

## International Humanitarian Law in the Iraq Conflict\*

By Knut Dörmann and Laurent Colassis\*\*

The armed hostilities in Iraq throughout the last almost two years have raised numerous questions from the perspective of international humanitarian law (IHL) or, as it is also sometimes called, the law of armed conflict. This article aims at addressing some of them. The focus will be on identifying the applicable law throughout the various stages of the hostilities and various problems that entail its practical application. It is not the aim of the authors to identify and attribute specific violations that may have been committed by the parties to the conflict.

All issues pertaining to *ius ad bellum*, *i.e.* related to the lawfulness of the use of force, are not subject of this article. Given the fact that there is often some confusion as to the relationship between the *ius ad bellum* and IHL (*ius in bello*), it should be stressed at the outset that IHL applies equally to all parties to an armed conflict, and that this is independent of whether the use of force has been lawful or not under the *ius ad bellum*.<sup>1</sup>

---

\* This article was initially published in the German Yearbook of International Law 47 (2004), 293–342; republication courtesy of *Duncker & Humblot*, Berlin.

\*\* Dr. *Knut Dörmann* is Deputy Head of the Legal Division of the International Committee of the Red Cross (ICRC), Geneva; *Laurent Colassis* is Head of Unit of the Legal Advisers to the Operations, Legal Division of the ICRC, Geneva. The article reflects the views of the authors and not necessarily those of the ICRC.

<sup>1</sup> See *Yoram Dinstein*, *Jus in Bello Issues Arising in the Hostilities in Iraq in 2003*, *Israel Yearbook on Human Rights* (Isr. Y.B. Hum. Rts.), vol. 33, 2003, 2; *Wolff Heintschel von Heinegg*, *Irak-Krieg und ius in bello*, *Archiv des Völkerrechts*, vol. 41, 2003, 274 *et seq.*

### **A. The Law Applicable to the Conflict in Iraq**

IHL only applies in situations of armed conflict. Treaty law has traditionally distinguished between international armed conflicts, including situations of military occupation, and non-international armed conflicts, the former being regulated in far more detail than the latter as can be seen in the core IHL treaties, *i.e.* the 1949 Geneva Conventions<sup>2</sup> and its two 1977 Additional Protocols.<sup>3</sup> The last years have however shown a growing tendency to regulate international and non-international armed conflicts in the same way in treaty law,<sup>4</sup> and customary international law has developed in a way as to apply the same rules to a large extent in both types of situations.<sup>5</sup> However, there are still important differences

---

<sup>2</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, UNTS, vol. 75, 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, UNTS, vol. 75, 85; Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, UNTS, vol. 75, 135 (Third Geneva Convention or GC III); Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, UNTS, vol. 75, 287 (Fourth Geneva Convention or GC IV).

<sup>3</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, UNTS, vol. 1125, 3 (Additional Protocol I or AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, UNTS, vol. 1125, 609 (AP II).

<sup>4</sup> *E.g.* the Protocols to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW), 10 October 1980, UNTS, vol. 1342, 137 (Protocol on Non-Detectable Fragments (Protocol I), UNTS, vol. 1342, 168; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II), UNTS, vol. 1342, 168, as amended on 3 May 1996, UN Doc. CCW/CONF.I/16 (Part I), Annex B; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), UNTS, vol. 1342, 171; Protocol on Blinding Laser Weapons (Protocol IV), 13 October 1995, UN Doc. CCW/CONF.I/16 (Part I), Annex A; Protocol on Explosive Remnants of War (Protocol V), 28 November 2003, UN Doc. CCW/MSP/2003/3, Appendix II), in connection with the Amendment to the Convention's Art. 1 on 21 December 2001, UN Doc. CCW/CONF.II/2.

<sup>5</sup> *Jean-Marie Henckaerts*, Binding Armed Groups Through Humanitarian Treaty Law and Customary Law, in: *Relevance of International Humanitarian Law to Non-State Actors*, Proceedings of the Bruges Colloquium, 2002, 132, available at: <http://www.coleurop.be/content/publications/pdf/Collegium27.pdf>; *Jean-Marie Henckaerts*, The Conduct of Hostilities: Target Selection, Proportionality, and Precautionary Measures under International Humanitarian Law, in: *Netherlands Red Cross (ed.), Protecting Civilians in 21st Century Warfare – Target Selection, Proportionality and Precautionary*

### *International Humanitarian Law in the Iraq Conflict*

between the two situations concerning the applicable law. To give just a few examples, the concept of combatant status, which entails *inter alia* the privilege of exclusion from criminal prosecution for lawful acts of war, and prisoner of war status only exist in international armed conflicts. The law of occupation also is unique to international armed conflicts. Based on this reality it is important to qualify the situation in Iraq as it has developed throughout the last almost two years.<sup>6</sup>

#### **I. Beginning of the Air Attacks on 20 March 2003**

The air strikes by the US and UK-led coalition that started on 20 March 2003 clearly constituted an international armed conflict between the coalition States and Iraq. An international armed conflict is generally defined as “any difference arising between two States and leading to the intervention of members of the armed forces”<sup>7</sup> or, as the International Criminal Tribunal for the former Yugoslavia (ICTY) has put it, as a situation where “there is a resort to armed force between States.”<sup>8</sup>

As for the core of existing IHL, the four Geneva Conventions of 1949 were applicable to this conflict, but not Additional Protocol I, to which neither the US nor Iraq are State Parties. While the Geneva Conventions focus almost entirely on the protection of persons in the hands of the enemy, Additional Protocol I in particular contains detailed rules on the conduct of hostilities, including air-to-ground operations. Consequently the air strikes, which were the predominant feature in the beginning of the military operations, were essentially subject to the rules of customary international law. However these rules of customary international law now correspond largely to those of Additional Protocol I. These include:

---

Measures in Law and Practice, Speeches and Proceedings of the Red Cross Symposium, 2000, 11–12.

<sup>6</sup> While not of interest for this article, it should not be forgotten that the repeated US and UK air strikes since September 1996, after three years of interruption, in the air exclusion zone of southern Iraq constituted an international armed conflict and were thus subject to the rules of IHL.

<sup>7</sup> *Jean S. Pictet* (ed.), *Commentary: Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 1958, 20 *et seq.*

<sup>8</sup> ICTY, Appeals Chamber, *The Prosecutor v. Dusko Tadic*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70, reprinted in: ILM, vol. 25, 1996, 35.

- the principle of distinction<sup>9</sup> and the fundamental rules derived from it, such as
- the prohibition of direct attacks at civilians or civilian objects;<sup>10</sup>
- the prohibition of indiscriminate attacks,<sup>11</sup> including those that may be expected to cause excessive incidental civilian casualties or damages (principle of proportionality);<sup>12</sup>
- the prohibition to attack objects indispensable for the survival of the civilian population;<sup>13</sup>
- the prohibition to attack cultural property;<sup>14</sup>
- the obligation to take precautions in attacks;<sup>15</sup>
- the obligation to take precautions against attacks;<sup>16</sup>
- the prohibition of the use of human shields.<sup>17</sup>

In addition, the rules contained in the 1907 Hague Regulations,<sup>18</sup> which are considered as reflecting customary international law,<sup>19</sup> have also been of primary importance to the international armed conflict in Iraq.

---

<sup>9</sup> Art. 48 AP I.

<sup>10</sup> Arts. 51 para. 2, 52 para. 1 AP I.

<sup>11</sup> Art. 51 para. 4 AP I.

<sup>12</sup> Art. 51 para. 5 AP I.

<sup>13</sup> Art. 54 AP I.

<sup>14</sup> Art. 53 AP I; Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, UNTS, vol. 249, 240, Art. 4.

<sup>15</sup> Art. 57 AP I.

<sup>16</sup> Art. 58 AP I.

<sup>17</sup> Art. 51 para. 7 AP I.

<sup>18</sup> Regulations Annexed to the IV Hague Convention of 1907 Concerning the Law and Customs of War on Land, 18 October 1907, reprinted in: Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907*, 1915, 100.

<sup>19</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, 136, para. 89; International Military Tribunal at Nuremberg, *Case of the Major War Criminals*, Judgment of 1 October 1946, Official Documents, vol. I, 253–254.

## **II. Control over Iraqi Territory**

With the deployment of allied ground forces to Iraq, their gaining of control over territory and the subsequent establishment of the Coalition Provisional Authority (CPA), the question arose if and when the situation constituted a military occupation.

Despite the fact that the law of occupation is quite well developed – the main sources of the law of occupation are to be found in the 1907 Hague Regulations and in the Fourth Geneva Convention of 1949, as supplemented by the 1977 Additional Protocol I – there has always been legal dispute about specific aspects. Some of these will be addressed in the ensuing sections.

### *1. What Factual Situations Amount to an Occupation?*

It is a not uncommon feature of armed conflicts that States which deploy armed forces in another country quite frequently deny the formal applicability of the law of occupation.<sup>20</sup> Also in the case of Iraq, the US and UK initially spoke rather of ‘liberation’ of Iraq than of ‘occupation’ of Iraq. This begs the question what exactly constitutes a military occupation and when does it begin.

A definition of occupation is provided in Article 42 of the 1907 Hague Regulations, which stipulates that

[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

The idea that the occupant must be in a position to exercise authority is also inherent in a number of other provisions of the Hague Regulations such as Article 43, which starts by stating “The authority of the legitimate power having in fact passed into the hands of the occupant [...]” Many national military manuals have adopted the Hague definition.<sup>21</sup>

---

<sup>20</sup> This seems to be the consequence of negative connotations the term often has, see *Adam Roberts*, *The End of Occupation in Iraq*, available at: <http://www.ihlresearch.org/iraq/feature.php?a=51>. *David J. Scheffer* claims that a reason could be a “belief, whether justified or not justified, that the situation differs significantly from the typical case of occupation,” see *David J. Scheffer*, *Beyond Occupation Law*, *American Journal of International Law (AJIL)*, vol. 97, 2003, 843.

<sup>21</sup> *E.g.* Australia: Australian Defence Force, *Law of Armed Conflict Commander’s Guide*, 1994, para. 1202; Canada: Office of the Judge Advocate General, *Laws of*

Despite the fact that the Fourth Geneva Convention of 1949 contains a large number of rules applicable in situations of occupation, it does not include a definition of occupation. However, the four Conventions contain an important clarification in common Article 2 para. 2. This stresses that the Conventions apply to “all cases of partial or total occupation of the territory of a High Contracting Party, even if the occupation meets with no armed resistance.”

This clarification indicates that occupation is not limited to situations where a belligerent gains control over the adversary’s territory as a consequence of armed hostilities in the course of an armed conflict.

Based on these provisions, there are three elements relevant for determining the existence of a military occupation:

- an exercise of authority over the whole or part of the territory of another State
- by a hostile force
- regardless of whether this was met by armed opposition.

The identification of a territory or part of it as ‘occupied’ is a factual matter based on these criteria. Thus, recognition of an occupation by the invading State or States is not constitutive, but merely declaratory.<sup>22</sup>

The second and third elements were rather unproblematic in the case of Iraq. The second element linked to the hostile nature of the foreign armed forces has created controversy in past practice when States procured themselves invitations to assist the host government and then took over essential leadership functions.<sup>23</sup> In Iraq, however, when the coalition forces started their military operations and

---

Armed Conflict at the Operational and Tactical Levels, 2001, para. 1203 (1); Germany: *Dieter Fleck* (ed.), *The Handbook of Humanitarian Law in Armed Conflict*, 1995, 241, para. 526; United Kingdom: UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, 2004, 275, para. 11.2 (UK Field Manual); United States: US, Department of the Army, *The Law of Land Warfare – Field Manual FM 27-10*, 1956, 138, para. 351 (US Field Manual).

<sup>22</sup> *Eyal Benvenisti*, *Water Conflicts During the Occupation of Iraq*, *AJIL*, vol. 97, 2003, 861; *Adam Roberts*, *What is Military Occupation?*, *British Yearbook of International Law*, vol. 55, 1984, 256; *Michael N. Schmitt*, *The Law of Belligerent Occupation*, 15 April 2003, available at: <http://www.crimesofwar.org/special/Iraq/news-iraq5.html>. See also *Gerhard von Glahn*, *The Occupation of Enemy Territory – Commentary on the Law and Practice of Belligerent Occupation*, 1957, 28.

<sup>23</sup> *Michael Bothe*, *Occupation, Pacific*, in: *Rudolf Bernhardt* (ed.), *Encyclopedia of Public International Law (EPIL)*, vol. III, 1997, 767.

*International Humanitarian Law in the Iraq Conflict*

gained control over Iraqi territory, this happened without Iraqi consent, thus the coalition forces were clearly hostile forces in the sense of IHL.

