

**APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW IN IRAQ -
2003.**

Dissertation submitted to the University of Nairobi in partial fulfillment of the requirements for the Degree of Bachelor of laws (LLB) 2004.

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DEDICATION.

I dedicate this dissertation to my Mum and Dad for their unending faith and trust in me. This piece also goes to Jared, Oscar and Daisy.

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The successful completion of this dissertation would not have been possible without the great assistance of the following persons.

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ABBREVIATIONS AND ACRONYMS.

AP.....	Additional Protocol.
Art.....	Article
CF.....	Coalition Forces
GA.....	General Assembly..
GC.....	Geneva Convention..
HRW.....	Human Rights watch.
ICRC.....	International Committee of the Red Cross.
ICC.....	International Criminal Court
IHL.....	International Humanitarian Law.
POW.....	Prisoner of War
Res.....	Resolution.
S.C.....	Security Council.
UK.....	United Kingdom.
U.N	United Nations.
UN DOC.....	United Nations Document
US.....	United states.
USAID.....	United States aid.
UNSC.....	United Nations Security Council.

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INTRODUCTION.

AN OVERVIEW OF IRAQ WAR-2003.

1.0 INTRODUCTION.

1.1 BACKGROUND.

War is a phenomenon of organized collective violence that affects either the relations between two or more societies or power relations within a society.

In early 2003, the United States claimed that it had proof and evidence that Iraq was hoarding chemicals of mass destruction. The American president George W Bush warned the world at large of an impending war unless it got rid of 100% of the weapons of mass destruction believed to be in the country. The inspections done by United Nation's experts did not reveal the presence of such weapons, but still America was not satisfied.

Further justification included the naked aggression against its Kuwaiti neighbor by Iraq in 1999, its efforts to obtain weapons of mass destruction, its record of having used such weapons, security council action under chapter VII of the United Nations Charter, and continuing Iraqi defiance of the councils requirements. On August 2, 1990, Iraq invaded Kuwait. It is easy to forget the wanton cruelty of Iraq's invasion, which was unprovoked, and the horror with which the world received news of it. That invasion rightly shaped, forever after, the way the world would look at Sadaam Hussein's Iraq¹

Another argument justifying the 2003 war was the legality based on humanitarian intervention. Saddam Hussein and his Baath party fitted the stereotype of the dictatorial leader of a tyrannical and totalitarian regime².

The Human Rights situation in Iraq had been poor for decades. The Human Rights situation in Iraq was addressed by the governments of the United Kingdom and United

¹ Taft, WH and Buchwald "Pre-emption, Iraq and International Law" (2003) 97 *American Journal of International Law* 557 at 557 – 58

² Hiro, D (2003) *Iraq, A report from the Inside* London: Cranta,; Berran, P (2003) *Terror and Liberalism* London 54-58

States following the 1st Gulf War in 1991, all of the prisoners of war suffered physical abuse³.

The captured Americans after this war were beaten, electrocuted, urinated and spat on. They suffered broken bones, torn muscles, chipped teeth, perforated eardrums and massive bruising and women were sexually molested. A marine lieutenant colonel was so hungry he ate the scabs off his wounds. More or less treatment was accorded to Kuwaitis and other Iraqis. The accumulated evidence of war crimes was simply overwhelming, in number and in details.

The case for humanitarian intervention may be overstated (some were not based on humanitarian intervention and some were based on consent) but it does illustrate just how fast the legal, political and moral debate on humanitarian intervention has moved⁴.

On March 19th 2002, the UK Prime Minister accepted that if the only way to dis-arm Iraq was to change the regime then regime change was indeed a war objective. These are only some of the reasons that justified the invading of Iraq in 2003. Shortly before the third week of March 2003, and after that week, there were 'Breaking News' in all manner of media across the globe about the war and attacks in Iraq. For a very long time this was the major news object for almost all the major media agencies in the world as they worked towards updating the world on the war. There were both public and private debates regarding the legality surrounding the war in loud and in hushed tones. "Was it right for the US and its allies to attack the small state in the Middle East?" was the most frequently asked question.

As much as there was a lot of attention regarding this war, the only people who really understood the intensity, the impact and the real effect of the attacks were mostly the Iraqi civilians on the ground, the combatants who took part in the war (American or Iraqi

³ Dickey, C "The Special Report on Iraq" Newsweek 17th February 2003

⁴ Holzgrefe, JL (2003) *The Humanitarian Intervention debate: Ethical Legal and Political Dilemmas*
Cambridge CUP

or otherwise) and the reporters who braved their lives to let the world know of the happenings there.

1.2 STATEMENT OF THE PROBLEM

International Humanitarian Law (IHL) is a major part of our laws and is the most essential law governing any war situation, and ninety percent of the countries in the world acknowledge this fact as shown by their ratification of IHL treaties. It is therefore based on this point that I wish to investigate the applicability of International Humanitarian Law in the war in Iraq in 2003, during the war. It is a fundamental principle that IHL laws are obeyed and followed in any war situation and this is exactly what state parties to IHL conventions are pledging when ratifying the conventions. I will seek to analyse the war situation in Iraq and the main question will be, were rules of IHL applied to the Iraq war?

1.3 JUSTIFICATION FOR THE STUDY

International lawyers have a vested interest in international Law, in this case (IHL), the international system and the international order. Increased international laws and more international institutions are seen as international social good. The anarchic 'State of nature' of sovereign states is constrained.

The most advanced example of this is the phenomenon of the European Union. This is an International organization that is designed to limit the power of individual sovereign states. It aims to do things the community way. This method embodies order, rules, laws, institutions and courts. It guides its members towards a Kantian notion of perpetual peace and to a political environment in which the idea of conflict between EU member states is unthinkable⁵.

⁵ Capps, P "The Kantian Project in Modern International Legal Theory" (2001) 12 *European Journal International Law* 1003

The war on Iraq has raised many challenges for international lawyers and I have taken it as a challenge to myself to study the implications of the war especially with regard to IHL.

Occasionally, the profession of an International lawyer can appear to be like that of an undertaker, business is bad if no one is dying. No one wants one until there is a crisis and especially an international crisis of epochal proportions.

However, unlike that international lawyer whose business is bad if no one is dying, I feel it is proper to study the real applicability on the ground of our laws. It is one thing to have an overwhelming list of laws and conventions acting as an umbrella of international peace and order yet when a real situation comes up, the umbrella ceases to do its job and becomes useless.

In the wake of Iraq War 2003, Tom Frank asked, “what is the proper role of the lawyer?”⁶ His answer is that they “should stand tall for the rule of law. They should zealously guard their professional integrity for a time when it can again be used in the service of the common weal.”⁷

As international lawyers we have to defend the efficacy of the International law institution system at a period when it is most needed, in this case, IHL.

1.4 THEORETICAL FRAMEWORK.

Since IHL is man made law, it strongly ascribes to the jurisprudential school of legal positivism.

According to John Austin, law is a command by the sovereign backed by the threat of a sanction.⁸ Law is legally valid only if it is commanded by the sovereign in a society and is backed by a threat of a sanction. In our case, IHL is man made law which all member states act as sovereign source that impose sanctions and act as guardians of the law. These laws act as commands imposed on the entire public that ought to be followed. The sovereign cannot be commanded or command itself and in issuing commands is

⁶ Frank, T “What Happens Now? The United Nations after Iraq” (2003) 97 *American Journal of International Law* 607 at 620

⁷ Ibid

⁸ Hart, HLA “positivism and the separation of Law and morals” (1958) 71 *Harvard Law Review* 593

incapable of legal limitation, it cannot be subjected to the law it makes. The sovereign cannot be limited in his or its power to issue commands or make law, and there are no constraints.

In my study, I emphasize much on the respect of IHL at all times. The reason behind this is because it is a norm from all the various sovereign states. That were a party to the creation of the laws, there is no room for deviation. No person has any excuse not to abide by the grand norm even those states that were a party to the creation of the laws, there is no room for deviation. No person has any excuse not to abide by the grand norm even those states that have not ratified IHL, as due to the lapse of time it has developed to the standard of customary international law.

Even though the Geneva Convention do not specifically give a direct sanction towards persons who breach these laws the now established permanent court International Criminal Court, as the jurisdiction to try war crimes and breaches of the Geneva Conventions and its statute goes further to impose sanctions on the violations although people can willingly obey law, governments cannot expect to accomplish their business on the basis of people's willingness to obey the law therefore it is necessary for the law to have sanctions.

On the characteristics of the law, Kelsen notes that sanction is an essential characteristic of law, every system of norm/law rests on some type of sanction, law rests on the cohesive order designed to bring about sanction.⁹He says sanctions are the key, essential characteristics of law because sanctions stipulate that coercion ought to be applied by officials where laws are breached that is, both criminal and civil laws. There has never been a large community, which was not based on a cohesive order.

Austin goes further to say that the command must be of a general character that it binds a person to a general code of conduct. It has to be of such a general character that it obliges a person or persons to a general code of conduct and touches on some aspect of the structure of law; law ought to be respected in a general form.

⁹ Ibid

1.5 OBJECTIVES OF THE STUDY

The major objectives of this study, while having the backdrop of the events of the 2003 war in Iraq include;

- To establish the real position of the Law of war in relation to the above occurrences?
- To discuss in brief how the war was conducted find out if the proper means and methods of warfare were used.
- To discuss the effects of this war. Were there proper measures put in place for the protection of the civilian population, and civilian objects?
- To find out more about the treatment of prisoners that were captured by the parties involved in the war? Was their treatment right and in accordance with the Geneva Convention?
- To give a brief overview of the states and the roles of the occupying powers in Iraq after the US on 1st May 2003 officially declared end of combat operations in Iraq.

1.6 HYPOTHESIS

In the process of carrying out this study, there are a few assumptions that shall be made. It shall be my greatest assumption that all the parties involved in this conflict have all ratified all the various conventions and treaties that add up to form IHL especially all the Weapons Conventions, the Conventions Prohibiting Production and Stockpiling of use of Chemical weapons, conventions on Conventional weapons (Protocol on non-detectable fragments). The 1980 Protocol on Incendiary weapons, and Conventions Prohibiting Indiscriminate effects.

The case of *Dusko Tadić*¹⁰ brought out the fact that as part of customary international law all parties should abide by the laws of IHL.

Additional protocol I of the Geneva Conventions Article I introduces the *Marten's clause*

“in cases not covered by International agreements, civilians and combatants remain under the protection and authority of principles of International law derived from established customs, from the principles of humanity and the dictates of public conscience”.

The *Marten's clause* applies at all times.¹¹ It is difficult again in a study like this to clearly prove or disprove as to whether laws of IHL were followed exhaustively in a war situation. This makes it difficult to give an accurate account of what really happened. In certain instances, the best people to give an account of a war situation were probably killed in the process of the war therefore one wonders who can give true and accurate information?

It is one thing to point fingers at a particular group to state that they enabled the carrying out of a particular violation but is the reporters' account reliable to a good extent? The study is therefore premised on the assumption that the reports and information – the data be it primary or secondary to be relied upon as a basis for this study is as close as elaborate account to the truth as possible and that the reporters did do a thorough research before putting their conclusions in writing for the world.

1.7 RESEARCH QUESTIONS

There are important fundamental research questions that seek to be answered whilst undertaking this study. The most important question is whether major IHL provisions were followed. Did the parties in conflict abide by them? Are these laws only properly written down in theory but when it comes to implementation is a totally different question?

Could the effects of this war especially on the civilian population and objects have been

¹⁰ ICTY appeals chamber case of 1995

¹¹ *Martens clause* found in 1st Additional Protocol.

avoided or reduced? The parties were aware of what was expected of them but did they do anything in particular to avoid or minimize the effects?

Towards the conclusion I shall look at the question of what distinct disciplinary responses can be offered to deter future occurrences of such a nature by any state not looking into a debate of whether a war is justified or not.

An analysis of the First world war, the Second world war, the Vietnam war, Gulf war I and now Gulf II among other situations, seems to consistently and chronologically portray humanitarian law as a body of law that has only taken honored in breach.

It is not prophetic to predict that when we encounter a similar situation that is undeserving of envy as found expression in the US – Iraq model of settling disputes, on we surely will, a sorry state of humanitarian will once again rear its ugly head¹²

1.8 METHODOLOGY

My research was based on several sources, mostly secondary data, mainly due to the lapse of the time since the war took place. It shall heavily rely on information to be found in newspapers and magazines e.g. the Time, the Independent and Newsweek and other media reports.

A further source of information was from various journal articles of different varied publications and the book sources as listed in the Bibliography.

The Internet is also a major source of material important for this research. The various sites of different organizations and news agencies that covered the war will be of great importance.

Perhaps one of the greatest data that forms the backbone of this study is from the various conventions and treaties that form the entire corpus of humanitarian law. There are numerous Conventions that have been passed and approved that form the body of this law. This study cannot be justified without a legal backing and that is why these sources of the law are important. The study will mainly be analytical but it shall not deviate from being descriptive in nature, describing the relevant law.

¹² Odhiambo, E Mwangi, E Ongoya, E “Operation Iraqi Freedom-Some Humanitarian Reflections” An article for publication *University of Nairobi Law Journal* 2004

1.9 LITERATURE REVIEW

Not much has been written on the war of 2003 especially from the point of view of the applicability of humanitarian law, so far. However, several authors have attempted to write about this war from the point of view of Public International law. McGoldric D in his book “from 9-11 to the Iraq war”¹³, he concentrates mainly on the legality of the war whether the United States was justified in attacking Iraq? The author however has a chapter analyzing very briefly the applicability or lack thereof of humanitarian law in the war.

The number of journal articles that discuss this war in relation to this study is slightly more than book publications. For example Frank T’s Article “What happens Now? The United Nations after Iraq”¹⁴ in which he discusses in detail why the United Nations could not stop this war and a short discussion on the effect of the war.

The unpublished article “Operation Iraqi Freedom; some humanitarian reflection”¹⁵ is the main article that discusses humanitarian views of this war.

Fleck D “The Handbook on Humanitarian Law in Armed Conflict”¹⁶ will be a good source of material because this book tries to put into context the relationship between an armed conflict and humanitarian law. The book discusses widely the general information needed for one to understand the basics of humanitarian law.

