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# Justice on hold: accountability and social reconstruction in Iraq

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## Abstract

*Having invaded Iraq without UN Security Council authorization, the United States was unable to convince many countries to take a meaningful role in helping Iraq deal with its violent past. Always insisting that it would "go it alone", the United States implemented accountability measures without properly consulting the Iraqi people. Nor did the United States access assistance from the United Nations and international human rights organizations, all of which possess considerable knowledge and experience of a wide range of transitional justice mechanisms. In the end, the accountability measures introduced by the Americans either backfired or were hopelessly flawed. What are needed in Iraq are a secure environment and a legitimate authority to implement a comprehensive transitional justice strategy that reflects the needs and priorities of a wide range of Iraqis. Such a strategy should contain several measures, including prosecutions, reparations, a balanced approach to vetting, truth-seeking mechanisms and institutional reform.*

In the pre-dawn hours of 30 December 2006, four executioners, their faces covered in balaclavas, escorted Saddam Hussein to the gallows. As they did so, a man standing amongst a group of official witnesses quietly slipped a cellphone camera out of his pocket and focused it on the condemned leader. What unfolded next in the semi-darkness of the chamber was more reminiscent of a public hanging in the eighteenth century than a considered act of twenty-first century justice. As one of Hussein's executioners dropped a noose on to his shoulders and tightened it around his neck, a group of onlookers began shouting insults. One man chanted a Shiite version of a Muslim prayer, clearly a sectarian barb aimed at Hussein, a Sunni. "Go to hell!" another voice shouted from the darkness. Then, as Saddam began to pray, the trapdoor suddenly opened and his body plunged into the drop.

Later that day, the video of Saddam Hussein's execution was aired repeatedly on Iraqi television. And, as numerous journalists reported, the video's strong sectarian overtones worried many Iraqis – Sunni and Shiites alike – who feared it would only fan the violence raging around them.[1] Equally disturbing, they said, was the feeling of déjà vu that the execution evoked.[2] During Saddam's 35-year reign, prisoners – many of whom had been executed at the same gallows – were themselves regularly taunted and mistreated in their last hours. For many Iraqis it was as if nothing had changed.

Hussein's execution marked the low point of a deeply flawed effort by the Bush administration to bring justice to the people of Iraq. The project began shortly after the US-led Coalition swept into Baghdad in April 2003. As the occupying power, the United States needed to secure a sprawling city, quell a growing insurgency and give immediate attention to numerous infrastructure, public health and safety needs. By the same token, public statements by the Bush administration had placed a high priority on uniting Iraqis and restoring their dignity. These were lofty pledges – pledges that many Iraqis across the country, as well as many abroad, embraced.

But these naïve assumptions were soon dashed as US troops, out-numbered and unprepared, stood by helplessly as much of Iraq's remaining physical, economic and institutional infrastructure was systematically looted and sabotaged.[3] Then, as spring turned into summer, hopes that a new and united Iraq would arise from the rubble were quashed by a nascent insurgency composed of Saddam loyalists and foreign fighters, creating a security quagmire that would last for the foreseeable future.

Amid this growing chaos, L. Paul Bremer III, a career diplomat in the US Department of State and an expert on terrorism and homeland security, arrived in Iraq to serve as the chief administrator of the Coalition Provisional Authority (CPA). Bremer issued several directives in the first month of his tenure that would set the course for years to come for how Iraqis would confront the legacy of past

1 See John Simpson, "Saddam hanging taunts evoke ugly past", *BBC News*, Baghdad, 30 November 2006.
2 See John Burns, "Hussein videos grip Iraq: attacks go on", *New York Times*, 31 December 2006.
3 Larry Diamond, "What went wrong in Iraq", *Foreign Affairs*, Vol. 83 (2004), p. 34.

crimes.[4] Most notable (and controversial) was the introduction on 16 May 2003 of the ''De-Baathification'' programme, in which the army and other security forces were dissolved and members of certain ranks in the Baath Party were removed from their positions and banned from future employment in the public sector. A later decree, issued on 10 December 2003, created the Iraqi Special Tribunal for Crimes against Humanity[5] to prosecute Iraqi nationals or residents of Iraq accused of genocide,[6] crimes against humanity and war crimes. Bremer also mandated a series of other administrative and institutional directives, including the establishment of a property claims commission, a central criminal court, a task force on victim compensation, and a new Iraqi army and civil defence corps.

Over the next three years, Bremer's directives were enacted as violence and lawlessness mounted in Iraq. By late 2006, suicide bombings had become almost daily events, already high levels of sectarian violence were rising, and few Iraqis were sanguine about their future. Eighty-two per cent of Iraqis polled by the BBC in January 2007 said they had no or very little confidence in the US-led occupation. Over half (53 per cent) said they had lost faith in their own government, elected under a new constitution in late 2005. Asked whether the execution of Saddam Hussein was helpful in bringing about reconciliation in Iraq, 62 per cent of Shiites thought it would, while 96 per cent of Sunnis thought it made reconciliation more difficult.[7]

This article examines how the US occupation and the Iraqi government have shaped the development of transitional justice mechanisms in Iraq and how ordinary Iraqis have perceived these processes. We discuss the recent history of prosecutions for human rights violations, efforts to purge the Iraqi government of wrongdoers, and emergent mechanisms for truth-seeking and reparations. Our research includes interviews since 2003 with Iraqi, US and British officials, forensic scientists, and representatives of the United Nations and non-governmental organizations. One of the authors of this article (Sissons) has intensively monitored De-Baathification issues and developments at the Iraqi High Tribunal during five missions to Baghdad from 2004 to 2007. Another (Stover)

4 The Coalition Provision Authority Orders are available at http://www.cpa-iraq.org/government/governing_council.html (last visited 20 November 2007). Several orders deal with transitional justice measures, including Coalition Provision Authority Order No. 1, ''De-Baathification of Iraqi Society'', CPA/ORD/16 May 2003/01; Coalition Provision Authority Order No. 2, ''Dissolution of Entities'', CPA/ORD/23 May 2003/02; Coalition Provision Authority Order No. 7, ''Penal Code'', CPA/ORD/10 June 2003/07; Coalition Provision Authority Order No. 13 (Revised), ''The Central Criminal Court of Iraq'', CPA/ORD/18 June 2003/13; Coalition Provision Authority Order No. 15, ''Establishment of the Judicial Review Committee'', CPA/ORD/23 June 2003/15; Coalition Provision Authority Order No. 35, ''Re-establishment of the Council of Judges'', CPA/ORD/21 Sept 2003/35.

5 The jurisdiction of the Iraqi Special Tribunal covers the crimes mentioned above, as well as violations of stipulated Iraqi laws committed from 17 July 1968 to 1 May 2003. CPA Order No. 48, ''Delegation of Authority Regarding an Iraqi Special Tribunal'', available at www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf (last visited 20 November 2007).

6 Early in 1959 the government of Iraq, a military dictatorship, signed the Convention on the Prevention and Punishment of the Crime of Genocide. See Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, 78 UNTS 277 (entered into force on 12 January 1951, entered into force for the United States on 23 February 1989).

7 ''Iraq poll 2007'', *BBC News*, 19 March 2007, p. 2.

accompanied Kurdish troops into Kirkuk during the first days of the war and later returned to Iraq to conduct on-site visits to mass graves and to interview representatives of Iraqi government and non-government institutions that possessed documents of alleged human rights abuses obtained during and after the war.[8] Finally, two authors (Pham and Vinck) conducted a comprehensive qualitative study in July and August 2003 in order to understand how Iraqis wished to deal with their legacy of human rights violations and political violence.[9]

## Transitional justice mechanisms

Societies emerging from periods of war or political repression can deal with the past in a number of ways. They can ignore a legacy of conflict and widespread violations of human rights and international humanitarian law by passing amnesty laws that pardon past offenders. Or they can confront them head-on by pursuing criminal trials, establishing truth commissions and initiating vetting and lustration programmes to remove past offenders from the public sector. They can also provide reparations and apologies to victims, create memorials, locate and identify the bodies of the missing, return stolen property, establish days of mourning and remembering, reform history textbooks, institute legal and institutional reforms to conform to international standards of human rights, and enact laws to correct the distributional inequities that often underlie conflicts.

All these activities comprise the main components of ''transitional justice'', which can be defined as a ''set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law''.[1]

Our studies have found that for transitional justice mechanisms to be effective in postwar societies they must meet six conditions.[2]

First, such measures can only be fully realized in a secure environment. Security in the aftermath of war and widespread political violence trumps everything; it is the central pedestal that supports all else. Without some level of security, witnesses cannot be transported to and from the courtroom safely, victims cannot tell their stories publicly, and investigators cannot collect and preserve evidence securely.

Second, it is imperative that a large segment of the population views the implementing authorities as both legitimate and impartial. While a necessary condition in all post-war settings, it is especially important in the

8 See e.g. Eric Stover, William D. Haglund and Margaret Samuels, ''Exhumation of mass graves in Iraq: considerations for forensic investigators, humanitarian needs, and the demands of justice'', *Journal of the American Medical Association*, Vol. 290 (6 August 2003), pp. 663–6.

9 *Iraqi Voices: Attitudes toward Transitional Justice and Social Reconstruction*, Human Rights Center, University of California, Berkeley, and ICTJ, May 2004.

aftermath of inter-ethnic conflicts or in situations where the prevailing authority is an occupying power.[3]

Third, the new authorities must have the political will and capacity to ensure that transitional justice measures have sufficient time to achieve their intended goals.

Fourth, they must implement such mechanisms in a manner that avoids collective guilt.

Fifth, and most importantly, transitional justice measures are most effective when they have been selected through a genuine process of consultation with those most affected by the violence. To the extent possible, all sectors of a war-ravaged society – the individual, community, society and state – should become *engaged participants in* and not merely *auxiliaries to* the processes of transitional justice and social reconstruction, although, undoubtedly, at different times and in different ways. Victims must receive formal acknowledgment and recognition of the grave injustices and loss they suffered. Families of the missing must be able to recover, bury, and memorialize their dead. Bystanders – those who did not actively participate in violence, but who also did not actively intervene to stop abuses – should come to recognize that their passivity contributed to the maintenance of a repressive state. Perpetrators must be held accountable for their crimes so as to validate the pain and suffering of victims and to communicate publicly that the past horrors deserve societal condemnation.

Finally, transitional justice mechanisms work more effectively if they are implemented alongside programmes designed to promote political, economic and social reconstruction; freedom of movement; the rule of law; access to accurate and unbiased information; and educational reform.[4]

1 Naomi Roht-Arriaza, "The new landscape of transitional justice", in Naomi Roht-Arriaza and Javier Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, Cambridge University Press, Cambridge, 2006, p. 2.

2 See Eric Stover, Hanny Megally and Hania Mufti, "Bremer's "Gordian knot": transitional justice and the US occupation of Iraq", *Human Rights Quarterly*, Vol. 27 (2005), pp. 830–57.

3 See e.g. John W. Dower, *Embracing Defeat: Japan in the Wake of World War II*, W. W. Norton, New York, 1999.

4 This was the finding of a five-year study of justice and social reconstruction in Rwanda and the former Yugoslavia conducted by the Human Rights Center, University of California, Berkeley. See Eric Stover and Harvey M. Weinstein, "Conclusion: A common objective, a universe of alternatives", in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, pp. 323–42.

## Past crimes, future reckoning

Iraq's confrontation with its violent past presents one of the most complex cases since the end of the Second World War. Transitional justice efforts have faced several challenges from the outset. First, there is the sheer magnitude and severity of the crimes Hussein and his fellow Baathists committed against the Iraqi people over a period of 35 years. Violence was a tool of state policy and deployed against all perceived or real threats. The regime executed thousands of government

opponents, left more than 300,000 missing and likely dead, crushed all dissent, and displaced more than a million Iraqis or forced them into exile abroad. Between 1977 and 1987 Iraq troops destroyed nearly 5,000 Kurdish villages and killed thousands of Kurdish civilians, in accordance with Baath policies of Arabization and a series of bloody pacification campaigns. The latter included mass forced disappearances and indiscriminate bombardments, including, from 1987 on, the use of chemical weapons. During the ''Anfal'' (''the Spoils'' in Arabic) campaign between February and September 1988, Iraqi troops stormed the highlands of Iraqi Kurdistan and gassed or otherwise executed more than 100,000 Kurds, forcibly displacing survivors to areas under government control.[10] In southern Iraq, Saddam expelled an estimated half a million Shiites to Iran for fear that they might support Iran during the Iran–Iraq war (1980–8), and later executed or ''disappeared'' up to 70,000 civilians in the aftermath of a failed uprising after the end of the 1991 Gulf War. Most of Iraq's missing are thought to be buried in dozens of mass graves across Iraq, some containing thousands of victims.[11]

Second, decades of repressive rule have fractured the individual and collective identities of Iraqis. The climate of terror engendered a breakdown of trust and confidence at all levels of society. Having lived under an autocratic state that imposed a single Iraqi identity for decades, many Iraqis emerged from the 2003 war torn between the state-imposed civic identity and their own ethnic and religious identities. During our interviews with Iraqis in 2003, Kurds, Turcomans and Assyrian Christians said that the Baathist state had promoted an Arab identity that resulted in overt discrimination against non-Arabs. Meanwhile, many Sunni respondents feared that a new Iraqi government, and especially one that contained an overwhelming majority of Shia or Kurds, would target Sunnis as a ''collective scapegoat'' for the crimes of the past. Yet, despite these concerns, many respondents told us that ''unity exists'' in Iraq and blamed the dictatorship for having fomented discord to maintain control. Respondents said – perhaps overly optimistically – that these divisions would diminish with the end of the regime.

Third, the political context of the US invasion and occupation of Iraq have had a decisive impact on accountability efforts. Following the invasion, it quickly became apparent that Iraq's occupiers lacked the linguistic, cultural and regional expertise necessary to understand Iraqi politics and society. Nor, with over one hundred thousand troops on the ground, were they accepted as a legitimate and impartial authority. Their status as occupiers and their lack of expertise meant that, despite good intentions, Coalition leaders were entirely the wrong group of players to jump-start an effective transitional justice process. Nor could they engineer the Iraqi ownership and impartial approach that such an effort required. Indeed, by the time of Bremer's arrival to head the CPA, insecurity in Baghdad had turned the US occupation into a physical and psychological bunker.

10 There is a significant variation in figures, with Kurdish authorities and Iraqi prosecutors stating that up to 180,000 were killed.

11 See e.g. *Iraq's Crimes of Genocide: The Anfal Campaign against the Kurds*, Human Rights Watch/Middle East, New Haven, 1995.

"Separated from Iraqis by the formidable security around the three-square-mile "Green Zone" (where the CPA was based) and around the CPA's regional and provincial headquarters", writes a former Coalition advisor, "the American civilians had little, if any, contact with the Iraqi people.[12]

Fourth, decades of autocratic rule have eviscerated Iraq's capacity to develop and administrate laws and policies, especially one as complex and resource-demanding as a transitional justice process. Iraqis also particularly distrusted the legal system, which they perceived as corrupt and influenced by politics. At the same time, the US occupiers were relying heavily on the advice and counsel of Iraqi exiles, many of whom lacked meaningful local knowledge, social networks or technical skills.

Finally, simmering tensions between the United States and the United Nations over the legality and necessity of the war have severely limited the participation of foreign experts in the process of transitional justice in Iraq. By "going it alone", the United States has alienated many of the very government and non-government entities that were best poised to pass on to the Iraqis the "lessons learned" and "best practices" gleaned from similar transitional processes in other countries. As a result, experts – particularly those working with non-governmental or United Nations organizations – were left watching or critiquing from the sidelines.

Despite these formidable challenges, Coalition officials in Baghdad moved swiftly to launch several transitional justice initiatives, including a "De-Baathification" programme, a tribunal and a task force to develop a policy for reparations for past crimes. They also explored truth-seeking options, such as a truth commission, but decided not to pursue concrete truth-seeking measures. Each of these initial steps has had important practical and political consequences.

## Prosecutions

During the 1990s, *Human Rights Watch* and other international human rights organizations tried unsuccessfully to persuade the United Nations and individual governments to establish an international tribunal to prosecute Saddam Hussein and other Iraqi leaders for crimes against humanity and other serious crimes. Then, in the months leading up to the US-led invasion of Iraq, the Bush administration began invoking Hussein's human rights record as a subsidiary justification for the offensive. In September 2002 a group of US inter-agency leaders decided that if a tribunal were established, it should be an Iraqi-led effort, a policy that was announced shortly before the fall of Baghdad.[13]

The announcement generated considerable international unease, as the decision had been made without consulting Iraqis inside Iraq or international

12 Diamond, above note 3, p. 39.
13 Personal communication (Sissons) with US government officials. US Department of Defense, "Geneva Convention, EPWs and War Crimes", briefing, Washington, DC, 7 April 2003.

experts, and without access to or knowledge of Iraqi judicial conditions on the ground. As *Human Rights Watch* wrote in July 2003,

> The Iraqi judiciary, weakened and compromised by decades of Baath party rule, lacks the capacity, experience, and independence to provide fair trials for the abuses of the past. Few judges in Iraq, including those who fled into exile, have participated in trials of the complexity that they would face when prosecuting leadership figures for acts of genocide, crimes against humanity, or war crimes.[14]

Many observers suspected that the decision was crafted to suit US policy interests, rather than those of a robust accountability mechanism.[15]

Aloof from international concerns, Coalition planners worked to implement Washington's policy as Coalition detention facilities filled with regime officials and others accused of human rights abuses. In July 2003 the newly formed Iraqi Governing Council (IGC), working in tandem with Coalition experts, established a four-person judicial commission to design a domestic judicial process for trying Saddam Hussein and others allegedly responsible for past crimes.[16] It was an opaque and difficult process. Coalition personnel were trained in common-law legal systems, but had little, if any, orientation towards the civil-law tradition employed in Iraq. Most had practically no experience with international criminal law. Their Iraqi counterparts, on the other hand, were grounded in Iraq's flawed legal tradition, with no international criminal legal experience.

In late 2003, a few days before images of Saddam Hussein's capture were broadcast worldwide, the CPA established the Iraqi Special Tribunal for Crimes against Humanity (hereinafter referred to as the ''Tribunal'').[17] *Human Rights Watch* and other human rights groups criticized the Tribunal's draft statute for disregarding essential fair trials guarantees and failing to set standards that would ensure that judges and prosecutors possessed adequate experience and could function in an independent and impartial manner. Human Rights Watch called on the United Nations not to lend ''its legitimacy and expertise'' to what it called a ''fundamentally flawed'' tribunal that was inherently vulnerable to political manipulation.[18] Indeed, the United Nations pursued a policy under which it neither assisted nor contacted the Tribunal; instead, the Tribunal became heavily dependent on the support of the Regime Crimes Liaison Office (RCLO), a group of mainly US officials based in the US embassy in Baghdad.

14 ''Iraq: Justice needs international role'', press release, *Human Rights Watch*, 15 July 2003.

15 Suspicions included: a US desire to ensure a court that would not inquire too closely into US policies in support of Iraq during the 1980s, including the period of the Anfal campaign; avoidance of the eventuality that any possible violations of international humanitarian law by US armed forces could fall under the Tribunal's jurisdiction; and US policy positions opposing the International Criminal Court and retaining the death penalty.

16 See ''Briefing paper: creation and first trials of the Supreme Iraqi Criminal Tribunal'', *International Center for Transitional Justice*, October 2005, pp. 6–7.

17 CPA Order 48, above note 5.

18 See ''Memorandum to the Iraqi Governing Council on the Statute of the Iraqi Special Tribunal'', *Human Rights Watch*, December 2003.

*Human Rights Watch*, the International Center for Transitional Justice (ICTJ) and other international human rights organizations also criticized the IGC and CPA for their lack of meaningful consultation with the Iraqi people, including the hundreds of thousands of victims and their families who were rapidly organizing themselves. In fact, the only initiatives that attempted to sound out the opinions and attitudes of the Iraq population with regard to a future transitional justice process were organized by civil society organizations.

Our organizations conducted one of the first studies in July and August 2003 to assess the opinions and attitudes of a wide spectrum of Iraqis with regard to justice and human rights.[19] The study found that a broad cross-section of Iraqi society strongly believed that the leadership of the previous regime should face trial for its acts, and that these trials should take place in Iraq and under Iraqi control. Despite mistrust towards the legal system in place under Saddam's regime, respondents expressed confidence that a sufficient reserve of "clean" (that is, uncorrupted) Iraqi lawyers and judges existed and could initiate the trials of those responsible for the most serious crimes. Respondents emphatically rejected the prospect of trials dominated by the international community or a foreign state, although they did not reject expertise and assistance from abroad if it would help to ensure the fairness, integrity and transparency of the trial process. Above all, they wanted the trials to be fair, impartial and able to withstand public scrutiny in Iraq and elsewhere.

In August 2005 the Iraqi parliament adopted a new statute for the Tribunal and changed its name to the Iraqi High Tribunal.[20] While the Tribunal was created as a domestic court inserted into the Iraqi legal system, its jurisdiction covered international crimes and legal provisions that were developed after the Second World War but had never been included in Iraqi law. Politically, Iraqi insurgents and much of the surrounding Arab region viewed the new tribunal as the illegitimate and politicized weapon of the US aggressor, an argument expertly wielded by Hussein and other defendants in the Tribunal's first trial. By September 2007 the Tribunal had completed two trials, *al-Dujail* and *al-Anfal*, and had begun a third trial involving crimes committed during the 1991 uprising. Tribunal officials have announced that there will be a total of fourteen trials.