The first element – exercise of authority – clarifies first of all that occupation need not be a matter of controlling the whole of another State’s territory, but arises when authority is established over any portion of its territory.<sup>24</sup> As to the concrete exercise of authority at least two different interpretations are conceivable. It could be read to mean that a situation of occupation exists whenever a party to a conflict exercises some level of authority or control over territory belonging to the enemy.<sup>25</sup> As a consequence, for example advancing troops could be considered as occupying forces, and thus bound by the law of occupation, during the invasion phase of hostilities.

This is the approach suggested by *Jean Pictet* in the ICRC Commentary to the Fourth Geneva Convention. In his view:

So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 [of the 1907 Hague Regulations]. The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the [fourth Geneva] Convention. *There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation.* Even a patrol which penetrates into enemy territory

---

<sup>24</sup> House of Commons, Iraq: Law of Occupation, Research Paper 03/51, 2 June 2003, 19.

<sup>25</sup> See, however, the interesting distinctions made by *W. Hays Parks* in the Questions and Answers on 7 April 2004, quoted by *Benvenisti* (note 22), 861, fn. 4:

Q: Is it your judgment or is it the military’s judgement that the United States is now an occupying authority in those portions of Iraq where U.S. forces have moved through? [...]

Parks: The term ‘military occupation’ is one of those that’s very, very misunderstood. When you are an infantry company commander, and you’re told to take the hill, you physically occupy it. That’s military occupation with a smaller – lower-case ‘m’ and a lower-case ‘o.’ It certainly does not mean that you have taken over it with the intent to run the government in that area. That’s the very clear-cut distinction, that until the – usually, until the fighting has concluded and is very conclusive, do you reach the point where technically there might be Military Occupation – capital ‘M,’ capital ‘O’ – and a declaration of occupation is issued. That’s a factual determination; it’s a determination by a combatant commander in coordination with other, as well. Obviously, we occupy a great deal of Iraq at this time. But we are not, in the technical sense of the law of war, a military occupier or occupation force.

Q: Until hostilities cease?

Parks: That’s going to be a factual determination by the combatant commander in consultation with others.

without any intention of staying there must respect the Conventions in its dealings with the civilians it meets.<sup>26</sup>

An alternative and more restrictive approach would be to say that a situation of occupation only exists once a party to a conflict is in a position to exercise the level of authority over enemy territory necessary to enable it to discharge the obligations imposed by the law of occupation, *i.e.* by substituting its own authority for that of the government of the territory. Thus, the invasion phase would be excluded. This is an approach that is suggested in many military manuals.<sup>27</sup> For example the new British Military Manual proposes a two-part test:

First, that the former government has been rendered incapable of publicly exercising its authority in that area; and, secondly, that the occupying power is in a position to substitute its own authority for that of the former government.<sup>28</sup>

On the basis of this approach the rules on occupation would not cover the invasion phase and battle areas.

Identifying the moment in which the rules of occupation start to apply is crucial as it determines which specific provisions of IHL regulate a situation. Once an occupation begins, in addition to some general provisions of IHL – for example, those contained in the chapter on “Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories,” Articles 27–34 of GC IV –, specific provisions relating to Occupied Territories<sup>29</sup> must also be respected.

Unlike the specific rules on occupation and on the treatment of aliens in enemy territory, the general provisions of Articles 27 to 34 do not address for example the possibility of internment of persons posing a security risk or the transfer or displacement of protected persons.

---

<sup>26</sup> *Pictet* (note 7), 60 (emphasis added).

<sup>27</sup> US Field Manual (note 21), 138, paras. 352 lit. a, 355–356; UK Field Manual (note 21), 276, para. 11.3.2; *Fleck* (note 21), 241 *et seq.*, paras. 526–528. See also *Roberts* (note 22), 256; *Lassa F. L. Oppenheim/Hersch Lauterpacht* (ed.), *International Law – A Treatise*, Vol. II (War), 7th ed. 1952, 434.

<sup>28</sup> UK Field Manual (note 21), 275, para. 11.3.

<sup>29</sup> Arts. 47–78 GC IV.



### *International Humanitarian Law in the Iraq Conflict*

Interestingly, the US Field Manual 27-10<sup>30</sup> and the old British Manual – The Law of War on Land<sup>31</sup> – adopted in the 1950s stated that as a matter of policy the entire range of obligations attached to occupied territory should, as far as possible, apply during invasion phases. This may be an indicator that both identified a situation in which civilians may be affected by parties to a conflict or hostilities and where their consequent protection needs were not adequately addressed by law.

Based on these protection needs, it seems to be a sensible approach to apply those provisions of the law of occupation which factually can be applied also in an invasion phase, to persons falling in the hands of a hostile party at that moment.

#### *2. The Lawfulness of Occupation Is Not Regulated by IHL and Does Not Affect the Application of the Law of Occupation*

It is essential to bear another point in mind. As has been stressed in the beginning, for IHL in general, the lawfulness or unlawfulness of an occupation does not affect the application of this body of law. The lawfulness of a particular occupation is regulated by the UN Charter<sup>32</sup> and other rules of *ius ad bellum*. Once a situation exists which factually amounts to an occupation, the law of occupation applies, regardless of its lawfulness. This was expressly recognized by an US Military Tribunal in the war crimes trials after the Second World War. In the case of *List*, the US Military Tribunal held that

[i]nternational Law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. [...] Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.<sup>33</sup>

The motives for the foreign forces' presence in the country and/or the intentions of the occupying power are also irrelevant for the application of IHL to the situation.

---

<sup>30</sup> US Field Manual (note 21), 138, para. 132 lit. b.

<sup>31</sup> UK, The War Office, The Law of War on Land Being Part III of Manual of Military Law, 1958, 141, para. 501.

<sup>32</sup> Charter of the United Nations, 26 June 1945, UNCIO, vol. 15, 335 (UN Charter).

<sup>33</sup> US Military Tribunal, *In re List and others*, Annual Digest and Reports of Public International Law Cases, vol. 15, 1948, 632, 647.

In this respect it makes thus no difference whether an occupation has received Security Council approval, or whether it is a consequence of an exercise of self-defense; or indeed whether it is labeled an “invasion,” “liberation,” “administration” or “occupation.”<sup>34</sup> What matters are the facts on the ground. The application of the rules on military occupation is then not left to the discretion of the occupying powers.

This is fully in line with the objectives of IHL, *i.e.* to protect in times of armed conflict without adverse distinction those not or no longer taking a direct part in hostilities, and to regulate permissible means and methods of warfare. It deals with humanitarian issues caused by armed conflict. Once there is armed conflict, IHL applies equally to all parties to an armed conflict regardless of the lawfulness of the resort to force.

### *3. Which States Are the Occupying Powers?*

Another question that arose during that period of the conflict was what States could be considered occupying powers in Iraq. Although this question had very important practical consequences, it did not generate much public debate. In addition to the US and the UK, a number of other States have or had troops on the ground in Iraq. Were they all occupying powers, with obligations under the Hague Regulations and the Fourth Geneva Convention?

The position of the US and UK was clear. These two States had established the Coalition Provisional Authority which exercised powers of government temporarily in order to provide for the effective administration of Iraq.<sup>35</sup> With the deployment of their ground forces, the US and the UK had established and were exercising authority over the territory of Iraq – even before the CPA was created.<sup>36</sup>

---

<sup>34</sup> *Benvenisti* (note 22), 861. See also *Dinstein* (note 1), 12; *Schmitt* (note 22).

<sup>35</sup> CPA, Regulation 1 of 16 May 2003, Sect. 1 para 1. The letter from the Permanent Representatives of the UK and the US to the UN, addressed to the President of the Security Council, 8 May 2003, UN Doc. S/2003/538, contains similar terms. This letter is referred to in SC Res. 1483 of 22 May 2003. Although it is implicit from the responsibilities of the CPA outlined in the letter that the US and UK are occupying powers, the words “occupation,” “occupiers” or “occupying power” do not appear therein.

<sup>36</sup> *Roberts* (note 20) sees the beginning of occupation in April 2003. See also *Heintschel von Heinegg* (note 1), 291.

*International Humanitarian Law in the Iraq Conflict*

In the preamble to Security Council Resolution 1483 of 22 May 2003, the Security Council also expressly recognized

the specific authorities, responsibilities and obligations under applicable international law of these States [the UK and the US] as occupying powers under unified command (the “Authority”).

The position of other members of the Coalition that had provided troops was more complicated. To the author’s knowledge, none of the States claimed publicly that they were occupying powers.<sup>37</sup> The preamble of the same Security Council Resolution notes that

other States that are not occupying powers are working now or in the future may work under the Authority.

While this could be interpreted as excluding other States as occupying powers, operative paragraph 5 of the resolution, which is the first provision in Resolution 1483 to specifically refer to the law of occupation,

[c]alls upon *all concerned* to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.

This reference to “all concerned”(emphasis added) is wider than the language of other provisions in the resolution, which are addressed only to the Authority. This could indicate that in the Security Council’s view not just the US and the UK could be occupying powers.<sup>38</sup>

The reference in the preamble to “other States that are not occupying powers” working now or in the future under the Authority could just be referring to States which provide support to the Coalition Provisional Authority, but whose engagement does not amount to exercising authority over any part of the territory of Iraq.

When assessing which States should be considered occupying powers, the ICRC considered the following:<sup>39</sup> The language of Security Council Resolu-

---

<sup>37</sup> *Scheffer* (note 20), 844; see also *Roberts* (note 20), who attributes this to the perceived “odium that comes with being labeled an occupier” and to “domestic political reasons.”

<sup>38</sup> See also *Scheffer* (note 20), 844: “This strongly suggests that the observance of occupation law for any state deploying military forces on Iraqi territory can be independent of whether that state is designated as an occupying power.”

<sup>39</sup> See remarks by *Jean-Philippe Lavoyer*, *Jus in bello: Occupation Law and the War in Iraq*, Proceedings of the American Society of International Law, vol. 98, 2004, 122.

tion 1483 was an indicator, but it was neither seen as conclusive nor as the only one. As always when “qualifying” a situation, the ICRC looked at the factual situation on the ground. What were the different contingents actually doing?

The focus was only on States that had actually provided combat personnel, to the exclusion of those that had provided experts such as engineers or medical staff – even if military. Then, the ICRC examined whether the national contingents in question had been assigned responsibility for and were exercising effective control over a portion of Iraqi territory. The ICRC considered all such States as occupying powers.

The fact that certain States had only been assigned very small sections of territory and had very few troops on the ground did not, in the ICRC’s view, make a difference. Within this territory, troops may be carrying out functions for which respect for the law of occupation could be relevant.<sup>40</sup> Examples would include troops carrying out patrols, mobile checkpoints, or arrests and detention of persons protected by the law of occupation. (The title given to these troops by their own States – “peacekeeping” or “stabilizing” forces – did not affect the ICRC’s determination, which focused instead on the actual functions they were carrying out.)

The ICRC approach was thus rather functional. While strictly speaking, the armed forces of some of these States were probably not exercising authority over territory within the meaning of Article 42 of the Hague Regulations, they could find themselves in a situation where they exercised control over protected persons and, in interacting with these persons, would have to respect the laws of occupation. Therefore, in order to maximize the protection of individuals, a memorandum was also issued to these States recalling their obligations under the law of occupation.

To avoid any doubt, it must be stressed that if and whenever the armed forces of any State became involved in hostilities, they had to respect IHL regardless of whether they had been considered an occupying power or not.

---

<sup>40</sup> See also *Roberts* (note 20): “Since any such contributors and their armed forces are still clearly urged to comply with the relevant Hague and Geneva rules, it is hard to see what practical problems might arise from the curious status of participating in an occupation but not being an occupying power.”

## *International Humanitarian Law in the Iraq Conflict*

### *4. The “Rights” and Duties of Occupying Powers*

This article is not the place to go into the details of the “rights”<sup>41</sup> and duties of occupying powers. As has been said those are clearly laid out in the 1907 Hague Regulations and in the Fourth Geneva Convention of 1949, as supplemented by the 1977 Additional Protocol I. In essence, they stress that the occupying power must not exercise authority in order to further its own interests, or to meet the interests of its own population. In no case may it exploit the inhabitants, the resources or other assets of the territory under its control for the benefit of its own territory or population.

Any military occupation is considered temporary in nature;<sup>42</sup> the sovereign title does not pass to the occupant<sup>43</sup> and therefore the occupying powers essentially have to maintain the *status quo*.<sup>44</sup> Thus, they should respect the existing laws and institutions and make changes only where necessary to uphold their duties under the law of occupation, to maintain public order and safety, to ensure an orderly government and to maintain their own security.<sup>45</sup>

In the case of Iraq, however, one of the aims of the coalition States was to engage in a transformational process leading to a regime change, creating democratic institutions.<sup>46</sup> Under its present form, the law of occupation precludes to a large extent such transformations.

The law does, however, contain room for change in the following areas:

Article 43 of the 1907 Hague Regulations, dealing with legislating powers of the occupant, states:

---

<sup>41</sup> *Michael Bothe* asserts that international law does not grant rights to the occupying power, but limits the occupant’s exercise of its *de facto* powers, *Michael Bothe, Occupation, Belligerent*, in: *Rudolf Bernhardt* (ed.), *EPIL*, vol. III, 1997, 764.

