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CAN INTERNATIONAL HUMANITARIAN LAW PLAY AN EFFECTIVE ROLE IN OCCUPIED IRAQ?

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I. INTRODUCTION

Some of my graduate students, coming from all corners of the globe, venture that international law remains little more than the will of strong over weak, that ultimately 'might makes right', and that the world's only superpower can do whatever it pleases in spite of international law and the United Nations (UN). Look at the way the United States (US) and United Kingdom (UK) in March 2003 invaded Iraq - a sovereign country - without clear UN Security Council authority, they say. What gives these major Powers the right to violate another country's national sovereignty? International law must exist only on paper! In these difficult times, it sometimes appears that the law of the jungle threatens to prevail over the international rule of law and multilateral cooperation. Yet, even as the Bush Administration tests international law and institutions, a dim but reassuring light seems to appear at the end of the tunnel.

In this article, we explore the role of international law with regard to American-led Coalition action in Iraq, and in particular, whether international humanitarian law can be effective there, despite American exceptionalism and apparent British Government support for it. First, we review the attitude of the Bush Administration with regard to the UN role leading up to the Anglo-American-led invasion and occupation of Iraq. Second, we take account of the immediate factual and political ramifications of the Coalition's military action in Iraq, highlighting its serious failures from the humanitarian perspective, and also the cost to the US in terms of political legitimacy. We will then be in a position to consider prospects for the observance of international humanitarian law in Iraq during these trying times, recognizing all the while that, as Hersch Lauterpacht said, "if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even

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more conspicuously, at the vanishing point of international law.”¹

II. SHOVING THE UNITED NATIONS ASIDE AND STARTING THE WAR ON FALSE PRETENCES

In order to justify taking military action against Iraq without the clear approval of the UN Security Council and before UN weapons inspectors could complete their work,² President Bush and Prime Minister Blair seem to have seriously exaggerated first the likelihood of a link between Saddam Hussein’s regime and the Al Qaeda network responsible for the 11 September 2001 terrorist attacks on the US and second, the possibility of the Iraqi regimes pursuing an ongoing programme of chemical and biological weapons development in violation of international law and the threat this could pose to the US, the UK and the international community at large. Already in his State of the Union Address of 29 January 2002, President George W. Bush had announced his country’s resolve to prevent Iran, Iraq and North Korea from acquiring chemical, biological or nuclear weapons. He also drew an implicit link between these countries and the terrorist attacks of 11 September 2001 that obliterated the twin World Trade Centre Towers in New York, damaged the Pentagon building, killed more than 3,000 people and incurred over 100 billion dollars in property damage, by stating that: “States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world.”³

Saddam’s regime had a horrific record of systematic human rights abuse including genocide against the Iraqi Kurd population and other serious violations of international law. However, little factual evidence seems actually to have surfaced to support the claims of either Bush or Blair on the need for *immediate* pre-emptive military action against Iraq,⁴ particularly since neither Iraq nor for that matter Afghanistan, seemed to have been involved in the 11 September terrorist attacks, UN weapons inspectors had not completed their inspections in Iraq, and the UN Security Council had not authorized the Coalition to deploy military force or to occupy Iraq. Even if the Bush / Blair attack on Iraq could somehow be qualified as an act of

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1. Hersch Lauterpacht, “The Problem of the Revision of the Law of War”, *British Yearbook of International Law*, vol.29 (1952-1953), pp. 381-382.
 2. Eric Pfanner, “Blix Says ‘Spin’ Was Used to Justify the War in Iraq”, *International Herald Tribune*, 5 September 2003. In a series of public statements, the former Head of the United Nations weapons inspections team, Dr Hans Blix, charged the Bush Administration with manipulation of UN reports on Iraq’s weapons stocks.
 3. “President Delivers State of the Union Address: The United States Capital Washington, DC”, Office of the White House Press Secretary, 29 January 2002.
 4. Associated Press, “Bush Defends Quality of Intelligence Data Information for Speeches is ‘Darn Good’”, 15 July 2003.

self-defence, anticipatory or otherwise, it fell far short of the threshold requirements set out in the famous *Caroline* case.⁵

At the time of writing, in October 2003, no weapons of mass destruction had yet been found in Iraq. Even in July 2003, American intelligence experts had warned the Bush Administration it was setting itself up for an embarrassment.⁶ While Democrats assailed the President for taking ill thought-out action in Iraq, Prime Minister Blair had to appear before the Foreign Affairs Committee which looked into allegations that the British Government disregarded the advice of its own secret intelligence service which had cautioned the Government not to exaggerate the missile threat the Iraqi regime posed to neighbouring countries and Israel. Top civil servants had to answer publicly also for having relied on an outdated graduate thesis (written 12 years earlier on the basis of information gathered from 1991 Operation Desert Storm to liberate Kuwait) that was posted on the internet and which the Government used to shore up its claims that Iraq possessed weapons of mass destruction, but without attributing the source.⁷ Robin Cook, Blair's former Foreign Secretary, who had resigned over the Government's decision to invade Iraq, stated publicly that Blair had indicated to him just two weeks before the start of the war, that he knew that Iraq posed no immediate danger to the UK.⁸

The Anglo-American military action against Afghanistan and Iraq met with disaster after disaster. It lent the impression to millions of Muslims the world over that the US and UK were aggressors against Islam. At the 13 October 2003 opening of the Organization of the Islamic Conference (OIC) a 57-member organization claiming to represent some 1.2 billion Muslims

