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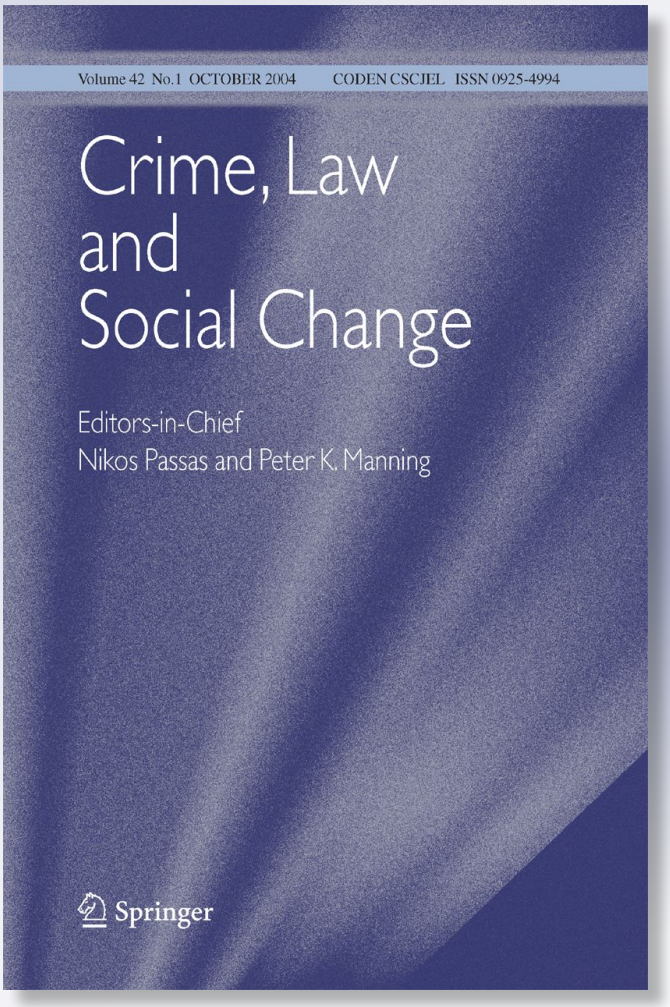

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Iraq and the case for Australian war crimes trials

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Abstract This article presents the case for Australian war crimes trials, following Australian participation in the invasion of Iraq and the subsequent deaths of as many as a million Iraqi civilians. It focuses on jus in bello (war crimes) rather than jus ad bellum (just war). The article sets out the argument and rationale that Australian war crimes trials are needed. Having established the necessity, the article identifies two of the principal alleged atrocities for which Australian officials should be held criminally accountable. It details Australian military support for the use of cluster bombs against civilians during the 2003 invasion, and senior Australian military commanders' responsibility for planning and carrying out multiple purported war crimes during the attack on Fallujah in late 2004. The article recognises that, in order for Australian officials to be prosecuted under the International Criminal Court (ICC), all domestic remedies must be first exhausted. It therefore specifically addresses which Australian laws can be used, with particular emphasis on anti-terrorist legislation passed in 2002 under the Howard Government and the introduction into Australia's domestic federal criminal legislation offences equivalent to the ICC Statute offences of genocide, crimes against humanity and war crimes. These provide the most applicable legal tools for prosecuting senior Australian officials for war crimes in Iraq.

Introduction

In the eight years since the 2003 invasion of Iraq, two independent studies have found that between 600,000 and 1.2 million Iraqis had died ('excess deaths') as a direct result of that invasion [17, 66]. Another study backed by the post-2003 Iraqi government accepted that there were at least 151,000 'violent deaths' in Iraq between March 2003

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and June 2006 [89]. These 'excess' or 'violent' deaths fall into two broad categories: those killed by the invading and occupying forces and those killed in the turmoil associated with the occupation. Senior Australian military and government officials have been directly involved in the former and indirectly in the latter.

We know that the pretext for invasion–rationales of an imminent threat from the regime of Saddam Hussein–was false [57], and that according to the UN Secretary General Kofi Annan the invasion was illegal under international law [8]. That war crimes were committed by the US led coalition in Iraq is beyond dispute. The 'Shock and Awe' of the invasion, the torture scandal of Abu Ghraib, the war profiteering and corruption of the occupation, and the indiscriminate killing of civilians and excessive use of force by coalition forces are just some of the many incidents of war crimes that have received intense international media attention and academic debate. Further revelations of coalition support for or direct participation in torture and indiscriminate killings were revealed in the massive cache of classified military documents released by Wikileaks in 2010.

Yet, so far, no-one has been held responsible. Persons implicated in lesser scale massacres in the Balkans have been prosecuted for war crimes [37]. While there have been at least four attempts to indict former US Defence Secretary Donald Rumsfeld and or other top US officials in Germany, France, and Spain [31] and moves (ultimately unsuccessful) to hold Bush administration officials responsible for policies of systematic torture, [1, 38] no legal moves have been made against Australian officials.

