, rather than enraging and provoking tens of thousands more to join them. How to deny new recruits to groups like al-Qaeda is a political issue. Tens of thousands of suicide bomber terrorists will emerge only from some political windfall for the small circle of existing terrorist leaders. The task is to arrest those leaders before providing them with any new political cause.

From 1969 to 1973, US bombs killed between 50,000 and 150,000 Cambodian peasants (Kiernan 1989). In his 2003 book, *Ending the Vietnam War*, Henry Kissinger reveals that he requested an estimate of the Cambodian civilian casualties of the US bombing from the Historical Office of the US Secretary of Defense (OSD). This office "gave me an estimate of 50,000 based on the tonnage of bombs delivered over a period of four and a half years." Kissinger cites this OSD figure in a footnote leading to an endnote quoting two paragraphs excerpted from an unnamed, undated memo "on civilian casualties in Cambodia" (Kissinger 2003:70n., 586n.7). However, he omits the passage containing the estimate of 50,000 civilian casualties. The endnote quotes the OSD as stating that

B-52 area bombers accounted for a much higher proportion of bomb tonnage in Cambodia than in North Vietnam—two-thirds in Cambodia versus a quarter in North Vietnam. During 1969–73 in Cambodia, it was difficult for reporters in Phnom Penh to estimate the proportion of civilian casualties caused by air operations. There is no doubt that most of those casualties occurred in 1973 ... The worst error occurred at Neak Luong, when more than a hundred civilians were killed. (Kissinger 2003:70n., 586n.7)

Pol Pot already hated America in 1969. But he was only the leader of a small group of 1,500 Khmer Rouge insurgents in the Cambodian jungle. Nixon and Kissinger's invasion of neutral Cambodia in 1970 and their escalation of the pre-1970 "secret bombing" into massive carpet bombing that ended only in 1973 provided Pol Pot and the Khmer Rouge leadership with the windfall they needed. The CIA's Directorate of Operations reported on 2 May 1973 that the communists had launched a new recruiting drive: "*They are using damage caused by B-52 strikes as the main theme of their propaganda ... This approach has resulted in the successful recruitment of a number of young men ... Residents ... say that the propaganda campaign has been effective with refugees and in areas ... which have been subject to B-52 strikes*" (US CIA 1973; emphasis added). From 1969 to 1973, the Khmer Rouge forces grew from 1,500 to over 200,000 soldiers. They took power in 1975 and perpetrated genocide (Kiernan 2002b). Hopefully, they will finally be prosecuted for it.

On the eve of the US invasion of Iraq, a senior US counter-intelligence official was reported as saying that "An American invasion of Iraq is already being used as a recruitment tool by Al Qaeda and other groups ... And it is a very effective tool." An American official based in Europe said Iraq had become "a battle cry" for Qaeda recruiters (Van Natta and Butler 2003:1). Ten days into the war, Egypt's President Hosni Mubarak said that as a result of the invasion of Iraq, "[I]f there was one bin Laden before, there will be 100 bin Ladens in the future." Someone might explain the difference to Senator Lieberman.

I do not believe that Bush planned to make enemies of the Muslim world, but he briefly called for a "crusade." I do not believe Condoleezza Rice intended genocide against Iraq, but she threatened it with "national obliteration" if it used chemical weapons. These statements alone could have made the United States another ten thousand convinced enemies. Predicting the fragility of Saddam's regime, the head of the US Defense Policy Board, Richard Perle, called it "a house of cards," which "will collapse at the first whiff of gunpowder" (PBS, 11 July 2002). Former Rumsfeld aide Ken Adelman predicted "a cakewalk" (12 February 2002).

A Warlike Intelligentsia

Apart from damaging the US economy and its diplomatic alliances, this reckless warmaking endangers the planet. Why is Washington getting away with magisterial crimes and blunders? If a journalist had come back to Lieberman with "What is your answer to the criticism that the war will create *more* terrorists?", Lieberman would have had to think carefully. To my knowledge, no journalist did. The US media

is dominated, almost as much as is the government, by a warlike intelligentsia and nationalist think tanks—what Russell Baker of the *New York Times* called “the bombing classes” (29 May 1993). “We need to err on the side of being strong,” says William Kristol, editor of the *Weekly Standard*, speaking on *Fox News* (*New York Times* 2003:A27). Syndicated columnist Ben Shapiro adds: “The United States has achieved an important step in the war against terror: overcoming our own aversion to civilian casualties in order to achieve victory” (quoted in Straub 2003). One could occasionally be forgiven for thinking that Washington’s sense of “moral clarity” comes not from studying difficult choices and making judicious decisions in the interest of the many, but from reading each other’s op-ed columns, to say nothing of advancing each other’s economic interests (Herbert 2003a, b).