The following are books that discuss International Humanitarian Law in general that I shall rely on heavily. These books give full details on the basics of humanitarian Law.

¹³ By Hart Publishing, Oxford Portland USA, 2004

¹⁴ 97 *American Journal of International Law* 607 at 620

¹⁵ *Supra* see note 12

¹⁶ Oxford University Press, New York, 1995

They include;

- Frits Kalshoven's "Constraints of Waging War"¹⁷

This book was an ICRC production initially of 1998 then was later reviewed with a second author in 2001. This book gives a general introduction and basics of IHL. The book in its subsequent chapters gives a good summary of the main IHL conventions and highlights the important provisions. These include the four Geneva conventions and its additional protocols. The final chapters have a discussion on enforcement and implementation of IHL. The authors discuss the various ways in which in their research and experience can so easily work towards full implementation of IHL.

- Françoise Bouchet-Soulmier's "Practical Guide to Humanitarian Law."¹⁸

Just as the title of this book suggests, it gives general guide to practically any topic under IHL that one can think of. The book's structure is mainly composed of small subheadings and at the end of each subheading gives a list extra links to further study of that issue. This book gives a guide to practically everything, from protected persons to detainees to mines, medical services, attacks, reprisals, relief, international criminal court and many more.

We can describe this book comfortably as a library of its own. This is because of its rich list of additional reading of virtually any topic of IHL. It also has an endless list of related and relevant websites.

- International Review of the Red Cross: Humanitarian Debate; Law, Policy, Action.

Frequently every year, the ICRC publication group publishes a collection of articles from various writers with particular emphasis on humanitarian law. Every article touches on a particular topic of concern in relation to IHL in place or with views to proposed changes in certain areas of law. These reviews are a good source of commentaries and ideas from some of the greatest scholars of humanitarian law worldwide. I intend to read through as many reviews as I can so as to get varied ideas

¹⁷ ICRC, 1987.

on how to approach the law and also to get a good grasp of what other scholars have written with regard to emerging trends in humanitarian law.

1.9.0 CHAPTER BREAKDOWN

1.9.1 Chapter 1: Means and methods of Warfare and Civilian Protection.

This chapter shall discuss briefly what the humanitarian law is with regard to methods of warfare. This chapter shall also give an in depth of the various types of weapons used during this war; then there shall follow an analysis on whether there were violations of the law or not.

The same chapter shall also discuss the law relating to the civilian population, which conventions apply then there shall follow an analysis of the situation in Iraq during the wartime and whether IHL did apply to ensure the safety of the innocent civilians or not.

1.9.2 Chapter 2: Prisoners of war and Occupancy.

This chapter shall discuss the humanitarian law with regard to prisoners of war. How should they be treated, were the relevant provisions of the law followed in the treatment of the captives of the both sides of the conflict? How serious then are these violations. This chapter shall be discussed using various examples and reports from the war.

The same chapter shall give a brief discussion on the US and its allies as occupying forces. What were their duties as per the law and did they perform those duties? This chapter will also give a brief discussion on the environmental impact following the war and what humanitarian law has to say about this.

1.9.3 Chapter 3: Winning The peace.

This chapter shall give a discussion on enforcement and implementation of IHL, and shall proceed to discuss the future of Iraq. What chances do the Iraqi people have in terms of facing the future?

¹⁸ ICRC Geneva publications.

1.9.4 Chapter 4: Recommendations and conclusion.

This chapter will give a conclusion on the entire study and a few recommendations regarding abiding by humanitarian law in times of armed conflicts. What can be done for the sake of the future to minimize the effects and to stress the importance of abiding by the laws?

CHAPTER 1

MEANS AND METHODS OF WARFARE

2.0 INTRODUCTION.

On 20th March 2003 the ICRC president Jakob Kellenberger called for respect of International Humanitarian Law in Iraq;

“ICRC solemnly and strongly appeals to all belligerents to fully respect IHL. There are limits to warfare. The civilian population must be respected and protected. It is prohibited to direct attacks against civilian population and belligerents must take every precaution in the military operations to spare the civilian populations. Indiscriminate attacks are prohibited, as are threats or acts of violence the primary purpose of which is to spread terror among the civilian population. The wounded and sick must be protected and cared for, combatants who fall into the power of the adverse party must be respected and treated as prisoners of war. The right to choose method and means of warfare is not unlimited. Weapons having indiscriminate effects and /or are causing superfluous injury or unnecessary suffering are forbidden by IHL, as are chemical and biological weapons. The ICRC calls upon the warring parties not use nuclear weapons...”¹⁹

It is an objective of humanitarian law to regulate the types of weapons used in warfare.

Means of warfare relates to the devices used to conduct hostilities. The term ‘means of warfare’ is better suited to encompass the meaning of words arms, projectors and any device that is capable of inflicting injury or suffering.²⁰

The terms ‘methods of warfare’ on the other hand may be understood as the modes of use of the means of warfare in accordance with a certain military tactic or concept.²¹ The reason why humanitarian law seeks to regulate means and methods of warfare is mainly as a concern for protection of civilians, other civilian objects and the environment.

¹⁹ ‘Humanitarian Debate, Law, Policy, Action; *International Review of Red cross June 2003 volume 85*

²⁰ Kalshoven, F and Zegveld, L (2001) *Constraints on the waging of war, An introduction to International Humanitarian Law* p.41. ICRC Geneva Publications.

²¹ Ibid

This rule was confirmed by the ICJ in its Advisory Opinion concerning *the Legality of the Threat and use of Nuclear Weapons* as follows:

*“States must never make civilians be an object of attacks and must consequently never use weapons that are incapable of distinguishing between civilian and military targets”*²²

In general, humanitarian law prohibits any weapon “of a nature to cause superfluous injury or unnecessary suffering” and any that may have indiscriminate or excessively injurious effects. This is an ancient principle, linked to the axiom that “the right of the parties to the conflict to choose methods or means of warfare is not unlimited.”²³

Humanitarian law may prohibit use, production, stockpiling or selling of certain kinds of weapons. This is now the case for biological and chemical weapons and landmines since 1977 when Protocol I additional to the 1949 Geneva conventions was adopted. Humanitarian law has codified that it is forbidden to employ methods or means of warfare that are intended or may be expected to cause widespread, long-term and severe damage to the natural environment.

The rules governing the use of such weapons are set forth in international conventions that address these issues specifically and therefore only apply to the state parties to these conventions. The main exceptions are the Geneva conventions whose rules apply to all states having the status of customary international law and which go along way towards regulating means and methods of warfare.

²² I.C.J., Advisory Opinion of 8th July 1996 – Opinion of Judge Guillaume, Para 5

²³ PI Article 35

The development acquisition or adoption of a new weapon, states are under the obligation to determine whether the use of this weapon would be prohibited by humanitarian law in some or all circumstances.²⁴

The four 1949 Geneva conventions and their two 1977 Protocols set forth the restrictions on the use of weapons. These rules are mandatory for all states. Some of the main rules are as follows:

- Parties to the conflict must distinguish between civilian and military objects. The weapons they use must always allow them to respect this distinction.
- Weapons must not be used in a way that would not be justified by a genuine military requirement or that would be proportionate to the military advantage sought or to the supposed military threat. The aim of these provisions is to limit superfluous, gratuitous or unnecessary damage or suffering.
- During attacks, parties to the conflict (in particular, their commanders) are under the obligation to take certain precaution to limit their possible effect on civilian objects.

2.1 CATEGORIES OF WEAPONS

Some weapons are authorized, except certain uses (edge weapons and firearms) while others are strictly prohibited (incendiary, biological and chemical weapons). The general rule that prohibits attacks against civilians is applicable to the use of all weapons.

2.1.0 Edge weapons

These are any offensive or cutting blades or other weapons made of metal or steel e.g. knives, swords, machetes, daggers or bayonets. Their use is restricted by the general rules of humanitarian law which prohibit attacking non combatants, killing or wounding treachously and causing superfluous injury or unnecessary suffering.²⁵

²⁴ PI Article 36

²⁵ Article 23 of Hague Convention IV; PI Articles 35-37.

2.1.1 Firearms

This is a broad category and includes all those that shoot cartridges or explosive projectiles for example shotguns, cannons, bombs, missiles and so on. Only some are prohibited:

- Explosive projectiles that weigh less than 400p (14 ounces) as established by the 1868 St. Petersburg Declaration Renouncing the use, in Time of war of certain Explosive projectiles.
- Bullets that expand or flatten easily in the Human Body as set forth in the 1899 Hague peace Declaration.
- Any weapon the main effect of which is to injure by fragments that are not detectable by x-rays once inside the human body as established by protocol I to the 1980 convention on convention weapons (protocol on Non-Detectable Fragments).

2.1.2 Incendiary weapons

These come under the category of firearms. Their aim is to set fire to objects or to cause burn injuries to humans. As with all weapons, it is prohibited to use them against individuals and objects protected by humanitarian law. It is prohibited to use them against combatants and military objectives that are located within a concentration of civilians as per protocol III to the 1980 Convention on Conventional weapons.²⁶

2.1.3 Weapons of mass destruction

This category includes weapons: biological, chemical and nuclear. Since these are indiscriminate by nature, their use is hard to reconcile with the spirit of humanitarian law, which is based on the military ability to distinguish between civilian and military objectives and between civilians and numbers of armed forces

²⁶ Protocol on Prohibitions and Restrictions on the use of Incendiary Weapons available at Sassoli, Marco, Antoine A Bouvier and Laura M.Olson. *How does Law Protect in War? Cases, Documents and Teaching Materuals on Contemporary Practice in International Humanitarian Law.*(1999)Geneva: ICRC

2.1.4 Bacteriological (or Biological) weapons

Bacteriological weapons (Biological weapons) are those that aim to spread diseases that threaten the health of human beings, animals and plants. Their use, production and stockpiling are prohibited by two main international texts,

The protocol prohibiting the use of poisonous or other gases²⁷ and the convention prohibiting the production of toxic weapons.²⁸

2.1.5 Chemical weapons

Chemical weapons mainly include munitions and devices that release toxin chemicals. The use of such weapons are prohibited by IHL conventions. The earliest of the conventions only prohibited the use of chemical and biological weapons in times of conflict but did not prohibit stockpiling or production.²⁹ Over the years, there was need to prohibit the production of chemical weapons and this was finally achieved in 1993 when a convention to that effect was passed to add to the IHL laws.³⁰ The 1993 convention requires states to ensure that their criminal law provides for punishment of violations committed by their own nationals (wherever committed.)

2.1.6 Nuclear weapons

There is no general prohibition on the use of nuclear weapons. However, they are interpreted as weapons of mass destruction and as such have indiscriminate effects. They are prohibited by provisions of Protocol I additional to the Geneva Conventions.³¹

²⁷ Geneva Protocol of 17th June 1925 for the Prohibition of the use In war of Asphyxiating, poisonous or other Gases and of Bacteriological methods of Warfare. Available at Sassoli, Marco, Antoine A Bouvier and Laura M. Olson. *How does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law.* (1999) Geneva: ICRC

²⁸ Convention of 10th April 1972 on the Prohibition of the Development, production and stockpiling of Bacteriological (Biological) and toxic weapons and on their destruction. Available *Ibid.*

²⁹ The Protocol for the Prohibition of the use of asphyxiating, poisonous or other gases and of bacteriological methods of warfare. Adopted in Geneva on June 17th 1925. Available *Ibid*

³⁰ The Convention on the Prohibition of the development, production, stockpiling and the use of chemical weapons and on their destruction. Was adopted in Paris on 13th Jan 1993. Available *Ibid.*

³¹ Art. 35(2) of GP I

2.1.7 Mines

Mines are objects designed to be placed under, on or near the ground and to explode due to the presence, proximity or contact of a person (in the case of antipersonnel land mines) or a vehicle (in case of antitank or anti vehicle landmines). Mines can also be maritime and from a strategic point of view, they are used to prevent the enemy from advancing or reaching a certain part of the territory.³²

In 1997, there was adopted a convention prohibiting use of anti-personal mines and has provisions on ways to be followed towards destruction of mines already placed.³³

These mines incapacitate, injure or kill one more persons.³⁴

State parties undertake to never under any circumstances to use antipersonnel mines and to ensure that no one uses them in this territory.³⁵ States also undertake never to “develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines.”³⁶

2.2 CONDUCT OF AIR RAID.

The war in Iraq started at 3:15 a.m. on March 20, 2003, with an attempt to “decapitate” the Iraqi leadership by killing Saddam Hussein. This strike was the beginning of a pattern that would be repeated many times.³⁷ This unsuccessful air strike was not part of long-term planning but was instead a “target of opportunity” based on late breaking intelligence, which ultimately proved incorrect.³⁸

The major air war effort began at approximately 6:00 p.m. on the same day with an aerial bombardment of Baghdad and the Iraqi integrated air defense system.

³² Cauderary, G “Anti-personnel mines” *International Review of Red cross* Vol 279 of 2000

³³ The Convention on the Prohibition of the use, stockpiling, production and Transfer of Anti-personnel Mines and on their Destruction. Ottawa Sept 18th 1997.

³⁴ Article 2.1 of the Mine Ban Treaty

³⁵ Article 1.1

³⁶ Article 1.1 b

³⁷ A useful timeline of the war was published in *The Guardian* and is available at <www.guardian.co.uk>

³⁸ Technical Sergeant Mark Kinkade, “The First Shot,” *Airman*, July 23, 2003, <<http://www.af.mil/news/airman/0703/air.html>> (accessed) November 13, 2003).