<sup>42</sup> House of Commons Research Paper (note 24), 18.

<sup>43</sup> *Benvenisti* (note 22), 862.

<sup>44</sup> *Rüdiger Wolfrum*, *The Attack of September 11, 2001, the War Against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?*, *Max Planck Yearbook of United Nations Law*, vol. 7, 2003, 56, available at: <http://www.forum.mpg.de/archiv/20031022/docs/911.pdf>.

<sup>45</sup> This would also include the need to prepare for and take the necessary steps to prevent or control the widespread looting which has been witnessed in Iraq. See also *Scheffer* (note 20), 855; *Wolfrum* (note 44), 58.

<sup>46</sup> For a more detailed analysis see *Roberts* (note 20), especially Sect. D. (The Transformative Purpose of the Occupation of Iraq).

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, while respecting, *unless absolutely prevented*, the laws in force in the country.<sup>47</sup>

Article 64 GC IV provides in the same context (emphasis added):

The penal laws of the occupied territory shall remain in force, *with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.* [...]

The Occupying Power may [...] *subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations* under the present Convention, to maintain the orderly government of the territory and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

These are examples that attribute to the occupant the power to legislate or bring about specific changes. Other exceptions are found in Articles 54 and 66 GC IV, to a certain extent also in Article 47 GC IV. An extensive debate as to what these provisions allow has been conducted elsewhere<sup>48</sup> and is therefore not repeated here.

It is worth asking whether occupation law should be changed to be more permissive. Some commentators are inclined to say yes, when the law of occupation is perceived as being in conflict with certain applicable provisions of human rights and with certain policy considerations – *e.g.* overthrowing an oppressive regime – which may be claimed to be in the interest of the international community more generally.<sup>49</sup> However, a change of the law of occupation should not be

---

<sup>47</sup> Emphasis added. “Public safety” is the non-authoritative translation of the authoritative French term “la vie publique,” which is much broader, *Marco Sassòli*, Article 43 of the Hague Regulations and Peace Operations in the Twenty-First Century, Background Paper Prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, June 25–27, 2004, Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR), 3–4, available at: <http://www.ihlresearch.org/ihl/pdfs/sassoli.pdf>.

<sup>48</sup> *Sassòli* (note 47); *Yoram Dinstein*, Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding, HPCR Occasional Paper Series No. 1, 2004, available at: <http://www.hsph.harvard.edu/hpcr/OccasionalPaper1.pdf>; *Wolfrum* (note 44), 59.

<sup>49</sup> *E.g.* *Wolfrum* (note 44), 56; *Roberts* (note 20); *Scheffer* (note 20), 849; *Robert Kolb*, Étude sur l’occupation et sur l’Article 47 de la IVème Convention de Genève du 12 août 1949 relative à la protection des personnes civiles en temps de guerre: le degré d’intangibilité des droits en territoire occupé, *African Yearbook of International Law*,

### *International Humanitarian Law in the Iraq Conflict*

suggested too lightly. One should not neglect the risks such change may entail. Opening the door too lightly could lead to abuse by aggressive armies.<sup>50</sup> The idea of the law of occupation was to prevent the occupying power from modelling the governmental structure of that territory according to its own needs disregarding the cultural, religious or ethnic background of the society of the occupied territory. As has been pointed out rightly, an occupying power cannot, by its very nature, be considered a neutral entity acting only in the interest of the occupied territory and its society.<sup>51</sup> This should be borne in mind when suggesting changes to the law.

The most acceptable scenario would clearly be if the UN Security Council determined explicitly, in a resolution based on Chapter VII of the UN Charter, what kind of transformation should be possible. This would provide the necessary legitimacy for the subsequent steps and could override the rules of IHL based on Article 103 of the Charter.<sup>52</sup> However, IHL rules of a *ius cogens* nature cannot be overridden. Interestingly, the *New Statesman* of 26 May 2003 quoted from advice that it attributed to the Attorney General, Lord *Goldsmith*, to *Tony Blair* that “in short, my view is that a further Security Council resolution is needed to authorise imposing reform and restructuring of Iraq and its Government.”<sup>53</sup>

### **III. The Situation after 28 June 2004 – End of Occupation?**

As to the applicable law no major change occurred until 28 June 2004. After President *George W. Bush* declared the end of major combat operations on 1 May 2003, the law of international armed conflict continued to apply, including the law of occupation in its entirety. Taking into account the intensity of the fighting after 1 May 2003, the threshold of Article 6 paras. 2 and 3 GC IV –

---

vol. 10, 2002, 299, 300, 308.

<sup>50</sup> This is also recognized by *Scheffer* (note 20), 851.

<sup>51</sup> *Wolfrum* (note 44), 65.

<sup>52</sup> *Scheffer* (note 20), 850. This is based on the assumption made by the ICJ in *Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United States), Preliminary Objections, Judgment of 27 February 1998, ICJ Reports 1998, 9, that under Art. 103, not only the UN Charter but also binding UN Security Council resolutions prevail over any other international obligation, see *Sassòli* (note 47), 16. *Sassòli* also provides interesting limiting elements to Security Council action, *id.*, 16–17.

<sup>53</sup> House of Commons Research Paper (note 24), 19. See also *Wolfrum* (note 44), 59.

“general close of military operations” – was not reached.<sup>54</sup> The general close of military operations would have led to an end of application of the Fourth Geneva Convention, with the exception of a number of provisions if occupation continues.<sup>55</sup>

Following a specific timetable agreed upon between the CPA and the Iraqi Governing Council in November 2003, later on accompanied by UN Security Council Resolution 1546 of 8 June 2004 on the political transition of Iraq, steps were taken for the establishment of a sovereign Iraqi government. On 28 June 2004 – two days earlier than foreseen in the UN Security Council Resolution – authority was formally transferred from the CPA to the newly established Iraqi Interim Government. The question thus arose as to the legal qualification of the situation after 28 June. This was very important for practical purposes as the answer determined the applicable law, for example with regard to persons deprived of their liberty.

The normal way for an occupation to end is for the occupying power to withdraw from a territory or to be driven out of it.<sup>56</sup> Occasional successes of resistance within occupied territories are, however, not sufficient to end an occupation.<sup>57</sup> The law of occupation also continues to apply after the general close of military operations to the extent that an occupying power exercises the functions of government in a territory.<sup>58</sup>

---

<sup>54</sup> *Pictet* (note 7), 62: “What should be understood by the words ‘general close of military operations?’ In the opinion of the Rapporteur of Committee III, the general close of military operations was ‘when the last shot has been fired.’ There are, however, a certain number of other factors to be taken into account. When the struggle takes place between two States the date of the close of hostilities is fairly easy to decide: it will depend either on an armistice, a capitulation or simply on ‘*debellatio*.’ On the other hand, when there are several States on one or both of the sides, the question is harder to settle. It must be agreed that in most cases the general close of military operations will be the final end of all fighting between all those concerned.”

<sup>55</sup> See, however, Art. 3 lit. b AP I, which developed the temporal application of the law for situations of occupation.

<sup>56</sup> *Oppenheim/Lauterpacht* (note 27), 436; *Roberts* (note 22), 257.

<sup>57</sup> UK Field Manual (note 21), 277, para. 11.7.1. See also *Roberts* (note 20): “[T]he status of occupation has not been viewed as being negated by the existence of violent opposition, especially when that opposition has not had full control of a portion of the State’s territory.”

<sup>58</sup> Art. 6 para. 3 GC IV; Art. 3 lit. b AP I; *Roberts* (note 22), 259.



### *International Humanitarian Law in the Iraq Conflict*

In the case of Iraq, foreign troops remained in the territory. Does this mean that the law of occupation was still applicable? What was the impact of UN Security Council Resolution 1546 adopted on 8 June 2004?

The continued presence of foreign troops *per se* does not necessarily mean that occupation continues. As has been pointed out by *Adam Roberts*, there are instances where an occupation is declared or widely presumed to have ended, despite the continued presence of occupant's forces.<sup>59</sup> This can happen, for example, if a treaty ending an occupation is accompanied by another one permitting the presence of foreign forces. He mentions in this regard the situations in Japan in 1952, East Germany in 1954 and West Germany in 1955.

#### *1. Transfer of Effective Control to Another Authority and Consent for Continued Presence*

As of 30 June 2004 – in the words of Security Council Resolution 1546 – the assumption of full responsibility and authority for Iraq lies in the hands of the Interim Government of Iraq. The Coalition Provisional Authority ceases to exist. Thus a transfer of authority from the Coalition Provisional Authority to the Interim Government will take place.

Not every transfer of authority to a local government and an ensuing consent to the presence of troops necessarily leads to an end of occupation. The devolution of governmental authority to a national government must be sufficiently effective. As pointed out in the new British Military Manual, if occupying powers operate indirectly through an existing or newly appointed indigenous government, the law relative to military occupation is likely to be applicable.<sup>60</sup> The reason for this is evident. Situations must be avoided where the protections to be granted to persons and property under the law of occupation can be circumvented. The occupying power cannot discard its obligations by installing a puppet government or by pressuring an existing one to act on its behalf. In all these cases, the occupying power maintains *de facto* – albeit indirectly – full control over the territory. A similar rationale underlies in fact Article 47 GC IV, which states that

[p]rotected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change in-

---

<sup>59</sup> *Roberts* (note 22), 258.

<sup>60</sup> UK Field Manual (note 21), 276, para. 11.3.1.

roduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territory and the Occupying Power [...].

The provision is intended to prevent local authorities, under pressure from the occupying power, from making concessions to the detriment of the inhabitants of the territory impairing their protections and rights.<sup>61</sup>

The validity of an agreement allowing the continued presence of troops by a new national government with the effect of ending occupation could depend on the government's legitimacy, for example if the local people had elected that government in an exercise of their right to self-determination. As is well known, in practice the legitimacy of new governments is often controversial. Express international recognition of such legitimacy could offer clearer guidance.

In the case of Iraq, the Security Council has endorsed the formation of the Interim Government – albeit limited in its competence.<sup>62</sup> This is a recognition by the Members of the UN Security Council of its legitimacy to act for Iraq and its independence. To the knowledge of the authors, this approach was not challenged by other States later on and thus is at least tacitly accepted. As such the Interim Government can consent to the continued presence of the Multinational Forces and thereby bring occupation to an end – as stated in the Security Council Resolution and in the letter annexed to it, in which the Prime Minister of the Interim Government requested the coalition forces' continued presence. The Multinational Forces would turn from a hostile force in the sense of the Hague Regulations into a friendly force.

The arrangements in relation to decision-making power between the Interim Government and the Multinational Forces as described in the resolution seem to support this conclusion. This is shown not just by the abolition of the Coalition Provisional Authority but, in particular, by the fact that in operative paragraph 12, the Security Council decided that it would terminate the mandate for the Multinational Forces if requested by the Government of Iraq.

---

<sup>61</sup> *Hans-Peter Gasser*, Protection of the Civilian Population, in: *Fleck* (note 21), 252, para. 541; *Kolb* (note 49), 299.

<sup>62</sup> See SC Res. 1546 of 8 June 2004: “Endorses the formation of a sovereign Interim Government of Iraq [...] which will assume full responsibility and authority [...] for governing Iraq while refraining from taking any actions affecting Iraq’s destiny beyond the limited interim period until as elected Transitional Government of Iraq assumes office [...]”

*International Humanitarian Law in the Iraq Conflict*

From a political point of view, it is difficult to argue otherwise in the face of a Security Council Resolution that clearly states the end of occupation.<sup>63</sup> However, as advocated by *Adam Roberts* and others, it is the reality, and not the label, that counts. The formal proclamation of the end of occupation would be of limited importance.<sup>64</sup>

The test remains whether, despite any labeling in the Security Council Resolution, a territory or part of it is “actually placed under the authority of the hostile army” as required by Article 42 Hague Regulations.

In this regard a decisive factor are the powers of the Iraqi Interim Government, such as whether it has political control over military operations of the Multinational Forces and whether it has the authority to overrule prior regulations of the Coalition Provisional Authority. It is obvious that the old occupying powers maintain a powerful military, economic and political presence. However, if the Iraqi authorities have the power to demand that the Multinational Forces leave and also have the power to overrule the legislation set up by the Coalition Provisional Authority, whether they exercise this power or not, the foreign army should not be considered hostile and can be seen as remaining in Iraq at the invitation of a fully sovereign government. It would then be difficult to continue to speak of an occupation.

If the Iraqi authorities request the foreign troops to leave – a possibility foreseen in Security Council Resolution 1546 – and these do not comply with that request, or if the Iraqi government is not able to enact new legislation or overturn laws imposed during the occupation, then it cannot be considered as exercising effective authority and as fully sovereign. The facts on the ground would go then in the direction that the Multinational Forces are exercising actual authority over Iraq. This would be a clear sign that the law of occupation continues or has again started to apply.<sup>65</sup>

---

<sup>63</sup> One could also argue, based on Art. 103 of the UN Charter, that a determination by the UN Security Council invoking Chapter VII would be binding. While this may have some merits, such a conclusion would be doubtful if it lead to ending obligations under the Fourth Geneva Convention which are of a *ius cogens* nature when factually there is still a situation of occupation.