The first trial involved charges of crimes against humanity related to the aftermath of a failed July 1982 assassination attempt against Saddam Hussein in the Shiite town of al-Dujail. The *Dujail* trial ran from 19 October 2005 to 26 December 2006, when final judgments were handed down. The ruling, later confirmed by the Cassation Chamber, found Hussein and six other accused guilty of a series of crimes, including crimes against humanity, wilful killing, torture and arbitrary detention. Hussein was executed four days later and three other high-ranking officials were executed in the following weeks.

19 *Iraqi Voices*, above note 9, pp. i–iv.
20 Law of the Supreme Iraqi Criminal Tribunal (Law 10 of 2005), *Official Gazette of the Republic of Iraq*, 18 October 2005.

Unlike the *Dujail* trial, which concerned crimes committed in a single town, the *Anfal* trial involved massive crimes, including the alleged gassing, imprisonment, execution and displacement of over 100,000 Kurds during the eight-phase Anfal military campaign of 1988. When the *Anfal* trial opened in August 2006 Hussein, his cousin Ali Hassan al-Majid and five security officials were accused of genocide, crimes against humanity and war crimes. But after Hussein's execution, public interest in the continuing trial of the remaining six accused declined dramatically amongst all groups except the Kurds. Final verdicts were handed down in August 2007.

Before discussing individual trials, it is important to note that between the time when investigations began in 2004 and the announcement of the first verdicts two years later, Iraq had lapsed into intense conflict. This had severe consequences for the Tribunal's work. Three defence lawyers and various Tribunal staff and their close relatives were killed, while witnesses and their families in the first trial had suffered multiple retributive attacks.[21] Quite apart from the Tribunal's own missteps, the rising violence fundamentally undermined its ability to exemplify new norms of accountability and justice. For what did it matter if the crimes of the past were adjudicated against yesterday's leaders when tens of thousands of Iraqis were dying in the streets?

## *Dujail* trial

The *Dujail* trial commenced at a time when Iraqis seemed hopeful about their future. A constitutional referendum had been held and national elections were about to take place. Many of the Tribunal judges hoped that the *Dujail* trial would create a new standard of Iraqi justice, one that was procedurally and substantively fairer than that of the previous regime. The Iraqi public had similarly high expectations, although public debate frequently focused on a different outcome: the humiliation of Iraq's former leaders in the courtroom and swift implementation of the death penalty.

Over the next two months Iraq was galvanized by the *Dujail* trial. It was televized via national and regional satellites, and viewers watched spellbound as Hussein, his half-brother Barzan al-Tikriti, former Prime Minister Taha Yasin Ramadan, despised former head of the Revolutionary Court Awad Hamd al-Bandar, and four Dujaili party functionaries were accused of horrific crimes. Complainants and witnesses testified with great emotion about the killing of their families and their own suffering under torture and through years of imprisonment.[22] This was a first for Iraq and in much of the region. Hussein and al-Tikriti used the platform to lambaste the US-led occupation and portray themselves as persecuted Arab leaders responding with dignity and forbearance, while defence

21 See Miranda Sissons and Ari S. Bassin, "Was the Dujail trial fair?", *Journal of International Criminal Justice*, Vol. 5 (2007), pp. 272–86.

22 Complainants were also allowed to be represented by legal counsel, who participated throughout.

counsel argued strenuously that the Tribunal, fruit of the poisoned tree of the invasion, was illegitimate.

After the first two months, however, the Iraqi public mood shifted from excitement to anxiety. Many Iraqis thought that Presiding Judge Rizgar Amin was giving Hussein and other defendants too much latitude during proceedings. There were also rumblings that the trial was beginning to take too long. Without a public outreach strategy, the Tribunal had no way of informing the public that such perplexing courtroom machinations were part and parcel of an open judicial process. This failure to educate the public cost the Tribunal dearly. Not only did it undermine its ability to illustrate new standards of justice, it also deprived it of potential allies and rendered it increasingly vulnerable to political interference from individuals who neither knew nor cared what the Tribunal was attempting to achieve.

Political interference was the single largest failing in the *Dujail* trial. The first intrusion took place in January 2006, when Presiding Judge Amin resigned after weeks of public criticism of his handling of the trial by the Minister of Justice and other leading political figures. Meanwhile, several other members of the Trial Chamber had already left the bench. Other examples of executive interference soon followed. The first occurred when the Higher National De-Baathification Commission[23] suddenly ousted the judge due to replace Amin from the Trial Chamber, reportedly because of his liberal leanings. A second major instance of political interference took place in the final stages of deliberations in the Trial Chamber. As rumours spread that Hussein might not be given the death penalty, the Commission intervened to replace one judge in the Trial Chamber and one in the Cassation Chamber. It is unclear whether this move decisively influenced the final ruling, as Presiding Judge Ra'uf Abd al-Rahman reportedly fought relentlessly to maintain the Tribunal's independence, but the message was certainly clear: political imperatives far outweighed the integrity of the judicial process. Too much judicial independence would not be tolerated.

The trial also suffered from other important flaws. First, Dujail was not seen as fully representative of the regime's crimes, nor did it have the emotional significance of other cases. There seemed little pressing reason to open with events that occurred in a single Shiite town more than twenty-five years previously. The fact that many of the victims were allegedly linked with the Dawa party was also unfortunate. Few Iraqis missed the fact that the Dawa was now an important element of the Iraqi governing coalition and that the Prime Minister was a leading Dawa leader.[24]

Second, the Trial Chamber lacked the analytical skills to build a detailed picture of the workings of the regime. Although evidence as to the crime base was plentiful, the Tribunal found it extremely difficult to analyse the linkage and

23 The De-Baathification requirements in Article 33 of the Tribunal Statute were far higher than those usually required, and were drafted in a deliberately unclear manner.

24 Both Ibrahim al-Jaafari (Prime Minister at the beginning of the *Dujail* case) and Nuri al-Maliki (from the middle of the *Dujail* case) were members of this Shiite Islamist political group.

contextual evidence that would allow the court and the public to understand how the regime functioned as a whole, and the role of individuals accused in relation to specific crimes. (This was particularly obvious in the case against Taha Yasin Ramadan, and also in the discussion of the Revolutionary Court trial of some 146 Dujailis.) Historians or other expert witnesses, who might have provided some of this valuable evidence, were not called to testify. Instead, the Trial Chamber eventually resorted to unsupported inferences to fill important gaps and so obtain the desired outcome.

Another shortcoming of the *Dujail* trial was its failure to live up to minimum fair trial standards. Although Dujail was almost certainly the fairest trial ever held in Iraq, it still failed to meet guarantees contained in the Tribunal's own statute and Article 14 of the International Covenant on Civil and Political Rights (ICCPR). Throughout the trial the Tribunal placed defendants at a significant disadvantage vis-à-vis the prosecution. It permitted ambiguous charging, limited access to important evidence and denied defendants the full opportunity to contest the evidence against them.[25] In addition, the abbreviated appeals process was inadequate to evaluate the complex substantive and procedural issues that arose during the trial. At the root was the Tribunal's inability to accept the defence as an essential partner in the truth-seeking process, which was not helped by repeated instances of unprofessional and sometimes unethical behaviour by certain defence counsel. Another factor was the defence weakness in effectively challenging the Trial Chamber on these issues.

Many Iraqis cared little for these defects and rejoiced at the final ruling on 26 December 2006, which upheld all findings except sentencing for Taha Yasin Ramadan, which it increased to the death penalty. But many more hesitated at the circumstances surrounding Hussein's execution, which was not only blatantly sectarian in implementation but had also involved tortured manipulation of death-penalty ratification requirements and breached various provisions of the Iraqi Criminal Procedural Code, including the requirement that executions not be carried out on religious holidays. The execution undid the pedagogical lesson the trial had been designed to achieve. The trial was not seen as an instrument of justice, but of sectarian revenge. Tensions rose inside Iraq, and Hussein was lionized as a martyr in the Arab world and beyond.

## *Anfal* trial

The Tribunal's second trial opened while the *Dujail* trial was still under way. The defendants included Saddam Hussein, his cousin Ali Hassan al-Majid (nicknamed "Chemical Ali" for his alleged use of chemical weapons against the Kurds), and five other co-defendants. The Tribunal charged the seven men with genocide, crimes against humanity and war crimes, for their role in planning, authorizing

25 Examples of such shortcomings included insufficiently specific charging documents, inadequate security arrangements, failure to gather and disclose exculpatory evidence, late or incomplete disclosure, and limited opportunities to confront witnesses as a result of witness confidentiality mechanisms.

and executing the 1988 Anfal campaign targeting the Kurdish population of northern Iraq.[26]

Unlike *Dujail*, the Iraqi regime's massive 1988–9 campaign against its Kurdish citizens had received worldwide publicity and been extensively documented by human rights organizations. It was a vastly more prominent series of crimes, of great emotional significance to Kurds. A wealth of official Iraqi documents attested to the regime's systematic and intentional use of chemical weapons against the Kurds, as well as mass executions, imprisonment and forced relocation.

*Anfal*'s prominence resulted in a better-organized and well-resourced investigative phase. By the time the case reached the Trial Chamber both the Tribunal and the Regime Crimes Liaison Office had learned from *Dujail*'s substantive and procedural problems. The accused in *Anfal* were also far easier to manage than in the *Dujail* trial, perhaps because five of the seven defendants were military and intelligence professionals who did not contest the court's authority or use the trial as an oratorical platform. Moreover, the evidence was damning: Iraqi officials had documented their plans to use "special weapons" against Kurdish "saboteurs" in meticulous detail, and the 10,000-page trial dossier gave an intricate insight into the campaign's design, implementation, chain of command and effect. The documentary evidence was complemented by vivid testimony from some 80 complainants and witnesses, as well as forensic and ballistics experts.

Despite a strong case and rich evidence, the *Anfal* trial still suffered from significant flaws. The first, unsurprisingly, was that of political interference. After just nine sessions the office of the Prime Minister requested that Presiding Judge Abdallah al-Amiri be removed. Amiri, an experienced and well-respected judge, had caused public consternation and prompted complaints from the prosecution for appearing to be partial to the defence. His comment to Saddam Hussein, "You were not a dictator", caused widespread public outcry. He was immediately removed by executive request (rather than under the Tribunal's own procedures to deal with situations of bias) and replaced by Judge Muhammad Uraybi al-Khalifa, who immediately took a hard-line approach in the courtroom.

The second and perhaps surprising area of political interference was related to the cases of Sultan Hashem and Hussein Rashid, both well-connected Sunni career military officers. Hashem was a former army chief of staff and Minister of Defence who during the Anfal campaign was commander of the First Corps; Rashid was army deputy chief of staff for operations during the Anfal campaign. In at least some quarters the two were respected military professionals who had had no choice but to follow the orders of a malevolent leadership, honourable men who symbolized the problems of collective scapegoating of the Sunni military elite. Trial and Cassation Chamber judges reportedly came under strong political pressure not to impose the death penalty, resulting in a legal and political crisis that, at the time of writing, has not yet been resolved.

26 For a detailed overview of *Anfal* trial developments, see the ICTJ trial updates at http://www.ictj.org/en/where/region5/564.html (last visited 20 November 2007).

Equality of arms was also a significant issue. Judge al-Khalifa often appeared impatient or dismissive of defence requests, *inter alia* repeatedly refusing to facilitate the testimony of defence witnesses through video testimony or other innovative means. As a result, only six defence witnesses testified during the course of the trial, in contrast to some 100 prosecution witnesses and complainants. Relationships between the judge and key lawyers soured as time went on, and a scandal erupted when the presiding judge ordered the arrest of defence counsel Badia Ezzat Aref for contempt of court when attempting to challenge the judge's refusal to receive a CD-ROM into evidence.[27]

The final significant feature of the *Anfal* trial was the place it failed to occupy in the public domain. Iraqis watched early proceedings of both trials with interest and concern. But, as mentioned above, after Hussein's execution public interest plummeted. While TV broadcasts of the proceedings continued, the flow of visitors to observe them ceased. Indeed, for much of the latter half of the trial there was at most one visitor in the observation chamber: an Iraqi observer for an international organization.

The Trial Chamber handed down its *Anfal* ruling on 24 June 2007; the Cassation Chamber followed suit ten weeks later. Al-Majid, Rashid and Hashem were given multiple death sentences. Two other defendants were given life imprisonment and charges against one were dropped for lack of evidence. Although the full story of the *Anfal* trial has yet to be completed, it is clear at the time of writing that the trial had, in the short term, failed to make the impact that many earlier proponents had hoped for. Despite spellbinding evidence, massive crimes and better organized trial proceedings, *Anfal* was compromised by the fact that it took place after the *Dujail* trial.

To date, hopes that the Tribunal could serve as the foundation of an impartial and fair judicial system in Iraq have not been borne out. Nor are they likely to be. Although the Tribunal operates better than courts under the previous judicial system, it has failed to demonstrate a clear commitment to new values of impartiality, judicial independence, equality of rights and the rule of law.

## Vetting and De-Baathification

Vetting to remove abusive officials from positions of authority, if carried out fairly, properly and prudently, can be a legitimate part of a larger process of institutional reform in periods of transition. It can also play an important role in ensuring that past abuses are not repeated and can deprive offenders of retaining power and influence over the affected populations during the social reconstruction process. At the same time, vetting is a complex, sensitive and resource-intensive process that is fraught with pitfalls. Vetting programmes, if badly handled, can easily turn into purges and so create further abuse, resentment and distrust.

27 Without US intervention Aref almost certainly would have been killed during detention; he was later spirited out of the country, unable to return.

Finally, extremely broad or poorly targeted vetting programmes can also deplete a post-war society of trained administrators. Indeed, the history of the last fifty years shows that countries trying to make the transition to democracy almost inevitably bring back some members of the ousted regime.[28]

On 8 May 2003, before Paul Bremer left for Iraq, Secretary of Defense Donald Rumsfeld gave him a memo entitled ''Principles for Iraq-Policy Guidelines'' that specified that the US-led coalition ''will actively oppose Saddam Hussein's old enforcers – the Baath Party, Fedayeen Saddam, etc.'' and that ''we will make clear that the US-led coalition will eliminate the remnants of Saddam's regime''.[29] Douglas Feith, Secretary of Defense for Policy, also gave Bremer the draft of a proposed CPA order initiating a policy of De-Baathification.

Ahmed Chelabi, leader of the Iraqi National Congress, and a handful of other Iraqi exiles had already developed the outlines of such a policy, drawn primarily from European experiences of de-Nazification at the end of the Second World War The lessons and insights gained from more than fifty years of other, more recent, vetting programmes, such as those in Bosnia and Herzegovina or in El Salvador, were never taken into account.[30] Chelabi's ideas appear to have heavily influenced the policy instructions given to Bremer prior to his departure for Iraq.[31] Bremer arrived in Baghdad on 9 May 2003. Just one week later, he set into motion a De-Baathification process that would have a profoundly destabilizing effect on Iraqi society.

The Arab Socialist Baath Party was a secretive Arab nationalist grouping, established in Syria in the 1940s, that Hussein used to gain access to power in 1968 and the presidency of Iraq in 1977. The party was one of the major instruments through which Iraqis, especially Shiites and Kurds, were brutalized. Following Stalinist models it had a secretive, cell-based structure that eventually paralleled or controlled all major institutions of society and government, with military and professional offices, student offices and an elaborate geographical network. Membership was a prerequisite for many professions, and the reports of local Baath Party members were vital in securing access to education and jobs, as well as maintaining a clean official record.

Coalition forces announced the ''disestablishment'' of the Baath Party on 16 April 2003. For many Iraqi Shiites and Kurds in the Iraqi Governing Council, some kind of vetting was an absolute necessity for a peaceful transition to democracy in Iraq. But the US-led Coalition also needed to address the fears of the newly disenfranchised Sunnis and, on a basic level, to keep the country functioning. All of this had to be achieved without access to reliable data on the structure of the Baath Party.

28 See David Cohen, ''Transitional justice in divided Germany after 1945'', in Jon Elster (ed.), *Retribution and Reparation in the Transition to Democracy*, Cambridge University Press, Cambridge, 2006, pp. 59–88.

29 Quoted in L. Paul Bremer III, ''How I didn't dismantle Iraq's army'', *New York Times*, Op-Ed, 6 September 2007.

30 Sissons interview with Dr Ahmed Chelabi, March 2006. On the lessons of vetting programmes see Alexander Mayer-Rieckh and Pablo de Greiff (eds.), *Justice as Prevention: Vetting Public Employees in Transitional Societies*, Social Science Research Council, New York, 2007.

31 See L. Paul Bremer III with Malcolm McConnell, *My Year in Iraq: The Struggle to Build a Future of Hope*, Simon & Schuster, New York, 2007.

In a fateful decision, Bremer adopted two sweeping measures. The first CPA Order, issued just one week after Bremer's arrival, dismissed four levels of Baath Party members from government service and banned them from all future state employment. It is important to note that all dismissals were based purely on rank, with no relation to individual wrongdoing. In addition, all bureaucrats from the top three ranks of government service were to be interviewed to check their party affiliation, and were to be dismissed if they held the rank of party member or above.[32] Bremer had the power to make exemptions on a case-by-case basis. The order applied to all national ministries, affiliated corporations and other government institutions, including hospitals, schools or university management. In addition, all those dismissed were eligible for criminal investigation. In the following months an estimated 30,000 individuals, including some 6,000 to 12,000 educators, were summarily dismissed from their posts.[33]

One week later Bremer disbanded the Iraqi special courts, armed forces, intelligence forces and related ministries.[34] All persons at the rank equivalent to colonel or above were deemed to be senior party members unless they could prove otherwise. A number of other institutions closely identified with the Baath Party or Hussein's family were also disbanded, such as the paramilitary *fidayin Saddam* and the National Olympic Committee. The decision to disband the intelligence apparatus has not been widely questioned, but the fateful decision to dissolve Iraq's military has been almost universally condemned. In addition to the security implications of the dissolution, there were also severe social consequences. Iraq's military had been major source of employment, social mobility and national pride. In the following weeks Bremer ordered a series of additional De-Baathification mechanisms to flush out the system in detail.[35] Registers were created to list and maintain control of Baath Party property – some Iraqi Governing Council members had already taken the leadership's Baghdad palaces for their own use – and the process was given nominal Iraqi ownership. An Iraqi De-Baathification Council (IDC) was ordered into being (although whether it actually functioned is unclear), and a set of implementation instructions announced.[36] Military investigators were to investigate the party affiliation of all ministerial employees;

32 See Coalition Provisional Authority Order No. 1, above note 4. This order designated the top four levels of party membership as ''senior Party members''. This included the ranks of *'udw qutriyya* (regional command member), '*udw far* (branch member), *'udw shu 'bah* (section member), and '*udw firqa* (group member). In all cases, the Administrator could grant exceptions on an individual basis.

33 L. Paul Bremer, Coalition Provisional Authority press briefing, 25 November 2003 (on file with authors).

34 Coalition Provisional Authority Order No. 2, above note 4.

35 Coalition Provisional Authority Order No. 4; Coalition Provisional Authority Order No. 5, ''Establishment of the Iraqi Debaathification Council''; Coalition Provisional Authority Memorandum No. 1, ''Implementation of De-Baathification Order No. 1'', CPA/MEM/3 June 2003/01.

36 The Council was empowered to trace party assets and investigate the identity and whereabouts of Baath Party officials and members involved in violations of human rights, and was charged with advising on implementation of De-Baathification goals. It was also given wide powers to gather and present any other information relevant to De-Baathification efforts. Individuals adversely affected by the decisions of the Council could appeal in writing to Bremer for a reversal and he retained the authority to grant exceptions on a case-by-case basis.

those belonging to the banned levels of party membership would be dismissed unless their employer requested an ''exception''. Individuals could appeal against findings on factual grounds to joint military–civilian committees, which would also grant or deny exception requests. Despite all the paperwork, actual implementation seems to have varied heavily across ministries, according to the individual attitude of the responsible minister. Lower-level employees were the first to be sacked, with ministerial power-holders often the last in line.[37] Some categories of members retained pension rights but would lose them in the case of an unsuccessful appeal.

The CPA failed to consult the Iraqi people about the desirability of its sweeping and often arbitrary De-Baathification process. Nor had it enough party or government data to judge whether the policy was well-founded. Our survey found that while the majority of respondents blamed the Baath Party for past crimes and felt that those responsible should be dismissed, they also felt it was unfair to penalize individuals solely on the basis of their party membership and sought to draw distinctions between members of the party, whom they referred to as Baathists, and ardent supporters of Saddam Hussein, whom they termed Saddamists. While respondents in northern Iraq generally supported a purging of the Baath Party from government institutions, many respondents in central or southern regions expressed concern about the impact of wide-scale De-Baathification on the need for human resources to rebuild the country.[38]

De-Baathification quickly slipped out of the control of the CPA. Within six weeks the Iraqi Governing Council had seized the initiative and created the Higher National De-Baathification Commission (HNDBC) with Ahmed Chelabi as its head. Chelabi and his advisers swiftly issued regulations that were posted in all ministries.[39] The CPA grudgingly acknowledged the coup several months later, although by this stage it was becoming increasingly opposed to De-Baathification's social and administrative effects, particularly in areas such as education.[40]

Chalabi's aggressive measures reached their nadir in 2003 with the dismissal of 12,000 Iraqi teachers, who had found their appeals blocked or endlessly deferred by the review process. In one of his final acts as CPA head, Bremer attempted to dissolve the Commission; shortly thereafter the interim Iraqi Prime Minister, Ayad al-Alawi, also sought to restrain the Commission's power. But the Commission was too politically and bureaucratically astute to be easily

37 This is based on De-Baathification field research 2006–7 by the International Center for Transitional Justice.

38 *Iraqi Voices*, above note 9, pp. 51–2.

39 See IGC Decision 21 of 18 August 2003 and Higher National De-Baathification Commission Order Number 1 of 14 September 2003 (on file at ICTJ). Determinations of membership were usually based on an individual's pay records at their place of employment, as party members often received extra allowances. Party membership records had not been found.

