

Cambridge University Press

978-1-107-10453-2 - Iraq and the Crimes of Aggressive War: The Legal Cynicism of Criminal Militarism

John Hagan, Joshua Kaiser and Anna Hanson

Excerpt

[More information](#)

Prologue

The first assault in the U.S.-led Iraq War was spearheaded by two F-117 Nighthawks dropping four 2,000-pound Bunker Buster bombs and four ships firing forty Tomahawk cruise missiles. They targeted a compound outside Baghdad where U.S. intelligence mistakenly believed Saddam Hussein was visiting his sons. Saddam apparently had not been there in almost twenty years. This assault killed the war's first civilian bystander.

The first strike was followed two days later by the Shock and Awe launch of 1,700 air sorties with hundreds more cruise missiles. Arab-American journalist Anthony Shadid reported from the ground that "Baghdad's residents ... were terrified. In the three hour blitz, at times bringing a new blast every ten seconds, Saddam's garrisons and the symbols of his three-decade rule were shattered" (Shadid 2005:61). The British *Guardian* newspaper called Shock and Awe terrorism by another name (Whitaker 2003). Iraq Body Count estimated that more than 6,000 civilians were killed in the ensuing first phase of the U.S.-led invasion.

A 1974 UN General Assembly resolution defines a war of aggression as the "serious and dangerous" use of force by one nation against another.¹ However, this definition is too inclusive. We argue in the first chapter of this book that the genocide in Sudan's Darfur region was one among numerous instances where another state justifiably could and should have used force to stop the killing of civilians. There are also circumstances in which one state is justified in defending another state against attack, for example, when Germany invaded an undefended Poland to begin World War II. The 1974 UN definition is too broad for purposes of criminal prosecutions or social scientific research, and there is no cumulative case law to clarify the definition of aggressive war.

The unformed nature of today's law of aggressive war is similar in some ways to the laws about unethical business practices encountered in the

Cambridge University Press

978-1-107-10453-2 - Iraq and the Crimes of Aggressive War: The Legal Cynicism of Criminal Militarism

John Hagan, Joshua Kaiser and Anna Hanson

Excerpt

[More information](#)

1950s by Edwin Sutherland, the famous American criminologist who coined the term “white collar crime” that today still frames much discourse about financial illegality. Sutherland (1949) included within his study of white collar crime the actions of U.S. corporations who illegally traded with Germany during World War II. Yet Sutherland and following social scientists contributed little beyond this to the socio-legal study of aggressive war. Our book seeks to advance this underdeveloped social science of wars of aggression.

Our approach is a social scientific analog to the political philosophy of Michael Walzer (1977) and his just and unjust war theory of crimes of international aggression. Walzer (2007) cites legal definitions of aggressive war – from Nuremberg, through the UN General Assembly, to the Rome Treaty. However, he emphasizes that these definitions do not sufficiently specify the events and circumstances that are necessary to circumscribe prosecutorial and trial applications of the concept of aggressive war.

Following the still new International Criminal Court, we begin by defining aggressive war as the use of armed force against another state without the justification of self-defense or authorization by the UN Security Council.² Examples of aggressive war include unprovoked and unauthorized attacks by armed forces, bombardments, and blockades. But Walzer (2012:35) argues that more attention is needed to the factors and circumstances that initiate war – *ad bellum* – to conclude whether a war is just or unjust. He further insists that what comes *after* a war is also a crucial part of whether it should or should not be fought in the first place. Foreseeable consequences of war – *post bellum* – must also be considered.

Our own contribution is a social scientific theory and empirical causal analysis built on this approach, with particular attention to consequences of war, based on extensive social science surveys and interview evidence gathered in Iraq – the most extensively reported but still infrequently empirically studied international conflict recently involving the United States. We bring social science data to bear in documenting both the background and consequences – *ad bellum* and *post bellum* – of the U.S.-led invasion of Iraq.