<sup>64</sup> *Adam Roberts*, *The Day of Reckoning*, *The Guardian*, 25 May 2004; *Roberts* (note 20).

<sup>65</sup> See also *Roberts* (note 20).

*Knut Dörmann and Laurent Colassis*

## *2. Application of IHL Post 28 June 2004*

In the face of continuing hostilities after 28 June 2004, the question arose as to which rules would apply to the new situation. The “commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including international humanitarian law,” as mentioned in the Security Council Resolution, was an indicator that the Security Council envisaged and accepted its continued application. Also in his letter *Colin Powell* stressed the commitment of the Multinational Forces “at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions.”

Assuming that occupation ended because foreign troops are and remained in Iraq with the consent of the Interim Government, does this mean that the conflict remains an international armed conflict, or should it be re-qualified as a non-international one?

Given that the Multinational Forces were fighting with and in cooperation with Iraqi armed and security forces, reporting to the Interim Government, against armed opposition groups or armed actors, there were good reasons to re-qualify the conflict as an internationalized internal armed conflict regulated by common Article 3 GC and customary rules (applicable in non-international armed conflicts). The plain wording of common Article 2 to the four GCs, as confirmed by the ICTY case law, the ICRC commentary and legal literature precludes at first sight the existence of an international armed conflict. Common to these sources is the requirement of an armed conflict between at least two States. Given that the Members of the Security Council – without objection from other States since – have identified the Interim Government as representing Iraq, it can hardly be argued that an international armed conflict continues between the coalition forces and armed forces of the State of Iraq. It is also excluded to qualify the armed groups, against which the Multinational Forces are fighting together with the Iraqi armed and security forces, as armed forces of a government or an authority, which is not recognized, in the sense of Article 4 A para. 3 GC III.

There are also views in the literature that the international element represented by the presence of the Multinational Forces is so marked that the more fully developed body of norms regulating international armed conflicts and occupations should remain applicable.<sup>66</sup>

---

<sup>66</sup> *E.g. Roberts* (note 22), 278; *Roberts* (note 20).

*International Humanitarian Law in the Iraq Conflict*

The reference, in *Colin Powell's* letter annexed to the Security Council Resolution, to the Geneva Conventions, and the announcement that persons would be interned where necessary for imperative reasons of security – a terminology used in instruments applicable in international armed conflicts only<sup>67</sup> – could in fact indicate an understanding that the law of international armed conflict continues to apply. But what would this mean in practice? For example, could members of the armed groups that fight the Multinational Forces be eligible for prisoner of war status? And conversely could members of the Multinational Forces in the hands of the armed groups be considered prisoners of war, with the consequence that they may be legitimately detained until the end of the armed conflict?

Taking into account the specific situation in Iraq, a more functional<sup>68</sup> approach towards the law of occupation could also be defended. Such an approach would mean that whenever and in so far as the Multinational Forces are exercising authority over persons or property in Iraq and is carrying out certain functions instead of the Iraqi Interim Government in specific fields, such as ensuring public order, it would be bound to apply the rules on occupation relevant to these activities.

In the authors' view, if one agrees that the new Iraqi Interim Government could give valid consent to the presence of the Multinational Forces and the occupation thus ended on 28 June 2004, the most straightforward legal approach would be to re-qualify the conflict as one or possibly several<sup>69</sup> internationalized internal armed conflicts regulated by common Article 3 GC and customary rules (applicable in non-international armed conflicts), since the international presence is on the government side against insurgents. Taking into account the rather rudimentary nature of treaty rules applicable in non-international armed conflicts, the substance of the law of occupation may in practical terms provide a more appropriate framework for activities such as fighting of insurgents and taking of prisoners if it goes beyond customary international law applicable to non-international armed conflicts and applicable human rights standards.

---

<sup>67</sup> Art. 78 GC IV.

<sup>68</sup> *Kolb* (note 49), 284.

<sup>69</sup> It is quite likely that not all armed opposition groups fight for one sole party to the conflict but that there are several non-state parties to the conflict. It is also possible that armed violence in certain regions does not constitute an armed conflict since it is not attributable to a party to an armed conflict.

Under the circumstances in Iraq at the time of writing, the rules on occupation, such as the right of the local population to continue life as normally as possible, the right of the Multinational Forces to protect their security, the obligation to restore and maintain public order and civil life, and the standards and procedures allowing internment for security reasons to the extent compatible with applicable human rights law, seem to be well suited to serve at least as guidance or minimum standards.

## **B. Some Selected Problems in the Application of IHL in Iraq**

### **I. Status of Persons in the Power of the Enemy – Before 28 June 2004**

In an occupied territory such as Iraq between April 2003 and the end of June 2004, there are two main categories of persons deprived of liberty, which depend on the status granted to them under IHL.<sup>70</sup> Persons deprived of liberty are either captured combatants entitled to prisoner of war status<sup>71</sup> and protected by the Third Geneva Convention, or they are civilians interned or detained and protected by the Fourth Geneva Convention.<sup>72</sup>

---

<sup>70</sup> Between March 2003 and December 2004, the ICRC visited and registered 13.611 persons held by coalition forces, of which 2.668 were still held by the Multinational Forces at the time of writing. These numbers do not represent the total number of persons held by the Multinational Forces but rather those registered by the ICRC. There are currently estimated to be more than 5.000 others held by the Multinational Forces who have not been visited by the ICRC, because the ICRC considered that the route used to access their location was not sufficiently safe.

<sup>71</sup> There are, however, some exceptions, like Art. 46 AP I which foresees that combatants who engage in espionage do not have the right to the status of prisoner of war. Art. 46 AP I reflects customary international law and was adopted by consensus during the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, 1974–1977, CDDH Official Records, vol. 6, 25 May 1977, CDDH/SR.39, 111. Spies will nevertheless be protected by the Fourth Geneva Convention, insofar as the nationality criteria set forth by Art. 4 of this Convention is fulfilled.

<sup>72</sup> There are also some exceptions, as certain categories of persons who are not combatants are granted prisoner of war status; this is the case, for instance, concerning war correspondents as provided in Art. 4 A para. 4 GC III.

## *International Humanitarian Law in the Iraq Conflict*

### *1. Prisoners of War*

#### a) General Observations

Prisoners of war are members of regular and irregular government armed forces<sup>73</sup> or members of militias or other volunteer corps, including those of organized resistance movements, who are fighting for those government forces, without being formally incorporated in them. Those belonging to this second category (*i.e.* members of militias or other volunteer corps, including those of organized resistance movements) will only be granted prisoner of war status if they fulfill the following four conditions:<sup>74</sup>

- 1) that of being commanded by a person responsible for his subordinates;<sup>75</sup>
- 2) that of having a fixed distinctive sign recognizable at a distance;<sup>76</sup>
- 3) that of carrying arms openly;<sup>77</sup>
- 4) that of conducting their operations in compliance with international humanitarian law.

---

<sup>73</sup> Except medical personnel and chaplains who are not combatants despite being members of the governmental armed forces but are, however, granted as a minimum the benefits and protection of prisoners of war when they are “retained;” see on this issue Arts. 4 C and 33 GC III as well as Art. 43 para. 2 AP I.

<sup>74</sup> Art. 4 A para. 2 GC III.

<sup>75</sup> “[T]he leader may be either civilian or military. He is responsible for action taken on his orders as well as for action which he was unable to prevent. His competence must be considered in the same way as that of a military commander. Respect for this rule is moreover in itself a guarantee of the discipline which must prevail in volunteer corps and should therefore provide reasonable assurance that the other conditions referred to below will be observed.” *Jean S. Pictet* (ed.), *Commentary: Third Geneva Convention Relative to the Treatment of Prisoners of War*, 1960, 59.

<sup>76</sup> “[T]he distinctive sign should be recognizable by a person at a distance not too great to permit a uniform to be recognized.” Such a sign need not necessarily be an arm-band. It may be a cap (although this may frequently be taken off and does not seem fully adequate), a coat, a shirt, an emblem or a coloured sign worn on the chest.” *Id.*, 60.

<sup>77</sup> “[T]here must be no confusion between carrying arms ‘openly’ and carrying them ‘visibly’ or ‘ostensibly.’ Surprise is a factor in any war situation, whether or not involving regular troops. This provision is intended to guarantee the loyalty of the fighting, it is not an attempt to prescribe that a hand-grenade or a revolver must be carried at belt or shoulder rather than in a pocket or under a coat.” *Id.*, 61.

Whether these four criteria must also be met by a State's regular armed forces has generated some controversy in literature.<sup>78</sup> Contrary to textual logic – the conditions are only mentioned in Article 4 A para. 2 and not in Article 4 A paras. 1 and 3 GC III –, that assertion has occasionally been made.<sup>79</sup> It is outside the scope of this article to address this controversy.

#### b) Members of Organized Resistance Movements

During the occupation of Iraq, various armed groups fighting against the coalition claimed they were resisting the occupying powers. The question arose whether the members of these armed groups could qualify as combatants, benefiting from prisoner of war status in case of capture, or whether they were directly participating in hostilities without being entitled to do so, and would therefore not be protected by the Third but by the Fourth Geneva Convention when falling into the hands of the coalition forces.<sup>80</sup>

It seems that the resistance in Iraq was mainly conducted by Iraqi civilians<sup>81</sup> and not by remnants of the armed forces of the former regime. It seemed that the various units of the governmental armed forces disintegrated after the collapse of *Saddam Hussein's* regime. To the knowledge of the authors, no member of the former armed forces claimed to continue the fight in the name of the former regime, albeit fighting clandestinely. It does appear, however, that after the collapse of the former regime, some members of its armed forces joined the resistance. After “leaving” the collapsed army of the former regime, they lost their combatant status as members of the regular armed forces and became civilians before joining one of the resistance movements.

Members of “organized resistance movements” are entitled to prisoner of war status if they “belong to a Party to the conflict” and fulfill the additional cumula-

---

<sup>78</sup> *George H. Aldrich*, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, *AJIL*, vol. 96, 2002, 895.

<sup>79</sup> *Id.*, fn. 17. See also *Yoram Dinstein*, *Unlawful Combatancy*, *Isr. Y.B. Hum. Rts.*, vol. 32, 2002, 255.

<sup>80</sup> See, *infra*, Sect. B. I. 3.

<sup>81</sup> See *Patrick Cockburn*, *When you have an occupation, you have resistance*, *Green Left Weekly*, No. 610, 15 December 2004, available at: <http://www.greenleft.org.au/back/2004/610/610p16.htm>.



### *International Humanitarian Law in the Iraq Conflict*

tive criteria set forth in Article 4 A para. 2 GC III.<sup>82</sup> At the outset, before considering whether these additional criteria are met, one would first have to examine how the term “organized resistance movements belonging to a party to the conflict” may be interpreted.

#### aa) ‘Resistance Movement’

In Iraq, the resistance was clearly composed of various armed groups.<sup>83</sup> There is no reason to exclude the possibility of several organized resistance movements fighting an occupying power which are not necessarily under a unified command or coordinated.<sup>84</sup> However, only members of those groups who fulfill all the cumulative criteria laid down in Art. 4 A para. 2 GC III must be granted the status of prisoner of war in case of capture.

It seems that most armed groups operating during the occupation of Iraq shared the common goal of ousting the occupying powers. The fact that the hostilities amounted to a concerted armed struggle against this occupation is an important factor differentiating such military operations governed by IHL from mere acts of civil unrest.

#### bb) ‘Organized’ Armed Groups

The requirement of being ‘organized’ means, *inter alia*, that the members of resistance movements must not only be isolated groups of individuals fighting under a commander, but must also form a military organization incorporating fighting units and having a chain of command, however rudimentary, and an

---

<sup>82</sup> See, *supra*, Sect. B. I. 1. a).

<sup>83</sup> The main groups mentioned in the media are the Sunni fighters in the “Sunni Triangle” North and West of Baghdad and the Shia fighters of the Mehdi Army in the South, see Twelve U.S. Marines Killed in Worsening Iraq Violence, Reuters, 7 April 2004; U.S. Forces Renew Strikes in Falluja, Reuters, 28 April 2004; see also *Patrick Cockburn*, US Military Death Toll on Iraqi Soil Tops 1,000, *The Independent*, 8 September 2004.