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5. In the *Caroline* case, the Governments of the United States and Great Britain agreed that the burden of proof was on the British Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. 29 *The British and Foreign State Papers* 1137-38; and 30 *The British and Foreign State Papers* 195-196 (1837).
 6. John Deutsch, who served as former director of the Central Intelligence Agency, told a Congressional Committee in July 2003 that if the Coalition failed to find chemical or biological weapons in Iraq, this would be an intelligence failure of "massive proportions" because it would mean that the US Government had gone to war in Iraq "on an incorrect intelligence judgment." Brian Knowlton, "A Bush Aide Defends "Murky Intelligence" on Terror as Norm", *International Herald Tribune*, 28 July 2003.
 7. Associated Press, "Top Aide Admits UK Erred in Crafting Case against Iraq", 26 June 2003.
 8. Warren Hoge, "Cook Diary Casts Doubt on Blair", *International Herald Tribune*, 6 October 2003. Hoge reports that: "An intelligence dossier published last September argued that Iraq had unconventional weapons that could be used within 45 minutes of an order being given. Cook said that he had no reason to doubt that Blair believed the claim at the time it was made, but that in their conversation on 5 March Blair told him the weapons were only battlefield munitions and could not be assembled by Saddam for quick use because of all the effort he has put into concealment."

around the globe – host nation Malaysia denounced the American occupation of Iraq as well as Israel’s treatment of Palestinians, characterizing them as a threat to ‘the very survival’ of the world’s Muslim community.⁹

Predictably, rather than to make the US and other western countries more secure, the Anglo-American strategy seems to have aided the Islamic fundamentalist cause in many countries, drawing it more supporters and inflaming passions of vengeance. The number and gravity of terrorist attacks on western targets have increased sharply since the launch of the new Bush / Blair anti-terrorist policy. The way the Bush Administration has identified Afghanistan and Iraq with terrorism has also seriously misled Americans. A Washington Post opinion poll conducted from 7-11 August 2003 revealed that, nearly two years after the 11 September 2001 attacks, 69 percent of Americans believed that Saddam Hussein had been personally involved in these attacks, despite any evidence of any such involvement.¹⁰ Rather than to seek to correct this mistaken belief, the Bush Administration sought to reinforce it, and in his address to the American people of 7 September 2003, Bush implicitly reiterated a link between Iraq and a terrorist threat against the US, perhaps hoping to blunt criticism of the war and the ensuing American occupation of Iraq.¹¹ He stated that:

Two years ago, I told the Congress and the country that the war on terror would be a lengthy war, a different kind of war, fought on many fronts in many places. Iraq is now the central front. Enemies of freedom are making a desperate stand there – and there they must be defeated. This will take time and require sacrifice. Yet we will do what is necessary, we will spend what is necessary, to achieve

9. *CNN*, “Islamic Nations Cite US ‘Threat’”, 13 October 2003.

10. Associated Press, A Poll: 70 percent Believe Saddam, 9-11 Link. President Bush and Secretary of Defence Donald Rumsfeld then issued a number of statements denying that they supposed any link between the deposed President of Iraq and the 11 September attacks. See *eg*, *Press Trust of India*, “A Saddam was Not Involved in 9/11 Attacks: Bush”, 18 September 2003.

11. In a television address to the American people, President Bush stated that: America and a broad coalition acted first in Afghanistan, by destroying the training camps of terror, and removing the regime that harbored Al Qaeda. In a series of raids and actions around the world, nearly two-thirds of Al Qaeda’s known leaders have been captured or killed, and we continue on Al Qaeda’s trail. We have exposed terrorist front groups, seized terrorist accounts, taken new measures to protect our homeland, and uncovered sleeper cells inside the United States. And we acted in Iraq, where the former regime sponsored terror, possessed and used weapons of mass destruction, and for 12 years defied the clear demands of the United Nations Security Council. Our coalition enforced these international demands in one of the swiftest and most humane military campaigns in history. See Office of the White House Press Secretary, “President George W. Bush Addresses the Nation from the Cabinet Room at the White House, 7 September 2003.

this essential victory in the war on terror, to promote freedom and to make our own nation more secure.

Not only has the Bush / Blair hard line polarized the West and Islam, but the Coalition's occupation of Iraq has become a veritable terrorist magnet, providing an easy target around which members and supporters of the former Ba'athist regime can unify and organize together with all sorts of crackpot militia members and Al Qaeda sympathizers who have infiltrated Iraq from Saudi Arabia, Syria, Jordan, Afghanistan, Pakistan, Uzbekistan and northern Iran.¹² An unsavoury collection of individual Ba'athists from Saddam's former government still wield enough power in some local towns and villages to intimidate citizenry and launch sporadic attacks on Coalition forces. We have to consider also the some 100,000 criminals Saddam released from jails during the war, and disaffected individuals among the thousands of Saddam regime military personnel and police who suddenly became unemployed when the US dissolved the military and police forces. When Saddam's former vice-president, Taha Yassin Ramadan was captured by Coalition forces, documents gathered by them revealed efforts of the Ba'ath party—a traditionally secular and anti-fundamentalist movement—to nevertheless form an alliance with Islamic fundamentalists to force the Coalition out of Iraq.¹³

The tragic results have already been seen in the attack on the UN Headquarters in Baghdad on 19 August 2003, which claimed the lives of 22 persons including the UN High Commissioner for Human Rights Sergio Vieira de Mello who seems to have been deliberately targeted for his role as UN Special Representative for Iraq. One could not help notice that the bombing was relatively well organized, planned and executed and seemed to have been carried out by former Iraqi soldiers and paramilitaries with the connivance of Iraqis guarding the UN compound, perhaps with background support from Al Qaeda operatives. These attacks on UN personnel and premises forced UN Secretary General Kofi Annan to scale down drastically the international staff presence in Iraq.¹⁴

Consider also the recent attacks against the Jordanian Embassy in Baghdad that claimed eleven lives,¹⁵ the attack on the Shiite Imam Ali Mosque in

12. Associated Press, "Lethal, Sophisticated Iraqi Enemy Takes Toll on US Troops", 3 October 2003.

13. Associated Press, "Cleric Says He is Forming a Religious Army in Iraq: Group would Challenge Coalition Forces", 26 July 2003.

14. Brian Knowlton, "More UN Workers Told to Quit Iraq: But Annan Stops Short of Full Pullout, Reductions Hinder US Efforts to Get Aid", *International Herald Tribune*, 26 September 2003.