The responsibility of former Australian Prime Minister John Howard (in power 1996–2007) former Foreign Minister Alexander Downer and former Defence Minister Robert Hill for war crimes allegedly committed under their command has not even been much debated. Nor has there been any serious efforts on the part of the successor Labor Government for any sort of accountability process, unlike the UK, where the government has launched the Chilcot Inquiry into British conduct regarding the Iraq War.

However, the test of any country with a claim to sovereignty and an integral legal system is that it can hold its own officials to account, regardless of their social rank. This principle is, in fact, built into the International Criminal Court (ICC), which was set up to 'complement' national systems and act only when those systems were 'unable or unwilling' to prosecute war criminals. The Australian law that mandates cooperation with the ICC observes that such cooperation 'does not affect the primacy of Australia's right to exercise jurisdiction with respect to crimes within the jurisdiction of the ICC' [47].

Such a legal assertion must be put to the test. In the second half of this article we detail Australian military support for the use of cluster bombs against civilians and senior Australian military commanders' direct responsibility for multiple alleged incidents at the city of Fallujah. But first, we will examine the rationale for war crime trials, and then explore existing Australian legislation which might provide appropriate opportunities for prosecution.

Why war crimes trials?

The Rome Statue of the International Criminal Court (ICC)–contemplated at the UN ever since the Second World War but only created in the late 1990's after the

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Rwandan genocide and after atrocities in the Balkans–succinctly sets out the principal rationales for war crimes trials. The need for war crimes prosecutions comes from recognition that 'grave crimes threaten the peace, security and well-being of the world', that the most serious of crimes 'must not go unpunished' and that the international community is 'determined to put an end to impunity'. However it is 'the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes' and the ICC is to be 'complementary to national criminal jurisdictions' [81].

Akhavan (2001) further argues that war crimes tribunals can act to prevent future atrocities by 'stigmatising delinquent leaders through indictment, as well as apprehension and prosecution'. Their influence will be undermined, future political rehabilitation will be blocked and the crimes will be recorded and not simply forgotten [5: 7]. The broader justice rationales for criminal prosecution are well known. Victims are comforted, there is a forum for the recording of historical facts, and a 'new dynamic in society' is generated, including the belief that aggressors will be punished. Particular individuals are held criminally responsible, reducing the culture of collective guilt and 'further cycles of resentment and violence' [52: 3]. For example, if the Australian justice system were to hold Howard and his chief collaborators responsible for their role in the middle-east aggression (in Afghanistan from 2001, as well as Iraq from 2003), disaffected Muslim youth might be less likely to seek revenge on Australian citizens, as happened in Bali in October 2002 [75].

Importantly, prosecuting senior officials can dampen the enthusiasm of those planning aggressive interventions and atrocities (or collaboration with such) elsewhere. Senior key individuals must be singled out, even if middle rankers are excused for following orders. As Kritz [1997] says: 'Total impunity … can be expected not only to encourage new rounds of mass abuses … but to embolden the instigators of crimes against humanity everywhere … criminal prosecution in some form must remain a threat and a reality' [52: 3]. However, ill-prepared attempts at prosecution may be counter-productive, reinforcing the popular belief that legal proceedings against powerful citizens will inevitably fail [67]. To be effective, therefore, war crimes prosecutions must be well considered and precisely framed.

Several arguments against prosecution have been usefully summarised by Osiel (2000) [68: 118–147] and two of them seem worth discussing here. The first argument against prosecutions is that social processes can be better alternatives to criminal trials. One such method has been a 'quick, decisive purge of enthusiastic collaborators' from state positions. Such a process occurred during German 'de-nazification' and in Alfonsin's purge of the Argentine generals [68: 130–131]. Yet even in these cases the purge did not prevent the trials of senior Nazi leaders or individual participants in Argentinean torture.

Another social process alternative to war crime trials is a 'truth commission', as have already been held in South Africa, Chile, Uganda and East Timor. Such processes are said to sacrifice conventional 'justice' for a full exposure of the 'truth' in return for immunity from prosecution; yet they often fail even in this latter objective, as the truths exposed are often very partial [68: 132].

A second argument against prosecutions has been to hold careful political reconstruction of policy above justice processes. It is said that legal essentialism could aggravate the careful building of new political structures, to save a country

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from dictatorship. Prosecution of powerful figures would cause divisions and test the will of both legal and political regimes. Yet as Osiel points out, this argument is more relevant to an insecure and unstable democracy, with powerful enemies [68: 118–120]. That does not really describe the Australian political system.