<sup>84</sup> According to the journalist *Cockburn* (note 81), “the resistance [in Iraq] has always been fragmented. [...] There isn’t a national leadership, although there seems to be more contact between different groups.”

overall structure unifying the members of the movement.<sup>85</sup> In spite of the massive preventive measures taken by the coalition, the armed groups operating in Iraq were obviously sufficiently coordinated, organized and equipped to successfully carry out regular armed attacks and thus to pose a permanent threat to the coalition forces and the civilian population. It can thus safely be assumed that most of these groups represented, each for themselves, organized paramilitary forces under responsible command and not just disorganized groups of individuals.

cc) 'Belonging to a Party to the Conflict'

The Commentary to the Third Geneva Convention in analyzing the term 'belonging to a Party to the conflict' provides that

international law has advanced considerably concerning the manner in which this relationship shall be established. The drafters of earlier instruments were unanimous in including the requirement of express authorization by the sovereign, usually in writing, and this was still the case at the time of the Franco-German war of 1870–1871. Since the Hague Conferences, however, this condition is no longer considered essential. It is essential that there should be a *de facto* relationship between the resistance organization and the party to international law which is in a state of war, but the existence of this relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organization is fighting. [...] In our view, the stipulation that organized resistance movements and members of other militias and members of other volunteer corps which are independent of the regular armed forces must belong to a Party to the conflict, refutes the contention of certain authors who have commented on the Convention that this provision amounts to a *ius insurrectionis* for the inhabitants of an occupied territory.<sup>86</sup>

Most authors<sup>87</sup> also consider that Article 4 A para. 2 GC III requires a link between a party to the conflict and a resistance movement.

---

<sup>85</sup> Antonio Cassese, Resistance Movements, in: Rudolf Bernhardt (ed.), EPIL, vol. IV, 2000, 210; see also Pictet (note 75), 58.

<sup>86</sup> Pictet (note 75), 57–58.

<sup>87</sup> Roberta Arnold, Training With the Opposition: The Status of the 'Free Iraqi Forces' in the US War Against Saddam Hussein, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, vol. 63, 2003, 631, 634–635, with further references to Regina Buss, G.I.A.D. Draper and Theodore Meron.

*International Humanitarian Law in the Iraq Conflict*

On the same issue, the ICTY stated that

[the] rationale behind Article 4 was that, in the wake of World War II, it was universally agreed that States should be legally responsible for the conduct of irregular forces they sponsor. As the Israeli military court sitting in Ramallah rightly stated in a decision of 13 April 1969 in *Kassem et al.*: ‘In view, however, of the experience of two World Wars, the nations of the world found it necessary to add the fundamental requirement of the total responsibility of Governments for the operations of irregular corps and thus ensure that there was someone to hold accountable if they did not act in accordance with the laws and customs of war.’ In other words, States have in practice accepted that belligerents may use paramilitary units and other irregulars in the conduct of hostilities only on the condition that those belligerents are prepared to take responsibility for any infringements committed by such forces. In order for irregulars to qualify as lawful combatants, it appears that international rules and State practice therefore require control over them by a Party to an international armed conflict and, by the same token, a relationship of dependence and allegiance of these irregulars *vis-à-vis* that Party to the conflict. These then may be regarded as the ingredients of the term ‘belonging to a Party to the conflict.’<sup>88</sup>

At the start of the conflict in Iraq, the “High Contracting Parties”<sup>89</sup> to the Geneva Conventions, parties to the international armed conflict, were the coalition States on the one hand and the State of Iraq on the other. Bearing in mind that a State is normally represented by its government, the question arises whether, following the collapse of the former regime of *Saddam Hussein*, it is possible to envisage that armed resistance movements fighting “against the occupation” and “for Iraq” belong to a party to the conflict in terms of common Article 2 to the four GCs. In other words, how can the required link between armed resistance movements and a High Contracting Party be established when the government of this party no longer exists?

The situations of organized resistance that the drafters of the Geneva Conventions had in mind usually refer to occupations where a force has lost effective control over territory but remains, to some degree, a viable entity, either by continuing organized resistance from the unoccupied parts of its territory or by establishing an exile presence and expressly or tacitly supporting armed resistance movements. The occupation of Iraq presented a case distinct from these cases of occupation, in the sense that there remained no representative of the former regime in Iraq or in exile.<sup>90</sup> Therefore, even tacit agreement of the former

---

<sup>88</sup> ICTY, Appeals Chamber, *The Prosecutor v. Dusko Tadic*, IT-94-1-A, Judgment of 15 July 1999, paras. 93–94, available at: <http://www.un.org/icty/tadic/appeal/judgement/>.

<sup>89</sup> Art. 2 para. 1 common to the four Geneva Conventions.

<sup>90</sup> As there is no indication of such a situation in Iraq, this article does not address the question whether a resistance movement, fighting in favor of a representative of the for-

regime could not be expected and a restrictive interpretation of Article 4 A para. 2 GC III precludes the granting of prisoner of war status to captured members of resistance movements. This restrictive interpretation is in line with the jurisprudence of the ICTY,<sup>91</sup> which requires that a government is held accountable for the operations of armed groups. It is also in accordance with the rationale of the other provisions of Article 4 A GC III dealing with similar cases, in particular paras. 3 and 6, which both require a link with a government. Indeed, these provisions implicitly demand that armed forces of a government or authority not recognized by the detaining power fight under the orders of a government or authority recognized by third States<sup>92</sup> or that the population which resists the invading forces acts in the name of the authority commanding the inhabitants who have taken up arms, or the authority to which they profess allegiance.<sup>93</sup>

Under a broader interpretation of the term “belonging to a party to the conflict” it could be considered that, following the ousting and disappearance of a former regime, an organized resistance movement could act as *de facto* agent of the State and that such agent engages the responsibility of the State. Indeed, in the absence of a government, the question remains whether it would be advisable to recognize the possibility for a sufficiently organized and structured movement with a responsible command enabling the respect of international humanitarian law to fight in the name of the liberation of an occupied State. Moreover, no longer linking the fight against an occupant with the defence of a government but rather of an occupied State is not in contradiction with Article 9 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, which provides that

conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.<sup>94</sup>

The commentary of these draft articles stresses that

---

mer regime, who remains clandestinely in the occupied territory, could ‘belong to a Party to the conflict.’

<sup>91</sup> See, *supra*, note 88.

<sup>92</sup> *Pictet* (note 75), 63.

<sup>93</sup> *Id.*, 67.

<sup>94</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83 of 28 January 2002.

### *International Humanitarian Law in the Iraq Conflict*

[Article] 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so. The exceptional nature of the circumstances envisaged in the article is indicated by the phrase 'in circumstances such as to call for.' Such cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative.<sup>95</sup>

Thus, in the absence of a government, the criteria of 'belonging to a Party to the conflict' could be met through a sufficiently clear *de facto* link between the group on one hand and the State and the population on the other hand, suggesting that the group effectively represents the State or exercises the *de facto* authority of a State party to a conflict. Despite the weakness of this broad interpretation which seems to contradict the jurisprudence of the ICTY and the denial of *ius insurrectionis* for the inhabitants of an occupied territory, it is nevertheless the only way to provide, on occasion, the protection of the Third Geneva Convention to members of organized resistance movements when the former regime no longer exists. Such a broad interpretation is also shared by *Levie* when raising the issue of illegal organizations:

[Despite] all, let us nevertheless be extremely liberal and endeavour to proceed on the assumption that each member, even of such an illegal body, is entitled upon capture to be treated as a prisoner of war, if that body fulfils the four basic conditions mentioned in the first article of the rules concerning the laws and customs of war on land, which form an annex to the Hague Convention of October 18, 1907.<sup>96</sup>

This solution also benefits members of the armed forces of the coalition in case they were to fall into the hands of resistance movements, as they would be in the power of *de facto* representatives of a party to the conflict and should therefore be granted the status of prisoners of war themselves.

#### dd) Additional Requirements of Article 4 A Para. 2 GC III

Furthermore, in view of the use of methods like suicide bombing and the deliberate policy of targeting civilians, armed resistance movements would almost

---

<sup>95</sup> Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-Third Session, UN Doc. A/56/10 (2001), 109.

<sup>96</sup> *Howard S. Levie*, Documents on Prisoners of War, *International Law Studies*, vol. 60, 1979, 778. The four special conditions laid down in the Hague Convention to which *Levie* refers are identical to those contained in subparas. (a) to (d) of Art. 4 A para. 2 GC III.

certainly have failed to meet at least one of the cumulative requirements of Article 4 A para. 2 lit. b (having a recognizable distinctive sign), lit. c (carrying their arms openly) and lit. d (respect for IHL).

Members of resistance movements in occupied territories will rarely meet all the conditions required for entitlement of prisoner of war status, as in order to accomplish their mission they will wear no uniforms or distinctive signs, hide their weapons and withhold their identity prior to their strike.<sup>97</sup> Various commentators have pointed out how difficult, if not impossible, it is for resistance movements to comply with the requirements of Article 4 A para. 2 GC III without departing from the guerrilla warfare to which they usually resort.<sup>98</sup> This reality was considered during the negotiations of Additional Protocol I. As a consequence, Article 44 AP I, in particular para. 3, was negotiated which modifies to a certain extent the conditions of Article 4 A para. 2 GC III for States parties to Additional Protocol I.

#### c) Determination of Status in Case of Doubt

Should any doubt arise as to the status of a captured person who has taken part in the hostilities, the detaining power must set up a competent tribunal which will rule on whether the person in question is or is not a prisoner of war.<sup>99</sup> This competent tribunal may be either a civilian or a military tribunal.<sup>100</sup> Until the tribunal has given its ruling, the person deprived of his or her liberty must be treated as a prisoner of war.

### *2. Persons Protected by the Fourth Geneva Convention*

All persons deprived of liberty who do not meet the criteria for prisoners of war are protected by the Fourth Geneva Convention<sup>101</sup> as detainees or internees, with the exception of nationals of coalition countries held by the coalition (for

---

<sup>97</sup> *Albert J. Esgain/Waldemar A. Solf*, The 1949 Geneva Convention Relative to the Treatment of Prisoners of War, Its Principles, Innovations, and Deficiencies, *North Carolina Law Review*, vol. 41, 1963, 550.

<sup>98</sup> *Cassese* (note 85), 210.

<sup>99</sup> Art. 5 para. 2 GC III.

<sup>100</sup> *Pictet* (note 75), 77.

<sup>101</sup> Art. 4 GC IV.

*International Humanitarian Law in the Iraq Conflict*

example, United States or British citizens in the hands of the United States or the United Kingdom). The latter, however, benefit from the rules of existing customary international law as reflected in Article 3 common to the four GCs<sup>102</sup> and Article 75 AP I,<sup>103</sup> which lay down minimum guarantees. During the occupation of Iraq, Iraqi citizens and nationals of States which were neutral within the meaning of international humanitarian law, that is, States not participating directly in the war in Iraq<sup>104</sup> were protected persons covered by the Fourth Geneva Convention.<sup>105</sup>

---

<sup>102</sup> The ICJ recognized the customary nature of Art. 3 common to the four Geneva Conventions not only in non-international armed conflict but also in the event of international armed conflict: ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States), Merits, Judgment of 27 June 1986, ICJ Reports 1986, 114 (*Nicaragua case*).

<sup>103</sup> On the customary nature of Art. 75 AP I, see *Christopher Greenwood*, International Law and the 'War Against Terrorism', *International Affairs*, vol. 78, 2002, 316; *Aldrich* (note 78), 893.

<sup>104</sup> In general international law, neutrality entails the obligation to refrain from participating in the hostilities (a neutral State is prohibited from providing any of the belligerents with help, either directly or indirectly through individuals with its consent), and the obligation of impartiality (strictly equal treatment of all the belligerents). IHL, for its part, has adopted a broader definition whereby neutrality simply means "non-belligerence." Any State not taking part in an armed conflict is therefore neutral within the meaning of the GCs. Furthermore, today there is talk of "States which are not involved in the conflict," but which nevertheless do not wish to be considered as fully neutral. That distinction, however, has little relevance for the application of IHL. See *Hans-Peter Gasser*, *International Humanitarian Law: An Introduction*, in: *Hans Haug* (ed.), *Humanity for All: The International Red Cross and Red Crescent Movement*, 1993, 25; *Bruno Zimmermann*, *Commentary on Art. 2 of Protocol I*, in: *Yves Sandoz/Christophe Swinarski/Bruno Zimmermann* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987, 61.

<sup>105</sup> "Paragraph 2 [of Art. 4 GC IV] also defines the position of nationals of neutral States; in occupied territory they are protected persons and the Convention is applicable to them; its application in this case does not depend on the existence or non-existence of normal diplomatic representation. In such a situation they may therefore be said to enjoy a dual status: their status as nationals of a neutral State, resulting from the relations maintained by their Government with the Government of the Occupying Power, and their status as protected persons. [...] In occupied territory [...] the diplomatic representatives of neutral States, even assuming that they remain there, are not accredited to the Occupying Power but only to the occupied Power. This makes it more difficult for them to make representations to the Occupying Power. In such cases diplomatic representations are usually made by the neutral State's diplomatic representatives in the occupying State, and not by those in the occupied territory. It should moreover be noted that the Occupying Power is not bound by the treaties concerning the legal status of aliens which may exist. The existence of such situations, often of a complicated nature, gave

To sum up, it can therefore be said that every person deprived of liberty during the occupation of Iraq was either a prisoner of war protected by the Third Geneva Convention or a detainee or internee protected by the Fourth Geneva Convention, with the rare exception of nationals of coalition States held by the coalition forces.