2.2 AL-DURA FARM BAGHDAD.

A human intelligence source provided the CIA with information on Saddam Hussein's alleged location at a farm in al-Dura, a district of southeastern Baghdad.³⁹ Two F-117A Nighthawk aircraft dropped four EGBU-27 2,000-pound penetrator bombs at 3:15 a.m. on a reported bunker at the farm. Moments later, the rest of the farm was hit with up to forty cruise missiles (Tomahawk Land Attack Missiles, or TLAMs) in an attempt to kill Saddam Hussein. The U.S. military later acknowledged there was no bunker at the farm, and Saddam Hussein broadcast a television interview days later. The attack resulted in one civilian killed and fourteen wounded, including nine women and a child.⁴⁰

Of the 29,199 bombs dropped during the war by the United States and United Kingdom, nearly two-thirds (19,040) were precision-guided munitions.⁴¹ Targeting based on satellite phone-derived geo-coordinates turned a precision weapon into a potentially indiscriminate weapon. According to the manufacturer, Thuraya's GPS system [these are satellite phones] is accurate only within a one-hundred-meter [328-foot] radius.⁴² Thus the United States could not determine from where a call was originating to a degree of accuracy greater than one-hundred meters radius; a caller could have been anywhere within a 31,400-square-meter area. This begs the question, how did CENTCOM know where to direct the strike if the target area was so large? In essence, imprecise target coordinates were used to program precision-guided munitions. Based on the results, however, accurate corroborating information must have been difficult if not impossible to come by and additional methods of tracking the Iraqi leadership just as unreliable as satellite phones.⁴³

³⁹ Gellman, B and Priest, D "Surveillance Provided Unforeseen 'Target of Opportunity,'" *Washington Post*, March 20, 2003.

⁴⁰ Wilkinson, M "Decapitation Attempt Was Worth a Try, George," *Sydney Morning Herald*, 22 March, 2003.

⁴¹ Ramesh (ed) "The war we could not stop" London, *The Guardian* June 2003.

⁴² Thuraya Satellite Telecommunications Company, "Extensive Roaming and Superior Connectivity," n.d., http://www.thuraya.com/products/services_marketing.htm (accessed June, 2004). A user must be outside with an unobstructed view of the sky to receive a Thuraya signal.

⁴³ *Ibid*

The United States used an unsound targeting methodology that relied on intercepts of satellite phones and inadequate corroborating intelligence. Targeting based on geo-coordinates derived from satellite phones in essence rendered U.S. precision weapons potentially indiscriminate. This combination of factors led directly to dozens of civilian casualties.

Without reliable intelligence to identify the location of the Iraqi leadership, it appears the United States fell back upon all it had, namely, inaccurate coordinates based on satellite phones, with no guarantee of the identity of the user. Leadership targets developed by inaccurate data should have never been attacked.

This flawed targeting strategy was compounded by the lack of an effective assessment both prior to the attacks of the risks to civilians (what the U.S. military calls a “collateral damage estimate” or CDE) and following the attacks of their success and utility (what the U.S. military calls a “battle damage assessment” or BDA).⁴⁴ Although air strikes on Iraqi leadership repeatedly failed to hit their target and caused many civilian casualties, no decision was made during major combat operations to stop this practice. Leadership targeting should never have been allowed to reach such a high number of failed strikes that led to significant civilian deaths.

The use of air-delivered cluster bombs against targets in or near populated areas also contributed to the civilian death toll.⁴⁵

Cluster bombs are bomblets assembled in clusters of hundreds or even thousands and delivered from aircraft dispensers, artillery shells or rockets or missile warheads. The bomblets are small (typically under 800 grams and under 7 centimeters in diameter) and can contain various payloads for use against different targets. They may be fitted with impact fuses or proximity fuses. As used by the Allied forces in the war, two dispensers are slung under a tornado fighter bomber; flying at low altitude over an enemy runway, the pilot drops the bombs which would then explode at the lapse of the fixed time. This

⁴⁴ US Dept of defense, 21st Century Guide to Operation Iraqi freedom: The 2nd Gulf War 2003.

⁴⁵ Human Rights Watch telephone interview with senior CENTCOM official #2, Tampa, September 27, 2003.

weapon delivers many bomblets producing fragments and the risk of indiscriminate use against civilians would appear low.⁴⁶

There are some types of cluster bombs that were widely used by the allied forces in this war. These are the Multiple Launch Rocket System (MLRS) made by the US and the Rockeye type of cluster bombs. The MLRS, for example, contains twelve (12) rockets with each warhead containing 644 bomblets, giving a total of 7728 bomblets deployed when the rockets are fired together. A slave of 12 rockets is said to deploy bomblets over an area of 23 hectares of a midrange and almost twice that area at the maximum range of over 30 kilometers. In three weeks from March 20 to April 9, U.S. and U.K. air forces dropped more cluster bombs in Iraq than they did in Afghanistan in six months. In Iraq, the United States used at least 1,206 clusters, containing more than 200,000 submunitions, only twenty-two shy of its half-year total for Afghanistan.⁴⁷

It is evident that with their long range and wide area coverage, cluster bombs carry an obvious risk of indiscriminate effects, which, without saying more, goes against one of the established principles of humanitarian law, which is the effect that weapons employed in any conflict should not have an indiscriminate effect. Indeed the indiscriminate nature of these weapons was witnessed on several occasions during the second Gulf War especially in densely populated areas where there were many Iraq civilian casualties arising directly out of the aerial bombings by the allied forces.⁴⁸

The humanitarian objection to the use of cluster bombs is not on the indiscriminate nature alone. These weapons have had very high failure rates; up to 40 percent normally fail to explode depending on the states of the ground (the rate is usually higher on the soft ground) and on meteorological conditions especially if the soil is covered with snow. Once on the ground and unexploded, they are extremely unstable and the explosion can be triggered over by the slightest movement of the ground on which they are lying, such

⁴⁶ E, Harriman ' Treachery: How Iraq went to war against Saddam' *The Times* Jan 2004 .

⁴⁷ This figure does not include two CBU-107s, which contain steel rods rather than explosive submunitions. "Operation Iraqi Freedom—By the Numbers," p. 11.

⁴⁸ *Supra* see note 12

as vibrations caused by people walking or a moving vehicle. In fact, it is very risky to approach them as this might disturb the ground and trigger their explosion. Clearing them is however very difficult and they cannot be neutralized.⁴⁹

As a result of these problems, it is proper and appropriate for us to conclude that such weapons are extremely dangerous. Cluster bombs have high proclivity towards the elimination of humankind from the conflict gripped area and by extension the earth's crust in general. Cluster bombs have caused many casualties among the civilian population when they have been left unexploded on impact or are left lying on the ground in an unstable condition. Hundreds of cluster bombs were dropped by allied forces, yet it is very evident the indiscriminate effects that this bombs have. Any use of this weapons is a clear violation of humanitarian law, especially their use in densely populated areas.⁵⁰

The Americans used electronic bombs(E- Bombs) whose bursts of microwave energy can scramble computer systems and knockout biological chemical(Bio- chem) facilities. They also also used Blackout bombs-they are non-kinetic weapons that dispenses carbon-fibre filaments that disable electrical power grids.⁵¹ Attacks on certain civilian power facilities caused additional civilian suffering, and the legality of attacks on media installations was questionable. The United states attacked al-Nasiriyya 400kV electrical power transformer station on March 22nd 2003, with a carbon filter bomb designed to disable power. The city lost power for 30days.⁵² On March 23 at 10:00 a.m., the United States attacked North Electrical Station 132. Hassan Dawud, an engineer at the station when it was attacked, said a U.S. aircraft strafed the facility, destroying three transformers, gas pipes, and the air conditioning, which brought the entire facility down as components that were not damaged by the attack overheated.⁵³

⁴⁹ Reuters, *Journalists: 21 Days to Baghdad A chronicle of the Iraq War* (London, Reuters Books 2003.)

⁵⁰ Supra see note 12

⁵¹ *Newsweek*, March 2003

⁵² 2003 Reuben E Brigety//Human Rights watch.

⁵³ Human Rights Watch interview with Hassan Dawud, engineer, North Electrical Station 132, al-Nasiriyya, May 9, 2003.

Protocol I to the Geneva Conventions prohibits the attacking of works and installations containing dangerous forces and other installations located at or in their vicinity. Such attacks are likely to release dangerous forces and consequent disproportionate collateral losses among the civilian population. The E-bomb is delivered by a cruise missile, is a warhead that explodes to emit a high energy pulse that like a bolt of lightning, will fuse any electrical equipment within range. The first night of war against Iraq, E-bombs detonated over President Saddam Hussein's key command and control bunkers in and around Baghdad. The lights blinked out, computers melted down, phones went silent. The desired effect of the first night's bombing as used by the Military planners was "shock and awe" to stun and demoralize Iraqi army that Sadaam's army quickly gave up.⁵⁴

2.3 CONDUCT OF GROUND WAR AND PROTECTION OF THE CIVILIAN POPULATION.

2.3.1 PROTECTION OF CIVILIANS.

Who is a civilian? Article 50 of the First additional protocol (A.P 1) to the 1949 Geneva conventions of 1977, defines a civilian as a person who is not a member of the armed forces. A civilian is under no obligation to identify himself as such by carrying an ID in order to claim protection to which they are entitled. In a non-international armed conflict, the prohibition of civilians taking part in hostilities is implicit.⁵⁵

The concern to protect civilian population as well as combatants against excessive and exceptionally cruel violence has been and still continues to be the main aim of humanitarian law, this concern dates back to the ancient times when the rules of humanitarian law began to emerge.⁵⁶

The following is a summary of humanitarian law provisions with the regard to the protection of civilians.

⁵⁴ Supra see note 52

⁵⁵ Additional protocol II art 13

⁵⁶ Fleck, D(1995) *The handbook on humanitarian Law in armed conflict* Oxford University Press, Newyork, P.13

- A clear distinction must be drawn in all instances between combatants and civilians on the one hand, and between military objectives and civilian objects on the other;⁵⁷
- It is forbidden to attack civilian persons or objects or to launch attacks of such a nature to strike military objectives and civilian persons or objects in an indiscriminate manner. Indiscriminate attacks are those that are not directed to a specific military objective;⁵⁸
- Acts of threats of violence aimed at spreading terror among the civilian population is prohibited;⁵⁹
- Attacks on military objectives which may be expected to cause incendiary loss of life or injury among the civilian population or damage to civilian objects that would be excessive to the concrete and direct military advantage anticipated are also prohibited;⁶⁰
- All feasible precautions must be taken to avoid and in any event to minimize ,incidental loss of life injury to civilians and damage to civilian objects;⁶¹
- Each party to the conflict must take all feasible precautions to protect the civilian population and civilian objects under its control against the effects of attacks.⁶²
- It is prohibited to use civilians and combatants *hors de combat* to shield military operations.⁶⁴
- Cultural property and places of worship may not be made objects of attack, unless they have become military objectives;⁶⁵
- It is prohibited to attack or to destroy objects indispensable to the survival of the civilian population, such as foodstuffs, crops livestock and drinking water

⁵⁷ Art. 48,51 of GP I

⁵⁸ Art. 51(1) of GP I

⁵⁹ Art. 51(2) of GP I

⁶⁰ Art. 51(5) (a) and (b) of GP I

⁶¹ Art 57 2 (a) (iii) of GP I

⁶² Art. 57 (i) of GP I

⁶⁴ Art. 51 (7) of GP I

⁶⁵ Art. 53 of GP I and the Hague convention for the Protection of cultural Property in the event of armed conflict of 14th may 1954.

installations and supplies, or to render them useless with the purpose of rendering their sustenance value to the civilian population.⁶⁶

- It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of humanitarian law constitute perfidy.⁶⁷
- Reprisals against protected persons and objects are prohibited as per Art. 51(6) of the first protocol.
- It is prohibited to order that there shall be no survivors and to make persons *hors de combat* objects of attack.⁶⁸

2.3.1 CONDUCT OF GROUND WAR.

The hostilities in Iraq in March and April 2003 were the largest engagement of ground forces since the Gulf War in 1991. The U.S.-led Coalition deployed about 350,000 ground forces,⁶⁹ while the Iraqis fought with an estimated 350,000 ground forces in the regular army and Republican Guard⁷⁰ and between 18,000 and 40,000 paramilitary *fedayeen*. Despite taking extensive precautions to protect civilians, U.S. and U.K. ground forces were found to have caused significant numbers of civilian casualties with the widespread use of cluster munitions, particularly in populated areas. Moreover, in some instances of direct combat, problems with training on as well as dissemination and clarity of the U.S. ground forces' rules of engagement may have, in some instances, contributed to loss of civilian life.

Iraqi forces violated IHL during the ground war, directly causing or contributing to civilian casualties. In particular, Human Rights Watch documented instances of abuse of the red cross and red crescent emblems; violations of the prohibitions on the use of civilian shields, use of antipersonnel landmines, and location of military objects in

⁶⁶ Art. 54 (2) of GP I

⁶⁷ (Hague regulation) Art. 23 f and Art. 37 of GP I

⁶⁸ Art. 40 of GP I

⁶⁹ "Operation Iraqi Freedom—By the Numbers," p. 3. This number includes all "deployed personnel," not just combat troops

⁷⁰ "State of the Iraqi Military," *New York Times*, April 2003

protected places, such as hospitals, mosques, and cultural property sites; and a failure to take precautions in preparing for urban combat. Witnesses also reported large numbers of Iraqi soldiers wearing civilian clothes, a practice that eroded the distinction between combatant and civilian and put the latter at risk.

2.3.4 Use of Human Shields

According to U.S. and U.K. media reports, Iraqi armed forces endangered civilians by using them to shield combatants from the enemy. Iraqi prisoners of war said they received orders to “use any means necessary” during their battle with the Marines including “putting women and children in the street.”⁷¹ Human Rights Watch gathered testimonies that are consistent with such allegations. Yusif Sahib Jawad, a 29-year-old taxi driver, witnessed *fedayeen* fighters hiding between houses on al-Madina Street where much of the fighting in al-Najaf took place. “Most of the *fedayeen* and Ba`thists distributed and hid between houses because they thought the Americans wouldn’t shoot civilians. They used civilians as shields,” he said.⁷²

In one case, he saw Ba`th militia members spot a U.S. helicopter in the sky and then pull their car next to a car carrying a civilian family. The helicopter fired and seven civilians died in their vehicle, Jawad said.⁷³ The press reported that helicopter pilots often encountered these kinds of situations. Coalition forces reported other cases of the use of human shields that they had witnessed. In al-Najaf, Colonel David Perkins, commanding officer of the Second Brigade, Third Infantry Division, saw a *fedayeen* drive behind a home in a four-by-four vehicle with its lights off. “He went into the building, came out with two women, one was holding a child. So everyone held their fire, and luckily the women were able to break loose,” Perkins said. After his hostages fled, the *fedayeen* jumped back in his vehicle and started shooting; the U.S. troops then killed him. Perkins witnessed another case as his unit was trying to take a bridge across the Euphrates. Iraqi forces lined up civilians in front of their vehicles so they could advance safely. “It would

⁷¹ Kerry, S, “Iraqis Deceive Marines at al-Nasiriyya: Men in Civilian Clothes Ambush U.S. Soldiers on Key Bridges,” *MSNBC News*, 24 March 2003,

⁷² Human Rights Watch interview with Yusif Sahib Jawad, al-Najaf, May 24, 2003 available <<http://www.hrw.org/reports/2003>> (accessed on 30 July 2004)

⁷³ Ibid

cease all fire,” Perkins said.⁷⁴ A sergeant in Perkins’ brigade said that during the battle of Baghdad, *fedayeen* would use civilians to shield themselves while running across the street.