40 Jonathan Steele, ''Anti-Baathist ruling may force educated Iraqis abroad'', *Guardian*, 30 August 2003, p. 16.

reined in, and at the time of writing had survived unscathed even as multiple reform proposals were tabled in 2006 and 2007.

The 2003–7 De-Baathification process was severely flawed in a number of ways. First, there was the problem of design. De-Baathification did not include any vetting policy: no attempt was made to assess individuals' suitability for public employment based on their human rights record or other criteria of integrity. The assumption was that all party members above a certain rank should be dismissed from government service, presuming that such persons *must* have perpetrated serious human rights violations or *must* have been ideologically committed to Baathism, and so were unfit for public employment. No factual basis for these assumptions has ever been made publicly available.

The policy was both too broad and too narrow: it no doubt removed many individuals who were not abusers from office (for example, the teachers dismissed in late 2003), but did not remove abusers who held lower-level party positions or indeed no positions at all. The incoherence bred widespread resentment from both sides. The Shia complained that abusers had not been acted against and feared that there were insufficient means of preventing the party's return to power. The Sunnis complained that De-Baathification was an instrument of collective punishment used to bar Sunnis from future participation in Iraqi public and political life. In the end, both were correct.

Second, De-Baathification procedures were unfair and opaque. Individuals were automatically dismissed without basic due process procedures, such as being notified of the information against them, the right to a hearing prior to dismissal, or the right to examine their own file. Exemptions and reinstatements were technically possible, but depended on ill-defined and often changing criteria. As a result, the HNDBC wielded enormous power over the lives of thousands of people with little or no accountability. There was the strong perception, and sometimes the reality, that the De-Baathification Commission was merely another political tool in the hands of its Shia masters. Its power extended to government contracting, approval of electoral candidacies, the leadership of NGOs, media outlets and professional associations, and intervention in judicial selection at the trials of the Iraqi High Tribunal.[41]

Third, De-Baathification made nearly everyone in Iraq unhappy. The Iraqi High Tribunal was dealing with only a handful of perpetrators and, in the absence of other visible large-scale initiatives to deliver justice to victims, De-Baathification became a stalking horse for all the demands of victims for justice in Iraq. By 2006 most Iraqis thought of De-Baathification as a policy that should prosecute perpetrators, secure reparations, return stolen property, create memorials, revise educational curricula and prevent the Baath Party's return to power in the future. But the bitterness and controversy De-Baathification provoked took their toll, and in 2006 the Iraqi government came under heavy

41 De-Baathification provisions were contained in a host of laws, not just the De-Baathification orders. These included the electoral law, the Statute of the Iraqi High Tribunal, the constitution and other legal instruments.

pressure to revise the programme. The deteriorating political and security environment – plus the political skill of De-Baathification's supporters – meant that change was slow to materialize. When it did, the changes were relatively weak. After fits of stop–start negotiations among the Iraqi leadership the Iraqi parliament was scheduled in September 2007 to consider a compromise draft law in which the framework of De-Baathification would essentially remain, but the rank at which it was carried out might differ. Some former defence-related officials and members of the armed forces would no longer be banned from public employment as long as they had not committed any crimes. Not only would the HNDBC remain, but it would be granted additional powers, including the right to launch criminal investigations and initiate prosecutions, a frightening proposal that also aroused judicial ire. Most people also missed one important additional point: almost all individuals eligible for De-Baathification had already been sacked. The game had shifted to control of reinstatements. But no attention had been paid to developing clearer reinstatement procedures which, although they were supposedly automatic, required an application process. The draft continued to give the HNDBC authority to act arbitrarily and unfairly in enforcing the same flawed De-Baathification system in a civil service that was in chaos.[42] At the time of writing this article there was little hope of any better outcome.[43]

## Truth seeking

Long before the outset of war, international human rights organizations and Iraqis in exile had begun discussing the idea of establishing truth and reconciliation committees to confront the massive human rights abuses of the Saddam era. With planning and good co-ordination, truth commissions can complement the work of criminal prosecutions by gathering and preserving the testimonies of victims of human rights abuses and investigating and exposing the larger historical patterns of abuse, responsibility and complicity. By investigating key cases, researching the causes and consequences of past abuses and writing a public report, a truth commission can formally acknowledge what has been denied, give respect and a voice to victims, and help to shape other justice mechanisms, such as reparations.[44]

In our 2003 survey of Iraqis, we found that legitimacy and public support for a truth-seeking process in Iraq would only emerge through an open, transparent and inclusive process of public consultation and education. Iraqis had

42 The International Center for Transitional Justice suggested an end to De-Baathification within one calendar year and the creation of clear hiring and promotions guidelines to prevent the recruitment of abusers to the public service in the future.

43 A new "Accountability and Justice Law" was passed by the Iraqi parliament on 12 January 2008, and approved by the presidency council on 3 February. For an overview of its contents see Miranda Sissons *Briefing Paper: Iraq's New Accountability and Justice Law*, International Center for Transitional Justice, January 2008, available online at http://www.ictj.org/images/content/7/6/764.pdf

44 See, e.g., Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, New York, 2001.

little understanding of a truth commission and limited exposure to other countries' experiences. Thus educating the nascent organizations of Iraqi civil society, religious and community leaders, representatives of ethnic groups and a broad cross-section of Iraq's (highly literate) population would be an indispensable first step.[45] Respondents were quick to suggest their own version of how a truth-seeking process should be conducted. Among the suggestions were:

> ''establishing local committees of reputable individuals to gather testimony and document the names of the dead and missing … declaring days of remembrance as national holidays; establishing memorials in every town and region; creating museums and documentation centers, photographic and videographic displays, and artistic works of literature, cinema, and theatre; and preserving detention centers and instruments of torture''.[46]

In Iraq, where only a small fraction of the total number of perpetrators will be prosecuted before the Iraqi High Tribunal and other courts, a truth commission could help to provide a comprehensive account of human rights violations over the past quarter-century by analysing the vast amount of evidence gathered by organizations and individuals within and outside Iraq. It could also explore the role of external players in preventing or enabling human rights abuses. Most importantly, a truth commission could deal with the fate of hundreds of thousand of Iraqis who are missing, disappeared or presumed dead. Either alone or in conjunction with the International Committee of the Red Cross (ICRC), it could help to trace the missing and oversee the exhumation of mass graves.

At the time of writing, neither the Iraqi government nor the Bush administration has given serious thought to establishing a truth commission. And in the light of the ongoing violence in Iraq, such an institution will not be feasible in the foreseeable future. However, this does not mean that the Iraqi government, in consultation with the United Nations and other organizations such as the ICRC and the International Center for Transitional Justice, should not begin exploring the possibility of initiating a truth-seeking process. A truth commission in Iraq should be built on the principles of education, consultation, independence and co-ordination. Establishing it will take time.

Since a vast majority of Iraqis support criminal prosecutions of past human rights offenders,[47] care will need to be taken to demonstrate that a truth commission will be a complement rather than an alternative to prosecutorial processes. Educating the population about the scope, objectives and limitations of a truth commission will be indispensable. This educational effort should address

45 *Iraqi Voices*, above note 9, pp. 55–6.

46 Ibid., p. 51.

47 Ibid., pp. 48–50. A similar survey carried out in southern Iraq found that 98 per cent of the respondents wanted those responsible for human rights committed crimes during the previous regime to be punished, and that 77 per cent favoured a court process over non-judicial processes. See *Southern Iraq: Report of Human Rights Abuses and Views on Justice, Reconstruction, and Government*, Physicians for Human Rights, 18 September 2003, p. 8.

all relevant sectors of society so that it is not perceived as a dialogue between "elites" or certain political factions.

Legitimacy and public support for a truth-seeking process in Iraq will be best achieved through a genuine process of public consultation and deliberation. Proposed laws establishing the commission should be publicized and debated in a variety of fora to ensure public understanding and commitment. Public debates should be held throughout the country on a range of topics, including the nature of the violations to be investigated, the principal objectives and legal powers of the commission, and whether the commission should hold public hearings for victims and publish the names of individuals accused of human rights violations. Those who serve on the commission should be well-respected persons of the highest integrity who represent a balance of political forces, ethnic groups and religious communities. For a number of reasons, including operational requirements that will encourage victims of sexual abuse to come forward, it is imperative that both women and men be represented on it.

## Reparations

History has shown that reparations in the form of material and symbolic compensation are essential for victims of massive violations of human rights. They can be as fundamental as one-time financial payments to individual victims, or collective processes such as public memorials, days of remembrance, parks or other public monuments, renaming of streets or schools, preservation of repressive sites as museums, or other ways of creating public memory. They can encompass educational reform, the rewriting of historical accounts and education in human rights and tolerance. Yet whatever reparations scheme is pursued, writes Naomi Roht-Arriaza, caution must be exercised not to use it "to stigmatize and marginalize those groups whose members perpetrated the abuse. Reparations must be offered in ways that acknowledge the suffering of victims but do not victimize others who did not actively engage in the violence."[48]

In our 2003 survey, we found that while Iraqis overwhelmingly supported material and symbolic compensation for victims of violations of human rights, they did not necessarily support single-instance ex gratia financial payments.[49] Many respondents recognized that the losses suffered were incalculable and that no amount of money could replace a family member (or, in some cases, an entire family) killed by the regime. Respondents suggested forms of reparations that included providing physical and mental health services and access to education and employment, meeting basic needs for shelter, food and clothing, returning confiscated property and establishing memorials inscribed with victims' names.

48 Naomi Roht-Arriaza, "Reparations in the aftermath of repression and mass violence", in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge, Cambridge University Press, 2004, pp. 121–39.

49 *Iraqi Voices*, above note 9, p. 40.

The vast majority of respondents believed that the financial costs of reparations should be borne by the Iraqi state.[50] Several stressed the need for security for victims' families. Reinstating dignity to honour the victims and their families was also mentioned.

On 26 May 2004, five weeks before the handover of power to the Iraqis, Bremer appointed Malek Dohan al-Hassan, then head of the Iraqi Bar Association, as chair of a task force on reparations and instructed him "to define the types of injustice for which compensation should be provided".[51] The group was also tasked with deciding who would be eligible for compensation, the appropriate level of compensation and the mechanisms through which it should be delivered. The task force was constituted but its members quickly disappeared – along with the millions of dollars allocated to fund initial compensation schemes.

Muslim and Arab culture places significant emphasis on the notion of compensation for harms suffered. Similarly, the pension and other benefits the Hussein regime had given to select veterans of the Iran–Iraq War and other groups had led many Iraqis to have high expectations of what an acceptable reparations scheme would contain. Members of the Iraqi Prime Minister's office pursued the idea of a reparations policy, albeit with little appetite for practical or financial details. Victim representatives then became exasperated and went ahead with their own drafting process via a parliamentary committee for martyrs and victims. In January 2006 the committee rushed through two laws – the Martyrs Association Law[52] and the Law of the Political Prisoners Association[53] – which, in turn, established two separate foundations to design and implement reparations programmes.

The committee had acted quickly because it feared that the new permanent parliament would not support reparations legislation. But haste had its consequences. The law was passed without scrutiny by the relevant legal officials, with the result that the final legislation violated several important Iraqi legal requirements. The programmes they instituted were moreover unfunded and ill-designed; eligibility was not defined according to impartial legal norms and was therefore open to accusations of sectarian and other bias; the laws promised very high benefits, such as housing and lifelong pensions, but the foundations had few resources with which to implement them. Even worse, the administrative mechanism set up to receive and decide on reparations requests was absolutely inappropriate and would be incapable of processing hundreds of thousands of claims.

One year later the Iraqi Prime Minister, acting through his reconciliation initiative, had earmarked $170 million for the foundations' operations and

50 Ibid., p. 42.

51 Coalition Provisional Authority press release, "Ambassador Bremer announces creation of special task force on compensation for victims of the former regime", Baghdad, 26 May 2004.

52 Council of the Presidency, Decision Number 3 of the Year 2006, Martyrs' Association Law, *Iraqi Gazette* No. 4018 (6 March 2006).

53 Council of the Presidency, Decision Number 4 of the Year 2006, Law of the Political Prisoners Association, *Iraqi Gazette* No. 4018 (6 March 2006).

selected individuals to serve as board members. Yet political and logistical problems had prevented the foundations from beginning their work. The two bodies were crippled by legal problems, ranging from the legal incapacity to design their own regulations or internal budget to litigation brought by Sunni parliamentarians who objected to the foundations' selective focus. Despite these major barriers, foundation board members optimistically spoke of preparing to receive applications and some parliamentarians were ready to admit that the laws should be revised, *inter alia* perhaps to include victims of post-2003 violence. But high-level attention, beset by other problems, was meagre. At the time of writing it seemed likely that Iraqi victims of severe human rights violations would continue to lack any kind of reparations process for the foreseeable future.

## Conclusion

Recently the US and Iraqi governments erected a heavily fortified compound in the Rusafa neighbourhood to ensure security for the trials of some of Iraq's most dangerous suspects, serve as a prison and detention facility for thousands of prisoners, and shelter judges and their families. Known as the ''Rule of Law Complex'', the court tried forty-three suspects in the first six weeks of operations, a rate of about one suspect a day. The Bush administration, which has invested heavily in the Rusafa complex, hopes to create a network of similar legal fortifications in other parts of Iraq, starting with Ramadi, the capital of Anbar province. Despite its status as a protected area, the Rusafa complex is not immune from the many problems afflicting Iraq's legal system. They include the large number of detainees that has resulted from the surge of US and Iraqi military operations, allegations of the use of torture to extract confessions and concerns about the impartiality of some court officials.[54]

This state of affairs hardly bodes well for the promotion of national reconciliation in Iraq. Nor is it conducive to the development of an independent, transparent and accessible judicial system, which is a key component of social reconstruction. Moreover, insecurity has created an environment in which many people are reluctant to speak publicly about their suffering and losses under the previous regime. These conditions suggest that implementation of a full-scale transitional justice process is not currently practicable.

That said, it would be a great tragedy to deny the Iraqi people the justice they so clearly desire. What is needed in Iraq is a secure environment and a legitimate authority to implement a comprehensive transitional justice strategy that reflects the needs and priorities of a wide range of Iraqis. It should contain a broad range of measures, including prosecutions, reparations, vetting, truth-seeking measures and institutional reform. To develop and implement such a strategy will take time and will require community-based consultations

54 Michael G. Gordon, ''Justice from behind the barricades in Baghdad'', *New York Times*, 30 July 2007.

throughout the country. It will also require the participation of both Iraqi and international experts, working with the assistance of an impartial body (preferably the United Nations) and making recommendations to the Iraq government.

For this strategy to be as effective as possible in Iraq, it should be linked to a process of social reconstruction that reaffirms and develops shared values and human rights. Our studies of survivors of genocide and other massive human-rights abuses in over a dozen countries suggest that the idea of justice encompasses more than criminal trials and the *ex cathedra* pronouncements of judges.[55] It means returning stolen property, locating and identifying the bodies of the missing so that they can be returned for proper burial, securing reparations and apologies, leading lives devoid of fear, securing meaningful jobs, providing children with good schools and teachers, and helping those traumatized by atrocities to recover. In other words, criminal justice and ''truth-telling'' alone cannot suture the lesions of individual and collective trauma in Iraq and other countries emerging from long periods of repressive rule. ''It requires'', as Kirsten Campell suggests, ''a fundamental change to the social order which made possible the original trauma of crimes against humanity.''[56] In this sense, justice in Iraq remains the event that is yet to come.

55 See Stover et al., above note 13, pp. 1–26.

56 Kirsten Campell, ''The trauma of justice'', presented at the international conference on ''Human fragility: rights, ethics, and the search for global justice'', University of the West of England (Bristol), January 2001.

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# Occupation in Iraq since 2003 and the powers of the UN Security Council

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## Abstract

*This article provides a summary analysis of the topical question of how far the Security Council may derogate from occupation law. The answer is that the Council may not derogate from those provisions of IHL that are of a specifically humanitarian nature (humanitarian* ordre public*), that derogations from international law or IHL are in any case not to be presumed and that the Council has not derogated in any way from occupation law in the case of the occupation of Iraq since 2003.*

The occupation of Iraq has focused attention on a problem that has been latent since the occupation of Germany and Japan after the Second World War. The law of occupation is generally based on conservation of the status quo in an occupied territory until the return of legitimate sovereignty. This normative option is designed to protect the self-determination of the territory's indigenous population.[1] The question now arises whether and to what extent this body of the law of armed conflict can be remodelled or derogated from in order to allow reconstruction of the occupied state (nation-rebuilding) under the umbrella of an international operation to which the United Nations makes some contribution. Can the will and supervision of the international community, expressed through the United Nations, roll back the respect for the status quo that is required by the law of occupation? Is such respect perhaps required in the first place only of an occupying power not covered by the United Nations umbrella? Can the law of occupation be set aside, wholly or partially, where the United Nations authorizes

certain transformative measures? More precisely, can the UN Security Council derogate from occupation law by virtue of its powers under Article 25 and Chapter VII of the UN Charter? In other words, to what extent is occupation law *jus cogens* for the Security Council? This last question in particular will be addressed in the following pages.

## The concept of derogation and the extent to which occupation law is *jus cogens*

Derogations from the law of occupation that are allowed and channelled via the UN Security Council may indeed appear helpful and constructive. For example, what sense would it make to require strict respect for local legislation when an international operation that aims to implement structural reforms is in place in an occupied country in order to consolidate peace there in the long run? On the other hand, such ad hoc manipulations by the Security Council carry a number of risks. The most striking is that a political body may arrogate for itself the role of judge of the applicability of humanitarian law by setting up selective legal regimes on a case-by-case basis, according to the political interests of a given superpower among its members at a given moment in history.[2] In such a scenario, the very idea of objective law to protect the interests of local populations, as is inherent in the legal regulation of occupation law, could be jeopardized by political subjectivism reflecting particular interests, not to mention forms of bargaining as varied as they are unpredictable. The question is thus one of striking some form of balance.

What is *jus cogens*? In brief, it is mainly a legal technique intended to maintain the unity and integrity of a legal regime wherever the public interest so requires. The aim is to prevent the fragmentation of that legal regime into more specialized regimes, the application of which would otherwise take priority by virtue of the *lex specialis* principle. For example, the prohibitions on torture and slavery are considered part of *jus cogens*. Accordingly, the law does not allow states or other subjects to adopt legislation[3] that departs from these prohibitions.

1 Article 43 of the 1907 Hague Regulations.

2 Such ad hoc manipulations by the Council have been witnessed recently in the field of international criminal law: in Resolution 1422 (2002), the Council requested the International Criminal Court not to commence or proceed with investigation or prosecution of any case involving current or former officials or personnel from a state not party to the Rome Statute contributing to an international peacekeeping or peace-restoring operation established or authorized by the Security Council. The aim of this resolution was to grant blanket immunity to personnel of the United States participating in such operations as, in the absence of such immunity, the United States was threatening to use its veto against these operations or simply to refuse to take part in them. In many cases this would have caused them to collapse. See Sebastian Heselhaus, ''Resolution 1422 (2002) des Sicherheitsrates zur Begrenzung des Internationalen Strafgerichtshofs'', *Zeitschrift für ausländisches öffrnetliches Recht und Völkerrecht*, Vol. 62 (2002), pp. 907 ff. This derogating regime has since been dropped: see Eric David, ''La Cour pénale internationale'', *Recueil des cours. Hague Academy of International law*, Vol. 313 (2005), pp. 353–6.

3 Multilateral, plurilateral, bilateral or unilateral.

Otherwise the parties adopting such legislation would be bound to apply it, and not the general prohibitive rule, because of the priority of a special law over a general law. *Jus cogens* thus constitutes a limitation on *law-making power* to preserve the integrity of normative regimes embodying rules of public policy. The key term in relation to this concept of *jus cogens* is therefore ''derogation'' or ''derogability'', or rather *non*-derogation and *non*-derogability. Derogation, when allowed, is the substitution of a normative regime that is more restricted *ratione personae*, and takes precedence *inter partes* for a normative regime that is more general *ratione personae*. In such cases, the general regime remains applicable among those parties that have not subscribed to the special, derogating regime; the special regime, however, governs the legal relations between those parties that have accepted it. Derogation is to be distinguished from abrogation, which puts an objective end to a legal regime for all its subjects. In that case, the legal regime in question ceases to exist *erga omnes*. *Jus cogens*, then, means non-derogability. The aim of non-derogability is to protect the normative integrity of a general regime that is considered indispensable in view of certain social values or public policy (humanitarian, moral, political, etc.). It forbids adoption by subjects of normative regimes especially applicable among them, as described above. Our enquiry will follow that line of thought in order to establish whether international humanitarian law (IHL) and occupation law can be derogated from, either by states (by mutual consent) or by the UN Security Council (by unilateral resolution).[4]

The question of the legal limitations on the powers of the Security Council to derogate from international law (and occupation law in particular) may be formulated at three levels. First, does the Council have the power to do so under the law of the Charter? Second, is the Council bound by general international law, of which the great majority of the rules of IHL are a part? And third, does IHL itself limit anyone's ability to derogate from it?[5] Logically, our enquiry must be split into the following sequence: we must ascertain first of all whether the Council has the relevant powers and, second, whether those powers are limited by a general or particular corpus of law.

## The powers of the Security Council

Nowhere does the UN Charter expressly affirm that the Security Council has powers to derogate from IHL norms. This is scarcely surprising, as the Charter cannot list exhaustively, *pro futuro*, all the norms from which the Council could be called upon to derogate. For a clearer answer we must therefore examine implicit powers or subsequent practice. The latter can be discounted immediately. The

4 The Security Council's act may be unilateral (resolution) but it is nevertheless a normative act that lays down *rules* applicable in a particular situation. It could thus ''derogate'' from occupation law and may therefore be subjected to an analysis based on the concept of *jus cogens*.