15. Alia Shukri Hamzeh, "11 Killed in Attack Against Jordanian Embassy in Baghdad: Government Condemns Bomb Attack As Cowardly Terrorist Act That Has No Political Message", *Jordan Times*, 8 August 2003.

Najaf that claimed 85 lives, including that of Shi'a Ayatollah Mohammed Baqir al-Hakim and leaving over 200 injured,¹⁶ the bombing of the Baghdad Police Headquarters,¹⁷ as well as a second attack on the UN compound in Baghdad on 22 September that killed an Iraqi policeman and left a further 19 wounded.¹⁸ One has to add the 12 October attack on the Baghdad Hotel, which housed the Iraqi Governing Council and it seems also offices of the Central Intelligence Agency, killing six and wounding 32. It appears that all these targets were carefully chosen, of significant symbolic profile, and required a certain level of expert technical sophistication as well as a high degree of secret planning, coordination and access to matériel. The use of car or truck bombs, activated remotely or by suicide bombers coincides worryingly with methods employed in the Bali Nightclub blast of 12 October 2002 and the Jakarta Marriott Hotel bombing of 5 August 2003, raising the spectre of an organized international campaign of longer term significance rather than mere potshots from ragtag militia and isolated individuals.

Ironically, Bush's war on terrorism handed to Islamic fundamentalist terrorists more than they could ever have achieved themselves, namely: a fearful bunker mentality on the part of Americans in their own homes; harsh treatment of Al Qaeda suspects at Guantanamo Bay in violation of basic rules of international humanitarian law and the Geneva Conventions which the international community as a whole has condemned and which ordinary Muslims can cite as American cruel treatment of their coreligionists;¹⁹ serious political split among western members of the international community; deployment of American soldiers in Afghanistan and Iraq to form easy targets for snipers and terrorists; and heightened fear on the part of Arab Governments of the threat of American imperial hegemony and an American grab for Middle East oil. To top it all off, all these factors provide fresh inspiration for the radicalization of thousands of new Jihadists and fanatical recruits.²⁰ Could Osama bin Laden have wished for more?

16. Associated Press, "A Iraq Mosque Blast Kills 85", 29 August 2003.

17. Fox News, "Car Bomb Attack at Baghdad Police Headquarters", 2 September 2003.

18. Associated Press, "UN Cuts Iraq Staff after Second Bombing" 26 September 2003.

19. The US Governments refusal to recognize Al Qaeda and Taleban fighters as combatants or prisoners of war under the Geneva Conventions of 12 August 1949, while at the same time keeping them in detention at Guantanamo Bay, Cuba, to prevent them from claiming the benefits of civil liberties extended under US law, puts these persons in a legal black hole.

20. The Bush Administrations belligerent policies have incensed ordinary people throughout the region and around the globe. See for example, Mohammed Zaatari, "Lebanese University Students Begin Hunger Strike to Protest War: This is the Least We Can Do to Support Iraq", *The Daily Star*, 1 April 2003.

III. INADEQUATE PLANNING AND PREPARATION FOR POST-WAR IRAQ

A. Failure to Distinguish Sufficiently Between Combatants and Civilians in Military Attacks

Disturbingly, neither the US nor Britain agreed not to deploy cluster bombs which in effect mine an area with unexploded bomblets. Neither did they refrain from the use of weapons incorporating depleted uranium which are suspected of causing serious sickness on an indiscriminate basis over the longer term. In a letter to the International Herald Tribune, Irene Khan, Secretary-General of Amnesty International, reminded Coalition partners that:

The laws of war are clear. The political and military leaders of all the States involved in the conflict – the United States, Britain and their allies as well as Iraq – are equally responsible. They are forbidden to attack civilians or civilian targets, or use indiscriminate or prohibited weapons. They are obliged to protect civilians, allow humanitarian assistance and treat humanely all combatants who are captured or civilians who are detained. ... Anyone who violates these principles must be brought to justice. Responsibility is individual and applies as much to the soldier as to the general, to the political leader as to the bomber pilot. All states have a responsibility to bring to justice those who commit grave breaches of the laws of war, whoever they are and wherever they committed their crimes.²¹

Despite the claims of US Secretary of Defense Donald Rumsfeld on the accuracy of aerial bombardment using so-called smart weapons in pinpointing military targets and avoiding civilian casualties, many bombs went astray, hospitals seem to have been hit and there were reports of thousands of ordinary civilians killed. By the end of May 2003, the Christian Science Monitor reported indications from independent surveys that between 5,000 and 10,000 Iraqi civilians were killed during the war, and that this figure was likely to climb much higher if we account also for the civilians killed since the war was declared to have ended.²²

21. Irene Khan, "Iraqis' Rights: Protecting the Innocent", *International Herald Tribune*, 28 March 2003.

22. Professor Marc Herold of the University of New Hampshire has been tallying the number of dead through exhaustive statistical collation and analysis of information gleaned from a wide variety of authoritative sources on the ground. Peter Ford, "Surveys Pointing to High Civilian Death Toll in Iraq: Preliminary reports suggest casualties well above the Gulf War", *The Christian Science Monitor*, 22 May 2003.

B. Failure to Prevent Lawlessness, Looting and Destruction of Cultural Property

Another disheartening consequence of poor Coalition planning was the failure to establish basic law and order following the overthrow of Saddam. Television news coverage shot in April 2003, portrayed general lawlessness in Baghdad as well as looting and destruction of Iraqi cultural property, exposing the Coalitions shocking lack of foresight to protect cultural sites. On 17 April 2003, a UNESCO international experts meeting stated that it:

deplores and is deeply shocked by the extensive damage to, and looting of the cultural heritage of Iraq caused by the recent conflict. It calls on the Coalition forces to observe the principles of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols.²³

The meeting also called on the Coalition to: safeguard all museums, libraries, archives, monuments and sites in Iraq by deploying armed force immediately to those places and prevent the export of all antiques, antiquities, works of art, books and archives from Iraq. It further called for an immediate ban on the international trade in objects of Iraqi cultural heritage, the voluntary and immediate return of cultural objects stolen or illicitly exported from Iraq and the deployment of an immediate UNESCO fact-finding and assessment mission.