The U.S. and U.K. press also reported incidents of Iraqi forces using civilians, including children, as human shields. In one of many accounts, Sergeant David Baird, a tank commander of the Royal Scots Dragoon Guards, said *fedayeen* “were crossing the road to try and outflank us on the left and, as they crossed, four or five of them grabbed kids by the scruff of their necks and dragged them across with them. . . . The children were only five to eight years old.” After the *fedayeen* crossed, they let the children run back to their mothers.⁷⁵

IHL prohibits the use of civilians as shields. Parties to a conflict are expressly prohibited from directing the movement of civilians to attempt to shield military objectives from attacks or to shield military operations.⁷⁶ In the cases described above, Iraqi soldiers used civilian bystanders to do both of the prohibited activities: to protect themselves and to advance on their enemy.

2.3.5 Use of Antipersonnel Landmines

Iraqi forces violated the prohibition on the use of indiscriminate weapons by laying antipersonnel landmines in several parts of the country. British Royal Marines advancing toward Basra encountered freshly sown antipersonnel minefields as well as newly laid anti vehicle mines that slowed their progress. “The U.N. withdrew three or four days before the war. Then the Iraqis rushed to put mines along the border,” said Dr. Akram al-Shuwali, director of Umm Qasr General Hospital. Mines caused several of the civilian casualties his hospital received during the war.⁷⁷ Further north, Iraqi forces used landmines against advancing U.S. troops.

Landmines newly planted prior to the Coalition attack were reported on the road between Basra and Baghdad. The Iraqis reportedly deployed landmines along access routes to

⁷⁴ Human Rights Watch interview with Colonel David Perkins

⁷⁵ Martin, B “Iraqi Paramilitaries ‘Used Children as Human Shields,’” *Independent*, April 2, 2003

⁷⁶ AP I, art. 51(7).

⁷⁷ Tim, B “Marines Plan the Siege of Basra,” *Daily Telegraph*, 31 March 2003.

their positions around al-Nasiriyya.⁷⁸ U.S. troops entering al-Najaf in the last days of March encountered mines on roads and bridges into the city. The Third Infantry Division was also “held up in a minefield” near Karbala’. According to a U.S. State Department demining expert, most mines found were a twenty-year-old design, largely imported from Italy.⁷⁹ The ICRC reported the presence of high number of incidents caused by unexploded ordnance and mines and to the potentially disastrous effects of plenty of weapons and ammunition easily accessible across the country. There were thousands of unexploded shells left behind by Iraqi troops near a popular football field.⁸⁰ Humanitarian Law prohibits any use of anti-personnel mines.⁸¹ Thus, even though Iraq is not among the 141 parties to the 1997 Mine Ban Treaty that prohibits use, production, transfer, and stockpiling of antipersonnel mines, any use of such mines by Iraq, is a violation of IHL

2.3.6 Abuse of Red Cross and Red Crescent Emblems

Iraqi armed forces violated IHL by abusing the red cross and red crescent emblems. These emblems may only be used to identify and protect medical personnel, buildings, and equipment in times of armed conflict and to identify national Red Cross and Red Crescent societies, the International Committee of the Red Cross (ICRC), and the International Federation of Red Cross and Red Crescent Societies.

The night of March 23, during the battle for al-Najaf, *fedayeen* came to the Hay al-Hussain Ambulance Center. The ambulances there and in other parts of Iraq were white with red crescent emblems on the front hood and rear door and sometimes on the side door. The *fedayeen* told the center’s staff that they knew of injured people who needed help and climbed in an ambulance with their guns. “They got in . . . and then took part in the battle. They used [the ambulance] as a cover to reach the field of battle,” said Rashid Majid Hamid, 42, a paramedic, who witnessed two such cases.⁸² At 11:00 p.m. five days later, an intelligence official commandeered an ambulance from the same center and

⁷⁸ “U.S. Landmine Experts Begin Removal Work in Iraq,” *Voice of America*, 24 May 2003

⁷⁹ *Ibid*

⁸⁰ “The situation in Iraq”(2003) *Humanitarian Debate ,Law ,Policy, Action; International Review of Red cross volume 85*

⁸¹ Ottawa Convention on the Prohibition of the use, stockpiling, Production and transfer of Anti-personnel mines and on their Destruction 1997.

posed as an ambulance driver to scout the road twenty kilometers (12.4 miles) southeast of al-Najaf. Paramedic Falah Muhsin, 52, said he was afraid to go along but “had no choice.” While these examples involved taking local ambulances, in other cases, the *fedayeen* took ambulances from a more central source. “Because they have so much power, they take them from the Ministry of Health,” Muhsin said. A doctor at al-Najaf Teaching Hospital said he saw *fedayeen* driving in cars with red crescent flags.⁸³ Coalition troops confirmed they had come under attack from ambulances. Major Samarov said the Marines took fire from ambulances one or two nights. In another instance of abuse of the red crescent emblem, the Iraqi Intelligence Service occupied the Red Crescent Maternity Hospital in Baghdad.

An international aid worker said that Iraqi forces disguised a Ba`th party militia building in Basra, with no connection to the ICRC, by affixing an ICRC emblem to it before the war started.⁸⁴ Such buildings served as rallying points for the local militia. They were used to store small arms, ammunition, rockets, grenades, and other ordnance, and during a crisis, the militia would go to there to receive orders.

These actions violate the prohibition on abuse of the emblem. International humanitarian law has long prohibited making improper use of the “distinctive emblem” of the red cross or red crescent.⁸⁵ Attacking the enemy under cover of the Red Crescent constitutes an abuse of the emblem. Using the ICRC emblem to protect military objects is equally unlawful.

2.3.7 Location of Military Objectives in Protected Places

In addition to protecting civilians, IHL gives special protection to certain facilities, including hospitals, places of worship, and cultural property. Iraqi armed forces used

⁸² Human Rights Watch interview with Rashid Majid Hamid, paramedic, Hay al-Hussain Ambulance Center, al-Najaf, May 24,

⁸³ Human Rights Watch interview with Dr. `Ali al-Tufaili, director, al-Najaf General Hospital, May 24, 2003.

⁸⁴ Human Rights Watch interview with international aid worker #1, Basra, April 30, 2003.

⁸⁵ API, art. 38.

these protected places to advance their military goals. The *fedayeen*, for example, used al-Nasiriyya Surgical Hospital as the base of their local operations.⁸⁶

The *Mukhabarat* occupied the Baghdad Red Crescent Maternity Hospital and threatened to kill Dr. al-Rikabi, the hospital director, if he challenged them. Such military use of civilian hospitals violates international humanitarian law. Parties to an armed conflict are required to respect and protect civilian hospitals, which may in no circumstances be attacked.⁸⁷ This protection ceases, however, if the medical establishments are used to commit “acts harmful to the enemy.”⁸⁸ By using hospitals as military headquarters, Iraqi forces turned them into military objectives. Some Iraqi civilians interviewed by Human Rights Watch interpreted the location of military hardware in neighborhoods as an intentional attempt by the Iraqi armed forces to use civilians to protect military objectives. “They put anti-aircraft guns in civilian parts to have a safe place. They thought the Americans would not hit them because it was between civilians,” said Dr. Muhammad Hassan al-`Ubaidi of al-Najaf Teaching Hospital. The location of military objectives in civilian areas raises concerns under IHL. While IHL does not prohibit fighting in urban areas, it does require parties to an armed conflict to take precautions to protect civilians from the dangers of military operations.⁸⁹ If properly implemented these precautions should provide civilians some protection in situations of urban warfare. With regard to precautions taken against the effects of attacks, IHL requires parties to an armed conflict, “to the maximum extent feasible,” to “avoid locating military objectives within or near densely populated areas.” They should also “endeavor to remove the civilian population . . . from the vicinity of military objectives.”⁹⁰

Iraqi armed forces also sought to protect themselves by establishing positions in mosques. In al-Najaf, they occupied the Imam `Ali Mosque, the most holy religious site in Iraq. Wasfi Tahir, a 26-year-old merchant, said he saw Iraqi *fedayeen* and Ba`th militia fighting from this mosque in the middle of the city. He said the *fedayeen* fired at U.S.

⁸⁶ Human Rights Watch interview with Dr. `Ali `Abd al-Sayyid, director, al-Nasiriyya General Hospital, May 7, 2003

⁸⁷ Fourth Geneva Convention art.18

⁸⁸ Fourth Geneva Convention art.19

⁸⁹ AP I, art. 57.

troops, but the Americans did not return fire. The press reported that about 150 members of the Ba`th party and *Fedayeen* Saddam had taken positions in the mosque.⁹¹ In Baghdad, *fedayeen* from Syria moved into the Abu Hanifa mosque, one of the holiest Sunni shrines in Iraq. At 4:00 a.m. on April 9, a firefight broke out between U.S. forces and *fedayeen* inside the mosque. According to a *fedayeen* combatant, the battle lasted until around noon, killing ten civilians and causing significant damage to the mosque's well-known clock tower.⁹²

IHL prohibits the use of "places of worship which constitute the cultural or spiritual heritage of peoples . . . in support of the military effort."⁹³ The Imam `Ali and Abu Hanifa mosques are not only places of worship, but also mosques with special religious and historical significance to Shi`a and Sunni Muslims, respectively. Iraqi forces' use of these mosques for military actions is clearly illegal.

Asked about the causes of civilian casualties in Baghdad, Dr. `Ali al-Aharkhi, chief of neurosurgery at the Adnan Khiralla Hospital, said, "The real problem was weapons put by our government in between civilian areas. If you put tanks near houses, they will definitely be attacked. There was a tank in front of my house. [The military forces] refused to move it."

2.3.8 Combatants in Civilian Clothes

Iraqi civilians around the country reported seeing Iraqi troops out of uniform. Dr. `Abd al-Sayyid, director of al-Nasiriyya General Hospital, blamed many of the civilian deaths in the battle of al-Nasiriyya on the practice. "*Fedayeen* were among the civilian homes. . . [T]he problem was with the Iraqi troops and *fedayeen* dressed as civilians," he said.⁹⁴ Yusif Sahib Jawad, the taxi driver who lived along the main battle route in al-Najaf, said he saw Ba`thist and *fedayeen* combatants wearing civilian clothes.⁹⁵ Qassim Abu Ahmad, 35, witnessed the battle in al-Yarmuk neighborhood of Baghdad. He

⁹⁰ AP I art.58(a)

⁹¹ Human Rights Watch interview with Qassim Abu Ahmad, Baghdad, 22 May 2003.

⁹² Supra see note 77

⁹³ AP I, art. 53(b).

⁹⁴ Human Rights Watch interview with Dr. `Ali `Abd al-Sayyid, director, al-Nasiriyya General Hospital, al-Nasiriyya, May 7, 2003

⁹⁵ Human Rights Watch interview with Yusif Sahib Jawad.

reported that all of the *fedayeen* he saw in the street or on rooftops were dressed like civilians. When asked how they knew these combatants were not civilians bearing arms, Iraqis generally replied that “everyone in the neighborhood knows” who is a ⁹⁶civilian and who belongs to the army, Ba`th party militia, or *fedayeen*.

Almost every member of the Coalition interviewed by Human Rights Watch commented on this practice. “By March 24 [the fourth day of the war], we were already seeing a large number of irregulars out of uniform. It was clearly a combination of systematic and conscious,” said Colonel Baldwin, whose troops advanced up al-Fao Peninsula to Basra. Other reports of Iraqi combatants fighting in civilian clothes came from Marines caught in an ambush along the route from al-Nasiriyya to al-Kut and the soldiers in the Second Brigade, Third Infantry Division, who fought in al-Najaf. The Iraqis often combined such conduct with use of civilian vehicles, particularly orange-and-white taxis. On April 7, for example, Special Republican Guard forces launched a counterattack on Second Brigade forces entering Baghdad while firing from civilian vehicles and wearing civilian clothes.⁹⁷

Such actions tend to erode the distinction between combatants and civilians and put the latter at risk. They do not, however, relieve the opposing side of its obligation to distinguish at all times between combatants and civilians and to target only combatants.⁹⁸ In case of doubt, a person must be considered a civilian.⁹⁹

2.4 Conclusion.

This chapter has studied in details the IHL provisions with regard to means and methods of warfare and also has stressed the importance of protecting a civilian population during wartime. As noted below many civilian casualties that could have been avoided did arise during the war.

⁹⁶ Human Rights Watch telephone interview with `Abu Ahmad Qassim, Baghdad, October 14, 2003.

⁹⁷ Human Rights Watch interview with Colonel David Perkins.

⁹⁸ AP I art.48

⁹⁹ AP I art. 50(1)

Significant civilian casualties occurred in the air war in Iraq despite the use of a high percentage of precision weapons. Many of the civilian casualties from the air war occurred during U.S. attacks targeting senior Iraqi leaders. The United States used an unsound targeting methodology that relied on intercepts of satellite phones and inadequate corroborating intelligence. U.S. and U.K. air forces also used some cluster bombs in or near populated areas. Attacks on certain civilian power facilities caused additional civilian suffering

U.S. weapons hit the targeted building in the densely populated section of Basra, but the buildings surrounding the bomb strike—filled with civilian families—were also destroyed. Human Rights Watch investigators found that seventeen civilians were killed in this attack.¹⁰⁰

In the early morning hours of Saturday, April 5, al-Tayyar, a 50-year-old laborer, went to his garden to get water. Moments later an American bomb slammed into the targeted house next door, destroying his house as well. He picked himself up and immediately began to search the debris. He spent the rest of the day working to pull the dead bodies of his family from the rubble of his home, finally reaching his dead son at 4:00 p.m.⁶⁷. Many other such cases and instances occurred throughout the war especially during the intense period of air raids. All such acts amounted to violation of IHL Especially with regard to the protection of the civilian population.