5 This is the *jus cogens* perspective.

Council has consistently reaffirmed the importance of respect for IHL and has even considered on several occasions that a breach of IHL constituted a threat to peace.[6] It is thus hard to imagine that it could itself derogate from that law en bloc.[7] At most, it will be necessary to identify derogable and non-derogable norms. As for implicit powers to set aside IHL, a theoretical basis could be found in the idea that the Council must have the legal capacity to take all measures necessary to maintain and restore peace. In view of the pre-eminence of Chapter VII of the Charter, as recognized by the Charter itself (see Articles 25 and 103), it must be considered that wherever a rule of international law external to the Charter is contrary to the achievement of that supreme goal, the rule in question should give way to it. An exception could be made for non-derogable rules which remain to be identified. This reading of the Charter would give the Council increased powers. It is consistent with the line of thought that sees peacekeeping and the powers established under Chapter VII, and by the Charter in general, as a type of supreme constitution of the international community.[8] This constitution would possess an intrinsic primacy that would prevail over any obstacle. Nothing would withstand it save probably *jus cogens*.[9]

The question can also be approached from the opposite perspective. Would it not be necessary to require some form of express legal basis to allow derogation from a body of law as fundamental as IHL? International humanitarian law is part of the essential rules of civilization. Its rules are ''locked'' against escape devices by means of special provisions contained in the relevant corpus of law (e.g.

6 See Jochen A. Frowein and Nico Kirsch, ''Article 41'', in Bruno Simma, *The Charter of the United Nations: A Commentary*, 2nd edn, Oxford and New York, 2002, pp. 724–5, with references. The following cases may be mentioned as examples: Yugoslavia (Resolution 771 (1991)); Resolution 836 (1993)); Somalia (Resolution 794 (1992)), Rwanda (Resolution 918 (1994); Resolution 929 (1994)); Haiti (Resolution 940 (1994)); East Timor (Resolution 1264 (1999); Resolution 1272 (1999)); Sierra Leone (Resolution 1306 (2000)). See also Fred Grünfeld, ''Human rights violations: A threat to international peace and security'', in Monique Castermans-Holleman et al. (eds.), *The Role of the Nation State in the 21st Century: Essays in Honour of P. Baehr*, The Hague and Boston, Mass., 1998, pp. 427 ff.

7 David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter*, The Hague and Boston, Mass., 2001, p. 180: ''A rather awkward conclusion would ensue from the assumption that the Council itself can employ measures of which it has indicated that they threaten international peace and security.''

8 Concerning this idea of a constitution, which is explored in German legal doctrine in particular, see Christian Walter, ''International law in a process of constitutionalization'', in J. Nijman and A. Nollkaemper (eds.), *New Perspectives on the Divide Between National and International Law*, Oxford, 2007, pp.191 ff.; Regis Chemain and Alain Pellet (eds.), *La Charte des Nations Unies, Constitution mondiale?*, Paris, 2006; Pierre-Marie Dupuy, ''L'unité de l'ordre juridique international'', *Recueil des cours. Hague Academy of International law*, Vol. 297 (2002), pp. 215 ff.; Bardo Fassbender, *UN Security Council Reform and the Right of Veto*, The Hague and Boston, Mass., 1998, pp. 89 ff.

9 In the words of Elihu Lauterpacht in the *Genocide Convention Case*, Provisional Measures, ICJ Reports, 1993, p. 440, §100: ''The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus – that a Security Council resolution may even require participation in genocide – for its unacceptability to be apparent.'' On the limitations of the Security Council with respect to *ius cogens*, see also Alexander Orakhelashvili, *Peremptory Norms in International Law*, Oxford, 2006, pp. 423 ff.

Articles 7, 8 and 47 of the Fourth Geneva Convention). They are considered fundamental by the Council itself, which demands that they be respected by all international actors and, in many cases, also by infra-state actors. They are value standards towards which all the efforts of the United Nations must be directed in accordance with Articles 1 and 55 of the Charter. According to F. Seyersted,[10] the power to interfere with the ''military and humanitarian'' rules of war would be of such consequence and such seriousness that, to be exercised, it would probably have to be expressly provided for in the Charter. There is no such authorizing rule. In view of the expected consequences, in Seyersted's opinion, it is not possible to imply such a power. We find similar opinions in the writings of other authors, sometimes in more circumscribed contexts.[11] There is room for doubt that it could ever be necessary to set aside IHL in order to maintain peace, or indeed that such a measure could do anything to promote peace and international security. The impossibility of derogating would therefore culminate in a sort of legal fiction: since the Council may derogate from rules of international law only when necessary in order to maintain or restore the peace, and since it is by definition not conducive to peace to put aside minimum rules of civilization such as those of IHL, the Council could never derogate from them. At most, again, this fiction of non-derogability could be limited to a sub-category of IHL rules, namely those which are specifically humanitarian in nature.

In the light of the two lines of reasoning presented, we may proceed on the following assumptions:

(i) that the Charter confers on the Security Council the power solely to derogate from specific rules of IHL and the law of occupation, but not from these bodies of law en bloc. Powers so far-reaching and so contrary to the very practice of the Council cannot be implied, nor have they been developed through subsequent practice. On the contrary, subsequent practice tends to argue against any construction to the effect that any such en bloc derogation could be ''necessary'' to the exercise of its international peacekeeping or peace-restoring roles; and
(ii) that derogation, if at all admissible, would not be presumed and could operate only with respect to specific rules of IHL that are not of a fundamentally humanitarian nature.

10 See Finn Seyersted, *United Nations Forces in the Law of Peace and War*, Leiden, 1966, pp. 206–7.
11 See, e.g., Henri Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre*, Paris, 1970, pp. 168–9: ''Aucune disposition de la Charte ne confère, explicitement ou implicitement, au Conseil de sécurité la compétence de modifier les lois de la guerre en prescrivant ou en autorisant l'application inégale de ces lois vis-à-vis d'un Etat agresseur. … [U]ne résolution du Conseil qui ordonnerait ou autoriserait, dans l'exécution de cette action armée, la discrimination au regard des règles du jus in bello… serai[t] illégale.''

## The applicability of general international law

As a subject of international law, any international organization is bound by the international law in which it moves and on which its constitutive instrument, the source of its very existence and powers, is founded. However, there is a whole series of general norms of international law that apply *intuitu personae* to states alone. The simplest example is the principle of sovereignty or territorial integrity. The Council is not bound by them because the UN lacks the objective triggering basis for the application of these rules: in our example, because it has no territory and no sovereign power. Conversely, by their very nature, the Security Council's powers constitute a major derogation from ordinary rules of general international law. In this perspective, the Council possesses stronger powers than those of a state under the guise of sovereignty. The Council possesses the power to decide on a wide range of measures, including military ones, and on the means for implementing them. It also has the power to give these decisions binding force. Measures taken under Chapter VII suppose in essence a derogation from all the most elementary rules of customary law among states: the principles of non-use of force, non-intervention in internal affairs of a state (recognized by Article 2(7) of the Charter, but which expressly creates an exception for Chapter VII), respect for territorial sovereignty and integrity, and so on.[12] A high degree of derogation from general customary law is therefore already implicit in the Council's ''exorbitant'' powers. Despite the doubts entertained by certain authors as to whether the Security Council can free itself from customary law on the grounds that Article 103 of the Charter states *expressis verbis* that obligations under the Charter prevail over concurrent treaty obligations only,[13] and not over concurrent customary obligations,[14] majority doctrine and consistent practice demonstrate that the Council, in the exercise of its Chapter VII roles, is not – and cannot without contradiction be – bound by general international law as a whole.[15] Similarly, a

12 One could also refer by way of example to the maritime blockade decisions which derogate from the principles of flag-state jurisdiction and freedom of the high seas: see Danesh Sarooshi, *The United Nations and the Development of Collective Security*, Oxford, 1999, pp. 194 ff., 263 ff., which refers to Southern Rhodesia (1965/66), Iraq (1990), Haïti (1993) and Yugoslavia (1993) cases.

13 This is because the aim of this article was initially only to neutralize the ordinary rule on clashing treaties (the *lex specialis vel posterior* rule) by stating that the Charter took priority in such cases. As regards customary law, any such indication may have seemed unnecessary, since the Charter law, which is more specialized, prevails in accordance with the ordinary rules (*lex specialis*).

14 See, e.g., Alix Toublanc, ''L'article 103 et la valeur juridique de la Charte des Nations Unies'', *Revue générale de droit international public*, Vol. 108 (2004), p. 446. The author affirms that Article 103 does not give the Charter priority in relation to these customary obligations, which means that the possibility for the Security Council to depart from them is seriously reduced in legal terms.

15 See Frowein and Kirsch, above note 6, p. 711; Hans Kelsen, *The Law of the United Nations*, London, 1950, p. 730; Terry. D. Gill, ''Legal and some political limitations on the power of the UN Security Council to exercise its enforcement powers under Chapter VII of the Charter'', *Netherlands Yearbook of International Law*, Vol. 26 (1995), pp. 61 ff.; Bernd Martenczuk, *Rechtsbindung und Rechtskontrolle des Weltsicherheitsrats*, Berlin, 1996, pp. 219 ff.; Karl Zemanek, ''The legal foundations of the international system'', *Recueil des cours. Hague Academy of International law*, Vol. 266 (1997), p. 232; Schweigman, above note 7, pp. 195 ff.; Erika De Wet, *The Chapter VII Powers of the United Nations Security Council*, Oxford and Portland, 2004, pp. 182 ff.; etc.

state *uti singulus*[16] is not always bound by general international law; it can set it aside when taking countermeasures, provided that it abides by the secondary general rules established by law in connection with this specific type of action.[17]

The foregoing does not mean that the Council is entirely free in relation to customary law. That would be contrary to the legal nature of international organizations and to practicability and reason. There are two principal limitations.

First, the general rule is that the Council must not depart from international law *save where its mission related to the maintenance or restoration of peace absolutely requires it to do so*. In other words, it must do so as little as possible.[18] Presumption is always against the validity of such departure; it must be motivated and could be tested according to the standards of necessity and proportionality. International law is the legal order of the community of states. It is an order forged by the experience of history to meet as nearly as possible the demands of international justice. It constitutes a normative reality essential to the survival of the community of states, unorganized and organized (United Nations). It is the order that surrounds the Council and links it to the world of interstate relations. This order should be disturbed as little as possible. The presumption is therefore always in favour of international law. It is for the Council to establish the imperious necessity of derogating from it. In law, no such necessity will be presumed. Unfortunately, the Council's practice does not sufficiently respect this precept. The leading powers increasingly have an unfortunate tendency to consider themselves above the law. The International Court of Justice (ICJ) has no power of review, except by request of advisory opinions and by incidental control – thus hardly ever.

Second, *the Council cannot be considered free in relation to all rules of customary law*. Some of those rules are also binding upon it, and not only on states. These rules may be considered as being part of a corpus of general international law applicable specifically to the Security Council and binding only on it, in the same way as general customary law is binding on states. Alternatively, we may consider them as part of customary law binding on all international legal persons indifferently. These rules could also form a *jus cogens* that is binding on all states and other subjects of international law, including the Security Council, without distinction.[19] In either case, the Council would not be able to depart from the general law as so posited. It would constitute an ''intransgressible''[20] and

16 This is not a situation of derogation *by agreement between one or more states*, but one of departure from the general rule by a single subject as permitted by customary law.

17 Zemanek, above note 15, p. 232.

18 This requirement for necessity, including in the context of international humanitarian law, is highlighted by Evelyne Lagrange, ''Le Conseil de sécurité peut-il violer le droit international?'', *Revue belge de droit international*, Vol. 37 (2004), p. 590.

19 We shall return to this point. Compare for example Schweigman, above note 7, p. 197; De Wet, above note 15, pp. 187 ff.

20 This term is used in the case *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, p. 257, paragraph 79: ''Further, these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.'' On this concept see Robert Kolb, ''*Jus cogens*, intangibilité, intransgressibilité, dérogation ''positive'' et ''négative''', *Revue générale de droit international public*, Vol. 109 (2005), pp. 305 ff.

''non-derogable'' barrier that the Council could not cross. The precise legal construction used to this effect is of little import. Again, the whole question boils down to the crucial point of derogation.

## Derogability/*jus cogens*

Does international humanitarian law constitute *jus cogens* in the sphere of general international law? Can the Security Council set aside the law of armed conflicts and, by exercising its powers under the Charter, provide for particular rules that are binding on member states and UN forces under Articles 25 and 103 of the Charter qua binding *lex specialis*? If such powers exist, where should their outer contours be drawn? Up to what point can the public order set up by the law of the Charter prevail over the public order of the law of armed conflicts?[21]

Some authors, for instance L. Condorelli,[22] consider that the Council must respect international humanitarian law in its entirety. Condorelli affirms that the treaty[23] and customary rule that IHL must be respected ''in all circumstances'' applies to all subjects of international law, including the Council, because it has essential implications for minimum guarantees that concern the individual. Also close to this school of thought are those, like E. David,[24] who consider that the

21 On the *jus cogens* nature of IHL, see also the doctoral thesis of Catherine Maia, ''*Le concept de jus cogens en droit international public*'', Université de Bourgogne, 2006, pp. 611 ff.

22 Luigi Condorelli, ''Le statut des Forces des Nations Unies et le droit international humanitaire'', in Claude Emanuelli (ed.), *Les casques bleus: policiers ou combattants?*, Montreal, 1997, pp. 105–6.

23 Article 1 common to the 1949 Geneva Conventions. On this provision, see Luigi Condrelli and Laurence Boisson de Chazournes, ''Quelques remarques à propos de l'obligation des Etats ''de respecter et faire respecter le droit international humanitaire en toutes circonstances''', *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva and The Hague, 1984, pp. 17 ff.; Nicolas Levrat, ''Les conséquences de l'engagement pris par les Hautes Parties contractantes de ''faire respecter'' les Conventions humanitaires'', in Frits Kalshoven and Yves Sandoz (eds.), *Mise en oeuvre du droit international humanitaire*, Dordrecht, 1989, pp. 263 ff.; Kamen Sachariew, ''States' entitlement to take action to enforce international humanitarian law'', *International Review of the Red Cross*, Vol. 71 (1989), pp. 177 ff.; Paolo Benvenuti, ''Ensuring observance of international humanitarian law: Function, extent and limits of the obligations of third states to ensure respect of international humanitarian law'', *Yearbook of the Institute of Humanitarian Law*, San Remo, 1992, pp. 27 ff.; Hans-Peter Gasser, ''Ensuring respect for the Geneva Conventions and Protocols: The role of third States and the United Nations'', in Hazel Fox and Michael A. Meyer (eds.), *Armed Conflict and the New Law*, Vol. II, London, 1993, pp. 15ff.; Giovanni Casalta, ''L''obligation de respecter et de faire respecter le droit humanitaire lors des opérations militaires menées ou autorisées par l'ONU'', *Droit et défense*, Vol. 97 (3 ) (1997), pp. 13 ff.; Fateh Azzam, ''The duty of third states to implement and enforce international humanitarian law'', *Nordic Journal of International Law*, Vol. 66 (1997), pp. 55 ff.; Frits Kalshoven, ''The undertaking to respect and ensure respect in all circumstances: from tiny seed to ripening fruit'', *Yearbook of International Humanitarian Law*, Vol. 2, 1999, pp. 3 ff.; Birgit Kessler, *Die Durchsetzung der Genfer Abkommen von 1949 in nicht internationalen bewaffneten Konflikten auf Grundlage ihres gemeinsamen Artikels 1*, Berlin, 2001; Birgit Kessler, ''The duty to ''ensure respect'' under Common Article 1 of the Geneva Conventions'', *German Yearbook of International Law*, Vol. 44 (2001), pp. 498ff. See also ICRC (ed.), *Commentary on the Additional Protocols*, Geneva, 1987, pp. 34ff.; and the case *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports, 2004, paras. 154 ff.

24 Eric David, *Principes de droit des conflits armés*, 2nd edn, Brussels, 1999, p. 85. See also Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria,*

great majority of the rules of the law of armed conflicts are part of *jus cogens* because this body of law is a final bastion against barbarity. Consequently, in their view, its application cannot be subordinated to a contrary agreement of states or to the discretionary will of an international body.

Other authors take the view that the rules of the law of armed conflicts that cannot be altered by the Security Council are restricted to what we may refer to as *ordre public humanitaire*, that is to say a core of rules within the law of armed conflicts deemed essential for, in particular, the protection of the individual. According to D. Schindler,[25] the non-derogable law of armed conflicts corresponds to its core (*Kerngehalt*). This core is formed by rules of humanitarian purport, for example pertaining to the means and methods of combat or the protection of victims. The Council could in any case not depart from these rules, the aim of which is to provide the individual with elementary forms of protection.

Some authors, for instance in the United States, show greater deference towards the Council's powers. In their view, the rules of the law of armed conflicts, but also the rules pertaining to IHL *stricto sensu*, could be set aside by the Council in an emergency. They opine that derogations are allowed only if there is a formally correct Council decision taken under Chapter VII and if the derogations are temporary, proportional and strictly limited to the irreducible demands of the situation. The Council could in no case dispense with the fundamental guarantees, in particular those contained in Article 3 common to the four 1949 Geneva Conventions.[26]

Recently a number of authors,[27] put off their stride by developments in practice following the Iraq war (2003), have ceased to focus closely on the degree

*Present Status*, Helsinki, 1988, p. 622; Stefan Kadelbach, *Zwingendes Völkerrecht*, Berlin, 1991, pp. 70–1; Stefan Kadelbach, "Zwingende Normen des humanitären Völkerrechts", in *Humanitäres Völkerrecht*, Informationsschrift, Vol. 5 (3) (1992), pp. 118–24.

25 See Dietrich Schindler, "Probleme des humanitären Völkerrechts und der Neutralität im Golfkonflikt 1990/91", *Revue suisse de droit international at européen*, Vol. 1 (1991), p. 12. See also Dietrich Schindler, "Die erga-omnes Wirkung des humanitären Völkerrechts", in *Recht zwischen Umbruch und Bewahrung*, Berlin, 1995, pp. 199 ff. In the context of occupation law, see e.g. Odile Debbasch, *L'occupation militaire: Pouvoirs reconnus aux forces armées hors de leur territoire national*, LGDJ, Paris, 1962, p. 419; David J. Scheffer, "Beyond occupation law", *American Journal of International Law*, Vol. 97 (2003), pp. 843, 849; Daniel Thürer and Malcolm McLaren, ""Ius post bellum" in Iraq: A challenge to the applicability and relevance of international humanitarian law?", in *Festschrift für Jost Delbrück*, Berlin, 2005, p. 763; Marten Zwanenburg, "Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation", *International Review of the Red Cross*, No. 856 (December 2004), p. 763; Massimo Starita, "L'occupation de l'Iraq: Le Conseil de sécurité, le droit de la guerre et le droit des peuples à disposer d'eux-mêmes", *Revue générale de droit international public*, Vol. 108 (4) (2004), p. 903.

26 See Brian D. Tittemore, "Belligerents in blue helmets: applying international humanitarian law to United Nations peace operations", *Stanford Journal of International Law*, Vol. 33 (1997), pp. 105–6. It is generally accepted that Article 3 common to the Geneva Conventions constitutes *jus cogens*; see Hans-Peter Gasser, *Le droit international humanitaire*, Geneva and Berne, 1993, p. 74. Swiss practice has affirmed this on several occasions; see *Revue suisse de droit international et européen*, Vol. 9 (1999), p. 711; *Revue suisse de droit international et européen*, Vol. 11 (2001), p. 604.

27 See, mostly in the context of occupation law, Marco Sassòli, "Legislation and maintenance of public order and civil life by occupying powers", *European Journal of International Law*, Vol. 16 (2005), pp. 681, 683–4, 690; Zwanenburg, above note 25, p. 763; Steven R. Ratner, "Foreign occupation and international territorial administration: the challenges of convergence", *European Journal of International Law*, Vol. 16 (4) (2005), p. 710; Gregory H. Fox, "The occupation of Iraq", *Georgetown Journal of International Law*, Vol. 36 (Winter 2005), pp. 296–7.

of derogation that is acceptable. They content themselves with supposing, very summarily, that the Council's action under Chapter VII, in combination with Articles 25 and 103 of the Charter, prevails over the law of armed conflicts. Some note this with a degree of satisfaction, others with a tinge of regret. To adopt this position is to presuppose something that needs to be proved.

It would seem helpful to start with the intermediate concept of ''humanitarian public order''. This concept provides the most balanced basis for harmonizing, first, the Council's prerogatives for action and requirements in terms of flexibility and, second, the humanitarian imperatives from which action by the Council must not depart, not least in its own interests. Such a nuanced construction is helpful mainly as far as the law of occupation is concerned. To sum up, the general idea that subtends our analysis is that the Council can derogate by establishing special rules that will prevail over that part of the law of armed conflicts that is not specifically humanitarian. Rules that do not provide for specific forms of protection for the individual fall into this category, such as the provisions of the 1907 Hague Regulations concerning the administration of occupied territory, for example the usufruct for public property of the occupied state provided for by Article 55 of the Regulations. However, the Council cannot derogate from the norms of international humanitarian law *strictu senso*, namely the many rules of this type contained in the Fourth Geneva Convention of 1949. These are norms that concern the fundamental protections vouchsafed to the individual in case of armed conflict. The effort of specifying these norms one by one will be made in another study, to which I can only refer the reader at this stage.[28]

## Application to the case of Iraq (2003–…)

The occupation of Iraq following the invasion by the US-led Coalition of like-minded states[29] provides some significant indications for clarification of our

28 Robert Kolb and Sylvain Vité, *La protection des populations civiles au pouvoir d'une armée étrangère*, Brussels, forthcoming (2008).