Of course, it would be naïve in the extreme to believe that this exercise in social science alone could lead to prosecutions and convictions for aggressive war in an international criminal court of law. In any case, Walzer (2007:642; see also Hagan 2010: chapter 2) argues against hasty judgments and further suggests that there is a “moral continuum” along which just and unjust instances of international aggression can be located. He concludes that “the American war in Iraq falls somewhere in between – closer in my view to the unjust pole” (2007:642). We go further: we argue that the *ad bellum* and *post bellum*

Cambridge University Press

978-1-107-10453-2 - Iraq and the Crimes of Aggressive War: The Legal Cynicism of Criminal Militarism

John Hagan, Joshua Kaiser and Anna Hanson

Excerpt

[More information](#)*Prologue*

3

evidence we consider supports a conclusion that the American war in Iraq was an unjust form of criminal militarism that constituted a war of aggression.

Thus we believe that our study of the American war in Iraq can inform and is relevant to judgments and decisions about criminal prosecution and convictions. There are obviously normative elements as well as social scientific aspects of the work presented in this book. To call acts of war instances of legal cynicism and criminal militarism – as we do – involves normative conclusions about what should count as crimes as well as efforts to objectively assemble and access evidence about these putative crimes.

Some will probably say we are simply “witnesses for the prosecution” – which we could conceivably be – but if this is so then our goal is to be open and objective social scientific witnesses. There are ample witnesses for the defense. Former and present CIA directors George Tenet and John Brennan began meeting in April 2014 with aides to plan how they would respond to the declassification of a 6,300-page, 6 million-dollar, and long-withheld Senate Intelligence Committee report on U.S. torture practices during the Iraq War.³ Despite earlier misleading denials by Director Brennan, the CIA Inspector General subsequently confirmed that its employees broke into a private Senate computer server to secretly monitor its work. Few expected the Tenet-Brennan defense to be an open and objective response to charges that the CIA misled Congress and the public about the legality and effectiveness of U.S. torture policies.

We see our approach as consistent with Howard Becker’s (1967) position that in choosing sides of an argument about aggressive war we can usefully acknowledge and advance *both* our value positions and our commitment to standards of social science. We see our study as expanding on the challenge Walzer articulates when he suggests that “surely this is [the kind of] work that must be done before the ICC [International Criminal Court] can think about prosecuting political leaders for the crime of aggression – or for any lesser crimes” (2007:642).

In his 2002 West Point speech elaborating his new War on Terror, President Bush used his presidential authority to issue a normative call to action in defense of American lives and liberty. He announced that “our security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives.” This formulation implicitly acknowledged the important requirement that there be an actual threat to justify a preemptive war, and the Bush administration set out to provide this justification. Yet the ad hoc character of the administration’s claims and justifications revealed the legal cynicism of the preemptive policy that led to the Iraq War – which is the focus of this book.

Cambridge University Press

978-1-107-10453-2 - *Iraq and the Crimes of Aggressive War: The Legal Cynicism of Criminal Militarism*

John Hagan, Joshua Kaiser and Anna Hanson

Excerpt

[More information](#)

Legal cynicism is a normless condition of skepticism in which rules of law are not regarded as binding (Sampson and Bartusch 1998:782). This lawlessness can generate fear in an effected population – as it did in Iraq – for the safety of individuals and their families. Legal cynicism can also be more broadly understood as a cultural frame or orientation in which law is viewed by a population as illegitimate, unresponsive, and ineffectual in providing security – that is, as “ill equipped to ensure public safety” (Kirk and Papachristos 2011:1191). We further borrow from these perspectives in viewing criminal militarism as a cultural frame or orientation in which laws of war are neglected or ignored.

Legal cynicism and criminal militarism originate with bureaucratic, political, and military elites and their agents, whose actions can be a source of perceptions of illegitimacy and injustice among nonelite populations. These subgroups often find and feel themselves to be poorly protected, ill-served, and mistreated by legal authorities (Ivkovic and Hagan 2006; Hagan, Shedd, and Payne 2005; Hagan and Albonetti 1982). Legal cynicism unfolds in ways that sometimes constrain but also more notably create possibilities for response strategies – including collective violence – among the affected subgroups (Lamont and Small 2008:81). Legal cynicism is a key cause of strategic responses that we argue is crucial to understanding sources of sectarian violence in Iraq.