¹⁰⁰ Human Rights Watch interview with `Abd al-Hussain Yunis al-Tayyar, Basra, April 22, 2003

CHAPTER TWO.

PRISONERS OF WAR (POWS) AND OCCUPANCY.

3.0 INTRODUCTION

The instrument that gives provisions regarding the treatment of prisoners of war in an international armed conflict is the third Geneva Convention (GC III). It lists the categories of persons who are entitled to be termed as prisoners of war, who have fallen into the arms of the enemy.¹⁰¹

3.1 PROVISIONS AS PER THE CONVENTION.

The Convention provisions apply to POWs who are captured in a properly declared war and also in all cases of partial or total occupation of territory by a belligerent, even if the occupation meets with no armed resistance.¹⁰²

The following can be termed as POWS if they fall into the arms of the enemy.

- Members of armed forces of a party to the conflict as well as members of militias who or volunteer corps forming part of such armed forces;
- Members of other militias and members of other volunteer corps, including those of organized resistance movements belonging to a party to the conflict and operating in or outside their own territory even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements...
- Members of a regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power;
- Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces that they accompany;

¹⁰¹ Art. 4 GC III

¹⁰² Stone, *J Legal Controls of International Conflict* (Maitland Publications PTY Sydney).

- Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law;
- Inhabitants of a non occupied territory, who on approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war;
- Persons belonging, or having belonged to the armed forces of the occupied country, if the occupying Power considers it necessary to inter them by reason of such allegiance, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces which they belong to which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment; and
- The persons belonging to one of the categories enumerated in the present article, who have been received by neutral or non belligerent powers in their territory.

The Geneva Convention that relates to the treatment of ‘Newspaper correspondents’ stipulates that;¹⁰³

“persons who follow the armed forces without directly belonging thereto, such as correspondents, newspaper reporters, sutlers or contractors who fall into the arms of the enemy and whom latter think fit to detain shall be entitled to be treated as P.O.W’s provided that they are in possession of an authorization from the military authorities of the armed forces which they are following...”

A war correspondent accredited to the armed forces shall retain the special status provided for in At.4 (a) of the G.C III.

The rest of the Convention has provisions regarding treatment of prisoners. It stresses the humane treatment of prisoners,¹⁰⁴ equality of treatment,¹⁰⁵ and detailed provisions

¹⁰³ The Geneva Convention of 27th July 1929 Relative to the treatment of ‘Newspaper correspondents’, Art.

81

¹⁰⁴ Art. 13 of GC III

¹⁰⁵ Art. 16 of GC III



regarding quarters, food, and clothing of prisoners of war.¹⁰⁶ Failure to respect the status of protected persons generally constitutes a war crime.¹⁰⁷ The Security Council did call upon parties involved not to close their eyes upon the rules of war as supported by the United Nations and to fully comply with their obligations under international law including in particular the Geneva Conventions of 1949 and Hague regulations of 1907.¹⁰⁸

The War in Iraq therefore qualifies for full application of the GC III because it has been categorized as an armed conflict of an international character. More than 8,300 Iraqis were held as POWs by the Americans and the Britons. However, not all Iraqi detainees were likely to be given POW status. Some of those picked up were members of irregular forces – such as the *Fedayeen* Saddam or Ba’ath Party militias – and were decided that they do not meet the threshold to qualify as prisoners of war¹⁰⁹

3.2 The Right to be a Prisoner of War

Under the customary laws of war combatants have been historically classified in interstate hostilities as either “privileged” or “unprivileged” combatants. The privileged combatant is a person authorized by a party to such an armed conflict to engage in hostilities and thus has the “combatant’s privilege.” This privilege not only entitles him to directly participate in hostilities, but also guarantees him prisoner of war status upon capture and immunity from prosecution by his captor for his lawful acts of war. Members of regular armed forces, including militias or volunteer corps forming such forces, are privileged combatants.¹¹⁰ Although members of regular armed forces are *expected* to comply with the laws of war, they do not forfeit their right to POW status upon capture

¹⁰⁶ Chapter II of GC III

¹⁰⁷ GC IV Art. 29

¹⁰⁸ Security Council Resolution No. 1483 of 22nd May 2003.

¹⁰⁹ According to Diane Orentlicher, Professor of Law at American University’s Washington College of Law “*Justice for War crimes in Iraq*” Crimes of War project. <www.crimesofwar.org> (accessed on 5 Sep 2004)

¹¹⁰ Art. 4A(1) and (3) of the GC III

even if they commit war crimes. They can, however, be tried and punished for such crimes by their captor.

An “unprivileged” combatant refers to a person who does not have the combatant’s privilege, but nevertheless directly participates in hostilities. Such combatants would include, *inter alia*, civilians who in violation of their protected status engage in fighting or other hostile acts. However, the law does sanction a *levee en masse* whereby civilians may spontaneously take up arms in order to resist an invading force. Spontaneity means that there is no time to organize into regular forces. Civilians participating in a *levee en masse* may qualify for privileged combatant and POW status, provided that they do not conceal their weapons and observe the laws of war. This is the single, limited exception to the proscription against civilians participating in hostilities¹¹¹

The International Committee of the Red Cross (ICRC) is mandated by the High Contracting Parties to the Geneva Conventions to monitor the full application of and respect for the Third and Fourth Geneva Conventions regarding the treatment of persons deprived of their liberty. Representatives of religious organizations, relief societies and any other organizations assisting POWs to visit the detention camps. The special position of the ICRC is recognized at all times.¹¹²

3.3 VIOLATIONS.

Violations took place at various detention camps over the war period between March and November 2003. The main places of internment where mistreatment allegedly took place included battle group unit stations; the military intelligence sections of Camp Cropper and Abu Ghraib Correctional Facility; Al-Baghdadi; Heat Base and Habbania Camp in Ramadi governorate; Tikrit holding area (former Saddam Hussein Islamic School); a former train station in Al-Khaim, near the Syrian border, turned into a military base; the Ministry of Defense and Presidential Palace in Baghdad, the former *mukhabarat* office in

¹¹¹ Goldman, R “ *The Legal status of Iraqi Foreign Combatants captured by Coalition armed Forces*” < www.crimesofwar.org> (Accessed on 20 Sep 2004.)

¹¹² Art. 125 G.C III

Basrah, as well as several Iraqi police stations in Baghdad. The main violations as reported by ICRC during their visits include,

- Brutality against protected persons upon capture and initial custody, sometimes causing death or serious injury;
- Absence of notification of arrest of persons deprived of their liberty to their families rousing distress among persons deprived of their liberty and their families;
- Physical or psychological coercion during interrogation to secure information;
- Prolonged solitary confinement in cells devoid of daylight; and
- Excessive and disproportionate use of force against persons deprived of their liberty resulting in death or injury during their period of internment.¹¹³

3.3.1 During arrest.

The provisions of IHL oblige the CF (Coalition forces) to treat prisoners of war and other protected persons humanely and to protect them against acts of violence, threats thereof, intimidation and insults;¹¹⁴ It is proper to respect at all times the human dignity, physical integrity and cultural sensitivity of the persons deprived of their liberty held under their control. The ICRC asked the authorities of CF to ensure that battle group units arresting individuals received adequate training enabling them to operate in a proper manner and fulfill their responsibilities without resorting to brutality or using excessive force.

The manner in which certain arrests were made out did not entirely conform to the provisions of G.C III.¹¹⁵ Arrests tended to follow a pattern. Arresting authorities entered houses usually after dark, breaking down doors, waking up residents roughly, yelling orders, forcing family members into tiny rooms under military guard while searching the

¹¹³ *Supra* See note 111

¹¹⁴ Art. 13 14,17, 87,of the G C III; Art. 5, 27, 31,32, 33 of GC IV.

¹¹⁵ As per Part III of GC III

rest of the house and further breaking doors, cabinets and other property. They arrested suspects, tying their hands in the back with flexi-cuffs, hooding them, and taking them away. Sometimes they arrested all adult males present in a house, including the elderly, the handicapped or the sick. Treatment often included pushing people around, insulting, taking aim with rifles, punching and kicking and striking them with rifles. Individuals were often led away in whatever they happened to be wearing at the time of arrest - sometimes in pyjamas or underwear - and were denied the opportunity to gather any essential belongings, such as clothing, hygiene items, medicine or eyeglasses. Those who surrendered with a suitcase often had their belongings confiscated. In many cases personal belongings were seized during the arrest.¹¹⁶

70% to 90% of the persons deprived of their liberty in Iraq had been arrested by mistake. The brutality of some arrests was attributed to the lack of proper supervision of battle group units.¹¹⁷

3.3.2 Notification to families.

In accordance with provisions of both the GC III,¹¹⁸ and the Fourth Geneva Convention, CF should promptly notify the families of all prisoners of war and other protected persons captured or arrested by them. Within one week, prisoners of war and civilian internees must be allowed to fill out capture or internment cards mentioning at the very least their capture/arrest, address (current place of detention/internment) and state of health. These cards must be forwarded as rapidly as possible and may not be delayed in any manner. As long as there is no centralized system of notifications of arrest set up by CF, it is of paramount importance that these capture cards be filled out properly, so as to allow the ICRC to transmit them rapidly to the concerned families.

When arrests were made in the streets, along the roads, or at checkpoints, families were not informed about what had happened to the arrestees until they managed to trace them

¹¹⁶ “ Detainees in Iraq” < www.icrc.org> (accessed on 5 Aug 2004).

¹¹⁷ *Ibid*

¹¹⁸ (Art. 70, 122, 123) of the GC III, Art. 108, 136, 137, 138, 140),GC IV

or received news about them through persons who had been deprived of their liberty but were later released, visiting family members of fellow persons deprived of their liberty, or Red Cross Messages. In the absence of a system to notify families of the whereabouts of their arrested relatives, many were left without news for months, often fearing that their relatives unaccounted for were dead.

Even upto date, there is still no satisfactorily functioning system of notification to the families of captured or arrested persons, even though hundreds of arrests continue to be made every week. Whereas the main places of internment (Camp Bucca and Abu Ghraib) are part of a centralized notification system through the National Information Bureau (and their data are forwarded electronically to the ICRC on a regular basis), other places of internment such as Mossul or Tikrit are not. Notifications from those places therefore depended solely on capture or internment cards as stipulated by the Third and Fourth Geneva Conventions.¹¹⁹

Since March 2003 capture cards have often been filled out carelessly, resulting in unnecessary delays of several weeks or months before families were notified, and sometimes resulting in no notification at all. It is the responsibility of the detaining authority to see to it that each capture or internment card is carefully filled out so that the ICRC is in a position to effectively deliver them to families. Despite improvements, the system still remains inadequate, as families outside the main towns do not have access to them, lists made available are not complete and often outdated and do not reflect the frequent transfers from one place of internment to another. In the absence of a better alternative, the ICRC's delivery of accurate capture cards remains the most reliable, prompt and effective system to notify the families, provided cards were properly filled out.

Despite some improvement, hundreds of families had to wait anxiously for weeks and sometimes months before learning of the whereabouts of their arrested family members. Many families traveled for weeks throughout the country from one place of internment to another in search of their relatives.

¹¹⁹ *Supra* see note 116

The same obligation of notification to families of captured or arrested persons applies to transfers, cases of sickness, deaths, escapes and repatriation and identification of the dead of the adverse party. All these events must be notified to the ICRC with the full details of the persons concerned, so as to allow the ICRC to inform the concerned families¹²⁰

3.3.3 Treatment during transfer and initial custody.

In accordance with provisions of IHL, the Coalition forces are required to treat prisoners of war and other protected persons humanely and to protect them against acts of violence, threats thereof, intimidation and insults¹²¹

There were several allegations indicating that following arrest, persons deprived of their liberty were ill-treated, sometimes during transfer from their place of arrest to their initial internment facility. This ill-treatment would normally stop by the time the persons reached a regular internment facility, such as Camp Cropper, Camp Bucca or Abu Ghraib.¹²²

One allegation collected by the ICRC concerned the arrest of nine men by the CF in a hotel in Basrah on 13 September 2003. Following their arrest, the nine men were made to kneel, face and hands against the ground, as if in a prayer position. The soldiers stamped on the back of the neck of those raising their head. They confiscated their money without issuing a receipt. The suspects were taken to Al-Hakimiya, a former office previously used by the *mukhabarat* in Basrah and then beaten severely by CF personnel. One of the arrestees died following the ill treatment (A 28 year old married father of two children). Prior to his death, his co-arrestees heard him screaming and asking for assistance.¹²³

During a visit of the ICRC in Camp Bucca on 22 September 2003, a 61-year old person deprived of his liberty alleged that he had been tied, hooded and forced to sit on the hot

¹²⁰ Art. 120, 121, 122, 123 GC III ; Art. 129, 130, 136, 137, 140 GC IV.

¹²¹ Art. 13, 14, 17, 87, of GC III; Articles 5, 27, 31, 32, 33 of GC IV.

¹²² Berger, J “ Prisoners and Visitors” at www.icrc.org/web/Eng (accessed on 22 Sep 2004.)

¹²³ Schniper, M “ Protecting Persons deprived of freedom remains a priority.” <At www.icrc.org/web/Eng> (accessed on 22 September 2004)

surface of what he surmised to be the engine of a vehicle, which had caused severe burns to his buttocks. The victim lost consciousness. The ICRC observed large crusted lesions consistent with his allegation.¹²⁴

3.3.4 Treatment During Interrogation.

Arrests were usually followed by temporary internment at battle group level or at initial interrogation facilities managed by military intelligence personnel, but accessible to other intelligence personnel (especially in the case of security detainees). The ill treatment by the CF personnel during interrogation was not systematic, except with regard to persons arrested in connection with suspected security offences or deemed to have an "intelligence" value. In those cases, persons deprived of their liberty supervised by the military intelligence were subjected to a variety of ill-treatments ranging from insults and humiliation to both physical and psychological coercion that in some cases might amount to torture in order to force them to cooperate with their interrogators.¹²⁵

3.3.5 Military intelligence section, "Abu Ghraib Correctional Facility".

In accordance with the provisions of GC III, detainees must not be subjected to cruel or degrading treatment; and must be protected against all acts of violence.¹²⁶ Torture and other forms of physical and psychological coercion against prisoners of war and other interned persons for the purpose of extracting confession or information is prohibited in all cases and under all circumstances without exception.¹²⁷ Confessions extracted under coercion or torture can never be used as evidence of guilt.¹²⁸ Such violations of I H L should be thoroughly investigated in order to determine responsibilities and prosecute those found responsible.¹²⁹

¹²⁴ *Ibid*

¹²⁵ *Ibid*

¹²⁶ Art. 13, 14, of GC III

¹²⁷ Art. 17 and 87, of GC III

¹²⁸ Art. 99, of GC III.