In the United States, substantial legal obstacles have been placed in the way of war crimes initiatives. Successive administrations have asserted legal immunity (being 'above the law') for their soldiers and officials engaged in international operations. The US (Clinton Administration) signed the Rome Statute of the ICC on 31 December 2000, but on 6 May 2002 (Bush Administration) informed the UN Secretary General that 'the United States does not intend to become a party to the treaty … [and so] has no legal obligations arising from its signature on December 31, 2000' [80: 192]. The United States has also passed the Military Commissions Act of 2006, which grants officials retroactive immunity from war crimes prosecution. In addition, it has signed treaties with countries guaranteeing American citizens immunity from ICC prosecution, and has cut or threatened to cut aid to countries reluctant to sign such agreements [38]. Legal obstacles to prosecution thus appear to be less in Australia, which has signed and ratified the Rome Statute of the ICC, than in the US.

While heads of government of less powerful states, such as Augusto Pinochet of Chile and Slobodan Milosevic of Yugoslavia have been charged under national and international law, respectively, senior US officials have so far escaped such a fate. Nevertheless, claims of privilege might not be long lasting. Crimes against humanity are now said to trump all state claims of immunity [44: 75]. For example, Pinochet was charged in 1998 in a Spanish case involving victims of his dictatorship under the doctrine of universal jurisdiction. Universal jurisdiction recognises that some crimes are so serious that they affect the entire international community, and that the perpetrators of such crimes can be prosecuted in countries other than where the crimes were committed [31]. The case established the key international legal principle, now known as the Pinochet Principle, that heads of state could not claim immunity in the face of international charges of genocide, crimes against humanity, or war crimes [38]. Subsequent international charges were pursued against former heads of state Milosevic and Charles Taylor of Liberia [31].

In 2004 and 2006, a coalition of international lawyers representing former detainees held in Iraq and Guantanamo filed criminal complaints under Germany's universal jurisdiction laws against former US Secretary of Defence Donald Rumsfeld, former CIA Director George Tenet, and former Attorney General Alberto Gonzales, among others. In 2007 under France's universal jurisdiction law, a similar coalition of human rights groups filed a complaint against Rumsfeld for torture and other serious war crimes. A complaint was filed in March 2009 under Spain's universal jurisdiction law against six senior Bush administration lawyers, including Gonzales, for their role in allegedly legitimatising the torture program [31].

At this point (December 2010), no one has been formally charged in any of these cases. Both German complaints and the one in France were eventually dismissed [19]. The Spanish case is technically still open, but no indictments have been forthcoming. Classified diplomatic cables released by Wikileaks in late 2010 confirm that the US pressured Spain into dropping any and all investigations or possible

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indictments. After meeting with US diplomats, Spain's attorney general recommended the case not proceed, and it has faltered since then [78].

Which Australian law?

While senior Australian military and government officials could be charged under other countries' universal jurisdiction laws, this article focuses on opportunities to pursue war crimes prosecution within the existing Australian legal system. As we shall see, Australian military support for the use of cluster bombs against civilians and the responsibility of senior Australian military commanders for multiple alleged incidents at the city of Fallujah are serious allegations of war crimes. Serious accountability is therefore required, if Australians wish to assert any credible voice in international affairs. The International Criminal Court process requires that domestic remedies be exhausted before an international remedy is sought [81]. This may involve a significant test of legal initiative and independence, in the apparent absence of political will.

The Australian Government under the Howard Prime Ministership signed the Rome Statute of the International Criminal Court on 9 December 1998 and ratified it on 1 July 2002, without reservations. It declared that 'no person will be surrendered to the Court by Australia until it has had the full opportunity to investigate or prosecute any alleged crimes … no person can be surrendered to the Court unless the Australian Attorney-General issues a certificate allowing surrender … [and] no person can be arrested pursuant to an arrest warrant issued by the Court without a certificate from the Attorney-General' [47].

Which Australian law could be used 'to investigate or prosecute any alleged [war] crimes'? As it happens, the Howard Government created the most suitable legal tools. Wide-ranging legislation inserted a range of new terrorism offences into the Australian federal Criminal Code, just prior to the Iraq invasion [25]. At about the same time the Treaty of Rome (for the ICC) was ratified and supplementary legislation incorporated all the Geneva Conventions into Australian law [47].

These anti-terrorism laws and their effects have been the subject of intense academic debate and analysis. However, the focus has been largely on the threats to civil liberties and the 'arbitrary and expansive use of executive power' [43: 357] regarding the domestic applications of the legislation. There has been little if any analysis to apply the anti-terrorism legislation and or the ICC offences of genocide, crimes against humanity and or war crimes to individuals responsible for Australia's participation in the Iraq or Afghanistan wars.