29 On this intervention from the point of view of *jus ad bellum*, see *inter alia* contributions in the AJIL, Vol. 97 (2003), pp. 553 ff., and in Karine Bannelier, Olivier Corten, Théodore Christakis and Pierre Klein (eds.), *L'intervention en Irak et le droit international*, Paris, 2004. See also Michael Bother, ''Der Irak-Krieg und das völkerrechtliche Gewaltverbot'', *Archiv des Völkerrechts*, Vol. 41 (2003), pp. 255 ff.; Thomas Bruha, ''Irak-Krieg und Vereinte Nationen'', *Archiv des Völkerrechts*, Vol. 41 (2003), pp. 295 ff.; Christopher Clarke-Posteraro, ''Intervention in Iraq: towards a doctrine of anticipatory counter-terrorism, counter-proliferation intervention'', *Florida Journal of International Law*, Vol. 15 (2002), pp. 151 ff.; Olivier Corten, ''Opération ''Iraqi Freedom'': peut-on admettre l'argument de l'autorisation implicite du Conseil de sécurité?'', *Revue belge de droit international*, Vol. 36 (2003), pp. 205 ff.; Rainer Hofmann, ''International law and the use of military force against Iraq'', *German Yearbook of International Law*, Vol. 45 (2002), pp. 9 ff.; Patrick McLain, ''Settling the score with Saddam: Resolution 1441 and parallel justifications for the use of force against Iraq'', *Duke Journal of Comparative and International Law*, Vol. 13 (2003), pp. 233 ff.; Paolo Picone, ''La guerra contro l'Iraq e le degenerazioni dell'unilateralismo'', *Rivista di diritto internazionale*, Vol. 86 (2003), pp. 329 ff.; W. Michael Reisman, ''Assessing claims to revise the laws of war'', *American Journal of International Law*, Vol. 97 (2003),

problem. These indications are nevertheless limited, so great are the ambivalence, ambiguity and caution that characterize the relevant Security Council resolutions. Immediate political concerns prevailed over legal considerations of principle. This is scarcely surprising, since the Security Council is a political organ acting in emergencies.

The question we shall address is not whether the occupation forces in Iraq have violated the law of occupation. There is little doubt but that they occasionally have done so; legal writing is practically unanimous in this respect.[30] Reference is made, for example, to the absence of adequate preparations for maintaining order in the first days after the invasion,[31] or to the far-reaching structural reforms of the Iraqi economy.[32] One of the most thoroughly discussed measures is the radical reform of foreign investment law. By Order 39 (2003) of the Coalition Provisional Authority, Iraq was completely opened up to foreign investments. Any previous, more restrictive legislation was repealed. The degree of openness seems to go beyond that of any other state in the world. Moreover, foreign investors are no longer subject to the duty to reinvest part of their profits in Iraq. All profits can be exported.[33] Under previous Iraqi law, this privilege was granted only to nationals of Arab states.[34] This structural reform, which was not necessary either for the security of the occupying army or for the maintenance of civilian life, is manifestly contrary to Article 43 of the 1907 Hague Regulations, at least unless authorized by

pp. 82 ff.; Christian Schaller, ''Massenvernichtungswaffen und Präventivkrieg: Möglichkeiten der Rechtfertigung einer militärischen Intervention im Irak aus völkerrechtlicher Sicht'', *Zeitschrift für ausländisch öffentliches Recht und Völkerrecht*, Vol. 62 (2002), pp. 641 ff.; Pierre-Marie Dupuy, ''Sécurité collective et coopération multilatérale'', in *Le droit international à la croisée des chemins*, VIème rencontre internationale de la Faculté des sciences juridiques, politiques et sociales de Tunis, Paris, 2004, pp. 61 ff. and 72 ff. The United States' principal allies in the war in Iraq were the United Kingdom, Australia, Spain, Italy, Japan, Poland and Portugal. Official US government sites indicate a rather generous and indiscriminate figure of 49 states: see http://www.whitehouse.gov/infocus/iraq/news/20030327-10.html (last visited 26 November 2007).

30 See Sassòli, above note 27, pp. 679, 694; Zwanenburg, above note 25, pp. 757–9; Starita, above note 25, pp. 886 ff.; Kaiyan Homi Kaikobad, ''Problem of belligerent occupation: the scope of powers exercised by the Coalition Provisional Authority in Iraq, April/May 2003–June 2004'', *International and Comparative Law Quarterly*, Vol. 54 (1) (2005), p. 260 (in relation to the nullity of reforms that are contrary to the law of occupation); Fox, above note 27, pp. 202 ff. 240 f., 295–6; Adam Roberts, ''The end of occupation in Iraq (2004)'', *International and Comparative Law Quarterly*, Vol. 54 (1) (2005), pp. 36 ff.; Adam Roberts, ''Transformative military occupation: Applying the laws of war and human rights'', *American Journal of International Law*, Vol. 100 (2006), pp. 614–15.

31 See Hans-Peter Gasser, ''From military invitation to occupation of territory: New relevance of international law of occupation'', in Horst Fischer, Ulrike Froissart, Wolff Heintschel von Heinegg and Christian Raap (eds.), *Crisis Management and Humanitarian Protection: In Honour of Dieter Fleck*, Berlin (2004), p. 154; Scheffer, above note 25, pp. 853 ff.

32 Complete liberalization of the economy and trade, opening up the country almost completely to foreign investment, abolition of the duty to reinvest in the country, complete reform of the tax system, etc. See, among others, Orders no. 37, 39 and 64 of the Coalition Provisional Authority concerning taxation, investment law and company law.

33 The usefulness of this reform for numerous US investors is apparent.

34 See Zwanenburg, above note 25, p. 757. The Provisional Authority has argued that it was authorized to carry out these reforms under Security Council Resolution 1483 (2003). This is not correct: see below.

a Security Council resolution.[35] Which brings us to the question we need to focus on more closely here: did the Council derogate from occupation law in the case of Iraq? As we shall see, it did not.

Before we plunge *in medias res*, a few introductory remarks are called for:

(i) The relevant Security Council resolutions all demand, explicitly or by reference, *respect for IHL and the law of occupation*. In the key Resolution 1483 (2003) that established the regime in Iraq after the end of the hostilities phase (albeit in the teeth of continuing resistance), the Council takes note of the letter from the permanent representatives of the United States and the United Kingdom ''recognizing the specific authorities, responsibilities, and obligations applicable under international law of these states as occupying powers under unified command'' (paragraph 13 of the preamble). This is a declaratory and not a constitutive statement. The Council recognizes a pre-existing obligation to which the states in question are subjecting themselves; it does not create it. That is one of the reasons why this statement appears in a preambular paragraph. Subsequently, in Resolution 1546 (2004), which sets out to endorse the end of the occupation, we find two paragraphs that are equivocal to say the least. On the one hand, the resolution affirms that the occupation of Iraq will cease as of 30 June 2004 (paragraph 2).[36] This was the date scheduled for the handover of power from the Coalition Provisional Authority to the Interim Government of Iraq. And yet in paragraph 17 of the preamble, the Council notes ''the commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law''. We know that occupation law is part of IHL. There is therefore a degree of ambiguity between the two paragraphs: occupation law seems no longer to be applicable; but through international humanitarian law (of which the Fourth Geneva Convention – which contains occupation law – is a part) it

35 It has already been stated that the Council does not have unlimited freedom. Moreover, as Sassòli points out (above note 27, p. 694), even in the case of transitional international civilian administration (in which the law of occupation possible does not apply entirely and *de jure*), far-reaching reforms should be left to the administered people in accordance with the principle of self-determination: ''[E]ven a UN administration should not introduce such fundamental changes, but at the outmost suggest them to the population of the territory it administers as a solution to their problems''. See also Fox, above note 27, p. 276.

36 This time the statement is to be found in the body of the resolution text, in paragraph 2, but it seems no less declaratory and non-constitutive: the occupation would appear to have ceased on 27 June 2004, as the Authority formally handed over its powers to the Interim Government of Iraq three days early. It would probably be mistaken to suppose that the Council wished to maintain occupation law between 27 and 30 June, despite this handover of powers. If that is the case, the statement is declaratory and non-constitutive. The essential thing, from the Council's point of view, is to know when the Authority relinquished its powers. However, the question may arise whether this statement is not after all constitutive. Does not the Council link the principle of effectiveness, as enshrined in Article 42 of the Regulations with binding effect for all members of the United Nations, with the handover of powers from the Authority to the Interim Government? If that is so, any effectiveness after that date would no longer relate to an occupation in accordance with the resolution, but could relate to one under Article 42 of the Regulations. On these aspects, see below.

could to some extent maintain its hold by effect of the Security Council's resolution itself. In any case, it is odd to imagine the post-occupation forces (as they would be in accordance with the Council's declarations) not complying with the fundamental humanitarian provisions of the Fourth Geneva Convention, many of which are to be found in Articles 27–33 (general rules) and Articles 47 ff. (occupied territories).

(ii) No derogation from rules of the law of occupation (where allowed) can be presumed, as it sets aside the international law that is ordinarily applicable. What is more, it would entail shuffling off rules of international law that are of great importance, as highlighted by the Fourth Geneva Convention in its ''locking'' techniques contained in Articles 7, 8 and 47. Any derogation from such a body of law must at least be clearly established by a provision with binding force. For example, it is not possible to derogate from international law by means of an exhortation, a recommendation or a guideline. Nor can one so derogate by means of an equivocal position that lends itself to uncertain interpretation. Political bargaining cannot be engaged in at the expense of humanitarian law. It follows that only a clear injunctive decision that is binding under Article 25 of the Charter can set aside rules of international law that would otherwise apply. Accordingly, any ambiguity in the Security Council's mandate must be interpreted as contrary to the idea of derogation.

Let us now consider separately the preliminary aspect (applicability of the law of occupation) and the substantive aspect (derogation from the substantive guarantees of occupation law). The aim is to see to what extent the Security Council derogated from applicable rules of IHL in these contexts.

## The applicability of occupation law

Regarding the applicability of occupation law, the Council's resolutions present two aspects for critical analysis. First of all, the Council seems to arrogate to itself the power to affirm *who is an occupying power and who is not.* The Council then seems to authorize itself to determine *the moment at which the occupation ends.*

### Ratione personae: *who is an occupying power?*

In the preamble to Resolution 1483 (2003) – a founding text comparable to Resolution 1244 (1999) for Kosovo – we may read that the Council notes the letter from the permanent representatives of the United States and the United Kingdom and ''recogniz[es] the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the ''Authority'')'' (paragraph 13 of the preamble). In the next paragraph the Council notes that ''other States that are not occupying powers are working now or in the future may work under the Authority'' (paragraph 14 of the preamble). Among these states are Spain, Poland and Japan. As many authors

remind us,[37] the aim of these none too felicitous provisions of Resolution 1483 was to spare the secondary states present in Iraq from being labelled ''occupying powers''. This label, perceived as very negative – almost as an affront to honour – in Europe and the United States after the Second World War, was proving potentially troublesome for these states on the domestic political scene. To have to admit, in Spain or Poland, to being an ''occupying'' power in Iraq would have stirred historical memories and rendered singularly complicated the policy of governments engaged alongside the United States against the majority will of their populations. Be that as it may, these statements by the Council seem to clash with the principle of effectiveness enshrined in Article 42 of the Hague Regulations. For IHL, actual control on the ground is the sole determining factor for the existence of a belligerent occupation.[38] If Poland,[39] for example, controlled areas of Iraqi territory, it was an occupying power. Could the Council label the situation differently and release the state in question from its duties under occupation law?

It would not appear that the Council could legitimately derogate, nor does it seem in fact to have done so. First of all, it should be borne in mind that the paragraphs in question are purely declaratory and simply preambular. The Council takes note of a situation in the form in which that situation is communicated to it. It considers that, in view of the facts *such as they were presented to it*, there are occupying states and non-occupying states. No attempt is made to arrive at a legal classification. The Council confines itself to affirming that it ''notes'' this situation, by way of a preambular introduction, before moving on to the injunctions contained in the body of the resolution. Such statements do not meet the conditions needed for derogation as set out above. Accordingly, occupation law continues to apply. If the ''non-occupying states'' should turn out to have exercised occupation powers in accordance with the criteria set out in Article 42, they would have to be labelled accordingly. But that is not all. The Security Council itself calls 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'' (paragraph 5 of the operative part of the resolution). Article 42 is therefore implicitly reaffirmed. The international law principle of effectiveness in the determination whether an occupation exists is certainly not put aside.

What, then, is the status of non-occupying states according to the Council's view? There are several possible interpretations. The Council may have considered, for example, that these states would not establish autonomous territorial control and would perform only limited tasks (humanitarian,

37 See, e.g., note 30 above.

38 This was recently recalled by the ICJ in the case *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, ICJ Reports, 2005, p. 59, § 172. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports, 2004, p. 167, §78, and p. 172, §89.

39 More than any other ''non-occcupying'' state, Poland did de facto exercise the duties and functions of occupation. See Liesbeth Lijnzaad, ''How not to be an occupying power: some reflections on UN Security Council Resolution 1483 and the contemporary law of occupation'', *Making the Voice of Humanity Heard*, Leiden (etc.), 2004, pp. 302–4.

reconstructive, etc.) under the overall and effective control of the United States and the United Kingdom. On the assumption that they possessed no real autonomy and were subordinate to the two dominant powers, the Council may have considered that their acts were attributable to those two main powers. However, this position does not appear very convincing with regard to Poland, which administered and controlled a small zone in the south of Iraq in a sufficiently autonomous and effective manner to be labelled an occupying power.[40] Although this may not have been entirely foreseeable to the Council, in the final analysis the effectiveness principle found in Article 42 of the Regulations must nonetheless prevail: Poland was undoubtedly an occupying power within the meaning of the Regulations. Quite logically, the ICRC enjoined Poland, as well as other "non-occupying" states, to comply with the provisions of the law of occupation in its zone. Not one of them demurred.[41]

In conclusion, it should be noted that the Council did not intend to derogate from the law of occupation and could not have done so by the means it chose to adopt. The preambular paragraphs contain only a declaratory indication of the way in which the Council sees the de facto situation on the ground. This indication is devoid of any binding force.[42] Accordingly, the Netherlands' position,[43] to the effect that these statements constitute decisions of the Security Council that are binding under Chapter VII, is not legally defensible. They are to be analysed as a political stance reflecting a will to achieve a "Transatlantic détente".

### *The end of the occupation*

The observations of the Security Council in Resolution 1546 (2004) on the end of the occupation confront us with a situation that is in some respects the reverse. The Council "[*w*]*elcomes* that, … by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty" (operative paragraph 2). However, paragraph 17 of the preamble notes "the commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law". The situation is the opposite of the previous one, inasmuch as the occupation is reaffirmed in the preambular paragraph and "set aside" by the operative paragraph. But is occupation law really "set aside"? The Council's statement in paragraph 2 seems purely declaratory: the

40 Ibid., pp. 302–4.

41 See Thürer and McLaren, above note 25, p. 761, who stress that the ICRC reminded these other states of the law of occupation and that none of them protested.

42 See principally ibid., pp. 759–61, and, in less clear and often too succinct terms, Lijnzaad, above note 39, pp. 292 ff. See also Zwanenburg, above note 25, pp. 755–6. Many authors have considered that Resolution 1483 is, to say the least, ambiguous: Jorge Cardona Llorens, "Libération ou occupation? Les droits et devoirs de l'État vainqueur", *L'intervention en Irak et le droit international*, Cahiers internationaux series, No. 19, Pedone, Paris, 2004, pp. 239 ff.; Kaikobad, above note 30, pp. 262–3.

43 See Zwanenburg, above note 25, p. 756.

Council notes that power will be handed over by the Authority of the occupying powers to the Interim Government on 30 June 2004; and it expresses its satisfaction at the implicit affirmation contained in this statement to the effect that the Iraqi government will enjoy *de jure* and de facto sovereignty over its territory. This is a statement in keeping with the principle of effectiveness contained in Article 42 of the Hague Regulations: if power has effectively been handed over, and if Iraqi sovereignty has been ''recovered'',[44] the occupation will cease from that moment on. The Council interprets this handover of powers as implying that effective occupation has ceased.

We know that the handover of power took place three days before the date stated in the resolution – that is, on 27 June 2004. If we follow the motivation, object and purpose, rather than the letter, of the resolution, we may conclude that the occupation came to an end on 27 June. The Council's statement is declaratory, not constitutive: it refers to the actual situation. It is therefore a movable and not a fixed reference. If occupational effectiveness ceased on 27 and not on 30 June, the occupation itself ended on 27 and not on 30 June. However, the statement remains hypothetical, as everything depends on the actual situation, which was not yet known at the time the resolution was adopted.

Is the Council's statement as to the nature of the situation not constitutive on one point, namely the legal significance of the handover of power by the Authority to the government? Was not the Council determining with binding effect for the member states of the United Nations that this handover, scheduled for 30 June, would be tantamount, *pro veritate*, to loss of effectiveness for the occupying powers as of the date on which it took place? Accordingly, it would no longer have been possible to argue that there could still be effectiveness (and hence occupation) after the handover of power.

The situation on the ground does not militate in favour of the idea that this handover of powers on 27 June created a clear break. The United States, in particular, took care to install in the government individuals who had close links with itself and to exclude those it considered hostile to its interests; it has continued to deploy[45] the same military contingents as before the handover date; it placed all these forces, used in combat against resistance and terrorism in Iraq, under its exclusive command; and it has retained a strict right of scrutiny over the actions of the government, whose margin for autonomous manoeuvre is limited. Accordingly, it can be said at the very most that the restoration of Iraqi sovereignty is an ongoing process.[46] The date of 27 June 2004 saw only a limited handover. It

44 Not ''transfer'' of sovereignty, as US sources indicate; since occupation does not alter sovereignty, which remains vested in the occupied state, there is nothing to transfer. This is an illustration of the extent to which politics muddies the most elementary legal truths. See Rahim Kherad, ''La souveraineté de l'Irak à l'épreuve de l'occupation'', in D. Maillard Desgrées du Loû (ed.), *Les évolutions de la souveraineté*, Paris, 2006, p. 152.

45 And there has even been an increase the number of these forces in 2007.

46 Roberts, ''The end of occupation'', above note 30, pp. 41–2, 46–7. This author acknowledges that occupation law could therefore apply after the date of 27/30 June 2004, in accordance with the principle of effectiveness. See also Roberts, ''Transformative military occupation'', above note 30, pp. 616–18.

may not have been sufficient to produce legal effects of a conclusive nature for the purpose of terminating the state of occupation. Some authors prefer to speak openly of an Iraqi government too dependent to be really autonomous: for them, it is not in a position freely to invite the Coalition forces to remain on its territory and thereby to convert the belligerent occupation into an occupation by invitation outside the scope of IHL. According to these authors, although it may not be a puppet government, it is not far from it.[47] If this is true, the acts of the new government cannot be perceived as acts of sovereignty. In that case, Article 47 of the Fourth Geneva Convention could be upheld vis-à-vis the occupying power: the formal change of status would not have ended the occupation and with it the grant of various forms of protection from its effects to the Iraqi inhabitants. We consider for our part that the government in Iraq since June 2004 has not yet attained such autonomous effectiveness as to authorize the conclusion that occupation law no longer applies.

Whatever interpretation is brought to bear, it must certainly be acknowledged that Resolution 1546 does not trigger the operation of a clear derogation either from Article 42 of the Hague Regulations or from customary law, both of which are based on the criterion of effectiveness.[48] Paragraph 2 of the resolution seems to be declaratory. It certainly does not expressly exclude the concurrent criterion of effectiveness. On the contrary, it seems to presuppose it by giving expression to it. Preambular paragraph 17 notes that the powers in question have committed themselves to acting in accordance with IHL. This paragraph is also declaratory. It notes that the relevant states have assured compliance with what are in any case their legal obligations. Consequently, the paragraph refers to a "hard" legal obligation to be found in IHL, of which occupation law is a part. How, then, could it be imagined that this binding acknowledgement of the applicability of IHL (and hence also of occupation law with its principle of effectiveness) could be set aside by paragraph 2, which simply notes that Iraq will recover its full sovereignty on 30 June in such a way that the occupation comes to

47 Thürer and McLaren, above note 25, pp. 769 ff. According to these authors, as effective sovereignty was not returned to the Iraqi government, the occupation continues in accordance with the principle of effectiveness. Such is the yardstick of legal correctness; Andrea Carcano, "End of the occupation in 2004? The status of the Multinational Force in Iraq after the transfer of sovereignty to the Interim Iraqi Government", *Journal of Conflict & Security Law*, Vol. 11 (2006), p. 58. See also Kherad, above note 44, pp. 153–4, who considers that the Interim Government was neither legal nor legitimate, as it was appointed by and subordinate to the authorities of the occupying powers; it was not therefore in a position to formulate an invitation to foreign military forces to remain on its territory and so transform a belligerent occupation into a peaceful occupation to which the IV Hague Convention and the Fourth Geneva Convention are supposedly not applicable. Luigi Condorelli, "Le Conseil de sécurité entre autorisation de la légitime défense et substitution de la sécurité collective: remarques au sujet de la Résolution 1546 (2004)", in SFDI (ed.), *Les métamorphoses de la sécurité collective, Droit pratique et enjeux stratégiques*, Paris, 2005, p. 237, considers that the sovereignty and independence of the new Interim Government, proclaimed by Resolution 1546, "relèvent du monde des fables et ne ressemblent en rien à la réalité" (belong to the realm of fable and bear no resemblance to reality).

48 There is therefore no basis for thinking that Resolution 1546 (2004) prevails over occupation law because it derogates from it, as affirmed by Sassòli, who begs the question (above note 27), pp. 683–4. Sassòli does, however, correctly acknowledge that the effectiveness of the occupation continues if we take account simply of the facts on the ground.

an end? This statement is a mere anticipation of a future event. If that anticipation should be proved wrong by the facts – by the very operation of effectiveness – IHL and occupation law would continue to apply inasmuch as the ordinary conditions for their applicability are met.