Accordingly, UNESCO deployed a first assessment mission from 15-20 May 2003 and a second mission in mid-June 2003. Following these missions, UNESCO registered its fears that perhaps between 2,000 and 3,000 cultural objects were looted from the National Museum in Baghdad as well as the entire contents of the National Library of Iraq. It was estimated that more than 1,500 paintings and sculptures went missing from the Museum of Fine Arts in Baghdad, only 400 of which were so far recovered.²⁴ By early October 2003, UNESCO member States were in the process of finalizing a "Draft UNESCO Declaration on the Intentional Destruction of Cultural Heritage"²⁵ addressing the protection of cultural heritage in situations of armed conflict and underlining the applicable international legal norms on State responsibility and individual criminal responsibility.

C. Failure to Ensure Security Even for Coalition Military Personnel and Pro-American Iraqi Police, Mayors and Governing Council Members

Despite a relatively quick and successful military campaign, Coalition

23. UNESCO Press Release No. 2003-26 of 17 April 2003.

24. Barry James, "UNESCO Lengthens List of Looted Art in Iraq: Thousands of Treasures Said to be Missing", *International Herald Tribune*, 24 May 2003.

25. UNESCO Document 32 C/INF.14 of 6 October 2003.

forces had to endure a series of deadly attacks, proving that it was far easier to secure military victory on the battlefield than to occupy and effectively control Iraq or to guarantee security and the rule of law. Within a few days of President Bush having proclaimed victory in Iraq, sporadic attacks began on occupying forces, claiming the lives of one or two Coalition soldiers per day.²⁶ Such attacks at first resembled uncoordinated and random strikes, for example, the dropping of grenades on US military convoys from highway overpasses, detonation of anti-tank and anti-personnel carrier landmines, and rocket-propelled grenade launches.²⁷ In a number of cases, innocent Iraqi civilians and bystanders have been killed or injured when Coalition forces returned fire or launched counter-strikes.²⁸

By the end of August 2003, more American soldiers had died in Iraq since President Bush announced that the war had ended, than during the war itself.²⁹ Coalition forces feared that they faced a classic guerilla war that had become more unified, organized, focused and lethal.³⁰

The announcement of the appointment of an unelected Iraqi Governing Council by the Administrator of the Coalition Provisional Authority³¹ was made on 16 July 2003, by which time the Council had already issued a public statement on its first meeting.³² The obvious challenge from the start would be that the Governing Council would be viewed by the international community at large, and more importantly, by Iraqis, as a puppet of the US, lacking any claim to the democratic will of the Iraqi people.

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26. Associated Press, "Grenades Hit Convoy in Iraq: 2 Americans Are Seriously Wounded in 2nd Day of Operation", 16 June 2003.
 27. *Associated Press*, "Attacks on GIs Spreading in Iraq: Grenades Dropped from Overpasses and Bombs Put on Roads", 26 June 2003; Agence France Press, "Bomb Kills One and Hurts 53 in Iraq", 10 September 2003.
 28. See for example, Ian Fisher and Patrick E. Tyler "7 Iraqis Die in Mortar Attack Near US Base", *New York Times*, 27 September 2003.
 29. This milestone came on 26 August 2003. "Tallying Americas Dead", *International Herald Tribune*, 28 August 2003.
 30. General John Abizaid, responsible for military operations in Iraq, told reporters that his forces were facing guerilla tactics, while US Defense Secretary Donald Rumsfeld acknowledged that the attacks on American forces might be organized regionally or even nationally. Brian Knowlton, "US Troops in Iraq Face Guerrilla War: General Warns Soldiers of Long Stays: NATO not Interested in a Wider Role", *International Herald Tribune*, 17 July 2003.
 31. Coalition Provisional Authority Regulation No. 1 reads: "Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA), relevant UN Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war, I hereby promulgate the following followed by five articles establishing the CPA under the US Central Command and, section 1, vesting it with all executive, legislative and judicial authority necessary to achieve its objectives. See CPA/REG/16 May 2003/01.
 32. Text of Statement Issued by Iraqi Interim Governing Council After Its First Meeting in Baghdad on 13 July, read by Governing Council member Muhammad Bahr al-Ulum.

On 25 September 2003, Akila al-Hashemi died, five days after having been ambushed by gunmen on her way to work. She had been one of three women members of the new Governing Council. The brother of the victim indicated to the press that his sister had received death threats over several weeks prior to the attack for collaboration with the occupation authorities. The International Herald Tribune reported that: "Because of its relationship with Bremer's administration, the Governing Council is an obvious target for attacks, and some council members have harshly criticized the occupation administration in Iraq for failing to properly guard them."³³

US soldiers and members of the Governing Council are not the only ones to have been targeted. On 16 July 2003, a pro-American mayor of the city of Hadithah was shot dead as he drove through town.³⁴ By 12 October 2003, the World Service of the British Broadcasting Corporation reported in a Special Report on Iraq that the Coalition was facing some 20 armed attacks per day and that members of the Governing Council, like the few remaining international staff of humanitarian organizations, were forced to sleep in a different place each night.

The deliberate targeting of pro-American elements has understandably put Coalition forces on high alert, which in turn, has led to some indiscriminate Coalition attacks on civilians as well as horrendous mistakes, in one case, involving a massacre of eight US-appointed Iraqi police officers and the wounding of six others.³⁵

IV. 'SHOCK AND AWE' IN IRAQ

A. The Shock of American Failure in Iraq

Just before the US Government began aerial bombardment of Iraq, Secretary of Defence Donald Rumsfeld stated that the US would win the war by the 'shock and awe' of its technological and military superiority.