In June 2010, the International Criminal Court expanded its purview to include the crime of aggression, defining it as a 'crime committed by a political or military leader which by its character, gravity, and scale constituted a manifest violation of the [United Nations] Charter' [84]. However, it will be at least 2017 before the ICC will be allowed to prosecute [84]. In the mean time, the broad ranging Australian law proscribing 'terrorist acts' could be considered as a substitute. Amendments made under Howard in 2002 to Part 5.3 s 100.1(1) of the Criminal Code create the offence of a 'terrorist act'. This involves serious harm, property damage or death caused 'with the intention of advancing a political, religious or ideological cause' and with

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the intention of 'coercing, or influencing by intimidation, the government of … [a] foreign country' or 'intimidating the public or a section of the public'. The maximum penalty for this offence is life imprisonment [26]. These charges might be used to describe the intention of senior Australian government officials, in collaboration with senior US officials, when by military invasion they sought and achieved the destruction of the Government of the sovereign state of Iraq, in contravention of the UN Charter [8, 58]. The evidence of their intention ('regime change') and principal methods (massive bombardment) were no secret, and could be readily compiled.

In July 2002, Australia passed the International Criminal Court (Consequential Amendments) Act 2002 (Cth.) as part of its ratification of the Rome Statute of the ICC. In doing so, it introduced into its domestic federal criminal legislation, i.e. the Criminal Code 1995 (Cth.) (Criminal Code), offences equivalent to the ICC Statute offences of genocide, crimes against humanity and war crimes [47]. When we consider the Australian military role in assisting missile strikes and the bombardment of Iraqi cities, including senior Australian military involvement in the attacks on the city of Fallujah, the relevant sections of the Criminal Code include: Crime against Humanity–Murder (s.268.8) and Crime Against Humanity–Attacking Civilians (s.268.35). The former charge is for a perpetrator who 'causes the death of one or more persons' and that offence is 'committed intentionally as part of a widespread or systematic attack directed against a civilian population'. The maximum penalty for both offences is life imprisonment. There are a number of related war crime offences that might be added, as the evidence is compiled, such as involvement in torture (s.268.13), destruction of property (s.268.29) and attacking undefended places (s.268.39). As direct collaborators with US forces, senior Australian officials can be held responsible not only for their direct command role but for their 'common purpose' [15, 22] in mounting the aggression. There are numerous sources of evidence on the actions and admissions of the Australian Defence Force, including in their 2004 publication 'The War in Iraq' [13].

The Howard Government was warned internationally [58] and within Australia [9] of the likely criminal consequences of the Iraq invasion. A large group of senior Australian lawyers specifically warned Howard that the invasion would constitute 'a fundamental violation of international law' and that 'widespread harm to the population' could not be justified and could be subject to Geneva Convention sanctions [9]. The fact of such warnings most likely aggravates the criminality of those responsible for the subsequent aggression.

Australian responsibility: cluster bomb deaths of civilians

There are two clear, specific cases regarding Australia's direct participation in serious war crimes allegedly committed in Iraq. The first is the Royal Australian Air Force (RAAF) support for US and British ground troop use of cluster bombs on civilian populations during the initial invasion in March and April of 2003. The second is Australian military commanders' responsibility for the assault on Fallujah in late 2004.

While there were significant numbers of civilian deaths resulting from aerial bombing in the geographical areas where the RAAF was reported as operating, this

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paper focuses on civilian deaths resulting from cluster bombs. The widespread use of cluster bombs in civilian areas by US ground troops supported by the Australian air force meant those civilian deaths were not only predictable, but also preventable.

In an editorial calling for the Bush Administration to be tried for war crimes in Iraq, columnist Paul Rockwell (2004) describes a cluster bomb as:

> a 14-foot weapon that weighs about 1,000 lb [455 kg]. When it explodes it sprays hundreds of smaller bomblets over an area the size of two or three football fields. The bomblets are bright yellow and look like beer cans. And because they look like playthings, thousands of children have been killed by dormant bomblets in Afghanistan, Kuwait and Iraq. Each bomblet sprays flying shards of metal that can tear through a quarter inch of steel. The failure rate, the unexploded rate, is very high, often around 15 to 20%. When bomblets fail to detonate on the first round, they become land mines that explode on simple touch at any time [74].

Human Rights Watch found that the 'targeting of residential neighbourhoods with these area effect weapons [cluster bombs] represented one of the leading causes of civilian casualties in the war' [27: 80]. A USA Today four-month study found that the US dropped or fired nearly 11,000 cluster bombs or cluster weapons during the invasion, containing between 1.7 and 2 million bomblets [90]. Britain used 2,000 more [88].