Closer to home, in the United States, Chicago’s neighborhoods with high rates of homicide are also places of acute legal cynicism. David Kirk and Andrew Papachristos find that residents in socially and economically disadvantaged neighborhoods of this city collectively “come to understand that the dominant societal institutions (of which the police and justice system are emblematic) will offer them little in the way of security” (2011:1198). This legal cynicism about law enforcement leads residents in affected neighborhoods to see it as acceptable and appropriate to resort to self-protection as “self-help” (Black 1983). Because this self-help can take the form of homicide, this is a provocative thesis. We examine related arguments in the culminating chapters of this book about the effects of unnecessary violent attacks by U.S./coalition forces on Arab Sunni civilians in Iraq. These chapters reveal that such attacks were sources of legal cynicism that led to widespread social support for Sunni militancy and insurgent violence.

Legal cynicism can have state-based political origins that are deeply embedded and difficult to discern. The roots of legal cynicism in Iraq included foreign and domestic political elites – from U.S. President Bush to Iraqi Prime Minister Maliki – who facilitated and enabled highly organized criminal militarism in Iraq. Indeed, there are persuasive arguments that the militarism that led to the American invasion of Iraq had elite intellectual roots that

Cambridge University Press

978-1-107-10453-2 - Iraq and the Crimes of Aggressive War: The Legal Cynicism of Criminal Militarism

John Hagan, Joshua Kaiser and Anna Hanson

Excerpt

[More information](#)

Prologue

5

extended beyond state actors, for example, as reflected in the post-9/11 call in the *Wall Street Journal* and elsewhere for a “World War IV” against Syria, Iraq, and Iran, which were famously included in the “axis of evil” identified by President George Bush in his 2002 State of the Union Address.

The World War IV idea was initially put forward in the *Wall Street Journal* in November 2001 by Eliot A. Cohen, who later took a leave from the School of Advanced International Studies at Johns Hopkins to accept a position in the Bush State Department. The idea was expanded on in a *Commentary* article in February 2002 by Norman Podhoretz, the magazine’s editor from 1960 to 1995. (Mills 2009:105)

These public intellectuals argued that the United States needed to wage a World War IV that would be similar in length and difficulty to the Cold War, which they thought of as World War III. They called on America to use its military might to forestall future threats to its security. Insofar as many such alleged threats formed false foundations for the war in Iraq, they exemplify an extreme form of criminal militarism.

We argue that this kind of militaristic thinking had legally cynical causes and consequences. Legally cynical, state-based politics often involve less noticed and therefore less predictable processes than do those in simplified, individual-level cause-and-effect models. Yet these deeply embedded paths of influence can also be durable and consequential – often in ways both anticipated and unanticipated. Several parts of this book examine the anticipated and unanticipated consequences of the covert as well as overt legally cynical policies of the Bush administration during the near decade-long American combat presence in Iraq.

For example, we explore the responses of Iraqi judges to the legal reasoning – which many critics and scholars regarded as legally cynical – that justified U.S. torture practices used in Abu Ghraib prison, but which were routinely cloaked in classified and tendentious opinions and memos. We also investigate Arab Sunnis’ fear in Baghdad of the lack of effective protection by legal authorities against Shia militia attacks aimed at taking over their communities. Indeed, many Arab Sunnis in Baghdad became convinced of the legally cynical view that Shia militia had taken over the Iraqi security ministry and were a government-based source of attacks on their communities. These chapters document and explain the successive and ongoing ways legal cynicism initially emerged, was enabled, and then also evolved into retaliatory, revengeful forms of criminal militarism in Iraq.

A militaristic form of legal cynicism initially helped to set the conditions and to form the possibilities for going to war in Iraq. Congress’s 2002 “Joint

Cambridge University Press

978-1-107-10453-2 - Iraq and the Crimes of Aggressive War: The Legal Cynicism of Criminal Militarism

John Hagan, Joshua Kaiser and Anna Hanson

Excerpt

[More information](#)

Resolution to Authorize the Use of United States Armed Forces against Iraq” claimed that Iraq was “a continuing threat to the national security of the United States” because it had “a significant chemical and biological weapons capacity” and was “seeking a nuclear weapons capability.”⁴ In Great Britain, a “Downing Street Memo” warned about the speciousness of these claims and that “the intelligence and facts were being fixed around the policy.”⁵ UN Secretary-General Kofi Annan declared in September 2004 that the ensuing war was “illegal” from the point of view of the UN Charter.

