

NO REGRETS ABOUT IGNORING INTERNATIONAL LAW

Howard Meyer takes the New York Times to task for ignoring the implications of International Law in regard to the U.S. invasion and occupation of Iraq...

From: Howard Meyer

To: Leo Lovelace, William R. Slomanson

Cc: Charles Gittings, Ian Lekus, Mary Ellen O'Connell, Pat Mische

Date: July 17, 2004

Subject: No regrets about ignoring International Law

Dear Colleagues:

I hope you will be able to retrieve and read the Friday editorial [see **Attachment A** below] that is discussed in the [proposed but unpublished] letter to the New York Times [see **Attachment B**].

This morning 17 July, eight letters were published that discussed that editorial. None made reference to the Times virtual blackout of the fact that International [Law] had bearing on the attack on Iraq without the authority of the United Nations Security Council.

It is my inclination to circulate the message above with the unpublished letter below.

[The article in **Attachment C**] is a more detailed critique of our major newspaper's neglect of the International questions raised by the use of force against Iraq.

Your comment, if any, is invited.

Howard

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[Howard N Meyer is a member of the ASIL and author of "The World Court in Action," a report for the lay reader on the International Court of Justice.]

List of Attachments:

A – New York Times editorial, *A Pause for Hindsight*, July 16, 2004.

B – Howard N Meyer, unpublished letter to the New York Times (2004).

C – Howard N Meyer, *On Not Taking International Law Seriously* (2004).

ATTACHMENT A

A Pause for Hindsight

Published: July 16, 2004

Over the last few months, this page has repeatedly demanded that President Bush acknowledge the mistakes his administration made when it came to the war in Iraq, particularly its role in misleading the American people about Saddam Hussein's weapons of mass destruction and links with Al Qaeda. If we want Mr. Bush to be candid about his mistakes, we should be equally open about our own.

During the run-up to the war, The Times ran dozens of editorials on Iraq, and our insistence that any invasion be backed by "broad international support" became a kind of mantra. It was the administration's failure to get that kind of consensus that ultimately led us to oppose the war.

But we agreed with the president on one critical point: that Saddam Hussein was concealing a large weapons program that could pose a threat to the United States or its allies. We repeatedly urged the United Nations Security Council to join with Mr. Bush and force Iraq to disarm.

As we've noted in several editorials since the fall of Baghdad, we were wrong about the weapons. And we should have been more aggressive in helping our readers understand that there was always a possibility that no large stockpiles existed.

At the time, we believed that Saddam Hussein was hiding large quantities of chemical and biological weapons because we assumed that he would have behaved differently if he wasn't. If there were no weapons, we thought, Iraq would surely have cooperated fully with weapons inspectors to avoid the pain of years under an international embargo and, in the end, a war that it was certain to lose.

That was a reasonable theory, one almost universally accepted in Washington and widely credited by diplomats all around the world. But it was only a theory. American intelligence had not received any on-the-ground reports from Iraq since the Clinton administration resorted to punitive airstrikes in 1998 and the U.N. weapons inspectors were withdrawn. The weapons inspectors who returned in 2002 found Iraq's records far from transparent, and their job was

never made easy. But they did not find any evidence of new weapons programs or stocks of prohibited old ones. When American intelligence agencies began providing them tips on where to look, they came up empty.

It may be that Saddam Hussein destroyed his stockpiles of banned weapons under the assumption that he could restart his program at a later date. His cat-and-mouse game with the weapons inspectors may have been the result of paranoia, or an attempt to flaunt his toughness before the Iraqi people. But we're not blaming ourselves for failing to understand the thought process of an unpredictable dictator. Even if we had been aware before the war of the total bankruptcy of the American intelligence estimates on Iraq, we could not have argued with any certainty that there were no chemical and biological weapons.

But we do fault ourselves for failing to deconstruct the W.M.D. issue with the kind of thoroughness we directed at the question of a link between Iraq and Al Qaeda, or even tax cuts in time of war. We did not listen carefully to the people who disagreed with us. Our certainty flowed from the fact that such an overwhelming majority of government officials, past and present, top intelligence officials and other experts were sure that the weapons were there. We had a groupthink of our own.

By the time the nation was on the brink of war, we did conclude that whatever the risk of Iraq's weaponry, it was outweighed by the damage that could be done by a pre-emptive strike against a Middle Eastern nation that was carried out in the face of wide international opposition. If we had known that there were probably no unconventional weapons, we would have argued earlier and harder that invading Iraq made no sense.

Saddam Hussein was indisputably a violent and vicious tyrant, but an unprovoked attack that antagonized the Muslim world and fractured the international community of peaceful nations was not the solution. There were, and are, equally brutal and potentially more dangerous dictators in power elsewhere. Saddam Hussein and his rotting army were not a threat even to the region, never mind to the United States.

Now that we are in Iraq, we must do everything possible to see that the country is stabilized before American forces are withdrawn. But that commitment should be based on honesty. Just as we cannot undo the invasion, we cannot pretend that it was a good idea — even if it had been well carried out.