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33. Alex Berenson, "Woman on Iraqi Panel Dies of Wounds", *New York Times*, 26 September 2003.
 34. Associated Press, "Pro-American Mayor of Iraqi City Killed, Convoy Attack Kills US Soldier", 16 July 2003.
 35. Anthony Shadid, "US Forces Mistakenly Kill Iraqi Officers: 8 Policemen Die in Incident Likely to Increase Tensions", *Washington Post Foreign Service*, 13 September 2003, p. 1. The mistake happened in Fallujah. The Post reported that: A US military spokesman said the soldiers had come under fire. But Iraqi policemen recovering in the hospital said they were attacked without provocation. The firing lasted nearly an hour, they said, despite their cries in English and Arabic that they were police officers. They said two of their three cars were marked and that they were all wearing uniforms or arm bands, although the shooting happened in the dark shortly after midnight. A Jordanian guard at a nearby hospital was also killed in what appeared to be crossfire, and the military said one US soldier was wounded."

However, the real shock has been the series of failures in securing effective control over Iraq and the awe has been produced on the part of the American public as to the prodigious budgetary implications assumed by its Government on its behalf.

The US Governments failure to work through the UN Security Council in a way that would have allowed UN weapons inspectors to complete their work meant that the US was obliged to occupy Iraq after it secured military victory, and even then, it sidelined the UN, specialized humanitarian organizations and NGOs on the ground. To further exacerbate matters, the White House insisted on running postwar planning and administration through the Defense Department rather than through the State Department. The lack of foresight and experience on the part of the US Administration to re-establish law and order throughout Iraq, which is normally a matter handled by UN agencies specialized in transitional administration, exacerbated the humanitarian problems brought about by the destruction and chaos of the war.

By shoving the UN Security Council aside before, during and after the war, the Bush Administration painted itself into a diplomatic corner. Predictably, when the US Government requested Bangladesh, France, Germany, India, Pakistan, Turkey and other countries, for troops to broaden the Coalition presence in Iraq, these countries refused on the grounds that the American invasion and occupation of Iraq lacked moral and political legitimacy.³⁶ By early September 2003, the less than enthusiastic response from these and other countries including Russia forced the US Administration to admit its failure to bring law and order in Iraq. It also forced the US to return to the UN Security Council, hoping to develop a resolution authorizing a UN multinational force for Iraq³⁷ that would have the legitimacy to attract the broad support of the international community.³⁸ Even then, the US insisted that full command and control would have to remain with US forces and that the only obligation upon American commanders would be to report regularly to the UN on the status of the situation in Iraq. Despite its high pressure tactics, the US at first failed to drum up support and the Government

36. President Jacques Chirac of France stated that the French Government would not send troops unless there was a clear United Nations mandate for this, and German Foreign Minister Joschka Fischer took a similar position. India also refused Washington's request to send a full division of troops. Note 30; Associated Press, "New Delhi Rejects US Request for Troops: Deployment in Iraq Would Need Mandate of UN, Official Says", 14 July 2003. Also Brian Knowlton, "US and Germany Look to Move past Discord over Iraq", *International Herald Tribune*, 25 September 2003.

37. Brian Knowlton, "US Turns to UN for Troops in Iraq: Powell Says Washington is Seeking Mandate to Share Occupation Burden", *International Herald Tribune*, 4 September 2003.

38. Associated Press, "US Commander in Iraq Details Need for Allied Troops", 5 September 2003.

had to call up thousands of National Guard reservists.³⁹

Despite the series of military, political and diplomatic fiascoes, at the opening of the UN General Assembly session in New York, President Bush reiterated his justifications for having gone to war against Iraq and said that further action might have to be taken against other regimes “before they arrive”, in other words, on a pre-emptive basis,⁴⁰ despite the UN Secretary General having just denounced the unilateral use of force by any State only moments earlier in his own address to the General Assembly.⁴¹

B. The Awesomely Large Additional US\$ 87 Billion Price Tag

In his 7 September 2003 address to the nation, President Bush announced that:

Our strategy in Iraq will require new resources. We have conducted a thorough assessment of our military and reconstruction needs in Iraq, and also in Afghanistan. I will soon submit to Congress a request for \$87 billion. The request will cover ongoing military and intelligence operations in Iraq, Afghanistan and elsewhere, which we expect will cost \$66 billion over the next year. This budget request will also support our commitment to helping the Iraqi and Afghan people rebuild their own nations, after decades of oppression and mismanagement. We will provide funds to help them improve security. And we will help them to restore basic services, such as electricity and water, and to build new schools, roads, and medical clinics. This effort is essential to the stability of those nations, and therefore, to our own security. Now and in the future, we will support our troops and we will keep our word to the more than 50 million people of Afghanistan and Iraq.⁴²

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39. Elisabeth Bumiller, “Bush Meets Allies, but Gets No Aid for Iraq”, *New York Times*, 25 September 2003; and Eric Schmitt, “US General Not Counting on Iraq Help”, *New York Times*, 26 September 2003.
40. President Bush Addresses United Nations General Assembly, The United Nations, New York, President Bush stated that: The deadly combination of outlaw regimes and terror networks and weapons of mass murder is a peril that cannot be ignored or wished away. If such a danger is allowed to fully materialize, all words, all protests, will come too late. Nations of the world must have the wisdom and the will to stop grave threats before they arrive. New York; Release of the Office of the Press Secretary of the White House, Washington, DC, 23 September 2003.
41. Brian Knowlton, “Bush, at UN, Stands Firm on Iraq but also Seeks help”, *New York Times*, 24 September 2003. Also Felicity Barringer, “Bush’s Speech Draws Skeptical Response: Analysts Question What Audience the President Was Addressing”, *New York Times*, 25 September 2003.
42. Office of the White House Press Secretary, President George W. Bush Addresses the Nation from the Cabinet Room at the White House, 7 September 2003.

Public opinion, however, began to shift in the US such that by the end of September 2003, 59 percent of Americans indicated that they were against pouring an additional US\$ 87 billion into Iraq and Afghanistan reconstruction efforts.⁴³ Similarly, by mid-September 2003, the popularity of the Blair Government at home had suffered a serious drop as indicated in by-elections.⁴⁴ At the same time that President Bush was pushing through his US\$ 87 billion budget request, he was blocking Democratic efforts to raise the Administrations spending on control of the AIDS epidemic in the poorest, most afflicted countries, from US\$ 2 billion to US\$ 3 billion.