¹²⁹ Art. 129, of GC III

In mid October 2003, the ICRC visited persons deprived of their liberty undergoing interrogation by military intelligence officers in Unit 1A, the "Isolation section" of "Abu Ghraib" Correctional Facility. Most of these persons deprived of their liberty had been arrested in early October. During the visit, ICRC delegates directly witnessed and documented a variety of methods used to secure the cooperation of the persons deprived of their liberty with their interrogator. In particular they witnessed the practice of keeping persons deprived of their liberty completely naked in totally empty concrete cells and in total darkness, allegedly for several consecutive days.¹³⁰

The military intelligence officer in charge of the interrogation explained that this practice was "part of the process". The process appeared to be a policy whereby persons deprived of their liberty were "drip-fed" with new items (clothing, bedding, hygiene articles, lit cell, etc) in exchange for their "cooperation".

The ICRC also visited other persons deprived of their liberty held in total darkness, others in dimly lit cells who had been allowed to dress following periods during which they had been held naked. Several had been given women's underwear to wear under their jumpsuit (men's underwear was not distributed), which they felt to be humiliating.¹³¹

The ICRC documented other forms of ill-treatment, usually combined with those described above, including threats, insults, verbal violence, sleep deprivation caused by the playing of loud music or constant light in cells devoid of windows, tight handcuffing with flexi-cuffs causing lesions and wounds around the wrists. All allegations of ill-treatment referred to the phase of arrest, initial internment (at collecting points, holding areas) and "tactical questioning" by military intelligence officers attached to battle group units, prior to transfer to Camp Bucca.

3.3.6 Treatment At Regular Internment Facilities.

The ICRC assessed the treatment of persons deprived of their liberty in regular internment facilities by CF personnel as respectful, with a few individual exceptions due

¹³⁰ *Supra* see note 122.

¹³¹ *Ibid.*

to individual personalities or occasional loss of control on the part of the guards. Abusive behavior by guards, when reported to their officers, was usually quickly reprimanded and disciplined by superiors.¹³²

However, it is not proper to say that all was well during internment as has earlier been evidenced by the violations during arrest and transfers. There are reports of persons who were accorded very rough treatment at the internment facilities by being slapped, roughed up, pushed around or pushed to the ground either because of poor communication (a failure to understand or a misunderstanding of orders given in English was construed by guards as resistance or disobedience), a disrespectful attitude on the part of guards, a reluctance by persons deprived of their party to comply with orders, or a loss of temper by guards.

3.3.7 "High Value Detainees" section, Baghdad International Airport

The internment of persons in solitary confinement for months at a time in cells devoid of daylight for nearly 23 hours a day is more severe than the forms of internment provided for in GC III and GC IV (investigation of criminal offences or disciplinary punishment). It cannot be used as a regular, ordinary mode of holding of prisoners of war or civilian internees. This kind of treatment contravenes the provisions of the convention.¹³³

Since June 2003, over a hundred "high value detainees" have been held for nearly 23 hours a day in strict solitary confinement in small concrete cells devoid of daylight. This regime of complete isolation strictly prohibited any contact with other persons deprived of their liberty, guards, family members (except through Red Cross Messages) and the rest of the outside world. Even spouses and members of the same family were subject to this regime. Persons deprived of their liberty whose "investigation" was nearing completion were reportedly allowed to exercise together outside their cells for twenty minutes twice a day or go to the showers or toilets together. The other persons deprived of their liberty still under interrogation reportedly continued to be interned in total

¹³² Gassman, G " *Access to war victims in Iraq: Humanitarian corridors and access to victims of War*" at <www.icrc.org/Eng/siteeng> accessed on 5 Aug 2004.

¹³³ 21, 25, 89, 90, 95, 103 of GC III.

"segregation". They were allowed to exercise outside their cells for twenty minutes twice a day and to go to the showers or toilets but always alone and without any contact with others.¹³⁴

There should be set up an internment regime which ensures respect for the psychological integrity and human dignity of the persons deprived of their liberty and make sure that all persons deprived of their liberty are allowed sufficient time every day outside in the sunlight and the opportunity to move about and exercise in the outside yard.

3.3.8 Exposure of Detainees.

The broadcasting of the photographs of POWs was also a violation of IHL.¹³⁵ Five U.S. soldiers captured by Iraqi forces were shown on videotape broadcast by Al-Jazeera on March 23 looking dazed and fearful.¹³⁶

Iraqi POWS are not the only ones who have been filmed or photographed in captivity. U.S. networks have also shown footage of Iraqi soldiers surrendering or being detained during military operations, and several still photographs of POWS have appeared in U.S. and other news media.¹³⁷

The Convention requires that POWS "must at all times be treated humanely," and goes on to list a number of specific requirements: they must not be killed, seriously endangered, mutilated or subject to medical or scientific experiments. Furthermore, they must be protected against acts of violence or intimidation, and against "insults and public curiosity"¹³⁸

¹³⁴ *Supra* see note 122.

¹³⁵ Article 13 of GC III

¹³⁶ Dworkin, A "The Geneva conventions and Prisoners of war." At < www.crimesofwar/project/reports> (accessed on 10 Aug 2004.)

¹³⁷ *Ibid.*

¹³⁸ *Supra* see note 104.

A spokesman for the ICRC, Florian Westphal, said,

“ICRC would consider the use of any image ‘that makes a prisoner of war individually recognisable’ to be a violation of Article 13 of the Convention. The condition of being taken prisoner might be considered degrading or humiliating in itself, and that representations of captives could also have an impact on families. Both sides should abide by the provisions of the third Geneva Convention, including Article 13.”¹³⁹

3.4 OCCUPANCY IN IRAQ.

As combat operations in Iraq ended, attention quickly shifted to the plight of the Iraqi population. Looting and violence have broken out in a number of cities, and critics were condemning U.S. and British forces for moving too slowly to restore order.

Human Rights Watch charged that “[s]ome U.S. government officials seem unaware of their obligations under international law to act promptly to prevent looting and other disturbances.”¹⁴⁰

The Annexed Regulations to Hague Convention IV of 1907, the 1949 Fourth Geneva Convention, and customary international law set forth the laws of belligerent occupation applicable in this conflict. Both the Nuremberg Tribunal and a 1993 Report of the U.N. Secretary-General characterized the Hague Regulations as reflecting customary International law binding on all States. Since Iraq, the U.S., and the U.K. are parties to the Geneva Conventions, that instrument also applies. There was extensive State practice of occupation in the 20th Century, particularly after the Second World War, much of which has matured into customary law bearing on the occupation of Iraq. While the 1977 Protocol Additional I to the Geneva Conventions contains the most recent codification of

¹³⁹ *Supra* see note 136.

¹⁴⁰ Schmitt, M “The law of belligerent occupation” at < www.crimesofwar.org/special/Iraq.> (accessed on 5 Sep 2004.)

occupation law, that treaty does not apply in this case because neither the U.S. nor Iraq are Parties to the agreement.

It could be said that the state of affairs subsisting in the state of Iraq from 9th April 2003 constituted belligerent occupancy, (a) it was by a belligerent state. (b) It entailed occupation of an enemy belligerent state (c) the occupancy occurred during the course of an armed conflict, and (d) it took place before any general armistice agreement was concluded between warring parties.¹⁴¹

3.4.1 When does occupation start?

These IHL laws on occupation come into effect as soon as territory is “occupied” by adversary forces, that is, when the government of the occupied territory is no longer capable of exercising its authority, and the attacker is in a position to impose its control over that area. The entire country need not be conquered before an occupation comes into effect as a matter of law, and a state of occupation need not be formally proclaimed. obligations and rights of the occupying power obviously extend only to those areas that the attacking forces actually control. Ultimately, whether territory is occupied is a question of fact.

That some resistance continues does not preclude the existence of occupation provided the occupying force is capable of governing the territory with some degree of stability. Moreover, it is not legally relevant that the occupiers claim to be “liberating” the population; so long as an International armed conflict is underway, the justification for the conflict has no bearing on whether the laws of occupation apply.

¹⁴¹ Graber, (1949) *The development of the law of Belligerent occupation 1863-1914*, p.5; Feilchenfeld, (1942) *The International Economic law of Belligerent Occupation*, P. 6; Glahn V(1957) *The Occupation of enemy territory: A commentary law on the law and practice of Belligerent Occupation* p. 28;

3.4.2 DUTIES OF AN OCCUPYING BODY APPLICABLE TO IRAQ.

The Security Council has in the past stressed the duties of an occupying power especially with regard to Iraq and pointed out that it,

“ reaffirms the sovereignty and territorial integrity of Iraq and underscores in that context the temporary nature of the exercise by the Coalition Provisional Authority of the specific responsibilities, authorities, obligations under applicable international law recognized and set forth in rsn 1483 (2003), which will cease when an internationally recognized government established by the people of Iraq is sworn in and assures the responsibilities of the Authority, inter-alia through steps envisaged...”¹⁴²

The maintenance of law and order is an essential part of the responsibilities of an occupying power. This is recognized in the U.S. Army’s Field Manual: “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety...” in the immediate months after the major military conflict, the security situation in Iraq was poor.¹⁴³ There was extensive violence and looting. Much of this was predictable expected.¹⁴⁴

Occupying powers are also responsible for the care of the civilian population, including its health and hygiene. In particular, an occupying power must, to the ‘fullest extent of the means available to it,’ ensure the population receives adequate food, water, and medical treatment. If supplies in the occupied territory are inadequate, foodstuffs and medical stores must be brought in. Relief agencies must be allowed to deliver humanitarian aid.¹⁴⁵ With regard to foodstuff, it was majorly the ‘Oil for food’ programme under which oil was sold to buy food and Humanitarian supplies.¹⁴⁶

¹⁴² Security Council resolution 1511 of 16th October 2003.

¹⁴³ Coalition Provisional Administration Order 3 pf 23 May 2003 sought to regulate weapons control. It prohibited heavy weapons and controlled small arms.

¹⁴⁴ Simpson, J “*The wars against Saddam: Taking the Hard Road to Baghdad*” (2003) London, Macmillan, 374-77

¹⁴⁵ Art.55 of GC IV

¹⁴⁶ UNSC Res 986 (1995). As of 29 May 2003, \$28 billion worth of humanitarian supplies and equipment had been delivered under the programme. An additional 10 billion was in the production and delivery pipeline.

The programme had been the only source of sustenance for 60% of Iraqis.¹⁴⁷

The occupying power is responsible for ensuring the education of children, and must make sure those children under fifteen years old are not left on their own.

Private property of the occupied country cannot be confiscated, though it may be requisitioned through compulsory purchase if necessary to support the occupying army. Pillage (looting by an occupying army) is strictly forbidden.

Enemy state-owned resources may be used by the occupying power to pay for military operations or to defray the cost of the occupation. The occupied territory can be required to bear the costs of its occupation so long as they are not excessive given the state of its economy. The US- run provisional government authority was referred to as the Coalition Provisional Administration (CPA). It had an office for legal counsel to provide legal advice on the law of occupation, which is a difficult area of Law with little recent practice. The US- Civil administrator of the CPA was L. Paul Bremer III.¹⁴⁸

The UN Security council showed its concern regarding the people of Iraq in its subsequent resolution and urged all parties concerned that:

“...consistent with Geneva Conventions and the Hague regulations, to allow full unimpeded access by International Humanitarian organizations to all people of Iraq in need of assistance to make available all necessary facilities for their operations and to promote the safety security and freedom of movement of the United Nations and associated personnel and their assets, as well as personnel of humanitarian organizations in Iraq in meeting such needs...”¹⁴⁹

On 10th April 2003, it was reported that the Red Cross, the last International aid agency working inside Baghdad had suspended its operations after one of its workers was

¹⁴⁷ The total population of Iraq is 27.1 million. In May 2003, malnutrition among children under 5 was estimated at 7.7 % as compared to 4% before the war. Most other health indicators were within seasonal norms.

¹⁴⁸ Supra see note 9

¹⁴⁹ Security Council Resolution of 28th March 2003 from <www.reliefweb.int> (accessed on 10 July 2004)

critically wounded in an attack on a convoy attempting to re-supply the city's hospitals¹⁵⁰. Vatche Arslanian, a Canadian logistics expert was reported to have been seriously wounded and had to be abandoned after colleagues trying to rescue him were forced back by gunfire. This does not reflect very well on the occupying power. There were also a small number of attacks on UN workers offering humanitarian relief and facilities .In November 2003, 7 Spanish intelligence officers were killed.¹⁵¹

A few days earlier, the ICRC had reported a shortage of water in Baghdad that was threatening the ability of hospitals to effectively carry out its operations. It was further reported that the casualties in the capital could only reach one hospital, where surgeons were working non-stop and running short of supplies. The occupying force should have ensured that at all times there was adequate supply of medical supplies and food. There were reports of surgeons operating on patients anaesthsised with headache pills¹⁵²and the World Health Organization reporting a shortage of equipment to deal with burns shrapnel wounds and spinal injuries.¹⁵³ This was a very serious period of shortages and the US did not have any valid excuse as to why the situation was like that, considering the presence of the advisory office giving legal advice.

A group of young men were reported to have been seen standing at the gates of Al-Kindi hospital in blue surgical gowns when, in actual fact, they were not doctors or medical orderlies. The young men were discovered to have been volunteers protecting the hospital from looters and thieves. Their argument was that British and American forces would not protect them hence they had to protect themselves.

¹⁵⁰ Elizabeth, B "Releif Agencies are forced to wait as chaos Reigns", NEW YORK TIMES-10th April 2003.