Congress would never have given President Bush a blank check for military action if it had known that there was no real evidence that Iraq was likely to provide aid to terrorists or was capable of inflicting grave damage on our country or our allies. Many politicians who voted to authorize the war still refuse to admit that they made a mistake. But they did. And even though this page came down against the invasion, we regret now that we didn't do more to challenge the president's assumptions.

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<http://www.nytimes.com/2004/07/16/opinion/16FRI1.html>

ATTACHMENT B

----- Original Message -----

From: Howard Meyer

To: letters [New York Times]

Sent: Friday, July 16, 2004 10:17 AM

Subject: "A Pause for Hindsight"

To the Editor:

In this morning's lead editorial ("A Pause for Hindsight" July 16) the Times Editorial Board expresses regret about some aspects of Iraq invasion coverage. There was no reference to the board's seeming unconcern with the Law of Nations question that most international lawyers and scholars -- and a fair number of other literates -- were troubled about: Did the President lead our nation into a disregard of United Nations Charter requirements?

On March 18, 2003, the editor of the page opposite the editorial page did publish an item headed "Good Reasons for Going Around the U.N." A subhead gave an unintended cue to some regular writers for the editorial pages: "The War might be illegal. but it could still be legitimate."

Within a year, the writer of that Op-Ed, noting that the supposed conditions for legitimacy of "Going Around the U.N." had not been met, wrote in a newsletter of her organization, that the invasion was not only illegal but illegitimate. The organization was the American Society of International Law, most of whose members (per her earlier Op-Ed) opposed the invasion as "illegal. This. as well as the persistent editorial avoidance of "illegality," should have been included in a review of "hindsight."

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(The writer is a member of the ASIL and author of "The World Court in Action," a report for the lay reader on the International Court of Justice.)

ATTACHMENT C

ON NOT TAKING INTERNATIONAL LAW SERIOUSLY

By Howard N Meyer *

The New York Times, during the run-up to and during the invasion and occupation of Iraq has not been fair, honest, or complete on the question:

Was the action of the United States in invading Iraq in March of 2003 a violation of International Law?

In fact, it has pretty much avoided dealing with the question. Its news columns have failed to report the ongoing, and serious controversy about this issue; its editorials have abstained from discussing its merits.

There is a serious issue about legality as to U.S. war on Iraq

One does not have to review much of the concerned and scholarly attention given to the issue to recognize that this was and is a substantial and important question. It has been against the national interest that the public's attention was not drawn to it. (That the rest of U.S. media have been equally indifferent must be admitted. That does not extenuate the Times' avoidance of the issue.)

A number of serious essays by qualified scholars were published or d before and after the invasion began. Almost all agreed that attack on Iraq violated the Law of Nations.

A representative example was provided by the American Society of International Law in an essay in its "Insights" series, April 2003. The writer was Professor Mary Ellen O'Connell, William Saxbe Designated Professor of Law, Ohio State University. She had written and lectured on such subjects for the Society and at her University. After careful attention to the contentions made about the question, she concluded:

"The pre-emptive use of military force absent an armed attack violates the plain terms of the United Nations Charter and the prevailing interpretation of those terms."

A seasoned veteran and well known figure in International Law education and scholarship, Professor Anthony A D'Amato, included in a statement distributed via an ASILforum listserv of

May 1, 2003 his estimate that only 20 percent of ASIL members believed the war against Iraq was legal under International Law. (he said he was in the minority.)

Other opinions on the illegality of the war are listed in an End Note. They are not offered to convince the reader that the armed attack mounted by U.S. and U.K forces violated the Law of Nations. Their purpose is to show that the problem of illegality presents a substantial question and that it should have been included in the nationwide debate on the Bush Administration's threat to use, followed by use of, military force.

An essay entitled "Oxymoronic Question: Is International Law Really Law," published in the newsletter of an ASIL Section September 2002, concluded:

"There has been active and sometimes vigorous debate in most media about the policy [to use force the overthrow the government of Iraq.], its wisdom, its cost in human lives and resources, its feasibility, the aftermath.....

"The extraordinary feature of such debate as there has been is the almost total absence of consideration of possible illegality of the Bush administration's plan of action.

".....it cannot be denied that there are legal questions presented. To ignore them, to argue as if they do not exist, is an abdication of responsibility by the media, a disregard of a constitutional obligation by members of Congress and a symptom of poor citizenship among the population."

Avoiding the issue of illegality of U.S. conduct

A Times Op-Ed of March 18, 2003 observed, in agreement with the authorities listed in the End Note, that most international lawyers believed that the then imminent invasion would be in violation of the U.N. Charter and the Law of Nations.

Its author Dean Anne-Marie Slaughter, President of the ASIL (not identified as such) wrote that the attack on Iraq, then two days off, would be illegal, contrary to International Law:

"The United States will now claim authorization under [Security Council] Resolution 1441. Most international lawyers will probably reject this claim and find the use of force illegal under the terms of the Charter."

Dean Slaughter neither agreed nor disagreed with the majority she cited. Instead she presented a provocative idea, expressed in a sub-headline:

“The war might be illegal but it could still be legitimate”

With this was born an idea that might disturb lexicographers and semanticists: that “legality” and “legitimacy” might not be synonymous. The idea that there was a difference enabled avoidance of the question whether our nation might possibly be a law-breaker.