### 3. 'Unlawful Combatants'<sup>106</sup>

While not unique to the Iraq conflict, the issue of the legal situation of 'unlawful combatants' or rather 'unprivileged belligerents' did arise in this context. In international armed conflicts, the term 'combatants' denotes the right to participate directly in hostilities.<sup>107</sup> As the Inter-American Commission has stated, "the combatant's privilege [...] is in essence a licence to kill or wound enemy combatants and destroy other enemy military objectives."<sup>108</sup> Consequently (lawful) combatants cannot be prosecuted for lawful acts of war in the course of military operations even if their behavior would constitute a serious crime in peacetime. They can be prosecuted only for violations of IHL, in particular for war crimes. Once captured, combatants are entitled to prisoner of war status and benefit from the protection of the Third Geneva Convention.<sup>109</sup> Combatants are lawful military targets. Generally speaking, members of the armed forces (other than medical personnel and chaplains) are combatants. The conditions for combatant/prisoner of war status can be derived from Article 4 GC III and from Articles 43 and 44 AP I, which developed the said Article 4 for States parties to the Additional Protocol I.<sup>110</sup>

---

rise to the idea of granting neutral nationals in occupied territory the status of protected persons within the meaning of the Convention." *Pictet* (note 7), 48–49.

<sup>106</sup> For a more detailed analysis, see *Knut Dörmann*, The Legal Situation of "Unlawful/Unprivileged Combatants", *International Review of the Red Cross* (IRRC), No. 849, 2003, 45–74.

<sup>107</sup> See Art. 43 para. 2 AP I.

<sup>108</sup> Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, 22 October 2002, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., para. 68 (IACHR Report).

<sup>109</sup> See, *supra*, note 71.

<sup>110</sup> Art. 44 AP I sets the standard for parties to the Protocol. Its status under customary international law is more doubtful.



*International Humanitarian Law in the Iraq Conflict*

Whereas the terms ‘combatant,’ ‘prisoner of war’ and ‘civilian’ are generally used and defined in the treaties of IHL, the terms ‘unlawful combatant’ and ‘unprivileged combatant/belligerent’ do not appear in them. They have, however, been frequently used at least since the beginning of the last century in legal literature, military manuals and case law. The connotations given to these terms and their consequences for the applicable protection regime are not always very clear.

The terms ‘unlawful combatant’ and ‘unprivileged belligerent’ describe all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war when falling into the power of the enemy. This seems to be the most commonly shared understanding.<sup>111</sup> It would include, for example, civilians taking a direct part in hostilities, as well as members of militias and of other volunteer corps – including those of organized resistance movements – not integrated in the regular armed forces but belonging to a party to the conflict, provided that they do not comply with the conditions of Article 4 A para. 2 of GC III. Taking into account the wording of Article 4 GC IV, which refers to all persons not covered by the Geneva Conventions I to III, they would be protected persons covered by the Fourth Geneva Convention whenever they are in the hands of the enemy.<sup>112</sup> That protection is supplemented by the fundamental guarantees contained in Article 75 AP I,<sup>113</sup> which essentially reflect existing customary international law. Those persons who do not fulfill the nationality criteria of Article 4<sup>114</sup> would be protected by the fundamental guarantees contained in Article 75 AP I. Thus, any interpretation that ‘unlawful combatants’ or ‘unprivileged belligerents’ are outside the protection of IHL is unfounded. The fact that a person has unlawfully participated in hostilities is neither a criterion for excluding the application of the Fourth Geneva Convention

---

<sup>111</sup> See, for example, *Aldrich* (note 78), 892; IACHR Report (note 108), para. 69.

<sup>112</sup> Art. 5 GC IV allows for limited derogations under strict conditions.

<sup>113</sup> Art. 75 AP I: “Fundamental guarantees

1. [... P]ersons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons. [...].”

<sup>114</sup> Art. 4 excludes from the scope of application of the Fourth Geneva Convention nationals of the detaining power and of co-belligerent States as well as of neutral States unless the latter are in occupied territory. For further detail see, *supra*, note 105.

– though it may be a reason for derogating from certain rights in accordance with Article 5 thereof –, nor for excluding the fundamental guarantees contained in Article 75 AP I.

While these rules concern ‘unlawful combatants’ in the hands of the enemy, a brief look at their situation under the rules on the conduct of hostilities is warranted as well. Under these rules only the civilian population and individual civilians enjoy general protection against dangers arising from military operations. They are protected against direct attacks, unless and during the time they take a direct part in hostilities. In accordance with Article 50 AP I, a civilian is any person who does not belong to “one of the categories of persons referred to in Article 4 A paras. 1, 2, 3 and 6 of the Third Convention and in Article 43 of this Protocol” (*i.e.* members of the armed forces). Thus for the purposes of the law on the conduct of hostilities, there is no gap: Either a person is a combatant or a civilian. Given that ‘unlawful combatants’ by definition do not fulfil the criteria of either Article 4 A paras. 1, 2, 3 and 6 of GC III or Article 43 of AP I, this means that they are civilians. For such time as they directly participate in hostilities, they are lawful targets of an attack.<sup>115</sup> When they do not directly participate in hostilities, they are protected as civilians and may not be directly targeted. It must be stressed that the fact that civilians have at some time taken direct part in the hostilities does not make them lose their immunity from direct attacks once and for all.<sup>116</sup>

While the law is rather straightforward in this regard, the concrete interpretation is not fully clarified. There is considerable disagreement over which behavior would constitute direct participation and which would not. Controversy exists also on the temporal loss of immunity. Therefore, the ICRC decided in 2003 to start a process of clarification of that concept through both meetings of experts and independent research by the ICRC and selected experts. The two expert meetings held so far were co-organized with the TMC Asser Institute in The Hague. The primary aim of this process is to try to formulate guidelines for the interpretation or even a generic definition of the notion of ‘direct participation in

---

<sup>115</sup> They only lose the immunity from direct attack to which civilians are entitled, but they do not become combatants.

<sup>116</sup> See Art. 51 para. 3 AP I: “Civilians shall enjoy the protection afforded by this Section, unless and *for such time as* they take a direct part in hostilities” (emphasis added). *Jean Pictet/Claude Pilloud*, Commentary on Art. 51 of Protocol I, in: *Sandoz/Swinarski/Zimmermann* (note 104), 619, para. 1944; *Michael Bothe/Karl Josef Partsch/Waldemar A. Solf*, *New Rules for Victims of Armed Conflicts*, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, 1982, 301.

*International Humanitarian Law in the Iraq Conflict*

hostilities.’ As many participants expressed the opinion during the first meeting<sup>117</sup> that further clarification of the notion of ‘direct participation’ would be facilitated by a discussion of concrete examples, the ICRC submitted a questionnaire to the participants for the second expert meeting in October 2004. The process of consultation will continue at least in 2005.

**II. Status of Persons in the Power of the Enemy – After 28 June 2004**

As already mentioned,<sup>118</sup> the legal situation in Iraq has changed since the handover of power from the Coalition Provisional Authority to the interim Iraqi Government on 28 June 2004. Therefore, the current hostilities between armed fighters, on the one hand, opposing the Multinational Forces and/or the Iraqi authorities, on the other, are no longer governed by the rules of IHL applicable in international armed conflicts, but by those applicable to non-international armed conflicts. This means that all parties, including the Multinational Forces, are bound by common Article 3 GC and by customary rules applicable to non-international armed conflicts, and this also has legal consequences on the status of persons deprived of their liberty in connection with the continuing hostilities.

*1. Persons Captured or Arrested before 28 June 2004*

The change in the legal situation has the following implications for persons deprived of their liberty who have been captured during the occupation of Iraq.

a) Persons Held by the Multinational Forces

With the end of the international armed conflict, the Third and Fourth Geneva Conventions no longer provide a valid legal basis for continuing to hold, without

---

<sup>117</sup> ICRC, Direct Participation in Hostilities under International Humanitarian Law, Meeting Report, available at: <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList575/459B0FF70176F4E5C1256DDE00572DAA>.

<sup>118</sup> See, *supra*, Sect. A. III. 2.

charge, persons captured before 28 June. Therefore, those persons currently interned by the Multinational Forces should be released<sup>119</sup> unless they are charged and tried.<sup>120</sup> Until the moment of their final release by the Multinational Forces, these persons deprived of liberty continue to benefit from the protection of the Third and Fourth Geneva Conventions.<sup>121</sup> The detained civilians who have been accused of offences or convicted must be handed over by the Multinational Forces to the Iraqi authorities (Article 77 GC IV). Until this handover, they remain protected by the Fourth Geneva Convention.<sup>122</sup>

As armed conflicts are ongoing, it would not be realistic, however, to require that every person held by the Multinational Forces who does not face a penal proceeding should be released, as such a person might constitute a security threat to the Multinational Forces in the context of an ongoing non-international armed conflict in Iraq. The Multinational Forces, therefore, could continue to hold these persons for the same reason(s) that they currently arrest and intern or detain persons in connection with a non-international armed conflict. As the Third and Fourth Geneva Conventions no longer provide a legal basis for continuing to hold them,<sup>123</sup> these persons should be placed within another legal framework that regulates their current internment or detention. Despite the provisions of Articles 5 para. 1 GC III and 6 para. 4 GC IV, a more appropriate approach would be to consider that these persons are now protected by common Article 3 to the four GCs, customary rules applicable to non-international armed conflicts, relevant rules of human rights law and Iraqi law, as their deprivation of liberty is no longer linked to the former international armed conflict but rather to one of the current non-international ones. The situation is the same as if these persons would have been released after the end of the international armed conflict and simultaneously re-arrested by the Multinational Forces, even if this sequence is more virtual than real, the detainees not recovering their liberty at any stage of this process.

---

<sup>119</sup> Art. 118 para. 1 GC III and Art. 133 para. 1 GC IV.

<sup>120</sup> Art. 119 para. 5 GC III and Art. 133 para. 2 GC IV.

<sup>121</sup> Art. 5 para. 1 GC III and Art. 6 para. 4 GC IV.

<sup>122</sup> Art. 6 para. 4 GC IV.

<sup>123</sup> See *supra*.

## *International Humanitarian Law in the Iraq Conflict*

### b) Persons Held by the Iraqi Authorities

Some of those captured by the coalition forces before 28 June 2004 have now been handed over to Iraqi authorities. This handover must not be perceived as a transfer in the sense of Articles 12 para. 2 GC III and 45 para. 3 GC IV,<sup>124</sup> as these Articles deal with the transfer of a protected person from a detaining power to another State party to the GC and do not address the ‘repatriation’ of such a person to his State of origin. Once handed over to the Iraqi authorities, they are no longer protected by the Third or Fourth Geneva Convention.<sup>125</sup> If the ensuing deprivation of liberty by Iraqi authorities is in connection with a non-international armed conflict, they are protected by common Article 3 of the four GCs, customary rules applicable to non-international armed conflicts, human rights treaties and relevant Iraqi law. If their deprivation of liberty by Iraqi authorities is unrelated to the continuing non-international armed conflicts, they are no longer protected by IHL but benefit nevertheless from the protection of Iraqi and human rights law. This handover can legally be interpreted as a release by the Multinational Forces followed by a “repatriation” (Articles 118 GC III and 133 GC IV) and a simultaneous re-arrest by the Iraqi authorities, once again even if this sequence is more virtual than real.

### *2. Persons Captured or Arrested after 28 June 2004*

Persons captured or arrested after 28 June 2004 and held by Iraqi authorities or by the Multinational Forces in connection with one of the ongoing non-international armed conflicts underway since then are protected by common Article 3 of the four GCs, customary rules applicable to non-international armed conflicts, relevant rules of human rights law and Iraqi law. Only those whose detention is not connected to an armed conflict are not protected by IHL.

UN Security Council Resolution 1546 grants the Multinational Forces a mandate to “take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolu-

---

<sup>124</sup> Art. 45 para. 3 GC IV would not be applicable *de jure*, but only by analogy, as this provision is laid down in Section II (of Part III of GC IV), which protects “aliens in the territory of a Party to the conflict.”

<sup>125</sup> If, however, they were transferred to another State than Iraq, in the sense of Arts. 12 para. 2 GC III and 45 para. 3 GC IV, they would remain under the protection of these Conventions.

tion [...]” Although the measure of ‘internment’ is not expressly mentioned in the Resolution itself, it is provided for in the letter signed by *Colin Powell* annexed to the Resolution. The latter states that the tasks of the Multinational Forces include “internment where this is necessary for imperative reasons of security [...]” While UN Security Council Resolution 1546 can be interpreted as giving the Multinational Forces the authority to intern persons, it neither clarifies which provisions of the Geneva Conventions apply nor stipulates which body of law applies to interned persons.