Let us add that operative paragraph 1 reinforces this reading. It imposes on the Interim Government the obligation to refrain ''from taking any actions affecting Iraq's destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes office''. This is tantamount to saying that the spirit of the principle codified in Article 43 of the 1907 Regulations operates to limit the margin of action of the Iraqi government in place after 27 June 2004. The Council manifestly considers it as an organ not in possession of full and complete sovereignty.[49] In the scenario anticipated by the Council, there is therefore no longer an occupation *strictu senso*, but neither is there an Iraqi government in possession of real and full independence. We are therefore in an intermediate, ambiguous, *sui generis* situation. It is certainly not of such a nature that the rules of occupation law do not apply to it. As long as the sovereignty of the Iraqi people has not been fully recovered, the law of occupation must provide adequate minimum guarantees.

In conclusion, it may be underlined that Article 42 of the Hague Regulations does not brook derogation by the Security Council.[50] It forms part of the humanitarian *ordre public* or *jus cogens*. Why must this provision be peremptory? If the principal condition for the applicability of the substantive protections vouchsafed by the law of occupation were not peremptory, that would mean that an occupying power or the Security Council would be allowed to set aside *de plano* all these substantive protections, including those of a humanitarian nature. By affirming that this law is not applicable, or by restricting the conditions for its application, it would be possible to avoid fundamental guarantees. Consequently, any effort to ''lock in'' the humanitarian protections or to declare them imperative would be a vain enterprise; manipulations in the scope of application would allow the entire occupation regime to be swept aside from the outset by a stroke of the pen. The substantive guarantees would then be robbed of any *effet utile* in a way that is contrary to the most intimate spirit of modern occupation law (Articles 7, 8 and 47 of the Fourth Geneva Convention). The reverse conclusion is therefore inescapable: if a single provision of substantive law has peremptory status, the norm that defines the scope of application of that

49 Roberts, ''Transformative military occupation'', above note 30, pp. 617–18.

50 This is a sort of a second-degree norm of *jus cogens*. Accordingly, the effectiveness criterion applicable to occupation law – which is the essential content of Article 42 – prevails over any contrary determination by the Security Council. However, this is not to say that a contrary determination by the Council is devoid of effect or relevance. It would indeed constitute an indication of the way effectiveness is perceived by a major organ of the United Nations. This determination could be followed by any juridical operator, at least if it is not in clear contradiction with the facts. It is therefore necessary to conclude that the Council has the possibility of trying to influence occupation law by means of subjective determinations of the situation, but that these determinations could not prevail over the criteria set out in Article 42. Nor has the Council received from the Charter the mandate to give a binding interpretation of the conditions for the application of Article 42.

fundamental rule and therefore constitutes the first condition of its application must also have peremptory status. This non-derogability is relevant to the question of who is (or is not) the occupying power and also the question of when the occupation ends. If we follow this construction, the Council would not have the substantive power to derogate from it. In that case, the resolution clauses cited above would necessarily have to be interpreted in a declaratory and not a constitutive sense, if they were not to be considered null and void by virtue of the principle of interpretation *in dubio pro validitate*.

## Derogation from the substantive provisions of occupation law

When we turn to the question of derogations by the Council from substantive norms, the legal evidence is more meagre still. In fact, we have been unable to locate a single one in the relevant resolutions. Some authors take the view that on this point as on others these resolutions demonstrate both the virtues and the vices associated with a degree of ambiguity.[51] In reality, ambiguity is limited. All the resolutions in question affirm, either directly or indirectly by reference to Resolution 1483 (2003), that IHL and occupation law are applicable without any exception. In the key Resolution 1483 (2003), paragraph 13 of the preamble states that the Council notes the letters of the representatives of the United States and the United Kingdom in which they recognize "the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command". In operative paragraph 5, we read that the Council "calls 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". No derogation, much less a clear derogation, is thereby enacted. The contrary seems true.

Several operative paragraphs then call upon the Authority (the said "occupying powers under unified command") and member states to take measures aimed at reconstructing Iraq and bringing it to sovereign independence. All these provisions are remarkably generic. None of them allows or obliges any party to act contrary to occupation law. In paragraph 1 we read that UN member states and concerned organizations are invited to "assist the people of Iraq in their efforts to reform their institutions and rebuild their country, and contribute to conditions of stability and security in Iraq *in accordance with this resolution*" (emphasis added); in paragraph 4 we read that the Authority is called upon to "promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of … conditions in which the Iraqi people can freely determine their own political future"; in paragraph 8(c) we read that the Authority, in co-operation with the

51 A number of authors have noted this. See, e.g., Nehal Bhuta, "The antinomies of transformative occupation", *European Journal of International Law*, Vol. 16 (2005), p. 735; Zwanenburg, above note 25, pp. 763 ff.

UN Special Representative, is to advance efforts ''to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq''; in sub-paragraph (e) of the same paragraph we read that they should promote ''economic reconstruction and the conditions for sustainable development''; in sub-paragraph (g) we read that they should promote ''the protection of human rights''; and so on.

It is therefore necessary to conclude that preambular paragraph 13 and operative paragraph 5 forbid derogations from applicable occupation law, given that no other paragraph allows them, expressly or by necessary implication.[52] As has been rightly pointed out, no provision of the Security Council resolutions calls for action going beyond or departing from occupation law.[53] This is clearly different from the situation in Bosnia and Herzegovina or in Kosovo.[54] At most, we may see in operative paragraph 4 an invitation to somewhat transformative structural reforms.[55] However, the language remains vague and imprecise. This is too little to constitute a derogation from occupation law, which is recalled in the same resolution as a factor setting limits to action. It is therefore not certain that those authors who affirm summarily that these resolutions extend the powers of the occupying powers beyond occupation law are right.[56] Admittedly, there are some places where the language goes further. However, it does so more by way of translating the law of The Hague into practical measures than by way of a departure from it. These instances are very limited, for example as regards the treatment of oil.[57] Are they really in opposition to occupation law or do they develop it in its areas of flexibility? At close scrutiny, they certainly do not seem to come within the realm of derogation.

It may finally be recalled that reforms such as ''de-Baathification'' – inasmuch as they concern oppressive structures – but also certain human rights reforms such as the ban on child labour are compatible with and even required by occupation law. In principle, these reforms are covered by the ''oppressive laws'' exception and by the positive obligation to guarantee the rights recognized in the

52 See also Kaikobad, above note 30, pp. 262–3 ; Thürer and McLaren, above note 25, p. 766.
53 Fox, above note 27, pp. 257 ff., 261.
54 Ibid., pp. 261–2.
55 Scheffer, above note 25, pp. 844–5 ; Zwanenburg, above note 25, p. 766.
56 See Starita, above note 25, pp. 893 ff.; Roberts, ''Transformative military occupation'', above note 30, p. 613: ''Taken as a whole, the purposes of the occupation as outlined in Resolution 1483 went beyond the confines of the Hague Regulations and the Fourth Geneva Convention.''
57 Jorge Cardona Llorens refers to the sale of oil by the Authority as a departure from (or an addition to?) the law of occupation (above note 42, p. 246). But first of all, this oil sale regime followed the ''Oil-for-Food'' Programme, i.e. an internationalized regime for trading in this commodity that had already begun. Second, it is not certain that occupation law does not allow flexible solutions under the general principle of ''usufruct'' that we find in Article 55 of the 1907 Regulations. See Langenkamp R. Dobie and Rex J. Zedalis, ''What happens to the Iraqi oil? Thoughts on some significant unexamined international legal questions regarding occupation of oil fields'', *European Journal of International Law*, Vol. 14 (3) (2003), pp. 417 ff. It is plain that the establishment of the Special Funds and the detail of the rules go beyond occupation law, but are they contrary to this law?

Fourth Geneva Convention and other human rights sources (for example the 1966 Covenant on Civil and Political Rights).[58]

## Conclusion

Our conclusion from the Iraq case study can be summed up in one sentence: the relevant Security Council resolutions contained no express or explicit derogations from the formally applicable law of occupation.

The Council operated more subtly. It adopted texts often characterized by studied ambiguity and implication, while leaving the question of the relationships between occupation law and the (slightly)[59] transformative mandate granted by it to be more tangibly addressed in practice. On the crest of this inviting and creative wave we should therefore not have been surprised to see the Authority of the occupying powers in Iraq refer to Resolution 1483 (2003) even for its most far-reaching reforms, such as those undertaken in the economic sphere. We find there a reading of occupation law that is to say the least *self-serving*. These fuzzy mandates from the Council constitute a rampant threat for international legality. True, the bastion of international law is formally left intact, as no express derogation from IHL is countenanced. But for how much longer will that remain the case, if there are other precedents like Iraq? Moreover, the substance of IHL that is so fundamental for protecting local populations and ensuring their self-determination is being surreptitiously left to the occupying powers' own interpretation. It is not difficult to guess the direction in which that interpretation will move. A body of law that is apparently malleable to the point of being stifled by many different hands – the historically explicable intrinsic vagueness of the Hague Rules, the flexible and implicit mandates of the Security Council, and the self-serving interpretation of occupying states themselves – is bound to see its credibility suffer. In the worse case, it will end up being perceived as a grimacing mask serving the distinguished but undesirable purpose of concealing reality.

58 Since the end of the Second World War it has been acknowledged that the occupying power must not apply, or leave unchanged, oppressive domestic legislation such as the Nuremberg laws of the National Socialist regime. The aim of the rule that prohibits changes in local legislation is to avoid legislation contrary to the principle of self-determination being imposed from outside. If this rule were to be interpreted as preventing legislative changes to amend oppressive laws, that interpretation would be contrary to its object and purpose. Some have gone so far as to affirm that there is a positive obligation incumbent on the occupying power to repeal, or at least suspend, such legislation. There can be no doubt as to this positive obligation, as otherwise the occupying power would fail in its "humanitarian" duties under the Fourth Geneva Convention, which demands that certain rights be guaranteed in all cases. See Gerhard Von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, University of Minnesota Press, Minneapolis, 1957, pp. 95, 107; Morris Greenspan, *The Modern Law of Land Warfare*, University of California, Berkeley (etc.), 1959, p. 245; Allan Gerson, "War, conquered territory, and military occupation in the contemporary international legal system", *Harvard International Law Journal*, Vol. 18 (3) (Summer 1977), p. 531; Sassòli, above note 27, pp. 675–6; Howard S. Levie, *The Code of International Armed Conflict*, Vol. 2, London, Rome and New York, 1986, p. 716. See also Jean Pictet (ed.), *Geneva Convention relative to the Protection of Civilian Persons in Time of War: Commentary*, ICRC, Geneva, 1958.

59 Much less than that of the Transitional Civil Administration in Kosovo.

There are arguments in favour of a new codification of the law of occupation to develop and raise it to a level that would meet the demands of the current problems. But this is clearly not the right time to do so. If we embark on that course now, we risk moving backwards rather than forwards. Some states will try to seize the opportunity thus presented to dismember occupation law, rather than to strengthen or at least adapt it.

In the absence of new treaty law, it remains to be hoped that in future the Council will not lightly indulge in explicit or implicit derogations from occupation law, and will not lend its hand to violations of the law by allowing occupying powers excessive latitude in interpreting and applying the (sometimes excessively) generic rules it lays down. It must also refrain from providing a semblance of legitimacy through resolutions that can be used as a source of authority to impress the uninitiated. Moreover, the UN Security Council should not yield to pressing demands to fulfil or give its blessing to particular political wishes by occupying powers in order to re-enter the decision-making process from which those very powers had initially (in the *jus ad bellum* phase) excluded it. There is a world of difference between a civil administration centred on the United Nations from the outset and the remote support provided by the Security Council for occupying powers that have, in that capacity, their own political agenda and particular objectives.

Here the very *rule of law* at international level, weak as it is, is at stake. The relative drubbing that occupation law has received in Iraq is only one of many warning signs that we have seen in recent years. Lest we forget: *caveant consules, ne quid detrimenti res publica (universalis) caperet!*[60] That is the only point: the enlightened common interest of all.

60 Let the Consuls beware, lest something harmful befall the (world) republic!

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# International humanitarian law and its implementation in Iraq

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## Abstract

*Despite the fact that four years have elapsed since the end of the major combat operations on 9 April 2003 and that the occupation formally ended on 30 June 2004, completion of the requirements for national sovereignty in accordance with the various resolutions of the UN Security Council has not been achieved. The author explains the different rules which were and are applicable to the situation in Iraq and presents the current humanitarian problems from the perspective of international humanitarian law.*

Throughout history Iraq has attracted the attention of nations, peoples and armies, drawn by its natural resources and the skills of its people. It was there that the first writing systems were invented and the first codes of law promulgated. To ensure the survival of its identity at this congested crossroads of the three old continents, and amidst international competition over trade routes, Iraq, like any other state, seeks autonomy through its own material and human resources. A country faced with invasion or occupation has to adapt to the newcomers in order to restore its well-being and regain its sovereignty. And that is what is happening in Iraq today.

A particularly crucial task among the ongoing violence there is to protect the population and restore security. Today, the importance of a complementary application of international humanitarian law, human rights law and refugee law to ensure greater protection for victims of armed conflicts has been recognized. This development has influenced the following article, which will deal with the

various kinds of suffering currently endured by the Iraqi people and the legal instruments to remedy them. To this end, the article first identifies the international humanitarian rules that can be applied in Iraq. It then goes on to discuss the humanitarian treatment of the victims of the armed conflict in Iraq and its effects on civilians.

## The humanitarian rules applicable

In order to find out which humanitarian rules can be applied in the context of the armed conflict in Iraq, the nature of that conflict must first be established so as to identify the legal rules by which it is governed and determine where the responsibilities for the protection of its victims lie.

From 9 April 2003 to 30 June 2004 there was a situation of occupation in Iraq. Foremost among the various international laws that could be invoked to govern that period are the Hague Convention (IV) of 1907 and the Fourth Geneva Convention of 1949, which contain the most comprehensive legal provisions relating to occupation. In addition, the other Geneva Conventions of 1949 and the customary international law of armed conflict are applicable.

Foreign occupation is deemed to be a factual situation which, in law, gives rise to rights and obligations divided between the occupying power and the occupied state. The law assigns the legal spheres of competence to the two parties in a manner intended to strike a balance between the occupying power's requirements in controlling the occupied territories and the national sovereignty required by the occupied state so that it has the means to survive.

The occupation formally ended on 30 June 2004. After that, the conflict could be classified either as international or internal, or as no armed conflict at all within the meaning of the Geneva Conventions. On the ground, the Multinational Force in Iraq is acting as an occupying force and applying the Geneva Conventions. Given this reality and following the resistance groups' argument according to which the foreign force is the occupying power, we have to examine which legal regime of the Geneva Conventions is applicable in this situation.

It can be said that the Multinational Force is performing two different roles in relation to the armed conflict in Iraq. On the one hand, it is officially operating as an ally of the Iraqi government, in accordance with Security Council Resolution 1546(2004);[1] on the other, it is dealing with the Iraqi forces and the armed elements as an occupation force in accordance with Resolution 1483(2003).[2] In the latter role it had to apply the four 1949 Geneva Conventions of 1949 in Iraq, as an occupied state, for a period of one year after the general close of military operations. At present, the Multinational Force is applying the Fourth Geneva Convention partially.

1 See S/RES/1546 (2004) of 8 June 2004.
2 See S/RES/1483 (2003) of 22 May 2003.

## Full and partial application of the Fourth Geneva Convention of 1949

The Fourth Geneva Convention of 1949, in accordance with Article 6 thereof, applies in full from the outset of an international armed conflict or occupation (para. 1). Article 6 further stipulates that the application of the Convention shall cease on the general close of military operations (para. 2), but that in the case of occupied territory its application shall cease one year after the general close of military operations (para. 3).

However, the third paragraph of Article 6 also provides for subsequent partial application of the Convention, subject to the following conditions:

1. one year must have elapsed following the general close of military operations; and
2. the occupying state must continue to exercise the functions of government in the occupied territory.

Article 6 also specifies the provisions of the Fourth Geneva Convention with which continued compliance in its partial implementation one year after occupation is mandatory. They are Articles 1–12, 27, 29–34, 47, 49, 51, 52, 53, 59 and 61–77, and finally Article 143, which allows delegates of the protecting powers and the International Committee of the Red Cross (ICRC) to visit all places of internment, detention or work, and stipulates that such visits may be prohibited only for reasons of imperative military necessity, and then only as an exceptional and temporary measure.

Applying Article 6 to the events in Iraq is not easy. Iraq was initially subject to the rule of the Coalition Provisional Authority (CPA), from 9 April 2003 to 30 June 2004. The end of the CPA's rule and the transfer of political authority to the Iraqi Interim Government raise questions as to the nature of the presence of the Multinational Force in Iraq. By virtue of Resolution 1546(2004), the approval of this presence by the Iraqi Interim Government is presumed; at the same time, in the absence of an agreement between the Iraqi government and the leadership of the Multinational Force, the nascent Iraqi forces remained under the command of that Force in accordance with the said resolution's operative paragraph 11. This is contrary to the terms agreed between the Iraqi and US governments in their two letters of 5 June 2004 to the president of the UN Security Council,[3] providing for the transfer of responsibility for security to the Iraqi government, which would assume command and authority over the Iraqi forces. As from a military point of view the administration of Iraq is carried out by such forces, and as military administration is one of the most important functions of government, the two conditions necessary for the partial application of the Fourth Geneva Convention are met. That is why the Multinational Force continues to apply the Convention, if

3 The "Text of letters from the Prime Minister of the Interim Government of Iraq Dr Ayad Allawi and United States Secretary of State Colin M. Powell to the President of the Council" of 5 June 2004 is annexed to Security Council Resolution S/RES/1546 (2004).

only partially. It is therefore of interest to examine the laws of occupation in greater detail.

## Competences of the occupying power

Article 43 of the Regulations respecting the Laws and Customs of War on Land, annexed to the Hague Convention (IV) of 18 October 1907, stipulates as follows:

> 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.

This implies the continuation of the legal system of the occupied state, which is the first manifestation of territorial sovereignty. Article 55 of the Hague Regulations consequently provides that ''the occupying State shall be regarded only as administrator''.

Part of the occupying power's task is thus to operate the public services in order to meet the essential needs of everyday life in terms of services and economic activity. In addition, it has the right to take the necessary steps to protect its personnel and installations, and the police powers of the occupying authority extend to the public services providing ordinary services to the civilian population and logistical services to the occupying forces. In order to function as administrator, the occupying power has considerable powers in all three branches – legislative, executive and judicial – of government. Under international customary law, it is up to the occupying power to appoint a military governor responsible for the occupying forces and vested with powers that are not determined in advance. A civilian governor can also be appointed to exercise the legislative and executive powers and to implement the general policy of the occupying authority. The commander of the provisional Coalition forces, General Ricardo Sanchez, was accordingly appointed as military governor when the occupation began on 9 April 2003, while General Jay Garner was appointed as civilian governor with the title of Director of Operations Iraq. The latter post was soon abolished and Ambassador Paul Bremer was appointed civilian governor, taking over the administration of Iraq from 13 May 2003 to 30 June 2004.

### Legislative power

The Hague Convention (IV) of 1907 seeks to maintain the legal system of the occupied state without change. However, the necessities of occupation require the issuing of decisions with legal force applying to the territory of the occupied state. In the legal system prior to the occupation of Iraq, the legislative power was not separate from the executive power. The Revolutionary Command Council, which was the supreme political power in Iraq, was responsible for promulgating laws and decisions having the force of law, while the powers of the elected National

Council were consultative. The occupying power took advantage of this situation, since the civilian governor combined the legislative and executive powers and used them to issue laws and orders with the force of law, all of which had a clear effect on the legal system in Iraq.

These measures included the Law of Administration for the State of Iraq for the Transitional Period, which was approved by the Governing Council on 8 March 2004.[4] It can be seen from the preamble to this law that it was deemed to be issued by the people of Iraq and not by the Governing Council, which had no legitimacy as it was not elected by the people. On the contrary, the Council could be viewed as part of the civilian power it shared with a civilian governor, as evidenced by the co-operation between Bremer and members of the Governing Council in promulgating this law. It will be recalled that the concluding provisions thereof do not indicate the constitutional body which conferred on the Governing Council the power to legislate.

The most distinctive feature of this law is that it serves as a provisional constitution for the administration of Iraq under occupation and replaces the Iraqi constitution of 1970. It effected a change in the Iraqi constitutional system by making the state federal rather than unitary (Art. 4) and gave extensive powers to the governorates, such that the president of the federal government cannot dismiss any member of a regional government or a governor or a member of the governorate or municipal council (Art. 55A). The law extended the federal powers of the Kurdistan region, conferring on the Regional Government the right to regional control over internal security and police forces. The Regional Government was further granted the right to impose taxes and fees within its boundaries (Art. 54A). It also allowed the National Assembly of the province of Kurdistan to amend any law which does not fall within the exclusive competence of the federal government (Art. 54B). This further weakened the central government under occupation. The law permitted multiple citizenships (Art. 11). It also gave three or more regions or a third of their electors the right to reject the results of the referendum on the permanent constitution, contrary to the purely democratic principle of majority rule.

## Executive power

The executive consisted of two bodies: the occupying authority and the Governing Council.