Warmakers do not want the human effects of their policies to become public knowledge. This brings their media cheerleaders into conflict with their self-described task as reporters of news. Rupert Murdoch, owner of the *Weekly Standard*, *Fox News*, and much else, states that “There is going to be collateral damage. And if you really want to be brutal about it, better we get it done now than spread it over months” (Kirkpatrick 2003:C7.) Who does Murdoch imagine “really want to be brutal”? One of his *Fox* pundits proclaimed, “Civilian casualties are not news. The fact is they accompany wars” (quoted in Alcorn 2002; see Barone 2001). And *Fox* anchor Brit Hume told the *New York Times*, “The fact that some people are dying, is that really news? And is it news to be treated in a semi-straight-faced way? I think not” (quoted from *New York Times* 3 December 2001 in *Extra!*, a publication of *Fairness and Accuracy in Reporting*). Not, in this view, if they are victims of American military action.

“DO NOT USE photos on Page 1 showing civilian casualties from the US war in Afghanistan,” copyeditor Ray Glenn wrote in 2001 to staff of the *Florida News Herald* in Panama City. “Our sister paper in Fort Walton has done so and received hundreds and hundreds of threatening emails and the like. The only exception is if the US hits an orphanage, school or similar facility and kills scores or hundreds of children” (quoted in Alcorn 2002). Such organized intimidation in Florida resembles the e-mail campaigns to vilify or silence dissident US professors and the “bourgeois riot” in Florida that stopped the 2000 US presidential vote-count (the *Wall Street Journal*’s Paul Gigot on the “bourgeois riot” quoted in Alterman 2003:180).

A news organization that covers up human tragedy, claiming it is “not news,” is a travesty. The next step is the firing of journalists, such as Peter Arnett (by MSNBC), who do think killing civilians is news. The step after that is killing journalists. On 9 April 2003, Reporters

Without Borders called for an investigation of incidents in which three journalists were killed by US forces:

Attacks on civilians, which include journalists, ... are war crimes.... US officials said a US tank fired on the Palestine Hotel because rockets were being fired from it. None of the journalists there saw any such thing and said that in fact things were very quiet in the area when the tank took several minutes to adjust its gun and then fired. Film by the French TV station France 3 confirmed this version of events.

By contrast, American syndicated columnist Thomas Sowell wrote of Iraq's Information Minister:

One bomb blowing up Baghdad Bob while he is talking on TV could refute his propaganda in a way that would be understood by everyone, everywhere, and save many lives. It would probably also take out some journalists from around the world, leading to an orgy of media denunciation on all continents. But more American troops could come home alive ... The phrase "the public's right to know" has been used to cover a multitude of media sins. The public also has a right not to know, when they don't want information at the expense of young American soldiers' lives. (quoted in Straub 2003)

Last September, the *New York Times* (8 September 2002) published a poll of Americans' views on the coming invasion of Iraq. The poll asked respondents whether they would support an attack on Iraq if there were substantial US military casualties. I sent a letter to the editor the same day, asking:

Did the otherwise comprehensive *Times/CBS News* poll of Americans' views on a US war against Iraq (Sept. 8) ask what their view would be if the attack killed thousands of innocent Iraqi civilians? If not, what does that say about moral clarity in national debate? Do the lessons of Hiroshima and Nagasaki, a million civilian Vietnamese dead, 100,000 Cambodian victims of US bombardment before the Khmer Rouge genocide, the Afghan wedding and engagement parties devastated by aerial attack, count? Donald Rumsfeld dismissed such concerns with: "We're not running out of targets, Afghanistan is." Would similar comment about Iraqi civilian "collateral damage" again provoke only mirth? Long after the Vietnam War, over two-thirds of Americans polled said they considered the war "more than a mistake; it was fundamentally wrong and immoral." This time, shouldn't Americans be asked in advance?

I received no response to my letter, which was not published. But the next *New York Times/CBS* poll, in October 2002, did ask Americans whether they would "favor or oppose the United States taking military action against Iraq if it ... would result in substantial Iraqi civilian casualties?"

And only a minority of respondents—49%—said they would favor such a war. In the next poll I saw after that, in mid-February, the percentage fell to 46% favoring a war that would result in substantial Iraqi civilian casualties, with 45% opposed (*New York Times* 14 February 2003:A15). Unfortunately, in the final run-up to the war, the next *Times*/CBS poll I saw, published on 11 March, had apparently dropped the question again. Or it failed to consider the responses on this question to be news. I do not know which, or why. The attack began a week later. In my view, those who had briefly managed to register opposition to a war causing “substantial civilian casualties” had shown not only moral and legal sensitivity but foresight.