CPA Memorandum Number 3 (revised)<sup>126</sup> regulates, in its Section 6, the policy of the Multinational Forces regarding “Security Internees” arrested after 28 June 2004. It refers to internment by the Multinational Forces “for imperative reasons of security in accordance with the mandate set out in UNSCR 1546 [...]” and stresses that “[t]he operation, condition and standards of any internment facility established by the [Multinational Forces] shall be in accordance with Section IV of the Fourth Geneva Convention.”

The rules on internment laid down in the Fourth Geneva Convention are a minimum to be respected in times of international armed conflict. However, given that IHL treaties do not regulate internment or detention in non-international armed conflicts in detail, recourse must be had to customary IHL as well as to international human rights law to clarify the uncertainties or insufficiencies of conventional IHL. Therefore, it is not sufficient to only refer to the Fourth Geneva Convention in order to grant the entire range of protection owed to persons deprived of their liberty in connection with a non-international armed conflict in Iraq. ‘Detaining Powers’ should afford better safeguards by resorting to customary IHL, human rights law and domestic law to supplement the insufficiencies of conventional IHL.

### **III. Interrogation of Persons Deprived of Their Liberty**

Sometimes it has been claimed that different standards apply in interrogating different categories of persons deprived of their liberty. This is in fact unfounded under existing law. IHL does not prevent interrogation but imposes limits on the methods to be used. In this regard, the rules are essentially the same. First, one can identify the minimum standard as contained in common Article 3 to the four

---

<sup>126</sup> CPA, Criminal Procedures, Memorandum Number 3 (revised) of 27 June 2004, CPA/MEM/27 June 2004/0.

*International Humanitarian Law in the Iraq Conflict*

GCs, which has been considered by the International Court of Justice in the *Nicaragua* case as a norm of customary international law applicable in all types of armed conflict.<sup>127</sup> The Court even considered it to reflect elementary considerations of humanity, which are “certain general and well-recognized principles, [...] even more exacting in peace than in war.”<sup>128</sup> Common Article 3 prohibits, at any time and in any place whatsoever

- violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- outrages upon personal dignity, in particular, humiliating and degrading treatment;

against all persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause.

Article 75 AP I which, as has been indicated before, reflects customary international law, follows a similar logic in defining certain minimum fundamental standards for *all* persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Geneva Conventions or under Additional Protocol I. That provision prohibits, at any time and in any place whatsoever, whether committed by civilian or by military agents:

- violence to the life, health, or physical or mental well-being of persons, in particular:
  - (i) murder;
  - (ii) torture of all kinds, whether physical or mental;
  - (iii) corporal punishment; and
  - (iv) mutilation;
- outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
- threats to commit any of the foregoing acts.<sup>129</sup>

---

<sup>127</sup> *Nicaragua* case (note 102), 114.

<sup>128</sup> ICJ, *Corfu Channel* (United Kingdom v. Albania), Judgment of 9 April 1949, ICJ Report 1949, 22.

<sup>129</sup> While this provision applies to international armed conflicts, a similar provision is contained in AP II for non-international armed conflicts (Art. 4) and reflects customary international law as well.

These standards have been stressed more specifically for certain categories of persons – for example in Articles 27 and 31 GC IV, which protect all persons not covered by the Geneva Conventions I to III, in particular civilians, and also ‘unlawful combatants’ and ‘unprivileged belligerents’ if they fulfil the nationality criteria of Article 4 GC IV. While Article 27 GC IV<sup>130</sup> recalls the obligation to treat these persons humanely under all circumstances, Article 31 GC IV prohibits physical or moral coercion, in particular to obtain information from them or from third parties. Article 32 GC IV further elaborates:

The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering [...] of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments [...], but also to any other measures of brutality whether applied by civilian or military agents.

Articles 13<sup>131</sup> and 14<sup>132</sup> GC III give more clarification to the situation of prisoners of war. One aspect which is specifically relevant during interrogation is ad-

---

<sup>130</sup> “Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.” It should be recalled that as to the reservation in regard to security measures contained in para. 4 (“However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.”), there is some discretion left to the State as to the measures, but the conceivable examples do not in any way reduce the protections in Arts. 27, 31 and 32; see *Pictet* (note 7), 207: “There are a great many measures, ranging from comparatively mild restrictions such as the duty of registering with and reporting periodically to the police authorities, the carrying of identity cards or special papers, or a ban on the carrying of arms, to harsher provisions such as a prohibition on any change in place of residence without permission, prohibition of access to certain areas, restrictions of movement, or even assigned residence and internment (which, according to Article 41, are the two most severe measures a belligerent may inflict on protected persons). [...] A great deal is thus left to the discretion of the Parties to the conflict as regards the choice of means. What is essential is that the measures of constraint they adopt *should not affect the fundamental rights of the persons concerned. As has been seen, those rights must be respected even when measures of constraint are justified*” (emphasis added).

<sup>131</sup> “Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. [...] Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.”

<sup>132</sup> “Prisoners of war are entitled in all circumstances to respect for their persons and their honour.”



*International Humanitarian Law in the Iraq Conflict*

dressed in one provision of the Third Geneva Convention. Article 17 GC III provides that prisoners of war cannot be coerced to answer questions beyond giving their name, rank, date of birth and service number. This was done primarily in order to prevent the detaining power from eliciting information on ongoing military operations from prisoners of war right after capture. There is, however, nothing in the Convention that would, for example, prohibit the interrogation of a prisoner of war suspected of war crimes. In addition, prisoners of war are free to give more information. The bottom line is that “no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”<sup>133</sup>

The key issue is therefore not “Can a detainee be interrogated?” but rather “What means may be used in the process?” Neither a prisoner of war nor any other person protected by humanitarian law, including ‘unlawful combatants,’ may be subjected to any form of violence, torture, inhuman treatment or outrages upon personal dignity. These acts are strictly prohibited by IHL. It is the detaining authority that bears full responsibility for ensuring that no interrogation method crosses the line.<sup>134</sup> This article is not the place to develop what constitutes torture, inhuman treatment or outrages upon personal dignity. There is some important case-law on this from the *ad hoc* Tribunals for the former Yugoslavia and Rwanda, as well as guidance from the various human rights courts and treaty bodies.<sup>135</sup>

Another issue that arose in the context of interrogation and guarding of persons deprived of their liberty was the use of personnel of private contractors for such purposes. The use of such persons raises a multitude of questions that cannot be addressed here (such as their status if captured and whether they may be legitimately targeted). The most important aspect in this context is the question of accountability or responsibility. The responsibility of States relying on private contractors must be established based on the general rules of State responsibility. These rules have found expression also in specific provisions of IHL, such as Article 29 GC IV, which stipulates that a State party is directly responsible for the

---

<sup>133</sup> Art. 17 para. 4 GC III.

<sup>134</sup> See *Jelena Pejic*, Three Misconceptions About the Laws of War, available at: <http://www.crimesofwar.org/onnews/news-miscon.html>.

<sup>135</sup> See for some references *Knut Dörmann*, Elements of War Crimes Under the Rome Statute of the International Criminal Court, 2003, 44–75, 314–324.

treatment by its agents of persons protected under that Convention. State agents in the above sense are all persons carrying out functions or tasks on behalf of a State, its administration and armed forces whether on an official or contractual basis.<sup>136</sup> Several provisions also emphasize specifically that it does not matter whether the prohibited acts were committed by military or civilian agents,<sup>137</sup> thus indicating that civilian contractors may also be held individually responsible. States are obliged to prevent and repress violations of IHL committed by such personnel, in particular acts of torture, inhuman treatment and outrages upon personal dignity.<sup>138</sup>

#### **IV. Exposure of Prisoners of War to Public Curiosity**

Prisoners of war enjoy fundamental guarantees requiring that they be treated in a humane manner at all times (the right to respect for their lives and their physical integrity, protection from insults, *etc.*). An example that made the headlines in the early days of the war in Iraq was the issue of the photographs of Iraqi prisoners of war published in the media, as well as US prisoners of war being shown on Iraqi television and the re-transmission of these images by various international television channels.

Exposure of prisoners of war to public curiosity is prohibited by Article 13 GC III which stipulates that

prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.<sup>139</sup>

When the Geneva Conventions were adopted in 1949, the taking and publishing of photographs of prisoners of war was not a new phenomenon.<sup>140</sup> Such publications were not specifically mentioned and clearly the drafters of the Third Geneva Convention did not intend to enumerate examples of what may constitute ‘exposure to public curiosity,’ but undoubtedly intended this expression to be broadly interpreted as it “follows from the obligation to treat prisoners humane-

---

<sup>136</sup> With regard to prisoners of war see Art. 12 GC III.

<sup>137</sup> Art. 32 GC IV and Art. 75 AP I.

<sup>138</sup> Art. 129 GC III and Art. 146 GC IV.

<sup>139</sup> Art. 13 para. 2 GC III. There is a similar provision in favor of persons protected by the Fourth Geneva Convention in Art. 27 para. 1 of this Convention.

<sup>140</sup> For various examples, see *Gordon Rissius/Michael A. Meyer, The Protection of Prisoners of War Against Insults and Public Curiosity*, IRRC, No. 295, 1993, 290–291.

*International Humanitarian Law in the Iraq Conflict*

ly. The protection extends to moral values, such as the moral independence of the prisoner [protection against acts of intimidation] and his honour [protection against insults and public curiosity].”<sup>141</sup> Thus, it was not unintentional that the provisions relating to humane treatment (Article 13 GC III) and to respect for the person of prisoners (Article 14 GC III) were put in Part II of the Third Geneva Convention (General protection of prisoners of war), before the provisions on life in captivity (Part III). Article 13 GC III does not define what acts would contravene the prohibition of exposure to public curiosity. It has been proposed by some authors<sup>142</sup> that this determination could be guided by the following criteria: a) the honor of the prisoner of war; b) the consequences for the prisoner and his family; c) the photographer’s intention and d) if it is routine or a staged event. Whatever criteria are laid down, ultimately the bottom line should be whether the prisoner can be recognized or not, in order to avoid any possible reprisals against the prisoner or his family.

Certain commentators<sup>143</sup> have argued that the showing of prisoners of war in the media could serve as proof that they are alive. This is, however, a weak argument as the Third Geneva Convention provides for mechanisms to inform their families of their whereabouts.<sup>144</sup> Moreover, one has to be cautious with such arguments and measure their consequences given that being exhibited on television<sup>145</sup> or in the newspaper may be extremely humiliating for a prisoner of war, put his family in danger and make his return to his country more difficult. Indeed, being captured may be regarded as particularly shameful in some cultures or, even worse, perceived as an act of treason which may subject the family of the “deserter” to reprisals. Given the increasingly intensive coverage of conflicts by the media and the expanding role of the major communications networks, it remains all the more important to uphold safeguards that protect the dignity of prisoners of war. To ensure this respect of human dignity, States parties to the conflict should prevent the publication or broadcast of images of prisoners of war who could be individually recognized. On the contrary, showing prisoners of war at distance, from behind or blurring their faces to prevent them from

---

<sup>141</sup> *Pictet* (note 75), 141.

<sup>142</sup> *Risius/Meyer* (note 140), 292–293.

<sup>143</sup> *E.g. Dinstein* (note 1), 12.

<sup>144</sup> Through capture cards (Art. 70 GC III), letters and cards (Art. 71 GC III) and Red Cross Messages gathered by the ICRC delegates during their visits (Art. 126 GC III).

<sup>145</sup> Broadcasts often show prisoners of war making declarations that may be the result of coercion, which would constitute a violation of Art. 17 para. 4 GC III.

being recognized individually would be acceptable as it neither violates their dignity, nor jeopardizes their families or their return to their country. Prohibiting the transmission of images of prisoners of war as individuals, whilst permitting images of prisoners of war who cannot be individually recognized, seems the best way for a party to the conflict to reconcile protection of the prisoners of war's dignity with the public's need to be informed.

A further question which arises is that of the retransmission by other television channels or newspapers of prohibited images of prisoners of war. The relevant provision (Article 13 GC III) refers to the obligations of a detaining power. Where the retransmission is broadcast in a State not party to the conflict, it therefore seems difficult to argue that such a retransmission *per se* violates Article 13 GC III.<sup>146</sup> Nevertheless, if a prisoner of war can be recognized individually, such a retransmission should not only be perceived as reporting a contravention but also as constituting a repeated violation of a prisoner's dignity. It is even possible that a prisoner of war would be recognized for the first time during such a retransmission.

Common Article 1 to the four GCs requires that States "ensure respect" for IHL. This obligation means that States must neither encourage a party to an armed conflict to violate IHL nor take action that would assist in such violations. This negative obligation can be illustrated by referring to the Draft Articles on the Responsibility of States<sup>147</sup> (Article 16), which attributes responsibility to a State that knowingly aids or assists another State in the commission of an internationally wrongful act.<sup>148</sup> In so far as each retransmission of the same images prolongs the effects of the initial violation of Article 13 GC III (disrespect of the prisoner's dignity), it may be argued that this is equivalent to assisting in the commission of a violation of IHL by a party to an armed conflict.