C. The Reconstruction Feeding Frenzy

The reconstruction of Iraq figures as an American foreign policy tool to help shift the power balance in the Middle East. It has been estimated that Jordan lost US\$ 1 billion as a result of the Anglo-American invasion and interruption of regular trade with Iraq, and it was reported that Jordans Foreign Minister Marwan Muashar was attempting to recoup these losses through reconstruction contracts in Iraq by lobbying with the Coalition Provisional Authority. Similarly, Egypt, whose trade with Iraq prior to the war came to around US\$ 2 billion, was actively pressing American authorities for a share in the reconstruction, while Kuwait and Saudi Arabia - key American allies in the region - were considered to be in prime position for a piece of the pie. The lions share of the lucrative nation-building exercise was slated to go to the American conglomerate Bechtel which, early on, had been chosen by the Government of the United States to receive some US\$ 680 million in contracts, and some to British companies. Syria, which was enduring strained relations with Washington, expected to receive little.⁴⁵ Many Governments outside the region were also vying with Washington for a share in reconstruction contracts, such as Poland, where some experts considered that contracts to rebuild Iraq could double Poland's GNP.⁴⁶ Altogether,

43. "Iraq Costs Spark Worry, Poll Finds", *International Herald Tribune*, 26 September 2003, which reported that: Concerned by the expense and growing US casualties, Americans are looking to the United States to give the United Nations a greater role in Iraq, according to the poll, released Wednesday. Just over half, or 51 percent, support ceding some military control in order to get other countries to send troops, and 70 percent favor the UN's taking on significant responsibility for establishing a stable Iraq government, up from 64 percent in April when major combat was winding down. Respondents remained divided on whether the United States or the United Nations should have the most say in creating the government.

44. Associated Press, "Labor Loses Safe Seat in Sign of Iraq Fallout", 19 September 2003.

45. Associated Press, "Citing past Work in Iraq, Arab Nations Vie for Contracts", 10 September 2003.

46. Brian Whitmore, "Poland Hopes Rebuilding Iraq Will Aid Economy", *The Boston Globe*, 11 June 2003.

European countries had some US\$ 1 billion at stake in potential business in Iraq, and many of them feared Washington would prevent them from accessing the Iraqi reconstruction effort.⁴⁷

V. THE COST OF UNILATERALISM AND THE ROLE OF INTERNATIONAL HUMANITARIAN LAW IN IRAQ

The Iraq war polarized international relations and isolated the US diplomatically. Opinion polls conducted in various countries since the war was officially ended indicated that public opinion in Turkey for example shifted strongly against allowing the US to use Turkish soil to launch attacks on Iraq, and that 83 percent of Turks had an unfavourable opinion of the US, up from 55 percent in the summer of 2002. Similar trends were found in Indonesia, in Palestine and Jordan, as well as many countries of Africa and in Europe, most markedly France, Germany and Spain, but with the exception of the United Kingdom. From the other side, American anger and distrust against France and Germany had increased.⁴⁸ The loss of legitimacy of American foreign policy, and the weakening of NATO, the UN and humanitarian organizations, will have to be assessed over the longer term. Once a State, particularly the world's only hyper power, fails to lead by example, but instead shows contempt for international law and multilateral institutions, then other States feel little reason to trust international political and legal cooperation as a reliable means for achieving consensus and getting things done.

All the same, there are signs for hope. In a way, the American-led Coalition action in Iraq demonstrates what everyone already knew - that like any set of norms, international law can be breached and the consequences are not always sure or clear, particularly for very powerful States. While it is true that international law is relatively weak and decentralized as compared to domestic law, international law does reflect the international community's shared social values and expectations, and above all, it embodies binding legal rights and obligations. In our increasingly interdependent world, international law forms a vital means by which the international community sets its own prescriptive norms, binding on all its members. Fortunately, States that break international law, as the Coalition members have done by attacking and occupying Iraq without UN Security Council authorization, always have the option to shift their course and return to the universally accepted means available to solve problems of global concern through international law and multilateral cooperation in concert with the international

47. Joseph Fitchett, "Rewards and Punishments in the Rebuilding of Postwar Iraq", *International Herald Tribune*, 3 April 2003.

48. Meg Bortin, "Poll Shows US Isolation: In War's Wake, Hostility and Mistrust", *International Herald Tribune*, 4 June 2003.

community at large.

At the vanishing point of international law, international humanitarian law cannot be truly effective unless the Occupying Power implements it in good faith. It should be remembered that, regardless of the lawfulness or unlawfulness of the commencement of hostilities and the use of armed force, international humanitarian law has to be respected. It provides the substantive normative foundation limiting the means and methods of warfare and extending protection over certain categories of persons and property.

Once it became clear to the US Administration that its breach of international law, and failure to observe international humanitarian law in Iraq, has been more costly in terms of political legitimacy both at home and abroad than even all the dollars it has poured into Iraq, it has again sought the familiar fora of multilateral negotiation and cooperation to repair its damaged reputation, although the Bush Administration insists on continued American control over all peacekeeping and humanitarian activities in Iraq. Perhaps the light at the end of the tunnel comes with the US Administrations realization that it cannot go it alone and that it risks alienating even the American voting public that seems to have grown weary of the expense of propping up Iraq, seeing American soldiers killed, and enduring serious strains on multilateral relations that remain vital to the maintenance of international peace and security.⁴⁹

On 16 October 2003, the US succeeded in getting the UN Security Council to adopt resolution 1511⁵⁰ under Chapter VII of the Charter of the UN that: recognizes the Governing Council and its ministers as the principal bodies of the Iraqi interim administration embodying Iraqi State sovereignty until an internationally recognized, representative government is established and assumes the responsibilities of the Coalition Provisional Authority;⁵¹ invites the Governing Council to provide to the Security Council for its review no later than 15 December 2003 a timetable for the drafting of a new constitution and for the holding of democratic elections;⁵² authorizes a multinational force under unified command (ie under US command);⁵³ urges Member States to contribute assistance under this UN mandate, including military forces, to the multinational force;⁵⁴ urges Member States and

49. Carl Hulse, "Sensing Time Is Right, Democrats Step up Attacks on Iraq War", *New York Times*, 25 September 2003.

50. UN Security Council resolution 1511, *introduced* by the United States, *cosponsored* by Cameroon, Spain and the United Kingdom, *adopted* on 16 October 2003.