Cluster bombs are prohibited under the Australian Anti-Personnel *Mines Convention Act* [12] but are not banned by the US and UK, and there is no evidence that the RAAF used them. But the ADF's direct support for US/UK aircraft dropping cluster bombs in densely populated civilian areas, and providing close air support for troops who used them as munitions, is a serious war crime charge. While technically not illegal as a weapon of war during the Iraq War, cluster bombs have long been condemned. Human rights groups have repeatedly called for a ban on their use. It is their inability to discriminate between military and civilian populations that is particularly offensive, as well as the ongoing danger to civilian populations from unexploded ordinance. Their use can thus comprise war crimes, under the Geneva Conventions [32]. Cluster munitions are now prohibited by nations that ratify the Convention on Cluster Munitions, which entered into force and became binding international law in August 2010. As of December 2010, Australia had signed but not yet ratified the treaty; the United States has refused to sign [79].

The Australian Defence Force outlines its participation in the Iraq War in its 2004 publication, 'The War in Iraq: ADF Operations in the Middle East 2003' [13]. Australia did not commit ground forces to the invasion, and its participation, codenamed Operation Falconer, was limited to 2,000 military personnel divided approximately equally between the navy, air force, and SAS (Special Operations). SAS units entered Iraq and were engaged in covert operations to identify and dismantle Iraq's supposed 'weapons of mass destruction', primarily in western Iraq. The navy helped clear the Northern Persian Gulf of mines, ensured Iraqi leadership did not escape, and contributed to the overall coalition naval blockade. The RAAF supplied 14 FA18 Hornet fighter jets, three Hercules transport planes, and P3 Orion surveillance aircraft. The Hornets carried air-to-air weapons, surface missiles, laser guided and conventional

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bombs. Their role initially consisted of providing support for mid air refuelling and other operations where US/UK fighter planes were particularly vulnerable.

Within a week of the 'Shock and Awe' aerial bombing campaign which began on 20 March, 2003, the RAAF's FA18 Hornet fighter jets' primary role was to provide close air support for US ground forces engaged in battle on their way north towards Baghdad [13]. On April 7, ADF Brigadier Mike Hannan announced that the Hornet's targeting policy was exclusively focused 'only on engaging targets in direct support of coalition ground forces' [39].

These ground troops that the RAAF Hornets were 'in direct support of' fired extensive cluster bomb munitions on civilians. A Human Rights Watch investigation found that 'Unlike Coalition air forces, American and British ground forces used cluster munitions extensively in populated areas … use of these weapons [cluster munitions] was widespread along the battle route to Baghdad' [27: 80], with significant numbers of civilian casualties in southern Iraq [30] including al Hilla, Najaf, Kerbala, Nasiriyah, and Baghdad, as examined below.

The daily ADF briefings given to journalists from this time [2] did not disclose specific battles or locations in which the Hornets were involved. They did, however, make it clear that the RAAF Hornets were giving direct air support to US ground forces along the battle route north to Baghdad. ADF media briefings on April 1 and April 4 are typical:

> April 1:
> 'QUESTION: And the bombing on the outskirts, are we involved in the battle for Baghdad now?
> GENERAL [ADF CHIEF PETER] COSGROVE: Well, we are, because we're supporting the forces which are directly confronting Iraqi divisions on the outskirts of Baghdad. We're supporting those forces. So, yes, the bombing missions our planes are doing are directly in support of military operations designed to step right up to Baghdad' [24].
> And April 4:
> BRIGADIER MIKE HANNAN: 'Now the issue with them [Hornets] is that they've been flying in that southern area of Iraq supporting the Coalition forces that are fighting in that area and attacking those, particularly those Republican Guard, and other Iraqi forces operating in the south' [40].

In this area of Iraq, on the outskirts of Baghdad, many civilians were killed by cluster bomb munitions fired primarily by US ground troops. On 31 March, 48 people were killed, including many children, and more than 300 injured in a cluster bomb attack at al Hilla (also spelled Hillah, Hilya), 80 km south of Baghdad. At least 250 Iraqis were killed and 500 wounded over 17 days from late March, most the victims of cluster bombs [29].

Roland Hugenin-Benjamin, a spokesperson for the International Committee of the Red Cross in Iraq, described what happened in Hilla as 'a horror, dozens of severed bodies and scattered limbs' [29]. UK journalist Anton Antonowicz reported from a Hillah hospital:

> Among the 168 patients I counted, not one was being treated for bullet wounds. All of them, men, women, children, bore the wounds of bomb

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> shrapnel. It peppered their bodies. Blackened the skin. Smashed heads. Tore limbs. A doctor reported that 'All the injuries you see were caused by cluster bombs…The majority of the victims were children who died because they were outside' [10].

The cluster bomb attack on al Hilla received international media attention, and was condemned by Amnesty International and Britain's Diana Fund, founded by Britain's Princess Diana to stop international land mine use [3, 4].