On 29 March 2003, an Iraqi suicide bomber killed four US soldiers. That evening, a British reporter told Aaron Brown on CNN that for fear of such incidents, a US commander in Iraq had instructed his troops that if they were approached by a civilian, “even if he is waving a stick, shoot him.” I saw neither Brown nor a guest comment on that revelation. The next evening’s guest, from the US Council on Foreign Relations, told Brown that the United States might “have to accept slightly more civilian casualties” to win the war quickly, which he called the “humane” policy. What he meant was, rather, that the United States would have to *inflict* more civilian casualties. It did. Troops opened fire on a car that would not stop, killing seven Iraqi women and children.

Then, on 31 March, I tuned into National Public Radio to hear a reporter discuss the US “incursion into Iraq.” I was immediately sent back to 1970, when I saw Richard Nixon talking on television about Cambodia, asserting that “This is not an invasion; it is an incursion.” It was an invasion, and what followed was even worse.

Endnotes

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References

- Alcorn G (2002) Civilian deaths no cause for concern. *Sydney Morning Herald* 12 January
- Alterman E (2003) *What Liberal Media?* New York: Basic
- Barone M (2001) The costs of war: Civilian casualties and collateral damage are inevitable in any war. *UNNews.com* 30 October
- Buncombe A (2003) Helicopter shot down by Iraqi “terrorists”. *Independent* (London) 13 June:14
- Gilmore G (2003) What Glenda Gilmore really said. History News Network, 14 April. <http://hnn.us/articles/1395.html> (last accessed 28 June 2003)

- Herbert B (2003a) Spoils of war. *New York Times* 10 April:A27
- Herbert B (2003b) What is it good for? *New York Times* 21 April:A23
- Herold M W (2002) A dossier on civilian victims of United States' aerial bombing of Afghanistan: A comprehensive accounting (revised). http://www.cursor.org/stories/civilian_deaths.htm (last accessed 28 June 2003)
- INDICT (2003) <http://www.indict.org.uk/> (last accessed 28 June 2003)
- International Criminal Court (1998) Rome Statute. [http://www.icc-cpi.int/docs/basicdocs/rome_statute\(e\).html](http://www.icc-cpi.int/docs/basicdocs/rome_statute(e).html) (last accessed 28 June 2003)
- International Criminal Court (nd) Elements of Crimes. [http://www.icc-cpi.int/docs/basicdocs/elements\(e\).html](http://www.icc-cpi.int/docs/basicdocs/elements(e).html) (last accessed 28 June 2003)
- Iraq Body Count (2003) <http://iraqbodycount.net/> (last accessed 3 July 2003)
- Kiernan B (1989) The American bombardment of Kampuchea, 1969–1973. *Vietnam Generation* 1(1):4–41
- Kiernan B (2002a) “Collateral damage” means real people. *Bangkok Post* 20 October. <http://www.fpif.org/commentary/2002/0211coldam.html> (last accessed 28 June 2003)
- Kiernan B (2002b) *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975–1979*. 2nd ed. New Haven, CT: Yale University Press
- Kirkpatrick D (2003) Mr. Murdoch's war. *New York Times* 7 April:C7
- Kissinger H (2003) *Ending the Vietnam War*. New York: Simon and Schuster
- Michalowski P (2003) The ransacking of the Baghdad Museum is a disgrace. *History News Network*, 14 April. <http://hnn.us/articles/1386.html> (last accessed 28 June 2003)
- New York Times* (2003) 30 April:A27
- Reporters Without Borders (2003) Bombing of journalists “may have been a war crime”. 9 April. http://www.rsf.org/article.php3?id_article=6013 (last accessed 3 July 2003)
- Straub S (2003) As some others see us: Reading America. *OpenDemocracy* 2 May. <http://www.opendemocracy.net/debates/article-8-92-1200.jsp> (last accessed 28 June 2003)
- United Nations General Assembly (1974) Resolution 3314 (XXIX): Definition of aggression. <http://ods-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement>
- US Central Intelligence Agency (CIA) (1973) Effects of Khmer insurgents to exploit for propaganda purposes damage done by airstrikes in Kandal Province. Intelligence Information Cable, 2 May. Declassified 19 February 1987
- Van Natta D Jr and Butler D (2003) Anger on Iraq seen as new Qaeda recruiting tool. *New York Times* 16 March:11