51. *Ibid*, para. 4.

52. *Ibid*, para. 7.

53. Following the adoption of resolution 1511, US Ambassador John Negroponte stated that the multinational force was intended to be under "unified United States command", removing any possible doubt as to the meaning of this phrase.

54. Para. 14 of UN Security Council resolution 1511.

international and regional organizations to support the Iraq reconstruction effort⁵⁵ and calls upon Member States and concerned organizations to help meet the needs of the Iraqi people by providing resources necessary for the rehabilitation and reconstruction of Iraq's economic infrastructure;⁵⁶ and requests that the US, on behalf of the multinational force ... report to the Security Council on the efforts and progress of this force as appropriate and not less than every six months.⁵⁷ Keeping in mind that the Coalition Provisional Authority has been parcelling out the lions share of reconstruction contracts to American companies, Security Council resolution 1511 in effect urges all UN Member States, rich and poor alike, to pay mainly American companies to reconstruct Coalition-bombed Iraq!

It is significant that Security Council resolution 1511 was adopted with the affirmative vote of all 15 Council members, including the positive vote even of Syria – an indication the international community at large welcomes that the US return to avenues for multilateral cooperation. On the other hand, France, Germany and Russia issued a joint statement explaining their view that, although the resolution was a step in the right direction, it did not give sufficient role to the UN nor did it set a clear enough timetable for a quick end to the American occupation of Iraq.⁵⁸

Perhaps more than Iraq needing to be liberated from the US, the US needs to be liberated of Iraq. Yet for the US to quit Iraq, it needs the support of the international community, and this support will not be fully forthcoming until and unless the US Government indicates its clear willingness to abide genuinely by the rules of international law, including those of international humanitarian law. At this juncture, it is therefore essential to review concretely the humanitarian legal obligations upon Coalition members occupying Iraq.

In its Memorandum to the belligerents,⁵⁹ the ICRC reiterated the legal obligations on the Occupying Power in respect of protected persons and property, which is worth quoting *in extenso*:

Persons not taking or no longer taking part in the hostilities, such as sick, wounded, shipwrecked persons, prisoners of war and civilians, must be respected and protected in all circumstances;

55. Para. 21 of UN Security Council resolution 1511.

56. Para. 22 of UN Security Council resolution 1511.

57. Para. 25 of UN Security Council resolution 1511.

58. Jess Bravin, "US Gets Security Council to Back Request on Iraq", *The Wall Street Journal*, Europe, 17-19 October 2003, A1.

59. Note Verbale of the International Committee of the Red Cross to the Belligerents conveying Its Memorandum on the Rules of International Humanitarian Law to Be Respected by the States Involved in Military Hostilities, March 2003, Geneva, Switzerland, *International Review of the Red Cross*, 85 No. 850 (2003), p. 425.

- All sick, wounded and shipwrecked persons must be collected and cared for, without any discrimination and in accordance with the relevant fundamental provisions of international humanitarian law, in particular the First, Second and Fourth Geneva Conventions;
- The sick, the wounded and the dead of the adverse party must be registered and notified to the ICRC;

Civilians must be respected and treated humanely; the following in particular are prohibited: attacks on their lives, physical integrity or personal dignity, deportation or forced displacements not justified by imperative reasons of security, hostage-taking, sentences and executions not respecting the rule of law and necessary judicial guarantees; civilians who do take a direct part in hostilities lose their protection against attacks only for the limited time of this direct participation;

Civilian internees and detainees are entitled to the same fundamental guarantees and must be treated in accordance with the Fourth Geneva Convention; in particular, they must be registered and notified without delay to the ICRC; the ICRC's right of access to them and their right to receive ICRC visits under Article 143 of the Fourth Geneva Convention must be respected and guaranteed;

Captured combatants must be given prisoner-of-war status and treated in accordance with the provisions of the Third Geneva Convention; in particular:

their capture and detention must be notified without delay to the party on which they depend and to the ICRC's Central Tracing Agency;

they must be held in places where their security is assured and which offer satisfactory material conditions in terms of hygiene, food and quarters;

any form of torture and ill-treatment is strictly prohibited;

the ICRC's right to visit prisoners of war, under Article 126 of the Third Geneva Convention, must be respected and guaranteed;

should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories entitled to prisoner-of-war status, such persons shall enjoy the protection of the Third Convention until such time as their status has been determined by a competent tribunal;

in the event of death, the place, date and cause of death, the place and date of burial and all necessary information to identify the grave sites must be specified in certificates or lists;

any person captured in relation with the hostilities must be treated with humanity; he must be handed over to a higher military authority and, in particular, may be neither killed nor ill-treated.

The ICRCs reminder to all those involved in the fighting of the rules of international humanitarian law applicable to the conduct of military operations is also worth quoting *in extenso*:

The Parties to an armed conflict are not entitled to an unlimited choice of methods and means of combat and must therefore observe a number of rules on the conduct of hostilities. These rules are laid down in the Hague Conventions of 1899 and 1907, and have been reaffirmed - and in some cases supplemented - in the 1977 Protocol I Additional to the Geneva Conventions.