On 28 March, 36 civilians died from cluster munitions in Najaf (160 km south of Baghdad) and another 40 on April 2. A hospital survey of Najaf in mid April 2003 listed 378 dead and at least 920 injured [27: 88, 55, 6]. At least 405 civilians, including 169 children, were killed and 900 injured in Nasiriyah, further south. Most died in the extensive ground battle from the start of the invasion through 31 March [27: 132], with extensive use of cluster munitions [16, 54].

On April 2–3, hospital officials reported at least 43 civilians were killed during US attacks on Republican Guard units in Aziziyah and the nearby village of Taniya, with many of the dead being children [11]. At least 35 died at Kerbala, most from cluster bombs, after the city fell to US forces on April 6 [88]. These are official hospital death figures, undoubtedly underestimates; many civilian deaths went unreported, as many who died never made it to a hospital or a morgue.

The ADF consistently and emphatically stated that the RAAF was not involved in the extensive aerial bombing and cluster bomb munitions attacks on Baghdad. However, under the legal doctrine of common purpose [15, 22], senior Australian officials are responsible for those attacks, as well as for the March 28 US missile attack on Baghdad's Al Nasser market, which killed at least 58 people, including many women, children and the elderly [59].

After first categorically denying they had used cluster munitions, the US then claimed that the high incidence of civilian deaths was because the Iraqis sited military installations- primary targets for US bombs- near civilian centres [88]. This is debatable, as eye witnesses in Hilla claimed the Iraqi military had fled before the cluster bomb attack [23]. Karbala civil-defence chief Abdul Kareem Mussan was quoted as saying that his 'men are harvesting about 1,000 cluster bombs a day in places [US Military] said were not targets' [88]. Regardless, under Article 85, 3(b) of the Geneva Conventions (Protocol 1), it is a war crime to launch 'an indiscriminate attack affecting the civilian population in the knowledge that such an attack will cause an excessive loss of life or injury to civilians' [32].

Cluster bomb use in populated areas also violates Article 48, which protects civilians from military attack, and Article 51, which prohibits indiscriminate attacks. Section 3(b) (Article 51) defines indiscriminate attacks as 'those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction'. Section 4(a) prohibits any 'attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated' [33].

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Defence Minister Robert Hill was questioned directly regarding the Coalition's use of cluster bombs on Channel 10's Meet the Press on April 6. He made it clear that Australia did not actively oppose their use by the US and UK [61]:

> 'DEBORAH SNOW: Minister, I would like to ask you a question about cluster bombs which have been inflicting some horrendous injuries, it seems, in parts of Iraq–including segments of the civilian population. I know that Australia doesn't use them, or assist in their use, so you've said, but do you actually condone the use of these weapons by our coalition partners the US and the UK in the Iraqi situation?
> ROBERT HILL: I don't think that the Americans have actually acknowledged using them…
> DEBORAH SNOW: The British have.
> ROBERT HILL: They have acknowledged, have they?
> DEBORAH SNOW: As far as I am aware.
> ROBERT HILL: Anyway, where it is possible to use an alternative munition, then we would prefer it. There are obviously aspects, in relation to cluster bombs, that we don't approve–and that is why we don't use them and we don't facilitate the use of them. Where there is not an alternative, that becomes a very difficult issue because we are in a conflict where Australian and other coalition lives are at risk. We want to achieve our goals as quickly and safely is possible.
> DEBORAH SNOW: Have you not taken steps to try to ascertain whether they are being used or not, and if so made certain representations as to how you think they should be used, given that we are perceived, at least in the Arab world, as a part of the force that is using these weapons?
> ROBERT HILL: No, I haven't done that. As I just said to you, if our coalition allies believe that they have no other alternative to safely and effectively achieve the mission, I am not going to condemn them for making that decision.'

Under the international legal doctrine of command responsibility, government and military officials can be held liable if they knew, or should have known, that anyone under their command was committing war crimes and they failed to prevent them [53, 56]. This doctrine of command responsibility is codified in Article 28 of the Rome Statute of the International Criminal Court. Further responsibility is specified under Article 28(a) regarding crimes committed by forces under their command if they 'either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes' [82].

Despite direct knowledge of their widespread use and lethal effect on Iraq's civilian population, Hill still refused to condemn, or even question, their use by Australia's allies. Nor did he act to stop the RAAF's direct cover for US troops firing cluster munitions on heavily populated civilian areas. Hill, former Australian Defence Force head General Peter Cosgrove, and Brigadier General Mike Hannan, and other senior Australian ministers were direct participants, rather than simply accomplices, in this large scale killing of civilians. They should be tried accordingly for war crimes, in particular for violations of the Geneva Conventions which protect

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civilians and prohibit indiscriminate attacks on civilian populations, and as per Australia's ratification of the Rome Statute of the International Criminal Court.

Australian responsibility: the assault on Fallujah

A second case providing detailed evidence for the war crimes prosecution of Australian officials is their direct responsibility for the brutal assaults on Fallujah in late 2004. There are numerous and well documented accusations of war crimes committed under the direct command of Australian Major General Jim Molan. Noam Chomsky (2006) describes these allegations as 'far more severe than the [Abu Ghraib] torture scandals' [20: 73].