---

<sup>146</sup> See, however, *Françoise J. Hampson* who considers that such a retransmission constitutes a renewed breach of Art. 13 GC III, *Françoise J. Hampson*, Liability for War Crimes, in: *Peter Rowe* (ed.), *The Gulf War 1990–91 in International and English Law*, 1993, 252.

<sup>147</sup> See, *supra*, note 94.

<sup>148</sup> See ICRC Report, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 28th International Conference of the Red Cross and Red Crescent, 2–6 December 2003, 23, IRRC, No. 853, 2004, also available at: [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5ZBHH7/\\$File/IRRC\\_853\\_FD\\_IHL\\_Challenge.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5ZBHH7/$File/IRRC_853_FD_IHL_Challenge.pdf).

### *International Humanitarian Law in the Iraq Conflict*

As stipulated by Article 129 para. 3 GC III,

[e]ach High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention.

This provision binds not only belligerents involved in an armed conflict but all High Contracting Parties, as it calls on all States to take concrete measures to suppress violations of IHL. According to the ICRC Commentary to the Third Geneva Convention,

[t]he expression ‘faire cesser’ used in the French text may be interpreted in different ways. In the opinion of the International Committee, it covers everything which can be done by a State to avoid acts contrary to the Convention being committed or *repeated*. [...] The authorities of the Contracting Parties should give all those subordinate to them instructions in conformity with the Convention<sup>149</sup> and should institute judicial or disciplinary punishment for breaches of the Convention.<sup>150</sup>

It seems to be a coherent approach that if the initial transmission of images constitutes a violation of Article 13 GC III, each retransmission of the same images should also be prohibited, as the effects of the violation of Article 13 GC III (disrespect of the prisoner’s dignity) are prolonged by each retransmission. Based on their obligations under common Article 1 to the four GCs and Article 129 para. 3 GC III, the States party to the Geneva Conventions should therefore take concrete measures to put an end to these retransmissions by requesting, for example, their media to be prudent and to show restraint, even if their motives for showing the pictures may in themselves be honorable. It must always be kept in mind that the consequences of these publications could threaten the prisoners and their families.

### **V. The Issue of ‘Ghost Detainees’**

It has been reported in various media that certain persons deprived of their liberty have been detained in undisclosed locations for interrogation for extended periods of time without notifying the ICRC or granting access to the ICRC.<sup>151</sup>

---

<sup>149</sup> At the end of March 2003, the Swiss Minister of Foreign Affairs requested the Swiss television not to broadcast images of prisoners of war, stating that this would be in violation of the Third Geneva Convention. *Pierre-André Stauffer*, Micheline Calmy-Rey: “Je comprends les manifestants,” *L’Hebdo*, 27 March 2003.

<sup>150</sup> *Pictet* (note 75), 624–625 (emphasis added).

<sup>151</sup> *E.g. Dana Priest*, *Memo Lets CIA Take Detainees Out of Iraq, Practice Is Called Serious Breach of Geneva Conventions*, *Washington Post*, 24 October 2004.

Under the Third and Fourth Geneva Conventions, parties to an international armed conflict are obliged to register and notify to the ICRC any prisoner of war and detained or interned civilian. This obligation is of key importance because it allows their families to be informed of their fate and makes it possible for the ICRC to individually follow persons deprived of their liberty in order to prevent their disappearance. Article 126 GC III and Article 143 GC IV oblige States to give permission to representatives of the ICRC to go to all places where prisoners of war or persons protected under the Fourth Geneva Convention may be, particularly to places of internment, imprisonment, detention and labor. ICRC delegates shall also have access to all premises occupied by prisoners of war or protected persons under the Fourth Geneva Convention. They shall be able to interview the prisoners or persons protected under the Fourth Geneva Convention without witnesses, either personally or through an interpreter.

The Geneva Conventions allow for ICRC visits to detainees to be delayed – for example, under Article 143 para. 3 GC IV, ICRC access to a civilian internee may not be prohibited except “for reasons of imperative military necessity, and then only as an exceptional and temporary measure.”<sup>152</sup> The reference to “imperative military necessity” most probably indicates that the drafters primarily had in mind particular battlefield constraints due to military operations, for example if ongoing fighting prevents access to detention facilities. This postponement is, however, not foreseen for the notification of a detainee to the ICRC, which should be done “immediately” and “by the most rapid means” (Article 137 GC IV). Parallel articles are Article 126 GC III on access delays to prisoners of war and Article 122 GC III on notification. It should be kept in mind that the Geneva Conventions represent a carefully crafted compromise between the security needs of States and the obligations to protect the lives and dignity of human beings including those held in detention. Clearly, notifying a detainee to the ICRC in no way presents an obstacle to interrogating him.

## **VI. The Situation of Embedded Journalists**

During the Iraq war the phenomenon of embedded journalists was very present. Some questions arose as to their legal situation. IHL applicable to international armed conflicts contains references to journalists in two ways. Firstly, the Third Geneva Convention refers to war correspondents (Article 4 A para. 4).

---

<sup>152</sup> For further information see *Pictet* (note 7), 576–577.

*International Humanitarian Law in the Iraq Conflict*

Secondly, Additional Protocol I contains one provision on journalists engaged in dangerous professional missions in areas of armed conflict (Article 79). Military press personnel is not specially mentioned, but as part of the armed forces, they have the same status as other members of the armed forces and they do not enjoy any special immunity.

War correspondents are representatives of the media who, in case of an international armed conflict, are accredited to and accompany the armed forces without being members thereof. Albeit being civilians, they are entitled to the status of and treatment as a prisoner of war in case of capture (with the consequence that they can be detained, independent of whether they pose a security threat, until the end of active hostilities in an international armed conflict).<sup>153</sup> Under the rules on the conduct of hostilities, they are protected in like manner to non-accredited journalists: they maintain their civilian status despite the special authorization received from military sources and must not be made the object of an attack.

Other journalists, including those engaged in areas of armed conflicts, enjoy the same rights and must abide by the same rules of conduct as all civilians. Their situation only differs from war correspondents once they find themselves in the hands of a party to a conflict. If they fulfill the nationality criteria of Article 4 GC IV,<sup>154</sup> they are protected by that Convention (deprivation of liberty is only possible if they pose a security threat and for the time of such threat or in case of penal proceedings). Otherwise, the customary protection of Article 75 AP I apply to them.

Journalists on a dangerous professional assignment in an operational zone are civilians; they are entitled to all rights granted to civilians *per se*.<sup>155</sup> Thus, journalists do not lose their civilian status by entering an area of armed conflict on a professional mission even if they are accompanying the armed forces or if they take advantage of their logistic support.

---

<sup>153</sup> An identity card as foreseen in the Third Geneva Convention will be proof of this authorization, proof that the enemy can demand before deciding on his status. The war correspondent card plays a similar role to that of a soldier's uniform: it creates a presumption. If there is any doubt about the status of a person who demands prisoner of war status, that person remains under the protection of the 1949 Convention pending the decision of a competent tribunal, according to the procedure laid down in the second para. of Art. 5 of the Third Convention (see, *supra*, Sect. B. I. 1. c)).

<sup>154</sup> See, *supra*, note 105.

<sup>155</sup> See Art. 79 AP I.

Provided that they do not undertake any action which could jeopardize their civilian status, journalists are protected in the same way as all other civilians. The protection granted to civilians is not linked to the nationality of the person concerned. In this respect, any journalist, be he or she a national of a State involved in the conflict or a national of a neutral State, is protected. A civilian must under no circumstances be the object of an attack, and civilians are entitled to respect of their possessions, provided these are not of a military nature. These rules, and many others besides, are equally applicable to journalists on dangerous missions.

The question whether embedded journalists fall under the rules of war correspondents or journalists on a dangerous professional assignment is purely factual. Only if they are accredited, as foreseen in Article 4 A para. 4 GC III, are they war correspondents. The wearing of a uniform as such has no legal implications in this regard. Such uniforms may, however, increase the risk that they will be the object of an attack since they are not identifiable as persons protected against attacks.

#### **VII. Feigning of Protected Status and Using Protected Objects and Persons to Shield Military Operations**

There have been instances reported during the Iraq conflict where fighters feigned civilian or non-combatant status, where surrender was feigned and in doing so adversaries were killed and injured.<sup>156</sup> Such behavior is clearly prohibited as perfidious and constitutes a serious violation of IHL.<sup>157</sup> Based on the same reasoning, booby-trapping of dead bodies<sup>158</sup> is absolutely prohibited.<sup>159</sup> While the law is relatively clear in this regard, it seems that in asymmetric warfare situations, the side facing an overwhelming adversary is willing to resort to such clearly prohibited behavior. Thus, the crucial question is how compliance with these essential rules of IHL, which are based on long standing traditions, can be ensured.

---

<sup>156</sup> See, e.g., *Rod Nordland*, Newsweek, 29 November 2004.

<sup>157</sup> Art. 37 AP I, Art. 23 lit. b of the 1907 Hague Regulations; Art. 8 para. 2 lit. b No. vi of the Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998), reprinted in: ILM, vol. 37, 1998, 999 (ICC Statute).

<sup>158</sup> E.g. *Nordland* (note 156).

<sup>159</sup> Art. 7 para. 1 lit. b of Protocol II to the CCW, as amended (note 4).



*International Humanitarian Law in the Iraq Conflict*

In such conflict situations there is also a strong tendency to mix with the civilian population or to find refuge in or next to civilian objects including those under special protection. Such behavior is likely to place the civilian population and civilian objects at great risk. IHL tries to prevent this by obliging the Parties to a conflict to the maximum feasible extent to

- (a) [...] endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
- (b) avoid locating military objectives within or near densely populated areas; [...].<sup>160</sup>

If protected persons are used intentionally for the purpose of shielding military operations, this is also absolutely prohibited under both treaty<sup>161</sup> and customary international law, and it constitutes a war crime under the ICC Statute.<sup>162</sup>

As for specially protected objects, Additional Protocol I prohibits that historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples be used in support of the military effort.<sup>163</sup> In accordance with Article 4 of the 1954 Hague Convention, it is prohibited to use cultural property situated within the State's own territory as well as within the territory of other High Contracting Parties and its immediate surroundings in a way which is likely to expose it to destruction or damage in the event of armed conflict. The obligation may be waived only in cases where military necessity imperatively requires such a waiver.

During the Iraq conflict, mosques, for example, have been repeatedly used to store weapons or as a refuge for fighters. The fact that mosques as cultural property are specifically protected does not give them immunity from attack if they are used for such military purposes.<sup>164</sup> It is only to the extent that cultural property is civilian that it may not be made the object of attack. It may, however, be

---

<sup>160</sup> Art. 58 AP I.

<sup>161</sup> Art. 51 para. 7 AP I.

<sup>162</sup> ICC Statute (note 157), Art. 8 para. 2 lit. b No. xxiii.

<sup>163</sup> Art. 53 lit. b AP I.

<sup>164</sup> See Art. 4 of the 1954 Convention on Cultural Property (note 14) in connection with Art. 6 of its 1999 Second Protocol. The latter provides that a waiver on the basis of imperative military necessity may only be invoked when and for as long as: (1) the cultural property in question has, by its function, been made into a military objective; and (2) there is no feasible alternative to obtain a similar military advantage to that offered by attacking that objective.

attacked in case it qualifies as a military objective. The Statute of the International Criminal Court therefore stresses that intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes or historic monuments is a war crime in both international and non-international armed conflicts, “provided they are not military objectives.”<sup>165</sup>

### **C. Conclusions**

The conflict in Iraq since the air strikes on 20 March 2003 has brought about interesting questions on the application of IHL. In the view of the authors, contrary to what several commentators have claimed after the events of 11 September 2001, existing IHL – treaty and customary international law – has shown its continued relevance and overall adequacy in application to the conflict in Iraq throughout its various phases. This statement does not mean that the law is absolutely perfect – no law could claim that. Plenty of areas remain – this article has shown some of them – where interpretations are not universally shared and where the law is in need of clarification. The discussion to specifically identify those and to find ways for improvement must be conducted and continued in the future. Only if the law is sufficiently clear will those meant to apply it be in a position to do so properly – even in the heat of a battle.

On the other hand, one should not lose sight of the fact that perhaps the main challenge remaining is how to ensure greater respect for IHL. The rules are there, but they are often not properly implemented. The conflict in Iraq has shown that even some of the most fundamental rules of IHL which are absolutely clear and where there is no dispute on interpretation, have been violated, such as the prohibition of hostage-taking. Here, more thinking is required on how better compliance can be achieved.

---

<sup>165</sup> ICC Statute (note 157), Art. 8 para. 2 lit. b. No. ix and para. e No. iv.