¹⁵¹ *Supra* See Note 9

¹⁵² Milmo, C & Buncombe, A "Surgeons Using Headache pills instead of unaesthetic", INDEPENDENT 9th April 2003.

¹⁵³ Owen, B "*Baghdad hospitals pushed to the limit*" GUARDIAN 9th April 2003

The ICRC reported excessive looting of Al-Rashid psychiatric hospital,¹⁵⁴ the only hospital offering mental help for miles. USAID was reported to have declared that it was not giving anyone kits to the military just so that they could be looted. A World health stock of medical supplies for treating 10,000 people for three months was reportedly stolen soon after the American military unit left it at a hospital in a city on the way to Baghdad.¹⁵⁵ Imposing the occupant's law to the occupied territory is highly discouraged. The party in occupation is authorized to enact legislative measures only in so far as they restore public order and civil life, that is, are concerned with the common interest or the interest of the population.¹⁵⁶ Massive looting, wounding, killing, maiming and killing that took control of the better part of Iraq constituted public disorder that would warrant urgent legislative efforts for purposes of protecting the general public.¹⁵⁷

3.6 NATURAL ENVIRONMENT.

IHL establishes specific provisions for the protection of the natural environment. It is prohibited to employ means and methods of warfare that are intended, or maybe expected to cause widespread, long-term severe damage to the natural environment and that may threaten the survival of the population.¹⁵⁷ These provisions are applicable whether the act of environmental degradation is intentional or unintentional. This comes from the principle that establishes hostilities must not destroy objects that are indispensable to the survival of the civilian population.¹⁵⁸

¹⁵⁴ ICRC review of June 2003

¹⁵⁵ Buncombe, A "*People of Baghdad guard hospitals from looters,*" INDEPENDENT 12th April 2003

¹⁵⁶ Mauvier, *Die Voelkerrechtliche Stellung Der Besetzten Gebiete,* (Tubingen, 1915) P. 23.

¹⁵⁷ *Supra* See Note 12

¹⁵⁷ Art. 35(5) of PI and Art. 55

¹⁵⁸ Art. 14 PII

The statute of the permanent International Criminal court (ICC) was adopted on July 17th 1998. The statute defines war crimes over which the court will have jurisdiction, once the conditions required to trigger the exercise of its jurisdiction have been met. Whether committed during an international or internal armed conflict, these war crimes include,

“ launching attacks in the knowledge that such attacks may cause widespread, long-term, and severe damage to the natural environment and would be clearly excessive in relation to the concrete and direct military advantage anticipated.”¹⁵⁹

Similarly, works or installations containing dangerous forces namely, dams, dykes, and nuclear electricity generating stations as well as military objectives located at or in the vicinity of these works must not be targets of attacks. This applies even where these objects are military objectives, if such attacks may cause the release of dangerous forces and consequent severe losses among the civilian population.¹⁶⁰

The meaning of the words ‘widespread’ and ‘long-term’ and severe damage have been given under the Environmental Modification convention¹⁶¹ as follows;

“ widespread damage is that which affects an area which encompasses several hundred square kilometers; or long-term damage is that damage that lasts for several months of approximately a season and severe damages means serious or significant disruption or harm to human life, economic resources or other assets”¹⁶²

Agenda 21 also has provisions regarding the environment and stresses that measures in accordance with international law should be considered to address in times of armed conflict large scale destruction of the environment that cannot be justified under international law. The general assembly and the 6th committee are appropriate forums to deal with this subject. Specific competence and the role of ICRC are taken into account. ICRC had a meeting of experts to study the problem of protecting the environment in time of armed conflict.¹⁶³ The following are some of the conclusions reached by experts.

¹⁵⁹ Art. 8 of the ICC statute.

¹⁶⁰ Art. 56 of PI and Art. 15 of PII

¹⁶¹ The Convention on the Prohibition of Military or any other use of Environmental Modification Techniques (ENMOD convention.) of 1976.

¹⁶² For a text of the Understanding provide by the UN Committee on disarmament: UNDOC CCD/S20 (1976). September Annex A

¹⁶³ Geneva From 27th to 29th 1992, ICRC meeting of experts.

That there was a general interest in preserving the natural environment even in time of armed conflict, the belligerents when selecting methods and means of warfare should take this general interest into account.

They were also in agreement that there should be a balance between the protection of environment and military necessity. There should be prohibition of actions causing damage, which is not warranted by military necessity. There should be an obligation at all times to choose the least harmful means of reaching a military objective. There should also be an obligation to respect proportionality between the military advantage expected and the incidental damage on the environment. The instruments of international environmental law should remain applicable in times of armed conflict and it is wrong to use self-inflicted damages to the environment for example using scorched earth policy.

ICRC was of the opinion that careful attention should be paid to the problem of environmental damage by the indiscriminate and unrecorded laying of mines. In May 2003, the ICRC reported presence of a high number of incidents caused by unexploded ordnance and mines and to the potentially disastrous effects of plenty of weapons and ammunition easily accessible across the country.¹⁶⁴

Use on the battlefield of certain specific weapons represents a growing risk to the natural environment. The law of armed conflict takes these technical developments into account and keeps their effects within tolerable limits. The laws that apply to natural environment are the least respected in times of war. In this aspect therefore, there is no defense that a party was acting in self defense and the destruction was occasioned at the spur of the moment when environmental considerations could not have been taken into account or that the area was destroyed by the warfare has no vegetation or human population.¹⁶⁵ Therefore, a destruction of the environment, not justified by military necessity and carried out wantonly is contrary to the existing international law.¹⁶⁶

¹⁶⁴ Supra see note 19

¹⁶⁵ Supra see note 12

¹⁶⁶ General Assembly Resolution 47/37 of 25th November 1992 on the Protection of the Environment in times of armed conflict.

In Iraq, many places, structures were badly bombarded and were completely destroyed; stray missiles landed on bare land with some causing casualties among the civilian population. No measures were taken to reduce bombardments or use weapons that do not cause a lot of environmental degradation. In an attempt to succeed over the war, the Iraqi government embarked on the ‘scorched earth strategy’ to prevent the movement of the fast advancing enemies from southern Iraq.¹⁶⁷ This strategy was based on the setting ablaze of oil fields and from the fire emanated a thick smoke, which affected human life and the natural resources on which the fire was set. This was a clear breach of the provisions discussed above relating to protection of the environment. Such damage was uncalled for, and unjustified.

3.7 CONCLUSION

The Geneva Conventions are committed to ensuring proper and humane treatment of detainees or captured persons. Having highlighted some of the violations that took place regarding treatment of POWS and setting out the issues surrounding occupancy, the next chapter shall discuss and highlight recommendations on what should have been done to avoid some if not all of the above highlighted violations in a war situation such as what happened in Iraq.

¹⁶⁷ Supra see note 12

CHAPTER 3
WINNING THE PEACE.

4.0 INTRODUCTION.

The questions at issue in humanitarian law, no matter how varied and complicated, can be reduced to two fundamental problems, viz, the problem of balancing humanity against military necessity, and the obstacles to doing so posed by state sovereignty. Sovereignty and military necessity are the two evil spirits in our story-and evil spirits we will not be able to exorcise soon. Any ostensible interference with or supervision of, their behavior in time of armed conflict, is all too quickly interpreted as an encroachment of this previous sovereignty.¹

Military necessity is the concept that constitutes an integral part of the phenomenon of armed conflict. It should be understood that "military necessity" is nothing more than the argument that certain things are permitted in armed conflict, on no other ground that they must be done. The opposite of the argument is that even in armed conflict certain things are not allowed, because they amount to an intolerable encroachment of humanity. The difficulty of balancing these two opposing arguments, can no longer be a matter of doubt. The century of international conferences on these matters, from 1899- 1999 has made this abundantly clear.²

Observance of the obligations restricting belligerent parties in their conduct of hostilities is rarely an automatic thing: more often than not, it must be fought for step by step, so as to prevent armed conflict from degenerating into the blind, meaningless death and destruction of total war. This battle for humanity is not always won. Yet, each even partial success means that a prisoner will not have been tortured or put to death, a hand grenade not blindly lobbed into a crowd, a village not bombed into oblivion: that, in a word, man has not suffered unnecessarily from the scourge of war. The main goal of humanitarian law of armed conflict, is to preserve humanity in the face of the reality of

¹ Kalshoven, F (1987) "Constraints of waging war" ICRC Geneva publications.

war.³

4.1 IMPLEMENTATION AND ENFORCEMENT OF IHL.

4.1.1 Activities of Red Cross and Red Crescent and other humanitarian bodies.

The president of ICRC had this to say regarding implementation,

“ Law without action remains a dead letter- a theoretical exercise. To achieve its lofty objectives, the law must be respected. Implementation is undoubtedly the greatest challenge facing IHL today. Those who have striven so hard to develop this body of law have therefore also sought to establish mechanisms to ensure that it is respected. It is essential that all those affected by the law including civilians and the military are made aware of its provisions. The dissemination of IHL is both a clear obligation governments and a major activity of the ICRC and National Red cross and Red Crescent societies.”⁴

Although the practice of human rights and humanitarian bodies is limited, it provides a welcome addition to the admittedly limited array of international means to enforce compliance with IHL by parties to armed conflicts. The strength of these bodies lies in their capacity to speak out openly, to reprimand, to extort and to find violations. Their weakness are that they have no power to authoritatively hold parties responsible for violations of that law. Therefore, while their interest in IHL should be supported, and encouraged, their activities in this area do not remove the need to develop supervisory mechanisms specifically mandated to enforce compliance with humanitarian norms.

With respect to the ICRC, the first organisation specifically mentioned in¹²¹ the 1st Geneva protocol paragraph one provides that parties to an armed conflict are bound to grant it “all parties within their power so as to enable it carry out humanitarian functions assigned to it by the conventions in order to ensure protection and assistance to the victims of the conflicts”. It adds for good measure that ICRC ‘may carry out any other humanitarian activities in favour of these victims subject to the consent of the parties to

² Ibid.

³ Frits Kalshoven; Lisbeth Zegveld Constraints on the waging of War. Geneva March 2001

⁴ Jakob Kellenbeger; President of ICRC 2001 available at the book cited above.

the conflict concerned.’

The Red Cross and Red Crescent organisations must be granted facilities ‘necessary for carrying out their humanitarian activities in favour of the conflict’. The main concern of ICRC especially, regards to persons in detention. Its officials should be given free opportunity to visit the detainees and access their situation at detention. Such was very important with regard to the detainees in Abu Ghraib and other detention centers.

4.1.2 Punishment.

States have an obligation to prevent and where necessary punish violations of IHL. This obligation is set out in several IHL instruments. States parties to the 1949 Geneva conventions and 1977 protocols must enact laws to repress (punish) the most serious violations and grave breaches.⁵ This obligation applies during international armed conflict on the basis of universal jurisdiction that is, regardless of the place where the offence was committed⁶ and the nationality of the perpetrator.⁷

The conventions and the 1st protocol impose a two-fold obligation, to enact legislation to provide effective sanctions for persons committing or ordering to be committed grave breaches and to search for to try or extradite such persons. For states that are party to PI, the obligation to repress grave breaches extends to grave breaches that result from a failure when under a duty to do so.⁸

IHL was one of the 1st areas of international law in which it was made clear that the individual, and not just the state was responsible for his or her acts. The Geneva conventions were the first treaties to require states to prosecute (or extradite) violators, regardless of their nationality or the place of the offence. It is essential to ensure that

⁵ Conduct constituting a grave Breach of the convention defined in Art 50/51/130/147 common to the 4 conventions. For GP I Art. 11(4) and 85 (2), (3) and (4).

⁶ *SS Lotus case* (1927) PCIJ pp 18-19 the PCIJ while noting the territorial character of criminal law observed that international law did not lay down “ a general prohibition to the effect that states may not extend the application of their laws and jurisdiction of their courts to persons or acts outside their territory.”

⁷ Art. 49/50/129/146 of GC I-IV and art. 85(I) of GPI.

⁸ Art. 86(I) of GPI

there is no safe haven for war criminals. The enforcement of individual responsibility through the prosecution and trial of alleged offenders is undoubtedly one of the most important mechanisms for ensuring respect for IHL. Criminal liability is not the only way of holding alleged offenders accountable for their acts. Other forms of accountability/responsibility include civil liability or liability in terms of damages to victims, truth commissions, immigration and nationality controls.⁹

States also do have an obligation under the Hague Convention protecting cultural property.¹⁰ The parties have an obligation to take all necessary steps, within the framework of their ordinary criminal jurisdiction, to prosecute and impose penal or disciplinary sanctions upon persons of whatever nationality commit or ordered to be committed a breach of this particular convention.¹¹ This obligation applies in international and non-international armed conflict, although it is limited to respect of cultural property.¹²

The Environmental convention¹³ imposes an obligation to take all necessary measures it considers necessary to prohibit and prevent violations of the convention on territory under the states jurisdiction and control.¹⁴ The convention prohibits military or any other hostile use of environmental modification techniques having widespread long lasting or severe effects of mass destruction, damage or injury to any other state party.¹⁵

4.1.3 Exercise of Jurisdiction by national or International Tribunals.

Under the statutes of the *ad hoc* tribunals, it is provided that the international tribunals

⁹ Punishing violations of International Humanitarian Law at the National Level. By Advisory Service on IHL, Geneva 2001.

¹⁰ The 1954 Hague Convention for the Protection of Cultural property; the second protocol to the Convention of 1999.

¹¹ Art. 28 of the cultural property convention.

¹² Art. 19(1) of the cultural property convention.

¹³ 1976 Environmental Modification Techniques Convention

¹⁴ Art. IV of the Environmental convention.

¹⁵ Art. I of the Environmental convention.

and national courts have concurrent jurisdiction to have primacy over national courts.¹⁶ Under the statute of the International Criminal Court (ICC), the court shall be complementary to the national jurisdictions, with the courts jurisdiction arising only where a state or which would otherwise have jurisdiction is unable or unwilling to investigate or prosecute.¹⁷

Adoption of the Rome statute, which is based on the premise that the court should be complementary to national courts, provides an incentive for states to ensure that national courts have jurisdiction to try persons suspected of genocide, crimes against humanity and war crimes. The Rome statute does not impose an obligation on state parties to ensure that these crimes are crimes also in domestic law. However, state parties which wish to take advantage of complementarity will need to review their national criminal law to ensure that prosecutions can be brought in national courts. review their national criminal law to ensure that prosecutions can be brought in national courts.