*The occupying authority*. This was composed of the civilian and the military arm. The civilian arm was headed by Ambassador Paul Bremer, who was appointed as a presidential envoy by George W. Bush on 9 May 2003 and granted full authority over the civil servants, activities and assets of the US government in Iraq. At the same time, US Secretary of Defence Donald Rumsfeld appointed Bremer as chief of the Coalition Provisional Authority and the executive,

4 See the Law of Administration for the State of Iraq for the Transitional Period, available at http://www.cpa-iraq.org/government/TAL.html (last visited 20 November 2007).

legislative and judicial powers were delegated to him, as indicated by Bremer in his memoirs.[5] The military arm of the occupation's executive power was headed by the commander of Coalition forces in Iraq, Lieutenant General Ricardo Sanchez, who reported to Bremer.

Bremer took up his post on 13 May 2003 and issued the first of a series of orders, namely an order for the Ba'ath Party to be dismantled and for the senior members of the party to be prevented from holding high office in government. His second order, issued on 23 May 2003,[6] provided for the dissolution of various "entities", including the Ministry of Defence and Military Armaments, the Republican Guard, the Presidential Guard, the Saddam Fedayeen and the Ministry of Information.

*The Governing Council.* This was created by Bremer on 13 July 2003. The Council represented Iraqi national authority and was one of the symbols of territorial sovereignty. It can be characterized as a presidential council consisting of twenty-five members representing the political elements active after the fall of the regime. To enable this Iraqi administration to ensure the continued provision of public services, the Governing Council constituted a cabinet of twenty-five ministers on 25 August 2003 reporting, in the absence of a prime minister, directly to the Governing Council along the lines of a presidential system.

In 2003 the Governing Council issued 142 presidential orders having the force of law, including Order No. 137 concerning the application of the provisions of the sharia (Islamic law) relating to family law (subsequently abrogated by Order No. 32/2004), Order No. 126 to expel the Mujahidin Khalq organization from Iraqi territory, and Order No. 127 to ratify the Law for the Establishment of the Iraqi Criminal Court for the Prosecution of Crimes against Humanity in Iraq.

In 2004, seventy-five orders were issued, including Order No. 33 approving the law on the administration of the State of Iraq, Order No. 51 concerning the creation of the Iraqi National Intelligence Service and Order No. 55 for the creation of the Commission on Public Integrity.[7]

## Judicial power

The Iraqi judiciary remained generally independent. To confirm this at the institutional level, a Supreme Judicial Council was established on 18 September 2003 and the judiciary was separated from the Ministry of Justice. The new council took over the administration of the Iraqi courts and the prosecution service. The above-mentioned Iraqi Criminal Court for the Prosecution of Crimes against Humanity was established by Order No. 48/2003 with the aim of trying certain officials of the previous regime accused of committing such crimes.

5 L. Paul Bremer III, *My Year in Iraq: The Struggle to Build a Future of Hope*, Beirut, 2006, p. 21.
6 All CPA official documents are published at www.cpa-iraq.org/regulations/ (last visited 20 November 2007).
7 Orders available at www.cpa.gov/government/governingcouncil.html (last visited 7 January 2008).

The Law of Administration for the State of Iraq for the Transitional Period, issued by the Governing Council on 8 March 2004, provided for the establishment of the Higher Juridical Council to oversee the federal justice system in Iraq, which includes courts of first instance, the Central Criminal Court of Iraq, courts of appeal and the Court of Cassation. Article 46B, however, states that ''The decisions of regional and local courts, including the courts of the Kurdistan region, shall be final, but shall be subject to review by the federal judiciary if they conflict with this Law or any federal law.'' The effect of this was to weaken the central government and to tend towards a confederal rather than a federal system.

## Security management

### Resolution 1546(2004)

This resolution of 28 June 2004[8] is deemed to be the basis for the official end of the occupation, with the transfer of political authority to the Iraqis from 30 June 2004 in accordance with Resolution 1511(2003), which had called upon the Coalition Provisional Authority to return governing responsibility and authority to the people of Iraq as soon as practicable (para. 6). The Governing Council was dissolved to make way for a sovereign Interim Government of Iraq responsible for drafting a permanent constitution, preparing for the election of a recognized representative government and establishing Iraqi forces to maintain order and combat terrorism (para. 16). Resolution 1511 also allowed for the formation of a multinational force to replace the provisional Coalition force which had occupied Iraq, so that it would not be seen as an occupation (para. 13).

From the start of the Interim Government presided over by Ayad Allawi on 30 June 2004, the Ministry of the Interior began training police units and carrying on its activities within the Multinational Force which replaced the provisional Coalition forces.

So from then on there were two detaining authorities present in Iraq, namely the authority in charge of the Multinational Force and the Iraqi national authority. To organize co-ordination between those two authorities, two letters were sent by the President of the Iraqi Interim Government and Colin Powell, then US Secretary of State, to the president of the UN Security Council, Lauro Baja. They contained the following points.

1. the establishment in principle of a security partnership between the Multinational Force and the Iraqi government to assist in providing security while recognizing and respecting national sovereignty;
2. the Iraqi security forces to be responsible to the Iraqi ministers;
3. co-ordination between the Multinational Force and the Iraqi security forces to achieve unity of command in their joint military operations; and

8 See notes 1 and 3 above regarding the resolution and the annexed letters.

4. efforts to reach agreement on the full range of fundamental security and policy issues, including policy on sensitive offensive operations.

However, operative paragraph 11 of Resolution 1546 provided for the Iraqi government to attach Iraqi security forces to the multinational force. This is what has effectively been taking place since the establishment of the Iraqi forces began, and has given rise to technical and operational problems in the absence of an agreement determining the relations between the two parties.

This legal gap between the parties led to the conclusion of a Memorandum of Understanding on 8 November 2004 between the British forces within the Multinational Force and the Iraqi Ministry of Justice. The Memorandum concerned persons accused of committing criminal acts, and provided for the British forces to detain such persons until such time as Iraq develops its capabilities to detain all the said accused persons in its own facilities.

It specifies three categories of detainees held by the British forces acting within the Multinational Force, namely,

1. persons suspected of having committed criminal acts;
2. persons detained on security grounds who are suspected of having committed criminal acts requiring them to be brought before the Iraqi courts; and
3. persons suspected of having committed criminal acts who have been detained at the request of the Iraqi authorities.

The Memorandum is basically concerned with the provision of humanitarian treatment to the said detainees, especially during their interrogation or delivery to the Iraqi authorities or the courts.

Despite the growth in the numbers and capabilities of the Iraqi forces, armed insurgent operations continued to increase, undermining the state of readiness of these forces and their ability to maintain security and impose the rule of law. This led to a delay in the transfer of responsibility for security from the Multinational Force to the Iraqi forces, contrary to the above-mentioned letters sent on 5 June 2004 to the president of the UN Security Council. There is thus a clear difference between what was resolved by the Security Council in operative paragraphs 1 and 2 of Resolution 1546 concerning the end of occupation, the dissolution of the CPA, the confirmation of full Iraqi sovereignty and the formation of a sovereign government of Iraq to assume full responsibility and authority by 30 June 2006, and the subordination of the Iraqi forces to the Multinational Force in accordance with the said resolution's paragraph 11. This had an adverse impact on the realities on the ground, as the said forces are acting as occupation forces in accordance with Resolution 1483(2003), rather than as allied forces in accordance with Resolution 1546(2004), and are doing so contrary to the wish of the Iraqi government to take over responsibility for security in Baghdad and the other provinces within the framework of its territorial sovereignty. This wish has been expressed in Resolution 1511 (para. 3) and Resolution 1546 (para. 8) and was confirmed in the letter annexed to Resolution 1637(2005) of the Security Council.

## *De facto* division of responsibility for security

There is, however, a de facto division of responsibility for security, despite the failure to arrive at a security partnership between the parties. It includes the following:

1. The Iraqi forces are subject to the supervision of the Multinational Force during patrols and raids on houses and the pursuit of armed elements in the operational areas, depending on the requirements of military planning and operations of the US forces in the field.
2. The Iraqi armed forces have full responsibility for security in a number of governorates, in accordance with partial agreements concluded between the commands of the Iraqi forces and the Multinational Force. By virtue of such agreements the latter resumes responsibility for security once again whenever a serious crisis arises in any of these governorates.
3. The Iraqi forces do not have any responsibility for security in a number of sensitive governorates such as the Al-Anbar, Diyala and Salahadin governorates.
4. In June 2007 the Multinational Force handed over responsibility for security to the *peshmerga* forces of the Kurdistan regional government directly, without going through the Iraqi central government, thus placing the security aspect in this region outside the central government's sphere of competence.
5. The Multinational Force is delaying the arming of the Iraqi military forces and the police with the modern weapons necessary for maintaining security and public order. This, in turn, is hampering the state of readiness of the Iraqi forces to face major terrorist operations and any emergency relating to the security or safety of Iraq, the protection of civilians and the smooth operation of the public services, all of which is contrary to the course of action laid down in the Security Council resolutions for the full transfer of responsibility for security to the Iraqi government.
6. It will be recalled that the worsening security situation in Iraq led the US forces to conclude contracts with private security companies (PSCs) for the protection of foreigners and foreign missions, particularly after the bombing of the United Nations office in Baghdad in 2003. The CPA issued Memorandum No. 17/2004 concerning the requirements for the registration of PSCs. To obtain a permit to operate in Iraq, such companies must first be registered with the Ministry of Interior. Section 9 of this Memorandum specifies the sphere of competence of such companies as deterrence rather than law enforcement. They are subject to the Iraqi penal code (Law no. 111 of 1969 as amended) and the Iraqi Weapons Code of 1992 as amended and so do not enjoy the immunity granted to the Multinational Force. The most well-known of these companies is Blackwater, to which the protection of the US embassy, diplomatic envoys and foreigners in Iraq was entrusted. On 16 September 2007 a mortar shell landed close to a passing convoy escorted by Blackwater. Its personnel responded by firing at random in Baghdad's

Al-Nusur Square, without counter-attack; ten civilians were killed and thirteen injured. This provoked a public outcry, and the Ministry of the Interior withdrew the company's licence to operate in Iraq. The US Secretary of State Condoleezza Rice was quick to present her personal apologies for the incident. In Washington, investigations are being conducted into the excesses of this company, including the introduction of unlicensed weapons and their delivery to unofficial bodies.

There are about 20,000 people working for private security companies in Iraq,[9] despite the fact that they have no legal capacity to impose law and order. However, at the security level they form a third force alongside the Multinational Force and the Iraqi forces. This is contrary to the law, and such companies cannot in any way be deemed to be a detaining authority when armed elements are arrested by them.

## Parallel non-international armed conflict

As explained above, an Iraqi government does exist and the foreign forces present in Iraq are deemed to be allied forces, the authority of which stems from UN Security Council resolutions and from the approval of the Iraqi government. At the same time, there are political elements in Iraq that consider the foreign forces' presence to be an occupation of the country and, as such, without legal authority. This is the justification asserted for their armed resistance against those forces, which is taking the form of a non-international armed conflict.

The present internal armed conflict in Iraq does not fall under Article 2 common to the Geneva Conventions, which relates to international armed conflict. Similarly, the 1977 Protocol II additional to the Geneva Conventions does not apply if an internal armed conflict lacks the organization found in international armed conflict, and in particular if it does not have co-ordinated and continuous armed operations and a command structure responsible for the application of international humanitarian law. Furthermore, Iraq is not party to it. Thus, as the necessary characteristics are lacking, the law that applies to the internal armed conflict in Iraq is Common Article 3 of the Geneva Conventions, the customary international law of internal armed conflicts and human rights law.

### The armed resistance

It was not long after the occupation of Iraq on 9 April 2003 that operations by unknown armed elements began against unspecified targets, the Coalition forces

9 In April 2004, in response to a request from Congress, the Coalition Provisional Authority (CPA) compiled a list of 60 different firms employing a total of 20,000 personnel (including US citizens, Iraqis and third-country nationals). See David Isenberg, *The Good, the Bad, and the Unknown: PMCs in Iraq, British American Security Information Council*, March 2006, available at www.basicint.org/pubs/2006PMC.htm (last visited 7 January 2008).

and civilian targets. The armed operations gave the impression that they were random actions intended to create a state of general terror rather than to achieve a military objective. This would place them in the category of terrorist acts.[10]

The armed resistance groups in Iraq cannot be considered combatants, since they do not fulfil any of the conditions of Article 4 of the Third Geneva Convention and, in particular, they do not belong to a party to the conflict. To a large extent they do not even comply with the most basic principles governing the conduct of operations, which require them to carry their weapons openly and to respect the laws and customs of war. When these essential conditions are not met, resistance in urban warfare to foreign occupation takes the form of random operations which target civilian and military persons and objects indiscriminately. However, when the attacks are directed more against civilians and civilian objects than military targets – as is indeed happening in the conflict in Iraq – such actions may be deemed to be terrorist acts which fall under the provisions of criminal law and the Anti-Terrorism Law of 2005.

Such acts have indeed characterized the armed operations carried out since the occupation began on 9 April 2003, including the bombing of the Jordanian embassy in Baghdad on 3 August 2003, the bombing of the UN headquarters in Baghdad which cost the life of UN Special Envoy Sergio Vieira de Mello on 19 August 2003, the bombing of the popular market in Hillah which resulted in more than 200 civilian deaths, and the bombing of the Sadriya market in Baghdad in 2006 which killed more than 100 civilians. These operations increased in 2007, with the number of victims running into hundreds in the explosion in Khillani Square and the Amarli district in Kirkuk and the explosions near the Sinjar region resulting in the deaths of over 500 civilians.[11]

Cultural objects have also been targeted, such as the booksellers in Mutanabi Street and historical monuments such as Baghdad's al-Sarafiya iron bridge. Attacks generally take the form of suicide operations using car bombs, as well as the shelling of residential areas and districts facing the International Zone where the Iraqi national government and the Multinational Force have their headquarters.

There have been far more attacks on civilians and civilian objects in these daily operations than against US and Iraqi vehicles and soldiers. They are often carried out using improvised explosive devices planted on public roads and

10 Article 1.2 of the Arab Convention for the Suppression of Terrorism signed in Cairo on 22 April 1998 defines terrorism as "Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize a national resources." Article 1.3 defines a terrorist crime as "Any offence or attempted offence committed in furtherance of a terrorist objective in any of the Contracting States, or against their nationals, property or interests, that is punishable by their domestic law."

11 For more information on civilian deaths in Iraq see Iraqi Body Count, www.iraqbodycount.org/ (last visited 7 January 2008), and Les Roberts, Riyadh Lafta, Richard Garfield, Jamal Khudhairi, Gilbert Burnham, "Mortality before and after the 2003 invasion of Iraq: cluster sample survey", *The Lancet*, Vol. 364 (9448) (20 November 2004), pp. 1857–64.

indiscriminately striking soldiers and civilians, contrary to the laws of war, under which it is mandatory to distinguish between military targets and civilians or civilian objects. Resolution 1546(2004) (para. 17) condemned all acts of terrorism in Iraq and called on the member states of the United Nations to prevent the transit of terrorists to and from Iraq, arms for terrorists, and financing that would support terrorists.[12]

## Minimal guarantees of Article 3 common to the Geneva Conventions

At all stages of non-international armed conflicts, international humanitarian law guarantees the protection of persons who come within the category of detainees. It does so by virtue of Common Article 3, which can be seen as a general convention in miniature, since it contains all the humanitarian principles for the protection of victims of armed conflicts. This article protects civilians and other persons not or no longer taking a direct part in the hostilities – that is, those who have laid down their arms and surrendered to the enemy, and those placed *hors de combat* by sickness, wounds or any other cause preventing them from taking part in the fighting. It also protects those who belong to elements bearing arms against the government authority or who support them in any way. If such persons are detained, they are not treated as prisoners of war if they did not fulfil the conditions outlined above for combatant status. To ensure that they do not face inhumane treatment, they are deemed to be detainees covered by the minimum level of humanitarian protection laid down in Common Article 3, without adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

The armed conflict in Iraq is sometimes waged between the Coalition forces and armed elements, and sometimes between the Iraqi authorities created after the dissolution of the Coalition Provisional Authority and those same elements. In the latter case, it is a non-international armed conflict because the latter have no international capacity but are local armed elements, possibly joined by foreign volunteers not linked to any specific international party. It cannot, however, be regarded as a mixed internal and international conflict, as was the case with the war in Bosnia-Herzegovina.[13]

12 "[The Security Council] … *Condemns* all acts of terrorism in Iraq, *reaffirms* the obligations of Member States under resolutions 1373 (2001) of 28 September 2001, 1267 (1999) of 15 October 1999, 1333 (2000) of 19 December 2000, 1390 (2002) of 16 January 2002, 1455 (2003) of 17 January 2003, and 1526 (2004) of 30 January 2004, and other relevant international obligations with respect, inter alia, to terrorist activities in and from Iraq or against its citizens, and specifically *reiterates* its call upon Member States to prevent the transit of terrorists to and from Iraq, arms for terrorists, and financing that would support terrorists, and *re-emphasizes* the importance of strengthening the cooperation of the countries of the region, particularly neighbours of Iraq, in this regard", Resolution 1546(2004) (para. 17).

13 See *Prosecutor* vs. *Dusko Tadic (Jurisdiction)*, International Criminal Tribunal for the former Yugoslavia, 1995, 105 ILR 419. Similarly, the International Court of Justice refused to consider the conflict in Nicaragua as an international armed conflict. This was because, on the one hand, the Contras were not a party to an international conflict and, on the other, they were not under the effective control of the government of the United States as a party to the conflict vis-à-vis the government of Nicaragua

## The protection of detainees

According to estimates by foreign sources, some 37,000 people have been detained by the Iraqi authorities on suspicion of taking part in the insurgency or of unlawful acts. Iraqi sources put the figure at around 20,000. Of these 37,000, about 10,000 are held in the prisons run by the Ministry of Justice, about 5,500 in the prisons of the Ministry of the Interior, 1,530 in the prisons of the Ministry of Defence, 500 in juvenile institutions of the Ministry of Employment and Social Affairs, and around 2,100 in the prisons of the Kurdistan region. The Central Criminal Court has sentenced 1,747 of the 2,000 people tried, 80 per cent of them for periods of imprisonment of five years or more.[14]

### The detaining authority

In every state the public authorities are responsible for maintaining law and order. The public authority which makes arrests or restricts the freedom of suspects as a result of breaches of public order and the use of arms against the public authority is known as the "detaining authority". Since the occupation of Iraq on 9 April 2003, the Coalition forces that occupied Iraq have been the detaining authority, as stated in Security Council Resolution 1483(2003) and confirmed by the two letters sent to the president of the UN Security Council on 8 May 2003 by the representatives of the United States and the United Kingdom, on the grounds that these two states, whose forces form the main contingents of the provisional occupation forces, are the occupying powers. Those forces are consequently subject to the provisions of the Hague Convention (IV) of 1907 and the Fourth Geneva Convention of 1949. All this was decided in the absence of an Iraqi national authority during the first days of the occupation.

The Iraqi national authority, represented by the Governing Council, was established by the civilian governor on 13 July 2003. A ministry was formed by the Council to fill the constitutional vacuum left by the fall of the previous regime and was regarded as an interim Iraqi administration in accordance with Security Council Resolution 1511 of 16 October 2003. Paragraph 16 thereof provided for the establishment of Iraqi police and security forces. Since such forces were not established at the time and the interim Iraqi administration did not exercise any police powers until 30 June 2004, the occupation authority remained the sole detaining authority during that period.

(*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* vs. *United States*), Merits, Judgment, [1986] ICJ Rep., at 14). See also Natalie Wagner, "The development of the grave breaches regime and individual criminal responsibility by the International Criminal Tribunal for the former Yugoslavia", *International Review of the Red Cross*, Vol. 85 (850) (June 2003), p. 372.

14 UN Assistance Mission for Iraq (UNAMI), *Human Rights Report, 1 January–31 March 2007*, pp. 21 ff., available at www.uniraq.org/FileLib/misc/HR%20Report%20Jan%20Mar%202007%20EN.pdf (last visited 28 January 2008).

## Rules regulating internment in occupied Iraq

Under Article 41 of the Fourth Geneva Convention, protected persons in the territory of a party to conflict may be placed in assigned residence or interned if the measures of control mentioned in that Convention are inadequate. However, internment or placing in assigned residence may be ordered only if absolutely necessary for the security of the state; or if voluntarily demanded by the person concerned, acting through the representatives of the Protecting Power, and if his or her situation renders this step necessary (Art. 42).

Protected persons in occupied territory who commit an offence which is solely intended to harm the occupying power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, or a grave collective danger, or seriously damage the property of the occupying forces or administration or the installations used by them, are liable to internment or simple imprisonment, provided the duration of the internment is proportionate to the offence committed (Art. 68). In any event, civilians retain all their civil capacity and may exercise the rights arising therefrom to the extent permissible by the condition of internment.

As there are two detaining authorities in Iraq, we shall examine separately the position of the detainees held respectively by the Multinational Force and by the Iraqi government authority.

With regard to the rights of the occupying powers to introduce or change laws, the Fourth Geneva Convention stresses that the penal laws of the occupied state shall remain in force, with the exception that they may be repealed or suspended by the occupying authority in cases where they constitute a threat to its security or an obstacle to the application of the Convention; the courts of the occupied state shall continue to function (Art. 64). It further stipulates that the penal provisions enacted by the occupying power shall not come into force before they have been published and brought to the knowledge of the inhabitants, and shall not have retroactive effect (Art. 65). The occupying power may enact laws that are necessary to ensure the administration of the occupied territories, and to ensure the security of the occupying state and of its members and property and likewise of the establishments and lines of communication used by its forces (Art. 64). In addition, the death penalty may not be pronounced against a protected person save where that person is guilty of espionage, of serious acts of sabotage against the military installations of the occupying state or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the laws in force of the occupied state before the occupation began (Art. 68). The occupying state may not arrest protected persons or prosecute or convict them for acts committed or for opinions expressed before the occupation or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war (Art. 70).