Moreover, the ICRC drew attention to the following rules of customary international humanitarian law, recognized to be binding on any party to an armed conflict:

- A clear distinction must be drawn in all circumstances between combatants and civilians on the one hand, and between military objectives and civilian objects on the other;

It is forbidden to attack civilian persons or objects or to launch attacks of a nature to strike military objectives and civilian persons or objects in an indiscriminate manner. Indiscriminate attacks are those which are not directed at a specific military objective, those which employ a method or means of combat which cannot be directed at a specific military objective and those which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law;

- Acts and threats of violence aimed at spreading terror among the civilian population are prohibited;

Attacks on military objectives which may be expected to cause incidental loss of life or injury among the civilian population or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated are also prohibited;

All feasible precautions must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects;

Each party to the conflict must also take feasible precautions to protect the civilian population and civilian objects under its control against the effects of attacks;

It is prohibited to use civilians and combatants *hors de combat* to shield military operations;

Works and installations containing dangerous forces and other

installations located at or in their vicinity must not be attacked, if such an attack causes the release of dangerous forces and consequent disproportionate collateral losses among the civilian population;

- Cultural property and places of worship may not be made the object of attack, unless they have become military objectives;

- It is prohibited to attack or destroy objects indispensable to the survival of the civilian population, such as foodstuffs, crops, livestock and drinking water installations and supplies, or to render them useless with the purpose of denying their sustenance value to the civilian population;

Due regard must be had for the general requirement to respect the environment, in particular that of other States and of areas outside national jurisdiction. Destruction of the environment may not be used as a weapon. It is prohibited to seek to inflict widespread, long-term and severe damage to the environment;

- It is prohibited to have recourse to means and methods of warfare which pointlessly aggravate the suffering of combatants *hors de combat* or which make their death inevitable;

-It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict constitute perfidy;

Reprisals against protected persons and objects are prohibited;

It is prohibited to order that there shall be no survivors and to make persons *hors de combat* the object of attack.

Concerning the limitations on the use of certain weapons, the ICRC underlined the prohibitions on the use of poisonous, chemical or biological weapons, dum-dum bullets and certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects. It must be noted that the ICRC also included a paragraph in its Memorandum stating its opinion that:

The principles and rules of international humanitarian law - in particular the principles of distinction and proportionality and the prohibition of superfluous injury or unnecessary suffering apply to the use of nuclear weapons. As the International Court of Justice has stated in its Advisory Opinion of 8 July 1996, the use of nuclear weapons would generally be contrary to the principles and rules of international humanitarian law.

The remainder of the ICRC Memorandum contains standard references to the obligations of the belligerents to prevent persons from becoming unaccounted for, the obligation to respect the Red Cross and Red Crescent emblems as well as medical, religious and Red Cross activities carried out under the emblem, the obligation on parties to the conflict to ensure the supply of indispensable items for the survival of the civilian population in territory under their control as well as the obligation to ensure that combatants are instructed in the rules of international humanitarian law. The Memorandum concludes by assuring the parties to the conflict of the ICRC's readiness and willingness to perform the tasks entrusted to it by the Geneva Conventions of 12 August 1949 and by the Statutes of the International Red Cross and Red Crescent Movement.

VI. FINAL REMARKS

The clear challenge for the US and other Coalition members is to face up to their clear legal obligations under international humanitarian law. Attempting to escape legal and political responsibility can only further weaken the legitimacy of the US-led Coalition over the medium and longer term and draw further criticism from the international community at large. The failure of the UN Commission on Human Rights to reach a consensus even on the basic applicability of the Fourth Geneva Convention,⁶⁰ and the Commission's rejection of a proposal to hold an emergency meeting on Iraq must be considered only a hollow victory for the US and Coalition members. Until Coalition members, and the US in particular, embrace their universally recognized legal responsibilities under the Geneva Conventions, we will continue to see news reports that undermine the legitimacy of the US and prospects for strengthened international legal cooperation.⁶¹ One has to

60. Associated Press, "UN Rights Body Rejects Request for Meeting on Iraq", 28 March 2003. The Associated Press reported that: Wary that any debate would turn political, Canada, Japan, European and several Latin American nations lined up with the United States to defeat a resolution calling on the 53-country United Nations Human Rights Commission to consider the effects of the war on the Iraqi people and their humanitarian situation. The resolution, sponsored by Algeria, Burkina Faso, Congo, Libya, Malaysia, Russia, Sudan, Syria and Zimbabwe, also said that the commission should reaffirm the applicability of the fourth Geneva convention among the belligerent parties. In the result, the resolution was supported by 18 States, and opposed by 25 States. Seven countries including India abstained, and three others were absent.

61. Alex Berenson, "US Troops Likely To Escape Penalties", *New York Times*, 26 September 2003 which reported that: AUS soldiers will probably face no penalties for two recent incidents in Iraq in which they killed at least a dozen people who apparently offered little or no resistance, Lieutenant General Ricardo Sanchez, the commander of allied forces in Iraq, said at a news conference here. ... In the first incident, two weeks ago, soldiers from the 82nd Airborne Division killed at least eight Iraqi police officers and a Jordanian

remember that the US has a long record of active support and respect for international law including international humanitarian law and the work of the ICRC, paying almost one-quarter of the ICRC budget. Ultimately, however, the price of exceptionalism in international affairs is infinitely steeper.

hospital worker in a shooting outside a hospital near Falluja, a town about 50 kilometers, or 30 miles, west of Baghdad that has been a center of resistance to the US-led occupation. A day later, the US military apologized for the deaths and began a probe. At least three surviving Iraqi officers said US soldiers had fired on them from close range, even though they had not tried to resist and had tried to explain that they were policemen. A few hours after the attack, the only spent ammunition visible at the scene was from US weapons. A day after the shooting the US military apologized for the deaths, and an investigation began. The second incident occurred Tuesday morning, when soldiers from the 82nd Airborne killed three members of a family and wounded three more, including two boys, in an attack on their house in a village just north of Fallujah. The family said its members were sleeping when the attack began. Sanchez said that the incident did not need to be investigated formally because US troops had attacked the house only after being ambushed by people who had then retreated into it. He did not explain how he could be certain without an investigation that an ambush had taken place.