4.1.4 Military courts.

Many states do not adequately provide for punishment of violations of IHL and arms control and disarmament treaties. In some states, this gap maybe partly remedied through the military justice system; courts martial or military tribunals. They are in apposition to try military members and associated personnel for conduct that amounts to a grove breach of the conventions. However, this only partly fills the gap. Firstly, courts-martial or military tribunals have jurisdiction over military personnel only where grave breaches and other violations maybe committed by civilians as well as the military.¹⁸

Secondly, it is unusual for military legislation of states to specifically create an offence termed as ‘war crimes’ which means that conduct amounting to a grave breach or other violation of IHL will have to be tried as a “like” or corresponding military offence (for example murder, assault, causing grievous harm) or under one of a number of possible provisions in states military law.

¹⁶ Art. Statute of the International Tribunal for former Yugoslavia; Art. 8 of the ICTR statute

¹⁷ Arts 1 and 17 of the Rome statute

¹⁸ Punishing violations of IHL at the national level. By Advisory Service on IHL, Geneva 2001.

There are both advantages and disadvantages in dealing with military personnel through the military justice system. The most obvious advantage is that it may be likely to institute proceedings than the civil courts, and may therefore offer a better prospect of those suspected of war crimes or other treaty violations being brought to justice.

As an advantage, military personnel and courts may have greater familiarity with the rules of IHL. One possible disadvantage is that the penalties available if a grave breach (or other treaty violation) is charged as a military may not adequately reflect the conduct which amounts to a grave breach or a treaty violation to be dealt with in this way. This is particularly the case for grave breaches or violations which have no obvious military offence, and which therefore have to be dealt with under catchall provisions.

U.S. President George W. Bush called the war in Iraq “one of the swiftest and most humane military campaigns in history.”¹⁹ Yet thousands of Iraqi civilians were killed or injured during the three weeks of fighting from the first air strikes on March 20 to April 9, 2003, when Baghdad fell to U.S.-led Coalition forces.²⁰

U.S. and U.K. military and civilian leaders have repeatedly stressed their commitment to avoiding civilian casualties and other harm to civilians. Neither country, however, does an adequate job of investigating and analyzing why civilian casualties occur. That job, left largely to organizations like Human Rights Watch, should be the responsibility of parties to the conflict. Having the capability to do this kind of assessment, the United States and United Kingdom should accurately account for the civilian casualties they caused in armed conflict so that they can provide maximum protection to civilians in any future conflict.

4.3 IRAQ NOW AND THE FUTURE.

As much as the allied forces have officially handed power to the Iraqis themselves, they, however still have responsibility over Iraq until such a time as there is stability in the

¹⁹ Simpson, J “*The wars against Saddam: Taking the Hard Road to Baghdad*” (2003) London, Macmillan, 374-77

²⁰ “Reports from Iraq” available at <www.cnn.com/International> (accessed on Feb 2004.)

country. The coalition states gave themselves a heavy responsibility over the future of Iraq. If they are to succeed, they will need the support of the international community of states and of International non- governmental organizations. But ultimately the people of Iraq will determine the future of Iraq.²¹

The Challenges the leaders faced were vividly illustrated in the space of two days in March 2004. On 1st March 2004, the Iraqi Governing council reached a unanimous agreement on an ambitious interim constitution, which will remain in place till an elected government can draw up a permanent constitution. It described Islam as the state religion and ‘a source’ for civil Law in Iraq rather than ‘the source.’ It also declared that no laws will contradict Islam.²²

It spelled out the principle of separation of powers and declared that Iraq will be a federal republic. The Kurds were granted the right to maintain a high degree of self-rule until a permanent constitution can be finished. Elections are to be held at the end of 2004 or in January 2005 at the latest.

The Interim constitution was highly hailed as a landmark²³. It was to be officially signed on 2nd march, which is the holiest day of the Shia calendar. However the signature was delayed because of a series of co-ordinated terrorist bombings on that date in their holy city of Karbala and in Baghdad, some 145 persons were killed and hundreds were injured. This followed endless reports of attacks in many parts of Iraq in and out of Baghdad. This is still the situation upto date. It is therefore recommended that the US and its allies still remain to maintain peace and order in Iraq and commit themselves to fully carry out the duties as enumerated by the Geneva Conventions as regards occupying forces.

²¹ D, Mc. Goldrick “ From 9-11 to Iraq War 2003” Hart Publishing, New York.

²² *Ibid.*

²³ *Supra* see note 136

4.3.1 Accountability for the past.

Even before the 2003 war, for the past many 20years, the human rights situation in Iraq had been bad. SC resolution 1843 affirmed, the need for accountability for crimes and atrocities committed by the previous Iraqi regime. One of the first meetings organized by the Special Representative was a national human rights workshop. This was held in Baghdad from 30 June to 1 July 2003. This brought together Iraq lawyers and human rights activists with experts from the International community to discuss justice for past human rights violations in Iraq. After the war began, the US deployed a special army unit to Iraq to gather evidence on Iraq war crimes.²⁴ The Governing Council was going to have to decide how to deal with Iraq's past for example, by trials, amnesties, truth commissions or some combination of these.²⁵ Or it could have decided to simply bury the past by ignoring it. The number of disappeared or missing persons was simply unknown but estimates of 300,000 are considered to be credible. Over 125 mass graves were unearthed in many parts of the country.

4.3.2 The Iraqi special tribunal.

On 10 December 2003, the Iraq governing Council approved the establishment of the Iraq special Tribunal – a war crimes court to try leading members of Saddam Hussein's Baath party regime for genocide, mass killing and other crimes against humanity committed between July 1968 and May 2003.²⁶ The governing law was based on Iraq and International legislation. In terms of the international crimes covered, it is similar to the Statute of the ICC.²⁷ There was provision for international

²⁴ 'Ensuring Justice for Iraq: Evidence Preservation and fair trials' <<http://www.hrw.org/press/2003/09>>

²⁵ Sadat, J "What would US do with Saddam" St. Louis Post Dispatch (23rd March 2003);D, Scheffer, 'Justice in the aftermath' Washington post (26th March 2003.)

²⁶ Hidler, J 'War crimes court will try Saddam Henchmen' *The times* (9th December 2003)

²⁷ Lederer, EM 'New Iraqi War Crimes Tribunal Emulate the International court, US opposes.' *Associated press* 20th Dec 2003. Proffeessor Bassiouni, a leading proponent of the ICC drafted the Iraqi Law on the special tribunal.

observers, but the judges were all to be Iraqis. The courtroom was located in a former museum and the estimated costs of establishing the court are \$75 million.²⁸

The new Iraq law on war crimes trials allowed for trials of Iraq nationals and residents responsible for crimes committed between 1968 and May 2003. It allowed for trial in absentia and the application of death penalty.²⁹ Possible offences are murder, disappearances, torture, the use of chemical weapons in the Iran-Iraq War and against the Kurds.³⁰ There will be strong political pressure on Iraq to ensure that the trial is fair and accords with International human rights standards.³¹ Saddam Hussein could potentially be subjected to the death penalty. General Tommy Franks, the American military commander, suspended Iraq's death penalty after the coalition took Iraq in April, but it remained on the statute books.³² It was for the Iraq governing council to determine whether it should be reinstated. The death penalty presents a problem for state such as the UK, which have adopted a position of principle against the death penalty. The UK would require assurances that anyone transferred will not face death penalty. Human rights watch expressed concern that the law would allow people to be prosecuted merely for having been members of the Baath party or the toppled Government, regardless of whether they had committed specific crimes.³³

The first defendants to appear before the tribunal would be from the 55 Iraqis named on the 'deck of cards' drawn up by the US identifying its most-wanted members of the former regime. The coalition was holding 38 of them in high-security jails inside Iraq, while another four were dead. They include military leaders such as Ali Hasan al-Majid, Saddam's cousin, also known as 'Chemical Ali' for his use of poison gases against Kurds, which killed tens of thousands of people, and Tariq Aziz, the former

²⁸ Gibb, F and Beeton, R US Sets Aside \$ 75m for putting Saddam on trial.' *The times* (9th January 2004.)

²⁹ Hidler, J and Farrel, S 'Saddam and his Henchmen to face War crime Death Penalty' *The times*

³⁰ The crime of aggression is another possibility but it is legally controversial and there is no agreed definition, e.g. in the context of the ICC

³¹ Art. 14 of the International covenant on Civil and Political Rights.(1966).

³² Section 3 of CPAORD 3 of 9th June 2003 on the penal Code , < [http://www. Defencelink .mil](http://www.Defencelink.mil)>

³³ Iraq; Law protecting war crimes tribunal lawed' < <http://www.hrw.org/library/Index/ENDMDE141812004>>.

deputy prime minister. The trials have not yet started despite the handover of power to the Iraqis in June 2004.³⁴

4.4 CONCLUSION.

The next chapter highlights what I would recommend should be followed at all times by parties to an armed conflict by the parties involved. Should parties involved in a conflict followed these recommendations to a basic minimum, many drastic effects of war will be highly reduced.

³⁴ *Supra* see note 136.

RECOMMENDATIONS AND CONCLUSION.

5.1 INTRODUCTION.

As the refuge of suffering men and women, humanitarian law is the most humane of laws, in this respect it belongs to every place and period. The international law of armed conflict, rather than being an end in itself, constitutes a means to an end: the preservation of humanity in the face of the reality of war. The reality confronts us everyday; the means remains therefore necessary.²⁰²

As we set out recommendations, it is not proper to give ways of preventing a war. To prevent future IHL violations by any armed forces, we recommend that the new Iraqi army be adequately trained in IHL and human rights law.

5.2 SUMMARY AND CONCLUSION.

The aim of IHL is not to act as to prevent war but seeks to minimize the effects of war by laying down the rules of war. IHL only applies in situations of declared armed conflict. The most effective method of reducing effects of war in order to have a more than average guarantee of respecting IHL, all armed forces in every country as part of their training have IHL in their curriculum. This is very important especially when they have to go to war. Iraqi forces also committed a number of violations of IHL, which may have led to significant civilian casualties. These violations included use of human shields, abuse of the red cross and red crescent emblems, use of antipersonnel landmines, placement of military objects in protected places (such as mosques, hospitals, and cultural property sites), and failure to take adequate precautions to protect civilians from the dangers resulting from military operations. The Iraq military's practice of wearing civilian clothes tended to erode the distinction between combatants and civilians and put the latter at risk. This dissertation has highlighted the above violations in detail and it is our hope that even in future human beings involved in war should be sensitive to the rules of war.

²⁰² *Supra* see note 168.

5.3 RECOMMENDATIONS.

5.3.1 General warfare.

With regard to the conflict in Iraq in 2003, as has been discussed in earlier chapters, there were violations that should have not occurred in the first place if certain precautions had been put in place. This should be used as a lesson for future, in case wars do arise. The whole purpose of IHL is to reduce the effects of war. In undertaking any military activity care should be taken to ensure that only military facilities are targeted.

First and foremost, the most efficient way to minimise the effects of war is to effectively train the members of the armed forces on the essential provisions of IHL at all times. Such training should not only be restricted to war time but also in time of peace. Armed forces should conduct better training on the application of rules of engagement, especially in urban warfare and in circumstances where the enemy may be wearing civilian clothes.

In time of war, air attacks like those launched in Iraq, should not be carried out until the intelligence and targeting failures have been corrected. Strikes should not be carried out without an adequate collateral damage estimate (CDE); strikes should not be based solely on satellite phone intercepts; and there should be no strikes in densely populated areas unless the intelligence is considered highly reliable.

Extreme caution must be used in the targeting of electrical power facilities. In particular, electrical generation facilities should not be attacked at all. If electrical distribution facilities are attacked, it should be done in such a way as to cause only temporarily incapacitation.

Media installations should not be attacked unless it is clear that they make an effective contribution to military action and their destruction offers a definite military advantage.

More planning, personnel, and resources need to be devoted to dealing with unexploded ordnance and abandoned stockpiles of arms and ammunition both during conflict and immediately afterward. Parties to a conflict should obey the provisions of

The distinctive emblem of the ICRC should never be misused or used for military purposes. The main aim of this distinctive emblem is for protection purposes, as the ICRC does not side during hostilities.

Weapons that have indiscriminate effects on an area on which it is used should never be used during war.

Parties to a conflict should at all times avoid using protected areas as a base for their objectives and advancement of their military goals, such facilities include hospitals, places of worship and cultural property even civilian homes.

5.3.2 Civilians

In the conduct of military operations, constant care must be taken to spare the civilian population and civilian objects from the effects of hostilities. Parties to a conflict are therefore required to take precautionary measures with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians, and damage to civilian objects. These precautions include:

- 1 Doing everything feasible to verify that the objects to be attacked are military objectives and not civilians or civilian objects or subject to special protection.
- 2 Taking all feasible precautions in the choice of means and methods of warfare so as to avoid and in any event minimize incidental loss of civilian life, injury to civilians and damage to civilian objects. Works and installations containing dangerous forces should never be attacked.
- 3 Refraining from launching attacks expected to cause incidental loss of civilian life, injury to civilians, [or] damage to civilian objects, which would be excessive in relation to the concrete and direct military advantage expected.
- 4 When circumstances permit, giving effective advance warning of attacks which may affect the civilian population.
- 5 When a choice is possible between several military objectives for obtaining the same military advantage, carrying out the attack that may be expected to cause the least danger to civilian lives and civilian objects.

²⁰³ *Supra* see note 81

- 6 Avoiding locating military objectives within or near densely populated areas.
- 7 Endeavouring to remove the civilian population from the vicinity of military objectives.

5.3.3 Prisoners of war

POWS should at all times be treated in accordance with the provisions of the third Geneva Convention. They should immediately upon capture, be granted their special status and to be treated accordingly. Incidences of torture or killing should never occur. These issues were discussed in detail in chapter two.

5.4 CONCLUSION.

The above recommendations should never at any one time during an armed conflict be deviated from. IHL rules should be obeyed at all times. If the countries of the world have to live in peace with each other, international law should be obeyed and any breach to be punished accordingly.

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