On at least two occasions, only days after the 9/11 attacks, President Bush expressed (with no apparent supporting evidence) his belief that Saddam Hussein and Iraq were involved in these attacks on America (see Baker 2013:135; Packer 2006:41). In advance of the war, the vice president of the United States leaked false claims about Iraqi weapons of mass destruction that were presented as newsworthy in *New York Times* articles written by Judith Miller (e.g., 2001). In the final months before the invasion, Bill Keller (2003), the executive editor of the *New York Times*, supported the invasion of Iraq with an op-ed proclaiming his membership in “The I-Can’t-Believe-I’m-a-Hawk Club.”

The weak evidentiary foundation for the war in Iraq was itself evidence of a criminal militarism grounded in legal cynicism. The justification for the war consisted of three essential claims. The first claim alleged the complicity of Saddam Hussein’s regime in the 9/11 attacks based on a reported meeting of the Iraqi consul in Prague with 9/11 hijacker Mohamed Atta. The FBI was never able to find any evidence for this claim, and despite persistent assertions by Vice President Cheney, President Bush acknowledged the absence of confirming evidence before and after the invasion.⁶ The second and most important claim was that Iraq was in possession of extensive stocks of biological and chemical weapons of mass destruction (WMDs). UN preinvasion and U.S. post-invasion inspections could not find WMD stockpiles.⁷ The third claim was that Iraq was obtaining capacity to make nuclear weapons, as evidenced by the acquisition of “yellow cake” uranium. The UN Atomic Energy Agency reported shortly before the U.S. invasion that this claim was based on a forged letter.⁸ Even Bush administration advisors, such as Richard Haass (2009), would later say that although the first Gulf War of George H. W. Bush was a necessity, the second Iraq War of George W. Bush was a choice. This was a chosen and unnecessary war: a war of aggression.

A war of aggression is among the most serious forms of criminal militarism, and Justice Robert Jackson observed at the post-World War II Nuremberg Trials that “we are not prepared to lay down a rule of criminal conduct against others which we would be unwilling to have invoked against us.” The Nuremberg Tribunal insisted that to initiate a war of aggression is not only an international crime – “it is the supreme international crime

Cambridge University Press

978-1-107-10453-2 - Iraq and the Crimes of Aggressive War: The Legal Cynicism of Criminal Militarism

John Hagan, Joshua Kaiser and Anna Hanson

Excerpt

[More information](#)

Prologue

7

differing only from other war crimes in that it contains within itself the accumulated evil of the whole.” This “accumulated evil” – in the *post bellum* form of unfolding, widespread, and systematic criminal consequences of the aggression – is the main subject of this book. The accumulated evil concept anticipates a path dependency⁹ and a negative trajectory of unnecessary violence that the unfolding policy decision to go to war in Iraq amply fulfilled.

The chapters of this book track a trajectory of legal cynicism and criminal militarism that especially affected Iraq’s Arab Sunnis. Uniquely advantaged during Saddam Hussein’s authoritarian regime, the Arab Sunnis were in turn marginalized in the U.S.-led formation of the new Iraqi state. Iraq’s Arab Sunnis disproportionately experienced the aftermath of the invasion and occupation, including torture, killing, displacement, and community insecurity that resulted from the war of aggression. The Arab Sunnis responded to their collective reversal of fortune with a resilient insurgent militancy. Seen through the “constraint and possibility” lens of legal cynicism, the former constraints – the invasion, occupation, torture, killing, displacement, and insecurity – made the militancy of the Sunnis insurgency not only a possible outcome, but actually the likely outcome of regime change in Iraq.

Wars of aggression are first and foremost recognized for their carnage and killing. This is why priority is given to establishing interim and final counts of the dead. Thus the results of criminal militarism in Iraq are best known through estimates of mortality. This is how and why the Web site of Iraq Body Count became such a widely cited news source in the reporting of the Iraq War. However, it is also essential to understand the further ways wars of aggression can be devastatingly destructive of the long-term fates of states and societies.