Molan was seconded from the ADF to US Forces in April 2004, and served as the coalition's Chief of Operations through 2005. He was the third highest ranking coalition military officer in Iraq, and was responsible for planning and directing the coalition's overall 'counter-terrorism' operations. He had direct command of 140,000 coalition (nearly all US) and 130,000 Iraqi troops [64]. In an August 2005 feature article, the *Australian* newspaper reported that Molan 'ran all military and non military operations at the strategic level for all forces, Iraqi and coalition, across Iraq, including the bitter fighting last year for Najaf, Fallujah, and Samarra.' The article emphasises that Molan not only planned, but also directed, the late 2004 assault on Fallujah [86].

The US-led coalition had previously attacked Fallujah in April 2004. There is no evidence to suggest that Molan was directly involved in this attack. The second assault, codenamed Operation Phantom Fury, like the first, was to clear out suspected Sunni insurgents who were allegedly using the city as a base for attacks on coalition troops. Citizens were instructed to evacuate the city, population 250,000, before the attack began, but men aged 15 to 45 were prohibited from leaving [41]. Many family members chose to stay with their fathers and brothers. Once the bombing began in October 2004, all exits out of the city were sealed off. An estimated minimum 30,000 to 50,000 civilians were then trapped in Fallujah when the coalition assault began [36, 60].

According to the *Washington Post*, 'electricity and water were cut off to the city just as a fresh wave of [bombing] strikes began Thursday night, an action that US forces also took at the start of assaults on Najaf and Samarra' [85]. The Red Cross and other aid agencies were also denied access to deliver the most basic of humanitarian aid- water, food, and emergency medical supplies [51]. The UN's Special Rapporteur on the Right to Food, Jean Ziegler, later said the coalition was using 'hunger and deprivation of water as a weapon of war against the civilian population [in] flagrant violation' of the Geneva Conventions [71].

Cutting off water, electricity, and denying access to humanitarian aid is prohibited in Article 54 (Protocol 1), of the Geneva Conventions: 'Starvation of civilians as a method of combat is prohibited. It is prohibited to attack, destroy, remove, or render useless objects indispensable to the survival of the civilian population…' [34].

On November 7, the coalition launched the ground campaign by seizing Fallujah's only hospital. A New York Times front page story stated that 'patients and hospital employees were rushed out of the rooms by armed soldiers and ordered

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to sit or lie on the floor while troops tied their hands behind their backs.' The story also revealed the motive for attacking the hospital: 'The offensive also shut down what officers said was a propaganda weapon for the militants: Fallujah General Hospital with its stream of reports of civilian casualties' [65]. The city's two medical clinics were also bombed and destroyed. Independent US journalist Dahr Jamail (2004, 2005) interviewed scores of Fallujah survivors after the assault [49, 50]. He documented eye witness accounts of American troops denying the Red Cross entry to Fallujah to deliver medical aid, and firing on ambulances trying to enter the city. Article 8 of the Geneva Convention (Protocol 1) strictly forbids attacks on hospitals, medical emergency vehicles and any impeding of medical operations [35].

Further purported war crimes occurred when US and Iraqi troops entered Fallujah. Jamail reports firsthand accounts of US snipers shooting women and children in the streets; unarmed men shot while seeking safe passage with their wives and children under a white flag; and photographers shot as they filmed battle [49, 50]. And in images beamed around the world on November 9, a US marine was shown to approach a wounded man, fire, and move away, saying 'He's done' [7].

Other accusations of serious atrocities committed under Molan's command are indicated by evidence from the US military. Chemical weapons were used in the attack on Fallujah. US soldiers wrote in a military journal that white phosphorous (wp) was such 'an effective and versatile munition' that the military 'saved our WP for lethal missions' [42]. After repeated and strenuous denial that the US had used white phosphorous, US Colonel Barry Venable admitted on November 15, 2005 that, 'Yes, it was used an incendiary weapon against enemy combatants' [45]. In a November 2005 editorial denouncing its use, the New York Times described white phosphorous: 'Packed into an artillery shell, it explodes over a battlefield in a white glare that can illuminate an enemy's positions. It also rains balls of flaming chemicals, which cling to anything they touch and burn until their oxygen supply is cut off. They can burn for hours inside a human body' [63].

It was Saddam Hussein's use of white phosphorous on Kurdish rebels that was one of the primary justifications for the invasion. Protocol III of the UN Convention on Certain Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (1980) bans the use of incendiary weapons against military targets in areas with a concentration of civilians. The Protocol has been signed by 94 countries, including Australia, but not the United States [72, 83].