Thomas Friedman was the Times Op-Ed writer who most frequently took advantage of the opportunity. Bill Keller (not yet Executive Editor) avoided the legal issue in a column urging “reluctant hawks” to embrace a second U.N. resolution (which U.S. sought and failed to win) “as a source of legitimacy” (Op-Ed February 8, 2003).

Readers of the editorial in the Times (Jan. 2, 2004, “A Wounded United Nations,”) will not find any mention of the legality of our conduct. There was a reference to the need of the U.S. for “the U.N.’s unparalleled ability to confer international legitimacy.” The United Nations Charter does not vest any authority in any organ of the U.N. to confer or withhold either legitimacy or legality. A nation can be said to have acted legally if it complies with Charter requirements that our statesmen helped to legislate half a century ago.

“Legitimacy” as a wished-for boon appeared in a lengthy essay by Robert Kagan (Arts & Ideas January 24, 2004). It surfaced in a new context in a major retrospective editorial March 19, 2004, “One Year Later,” envisioning “real United Nations authority, transforming a military occupation into a *legitimate* exercise in international nation-building.” The writer seems to have been unconcerned as to whether the “military occupation” was even legitimate, let alone legal.

We should return to Dean Slaughter’s essay that offered the possibility of legitimizing an illegal war. Central to its argument was the paragraph:

“So, how can United Nations approval come about? Soldiers would go into Iraq. They would find irrefutable evidence that Saddam Hussein’s regime possesses weapons of mass destruction. Even without such evidence, the United States and its allies can justify their intervention if the Iraqi people welcome their coming and if they turn immediately back to the United Nations to help rebuild the country.”

As the writer concluded, she described a condition necessary for the validity of her tentative hypothesis. “...*depending on what we find in Iraq, the rules may have to evolve, so that what is legitimate is also legal.*”

We now have a fairly good idea of what we found. The condition for the divorce of legitimacy from illegality, for disregarding the latter, was not met. Dean Slaughter herself recognized this in a letter to the membership of the American Society for International Law, posted in the its Newsletter for March/April 2004.

With commendable candor she wrote:

“A year ago, when the U.S. and Britain decided to send troops to Iraq, without a second UN resolution, I argued that their action was illegal under international law but *potentially* legitimate in the eyes of the international community. I set forth three criteria for determining the ultimate legitimacy of the action: 1) whether the coalition forces did in fact find weapons of mass destruction; 2) whether coalition forces were welcomed by the Iraqi people; and 3) whether the U.S. and Britain turned back to the U.N. as quickly as possible after the fighting was done.

“A year later I conclude that the invasion was both illegal and illegitimate. The coalition’s decision to use force without a second Security Council resolution cannot stand as a precedent for future action, but rather as a mistake that should lead us back to genuine multilateralism.”

Weeks after this statement was distributed to members of the American Society of International Law, it had not been mentioned by the Times. It was there that the Op-Ed, thus thoroughly reconsidered, was published.

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* The writer is author of THE WORLD COURT IN ACTION concerning the origins and achievements of the International Court of Justice.

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End Note

[The principal legal infirmity of the U.S. resort to armed force was the lack of an authorizing Security Council Resolution, clearly required by the U.N. Charter. Subsidiary questions pertain to whether prior events and Council actions dispensed with the necessity of a new or “second” Resolution.]

In addition to essay by Mary Ellen O’Connell, cited in text:

- Marc Weller, “The Legality of the Threat or Use of Force against Iraq.” (The Journal of Humanitarian Assistance) posted 3 June 2000.
<http://www.jha.ac/articles/a031.htm>
- Michael Byers “Jumping the Gun” London Review of Books 25 July 2002 vol 24 # 14.
- Singh & Macdonald for Public Interest Lawyers in behalf of Peacerights: “Legality of force against Iraq.” 10 September 2002
- Marjorie Cohen, Professor at Thomas Jefferson School of Law “Invading Iraq Would violate U.S. and International Law.” JURIST Magazine
<http://jurist.lawpitt.edu/forumnew58.php> (initiates a forum of which contributors by large majority agree.)
- Williams & Hove of University of South Wales Faculty of Law “Legality of Use of Force Against Iraq,” letter dated 20 March 2003 to Hon Simon Crean MP.
- Howard N Meyer for History News Service MARCH 4, 2003, “Will We Turn the U.N. Charter into a ‘Scrap of Paper?’”
- Two compendia of articles on legality summarized sub. Nom “International Law and a War on Iraq.” Global Policy Forum: www.globalpolicy.org/security/issues/iraq/lawindex.htm
- ASIL members speak out “On the Legality of the Use of Force in Iraq.” Newsletter 2003.
- Text of April 2003 “ASIL Insights“ Essay by Mary Ellen O’Connell.
- See also Meyer essay “Oxymoronic Question: Is International Law Really Law?” (posted in Newsletter of ASIL UN 21 Newsletter)

[PEGC / CBG – 2004.07.20]