Thus wars of aggression are also characterized by their longer-term goals, which have to do with repressing and controlling surviving population groups. The goals of the U.S. occupation and presence in Iraq involved quickly achieving compliance and collaboration in establishing an American-designed democracy. This conspicuously failed and the U.S. forces remained in Iraq far longer and at far greater expense than predicted by the Bush administration. After a briefly stunned and slightly optimistic period following the 2003 invasion, the occupation entered its chaotic period of lawless looting. This was followed from 2004 through 2007 by the rising levels of violence that ultimately verged on civil war and the subsequent surge of U.S. forces. After this peak and a subsequent decline in violence, an interim period of relative peace and security lasted from 2008 through 2011, coinciding with the phased and final departure of American combat forces. Then the renewal of insurgent violence began in 2012.

Cambridge University Press

978-1-107-10453-2 - *Iraq and the Crimes of Aggressive War: The Legal Cynicism of Criminal Militarism*

John Hagan, Joshua Kaiser and Anna Hanson

Excerpt

[More information](#)

Instead of producing a smooth transition to an American-designed democratic society, the American war of aggression resulted in a massive and fearful period of population displacement that impacted in largest numbers the Arab Sunni population of Baghdad and beyond, as well as the development of an even more threatening and stubbornly resilient and militant Arab Sunni resistance and insurgency. Although it is typically suggested that these outcomes were produced by the lack of American planning and preparation for the occupation, we argue that these outcomes actually reflected a more predetermined set of policies that were destined to fail based on their belligerent origins and false assumptions. These included the assumed wisdom of removing all or most of the prior regime's Arab Sunni Ba'ath Party members from elected and non-elected positions in government and the demobilization of the Iraqi military.

The war of aggression began by privileging in its planning an ex-patriot Shia elite opposition who were mostly in exile until the invasion, while at the same time putatively insisting not only on defeating but also on largely disenfranchising a growing nonelite Shia Sadrist movement and the Arab Sunnis who were largely dismissed as the enemy constituency of Saddam Hussein. The criminally militaristic aggressiveness of the American-instigated war presupposed a Shia leadership that, given its savage mistreatment under Saddam, would willingly collaborate in forcefully defeating and dismissing the previously ascendant Arab Sunnis. This war of aggression did not include a robust effort to rehabilitate or reintegrate the Arab Sunnis into Iraq's economy and governance. The Bush administration's prejudgment of an emergent Arab Sunni resistance was expressed in Donald Rumsfeld's metaphor characterizing these "dead ends" as the "remnants of a dying cause."

The representative of the Coalition Provisional Authority (CPA) in Sunni Anbar province, Keith Mines (2012), commented that the head of the CPA, Paul Bremer, was "taken in by the Shia and Kurds, feeling like the Sunnis had lost for legitimate reasons . . . and so could be ignored or even treated badly." Bremer also clumsily and dismissively stumbled into a policy of aggressively and ineffectively opposing a Shia Sadrist movement that was cynical about the U.S. invasion and occupation from the outset. Bremer was an assertive and uncompromising agent of the war of aggression.

Despite substantial amounts of frequently excellent journalism, there is relatively little empirical documentation or theoretical explanation of war crimes in Iraq – even, and perhaps most notably by criminologists, who might have been expected to take a special responsibility and interest. This book provides the social scientific underpinnings of a theoretical and empirical criminology of the Iraq War. Our focus is on the varied crimes that the legal cynicism and criminal militarism of this war produced.

Cambridge University Press

978-1-107-10453-2 - Iraq and the Crimes of Aggressive War: The Legal Cynicism of Criminal Militarism

John Hagan, Joshua Kaiser and Anna Hanson

Excerpt

[More information](#)

Prologue

9

The Iraq War and the Vietnam War to which it is often compared involved the perpetration of major crimes that have formed violently aggressive book-ends of American foreign policy since World War II. Yet the American public and scholars who study crime have shown little inclination to remember or analyze these wars as crime scenes. Americans prefer to remember their wars victoriously, rather than dwell on their failures, and we argue that doing so is a virulent form of legal cynicism and denial that metastasizes in unexpected ways, including the perpetuation of a militaristic framing of American foreign policy that encourages repeated involvement in foreign wars.