Relatively few insurgents were found once the city was subdued; most had fled the city long before the assault began [20: 110]. Meanwhile an estimated 70% of the city was utterly destroyed, with thousands dead [48].

As addressed earlier, government and military officials can be held liable for war crimes committed under their command as per Article 28(a) of the Rome Statute of the International Criminal Court if they 'either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes' [82]. The consistency and similarity of the attacks at Najaf, Samarra, and Fallujah display a deliberate disregard for civilian casualties in the planning and implementation of those military assaults. By Molan's own admission, he was responsible for not only planning, but also directing, these attacks [62]. It is not conceivable that Molan was unaware of the serious and well documented accusations of war crimes being committed under his command, many of which

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were being reported in international media at the time. The same applies to the senior Australian ministers to whom Molan was directly accountable: former ADF Chief General Peter Cosgrove and former government ministers including Defence Minister Robert Hill, Foreign Minister Alexander Downer and Prime Minister John Howard. Molan and these officials should be tried for war crimes, particularly for alleged violations of the Geneva Conventions detailed above, and as specified in the Rome Statute of the International Criminal Court.

The assault on Fallujah did not end with the city being militarily subdued in late 2004. An extensive peer reviewed study released in July 2010 found higher rates of cancer, leukemia, and infant mortality in Fallujah from 2005 to 2009 than corresponding rates for survivors in the years following the atomic bombs dropped on Hiroshima and Nagasaki in 1945. The epidemiological study, 'Cancer, Infant Mortality and Birth Sex-Ratio in Fallujah, Iraq 2005–2009,' was published in the *International Journal of Environmental Studies and Public Health*. Its examination of 711 houses and 4,843 individuals revealed a four-fold increase in cancer rates since the coalition assault. The types of cancer were similar to the cancers resulting from radiation fallout at Hiroshima and Nagasaki. The study also found heightened levels of birth defects, and infant mortality rates of 80 deaths out of 1,000 births; eight times higher than neighbouring Kuwait. Leukemia rates were 38 times higher, cancer in children 12 times more frequent, breast cancer 10 times more common than in nearby Arab countries of Jordan, Egypt, and Kuwait [18].

Lead author Dr. Chris Busby, professor of molecular biosciences at the University of Ulster (UK) said, 'To produce an effect like this, some very major mutagenic exposure must have occurred in 2004 when the attacks happened' [21]. In a separate interview, he said 'My guess is that this was caused by depleted uranium. They must be connected,' although he emphasised that it could not be certain without further research and independent analysis of samples from the area [28].

The US military has long been condemned for its use of depleted uranium. Depleted uranium is twice as dense as lead, making it ideal for use in armour piercing bullets and shells. Once the shell or bullet makes contact, up to 40% of the uranium is released as a very fine radioactive dust that can be carried for miles by wind and inhaled by human beings, or is deposited in the ground. Depleted uranium has been linked to Gulf War Syndrome and other significant health issues of US military veterans who served in the first Gulf War. It has been linked to significant increases in the types of cancer in areas where it was deployed in both Iraq wars, but such links are difficult to prove and the medical community remains somewhat divided as its effects [14]. While technically not banned as a weapon of war, its use in civilian areas could constitute a war crime similar to the use of cluster munitions in areas of civilian populations. While the US has admitted to the use of depleted uranium in Iraq, it is not clear whether depleted uranium weapons were used in the assault on Fallujah [46].

Conclusion: the case for Australian war crimes trials

War crimes legislation, at national and international levels, has significantly strengthened since the 1998 Statute of Rome and the establishment of the

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International Criminal Court. Australian officials, lawyers and citizens have a responsibility to test the legal instruments available to them and to bring their own military and government officials to justice. Such prosecutions could act to significantly deter future aggressive interventions and atrocities. Inaction, on the other hand, can only engender cynicism and cultures of impunity. However, to be effective, war crimes prosecutions must be well considered and precisely framed.

The best legal instruments available, which must be tested before there is recourse to international processes, are the 2002 anti-terrorist laws which criminalise terrorist acts done (inter alia) 'with the intention of advancing a political … cause' and with the intention of 'coercing … the government of … [a] foreign country … [or] intimidating the public' [26]. At approximately the same time, the Howard Government introduced offences equivalent to the International Criminal Court Statute offences of genocide, crimes against humanity and war crimes into Australia's domestic federal criminal legislation, i.e. the Criminal Code 1995 (Cth.) (Criminal Code) [47]. Specific acts which could be included in an indictment against senior Australian officials include Royal Australian Air Force cover for the widespread use of cluster bombs in civilian areas by US ground troops during the 2003 invasion, and Australian command of coalition forces which actively carried out attacks on civilian populations in the Iraqi city of Fallujah in 2004. Well considered indictments against these officials should be pursued as soon as possible in Australian courts, as part of the international process.

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