Even Barak Obama, who ran for president to a large extent based on his early opposition to the Iraq War, has perhaps surprisingly displayed an inclination toward victorious denial in his observations about the Vietnam War – the conflict that produced many of the generals who would later lead the Iraq War. “Let it be remembered,” President Obama reminded the Minneapolis American Legion Veterans of the Vietnam War in August 2011, “that you won every major battle of that war. Every single one.”¹⁰ This was not an idle or passing thought. Less than a year later, in May 2012, President Obama repeated nearly the exact same words in a commemoration of the fiftieth anniversary of the Vietnam War at the Vietnam Veterans’ Memorial on Washington Mall. With the 2012 election campaign approaching, and several million Vietnam veterans among the electorate, there is reason to ask whether these victorious claims involved elements of a politically motivated and targeted militarism.

The claim that the U.S. military won all the major battles in Vietnam is relevant – and indeed predictive – of subsequent claims of the victorious results of the 2007 surge of troops in Iraq. In his first book about the Iraq War, journalist Thomas Ricks (2006:129) quotes a North Vietnamese officer as responding to the claim that the United States won all the major battles by saying, “that may be so, but it is also irrelevant.” His point was that North Vietnam won the war by gaining the support of the people and communities the war was literally and figuratively fought over. In this respect, there is an important similarity in the Vietnamese and Iraq experiences. Several months into the Iraq War, Ricks noted that the Americans, as before in Vietnam, “had no idea who the enemy really was. Nor did they know much about what Iraqis thought of them” (2006:129).

The Americans, especially their commanding officers and diplomatic core, were isolated in the cocoon of Baghdad’s Green Zone, or what Rajiv Chandrasekaran (2006) aptly called *The Imperial Life in the Emerald City*. George W. Bush (2003a) rushed to claim “mission accomplished” after the U.S. invasion, perhaps to further confirm his father’s militaristic assertion after the first Gulf War that “By God, we’ve kicked the Vietnam Syndrome once

and for all.” But the occupation of Iraq that followed the invasion proved a distinctly different challenge than the earlier Gulf War.

David Petraeus and his plan for the 2007 surge of more troops and a new counterinsurgency strategy drew directly on his Vietnam experience. We argue in this book that the surge was part of this long-term problem and did not provide its solution. The surge of forces in Iraq became the new hope for reversing the chaos and killing that burst explosively out of control in 2005 and 2006. The surge initially elevated the Iraqi and American death tolls, but when the killing entered a period of decline, it immediately sparked new claims of victory.

Two veterans of American politics as well as Vietnam, former infantryman Chuck Hagel and Navy bomber pilot John McCain, took up their long-lasting disagreements about the lessons of war in a revealing 2013 congressional confirmation hearing for Hagel’s appointment as defense secretary. This confrontation recalled earlier disputes about the winning of battles, but now in the context of the surge of troops in Iraq.

Battle Scars

The congressional hearing began with Senator McCain acknowledging that he and Senator Hagel were old friends but that nonetheless he questioned Hagel’s professional judgment and worldview on national security. McCain started his questioning of Hagel by citing an earlier exchange between Hagel and Secretary Condoleezza Rice about the proposed surge.

SENATOR MCCAIN: In January of 2007, in a rather bizarre exchange with Secretary Rice ... You said, quote, “matter of fact, I have to say, Madam Secretary, I think the speech given last night by this President [Bush] represents the most dangerous foreign policy blunder in this country since Vietnam. If it’s carried out, I will resist it.”

And then of course you continued on and on for months afterwards talking about what a disaster the surge would be, even to the point where the surge was succeeding...

Do you – do you stand by that – those comments, Senator Hagel?

MR. HAGEL: Well, I would defer to the judgment [of history] to sort that out, but I’ll–

SENATOR MCCAIN: I want to know if you were right or wrong. That’s a direct question. I expect a direct answer.