### Detainees held by the Multinational Force

Around 18,000 detainees are currently held in detainment centres by the Multinational Force. These camps are located at Bucca in Basra, Cropper near Baghdad International Airport and Susa in Sulaimaniya. The Multinational Force also reopened Abu Ghraib prison after closing it directly after the occupation began. This prison was the scene of serious human rights violations by US prison personnel, namely the degrading treatment of Iraqi prisoners in the cells.

The Iraqi Bar Association is trying to facilitate the release on bail of unconvicted detainees. The Ministry of Justice has had bail forms distributed to enable them to carry out the bail formalities in the 130 notaries' offices in Baghdad and the governorates. An investigation service has been established to look into the settlement of cases of detainees who have not been proved to have committed crimes. In order to speed up the proceedings, the Bar Association is representing them in the lawsuits brought against them.

Despite prolonged detention, many detainees have not had their case heard because of the security situation and the delay in the investigation committees' work to pass their case on to the courts or to release them in the absence of specific charges against them. Twenty-seven tribunals have been established to deal with the situation of those detainees, and 1,100 out of a total of 4,062 have been released through due process on the part of the Iraqi authorities. With regard to the detainees held by the Multinational Force, approximately 25,000 detainees held by it are subject to legal proceedings before Iraqi judges.

## The protection of civilians

The deterioration in the security situation in Iraq has had a serious effect on civilians, particularly in the "hot spots" of the city of Baghdad and the governorates of Anbar and Diyala, where a number of families were forced to abandon their homes, fleeing the military operations conducted by the joint Iraqi and multinational forces on the one hand, and the armed operations carried out by the insurgents on the other. The persons adversely affected by the conflict since the occupation of Iraq on 9 April 2003 can be divided into the following categories.

### Internally displaced persons

These are persons who leave their ordinary place of residence because of natural and humanitarian catastrophes and live temporarily elsewhere within the territory of their state until such time as the causes for their displacement are removed.

The report by the United Nations Assistance Mission for Iraq (UNAMI)[15] indicated that the displacement situation had worsened after the events of 22

15 UNAMI, *Human Rights Report, 1 March–30 April 2006*, available at www.uniraq.org/documents/HR%20Report%20Mar%20Apr%2006%20EN.PDF (last visited 28 January 2008).

February 2006, with the bombing of the Golden Mosque in Samarra – the Imam al-Askari mosque, one of Iraq's holiest shrines. This was followed by a serious upsurge of violence in Baghdad, Basra and other regions carried out by armed militias. It included the destruction of religious centres, kidnappings, torture and extrajudicial killings, forcing civilians to flee their homes from arbitrary acts of revenge, such as mortar attacks on residential districts.[16] According to the Ministry of the Interior, 249 people were killed during the period of 22–25 February 2006 alone.

These events created a sense of helplessness among the Iraqi authorities, who were unable to get help to the displaced persons, particularly because of the breakdown in public services and the closing of schools in a number of the regions affected. Similarly, neither the Iraqi Red Crescent nor the ICRC were able to provide the necessary relief owing to the increasingly precarious situation. According to the figures provided by the Ministry of Immigration and Emigration, 26,858 families were displaced, bringing the number of displaced persons up to about 1.5 million.[17] A sum amounting to 500 million dinars was allocated to relief operations, including the establishment of eleven camps for their temporary accommodation until the causes for the displacement are removed.

## Refugees

Refugees are persons who have left their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion (Art. 1A (2) of the 1951 Convention Relating to the Status of Refugees). The granting of refugee status to asylum seekers is subject to the decision of the host country on the basis of security and political reasons. However, the host country may not expel or return a refugee to the country he or she has fled if there is reason to believe that this would endanger his or her life or if he or she is at risk of being ill-treated or tortured. In such cases, the country must find other solutions.

The restrictions imposed by host countries fearing infiltration by terrorists among asylum seekers and the unwillingness of those countries to accept their increasing numbers have aggravated the problem of Iraqi asylum seekers since the fall of the previous regime. The office of the UN High Commissioner for Refugees (UNHCR) is working to find governments willing to grant asylum to those it has registered at its offices in Damascus and Amman. The US government has promised to respond to 7,000 applications submitted by asylum seekers.

In the light of recent developments and the improved security situation in the second half of 2007, Iraqi families have started to return home and coaches are

16 Ibid.

17 Quoted in "Shia, Sunnis forming Iraq ghettos", *Al Jazeera*, 30 July 2006, available at http://english.aljazeera.net/English/archive/archive?ArchiveId=24808 (last visited 28 January 2008).

now transporting Iraqi families from Damascus to Baghdad instead of the other way around.

## Emigrants

Emigrants are persons who have left their country or ordinary place of residence for economic, social or political reasons in order to live in another.

A large number of Iraqis have arrived in Syria and Jordan, the countries most accessible for those leaving Iraq for various reasons: the deteriorating security situation there, their inability to find jobs, the search for work or a safe haven, or application for political asylum in other countries. During the first half of 2007, 19,800 asylum applications were registered with the UNHCR in those two countries.[18]

As the overwhelming majority of these Iraqis fail to obtain residence permits in Syria and Jordan, it is difficult to describe them as immigrants, particularly as they do not intend to remain there for a long period, the majority of them hoping to return to Iraq as soon as the security situation improves.

The governments of Syria and Jordan have complained about the economic and environmental burdens arising from the presence of 1,000,000 and 750,000 Iraqis respectively on their territory. The neighbouring states have therefore tried to find solutions for the difficulties faced by the Iraqis in those countries, including health, educational and economic problems, and to respond to appeals for assistance in meeting their needs. To this effect a conference attended by most of the neighbouring states was convened at Sharm Al-Sheikh in May 2007. It set up three committees:

- the Energy Committee, which met in Ankara in June 2007 to discuss the electricity crisis, petroleum by-products and water;
- the Immigrants Committee, which met in Amman in July 2007, when Iraq promised to grant US$25 million to assist the Iraqis in Syria and Jordan. The Jordanian government offered to admit Iraqi students to Jordanian schools but not to grant them residence; and
- the Security Committee, which met in Damascus in August 2007 with the aim of arriving at an agreement between Syria and Iraq to prevent the infiltration of armed elements through the common borders between Iraq and the neighbouring states. The efforts in this field culminated in the visit to Damascus of the Iraqi Prime Minister, Nouri Al-Maliki.

18 For information on the UNHCR in Iraq in 2007 see UNHCR, "Iraq situation response: update on revised activities under the January 2007 Supplementary Appeal, July 2007", available at www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=SUBSITES&id=46a4a5522 (last visited 28 January 2008).

### Recipients of government aid

These are the people who receive aid from the Iraqi government because they have been directly or indirectly affected by the armed operations. The aim is to alleviate the suffering resulting from the continuation of the internal armed conflict. They fall into two categories:

(a) *Direct victims of armed operations.* On 1 June 2004, the Iraqi Interim Government issued Order No. 10 to the Law on the compensation of martyrs or people injured as a result of terrorist acts in respect of members of the Iraqi armed forces and civilian victims. As regards civilians, Paragraph 4 of the Order provided that ''appropriate compensation shall be granted to citizens martyred or permanently disabled as a result of terrorist acts. The definition of ''terrorist acts'' and the scope of the compensation to be determined are in accordance with the instructions of the Ministry of Finance.''[19]

(b) *Indirect victims of armed operations.* As a result of the economic decline due to the occupation of Iraq and the ongoing armed conflict, many Iraqis on limited incomes are suffering from hardship and the rise in the rate of inflation to 50 per cent. Unemployment is increasing and the plight of the growing number of widows and orphans as hostilities continue is becoming ever more acute. To address this situation the Iraqi government has set up two relief programmes. The first programme consists of a social protection network to assist a million Iraqi families earning less than a dollar a day; it was established in December 2005 and was allocated US$500 million in 2006 and US$730 million in 2007. The second programme is designed to provide credit on easy terms for unemployed graduates to establish small production projects, and for owners of commercial premises adversely affected by terrorist acts, displaced persons returning to their homes and disabled persons covered by the social rehabilitation programme. A total of US$10 million has been allocated for this programme.

## Conclusion

The occupying authorities are seeking to extend their influence in the occupied state and to remain in it for as long as possible in order to reap the fruits of occupation and to benefit from the resulting economic, political and strategic advantages. For its part, the national authority in the occupied state is seeking to lighten the burden of occupation in order to regain its national sovereignty, diminished by foreign occupation. Though it may seem paradoxical, there may be

19 Order 10/2004 issued by the Prime Minister according to Article 26 of the Law of Administration for the State of Iraq for the Transitional Period, of 8 March 2004.

a convergence of short-term or long-term interests in the aims of the occupying authorities and those of the national authority.

In the short term, a national authority that comes into being under an occupation can continue only if it accepts the results of the occupation and co-operates with the occupying authority so as to safeguard what remains of the semblance of sovereignty, namely the existence of a national civil administration, and to ensure the running of the public services and the return to civilian life once the fighting has ceased.

Over time, military occupation may change into peaceful occupation by virtue of a treaty of peace and friendship forming the basis for a long-term political alliance between the occupying state and the occupied state. This model proved successful in Germany and Japan after the end of the Second World War in 1945 and in South Korea after the ceasefire agreement in 1953. The success of such alliances may be attributed to two factors: first, the elimination of the previous political regime and the establishment of a liberal democratic system on the lines of the model prevailing in western Europe and North America; and, second, a stable internal security situation in which the new political regime and reconstruction measures similar to the Marshall Plan for western Europe can succeed.

However, the situation in Iraq is different, owing to the existence of a conflict between the political elements active after the fall of the previous regime and the recourse to arms by the occupying power to manage that conflict, thereby becoming a party to it and prolonging the occupation as a result. It is therefore necessary to distinguish between the legal aspect and the political aspect in Iraq, which remains subject to the political realities on the ground.

Although four years have elapsed since the war ended on 9 April 2003, completion of the requirements for national sovereignty has not been achieved in accordance with the two above-mentioned resolutions of the Security Council and the letters annexed to them. On the one hand, the security partnership between Iraq and the Multinational Force has not been established; on the other hand, full responsibility for security has not been transferred to the Iraqi forces. In view of the foregoing, it can be said that the political situation in Iraq is different from the legal situation specified in the Security Council resolutions and the United Nations Charter. This means that the Multinational Force must continue to fulfil its commitment to transfer the full responsibility for security to the Iraqi government.

The insurgents are subject to the provisions of Article 5 of the Fourth Geneva Convention of 1949, among others, when they fall into the hands of the Multinational Force as the detaining force. When they fall into the hands of the Iraqi forces as the detaining force, they are subject to the Iraqi penal code[20] and to the law on the fight against terrorism,[21] since they are considered to be terrorists; in that case, the only way they are protected by international humanitarian law is within the framework of Article 3 common to the four 1949 Geneva Conventions.

20 Law No. 111/1969.
21 Law No. 13/2005.

The deterioration in the security situation and the poor level of service provided by the public services has increased the suffering of the civilian population. Their ordeal has been further aggravated by the fact that civilians are the prime target of the operations by armed elements and of air raids on residential areas by the Multinational Force. The international community is urged to provide assistance – through the individual states, the international organizations, including the special agencies of the United Nations, and the non-governmental organizations, foremost among them the International Committee of the Red Cross – to the victims of the armed conflict in Iraq.

Since September 2007 the security situation has improved, thanks to the joint operations led by the Iraqi forces and the Multinational Force against the insurgents, particularly in Baghdad and Diyala. This new development gives hope to the Iraqi people and courage to resume their economic activities. The Joint Declaration signed between President Bush and the Iraqi Prime Minister on 26 November 2007 should enable the Security Council's mandate under Chapter VII of the United Nations Charter and that of the Multinational Force in Iraq to draw to a close at the end of 2008. It should also enable a relationship of co-operation to be established between Iraq and the United States. The year 2008 should thus be the year in which the recovery of full sovereignty is accomplished.

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# Suicide attacks and Islamic law

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## Abstract

*Suicide attacks are a recurrent feature of many conflicts. Whereas warfare heroism and martyrdom are allowed in certain circumstances in times of war, a suicide bomber might be committing at least five crimes according to Islamic law, namely killing civilians, mutilating their bodies, violating the trust of enemy soldiers and civilians, committing suicide and destroying civilian objects or properties. The author examines such attacks from an Islamic* jus in bello *perspective.*

One of the most disturbing developments in the history of warfare under Islamic law and international humanitarian law is the phenomenon of suicide attacks. These operations are carried out in many conflicts around the world, and have become a prominent feature in the present Iraq war[1] as well in the occupied Palestinian territories[2] and Afghanistan. In this article we shall focus on their use by Muslims from the perspective of Islamic *jus in bello* (rules governing the conduct of war). Historically, the first organized suicide attacks in Islam were carried out by the Nizari Isma'ili, a Shiite community.[3] It was Hasan-e Sabbah who initiated an open revolt against the Seljuq emirs (Arabic *amīr* – "commander", or "prince") and laid down the foundations of an independent Nizari Isma'ili state based on their fortress of Almut. The Seljuq vizir, Nizam al-

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Mulk, who was assassinated on 12 Ramadan AH 485 (16 October 1092), is thought to have been the first prominent victim of the Nizari devotees (*fida'is*).[4]

There are many questions that need to be answered in this discussion. For instance, what is the position of Islamic law vis-à-vis suicide attacks? Are they martyrdom or perfidious acts? Are there circumstances in which such attacks are allowed? Can the heroism of the companions of the Prophet (PBUH) and Imam Husain on battlefields be considered as equivalent to suicide attacks? Who can carry out such attacks and against whom can they be carried out? Can women, children and civilians be the target of such attacks? These and other relevant questions that we have attempted to answer are complex rather than simple.

## Rulings of some Muslim scholars regarding suicide attacks

On 18 April 1983, the Lebanese Shiite organization Islamic Jihad (the precursor of Hezbollah[5] – the Party of God) carried out suicide attacks on the US embassy in West Beirut, killing sixty-three staff members. On 23 October the same year the

1 Up-to-date statistics are hard to come by in Iraq, but a report in the *Boston Globe* of 10 June 2005 quoted statements by US Defence Department officials (who asked to remain anonymous) that over 50 per cent of the seventy insurgency attacks a day (on average) were carried out by suicide bombers. Casualty levels fluctuate wildly, but average around twelve deaths per suicide attack. The majority of suicide attacks originate from Al Qaeda, and are carried out by zealous recruits from all over the Muslim world who are flooding into Iraq. Other organizations that have also carried out suicide attacks are the Salafi-jihadi umbrella group Jaish Ansar al-Sunnah (JAS) and the Shia cleric Moqtada al-Sadr's Mahdi Army. See A. B. Atwan, *The Secret History of Al-Qa'ida*, Saqi Books, London, 2006, p. 100.

2 In Palestine most resistance organizations now have a suicide wing. The most active since the outbreak of the second *intifada* have been Hamas, the Al-Aqsa Martyrs' Brigade (part of Fatah) and the Palestinian Islamic Jihad (PIJ). See Christoph Reuter, *My Life is a Weapon: A Modern History of Suicide Bombing*, trans. from German by Helena Ragg-Kirkby, Princeton University Press, Princeton N.J. and Oxford, 2004, repr. Manas Publications, Delhi, 2005, pp. 79–114.

3 After the death of the sixth imam, Ja'far al-Sadiq, in AH 148, the majority of Shia acknowledged Imam Musa Kazim as their seventh imam, whereas the minority upheld the claims of his elder brother Isma'il. After the foundation of the Fatimid state in Tunisia by 'Ubayd-Allah al-Mahdi (AH 297–322/AD 909–34), his descendant al-Mu'iz li-Din Allah (AH 341–65/ AD 953–75) established the Fatimid Caliphate in Egypt. Al-Mustansir, who was the eighth Fatimid caliph, died in AH 487, and one of his sons, al-Musta'li, became the ninth Fatimid caliph and was the imam of the western Isma'ilis, whereas his other son Nizar was the imam of the Nizaris or eastern Isma'ilis. Both types of Isma'ilis are found in India and Pakistan: the eastern Isma'ilis are the followers of the present Aga Khan, and the western Isma'ilis are popularly called Bohoras. The eastern Isma'ilis are also found in east Africa, central Asia, Persia, Syria and China. See *Adv.-General v. Muhammad Husen Huseni* (*Aga Khan case*), (1886) 12 Bom. HCR 323, at 504–49; see also Asaf A. Fyzee, *Outlines of Muhammadan Law*, Oxford University Press, New Delhi, 1974, 2nd imp. 1999, pp. 39–43.

4 See Farouk Mitha, *Al-Ghazali and the Ismaʿilis: A Debate on Reason and Authority in Medieval Islam*, Isma'ili Heritage Series, London, 2001, Vol. 5, p. 23. See also Farhad Daftari), "Hasan-i-Sabah and the origins of the Nizari movement", in Daftari (ed.), *Medieval Isma'ili History and Thought*, Cambridge University Press, Cambridge, 1998, p. 193; and Bernard Lewis, *The Assassins, A Radical Sect in Islam*, Weidenfeld and Nicolson, London, 1967.

5 It has rightly been pointed out by Donald Neff that, without anticipating it, and certainly without wanting it, the policy of Israel in Lebanon "created … its own worst enemies" – the Hezbollah and (later and only indirectly) Hamas movements. See www.wrmea.com/archives/november02/0211020.html (last visited 17 December 2007).

headquarters of the US and French forces in Beirut were attacked by suicide bombers, resulting in the death of 298 military men and women. According to Saʿad-Ghorayeb, these suicide attacks took place because Khomeini, the supreme Shiite leader or *marjaʿa*,[6] authorized them. The ''martyrs'', as he termed them, at the US Marines compound ''saw nothing before them but God, and they defeated Israel and America for God. It was the *Imam* of the Nation [Khomeini] who showed them this path and instilled this spirit in them.''[7]

The leading figure among the Lebanese Shiite community, Sayyid Muhammad Hussayn Fadlallah, initially denied that he supported these attacks,[8] but eventually gave them his endorsement. He stated,

> Sometimes you may find some situations where you have to take risks. When reality requires a shock, delivered with violence, so you can call upon all those things buried within, and expand all the horizons around you – as, for example, in the self-martyrdom operations, which some called suicide operations.

Fadlallah described the attacks as the ''answer of the weak and oppressed to the powerful aggressors''.[9] He argued that in the absence of any other alternative, unconventional methods became admissible, and perhaps even necessary:

> If an oppressed people does not have the means to confront the United States and Israel with the weapons in which they are superior, then they possess unfamiliar weapons … Oppression makes the oppressed discover new weapons and new strength every day … They must thus fight with special means of their own. [We] recognize the right of nations to use every unconventional method to fight these aggressor nations, and do not regard what oppressed Muslims of the world do with primitive and unconventional means to confront aggressor powers as terrorism. We view this as religiously lawful warfare against the world's imperialist and domineering powers.[10]

For Fadlallah there is no difference between setting out for battle knowing you will die after killing ten of the enemy, and setting out to the field to kill ten and knowing you will die while killing them.[11] Without suicide bombers/

6 Individual Shiites are bound to accept a *marjaʿa*'s opinion in *fiqh* (Muslim jurisprudence) matters without any dissent.

7 Saʿad-Ghorayeb, *Amal, Hizbu'llah: Politics and Religion*, Pluto Press, London, 2002, p. 67; Martin Kramer, ''Sacrifice and ''self-martyrdom'' in Shiite Lebanon'', *Terrorism and Political Violence*, Vol. 3 (3) (1991), pp. 30–40. See the revised version in Martin Kramer, *Arab Awakening and Islamic Revival*, Transaction Publishers, New Brunswick, 1996, pp. 231–43.

8 See Ghorayeb, above note 7, p. 6.

9 Judith Palmer Harik, *Hezbollah: The Changing Force of Terrorism*, I. B. Tauris, London and New York, 2004, pp. 65, 70.

10 See Martin Kramer, ''The moral logic of Hizballah'', in Walter Reich (ed.), *Origins of Terrorism: Psychologies, Ideologies, Theologies, States of Mind*, Cambridge University Press, Cambridge, 1990, pp. 131–57, available at http://www.geocities.com/martinkramerorg/MoralLogic.htm (last visited 17 December 2007).

11 Martin Kramer, ''The oracle of Hizbu'llah'', available at http://www.geocities.com/martinkramerorg/Oracle2.htm (last visited 17 December 2007).

martyrdom operations in Lebanon, ''we wouldn't have been able to win'', he asserted in 2000, ''but we don't need them any more''.

On 25 February 1994 Dr Baruch Goldstein, a Jewish settler, massacred 29 Muslim worshippers during *fajr* (dawn) congregational prayer in a Hebron mosque. In response, the Islamic resistance movement Hamas introduced suicide attacks into its conflict with Israel and started to strike at Israel's heartland. The suicide attack on 13 April 1994 at the central bus station in Hadera was probably the first such attack by Hamas. Another took place on 25 February 1996 on bus no. 18 in Jerusalem.[12] Other Palestinian groups followed suit. Ramadhan Shellah, a leader of Islamic Jihad in the Occupied Territories, acknowledged that the tactic had been taken over from the Lebanese Hezbollah. In an interview given to *Al-Hayat* newspaper on 7 January 2003 he was asked whether the organization had borrowed the idea of ''martyrdom operations'' from Hezbollah. ''Of course'', he said.[13]

In his interview, placed on his organization's website,[14] Fadlallah strongly supported the use of such attacks by Palestinian groups. He explained,

> [W]e know that the *mujahidin* are not targeting the civilians but the occupier in occupied Palestine. In addition, we don't consider the settlers who occupy the Zionist settlements civilians, but they are an extension of occupation and they are not less aggressive and barbaric than the Zionist soldier. At the same time that we confirm the legitimacy of these operations, we regard them among the most prominent evidence of *jihad* in Allah's way, and we consider any criticism, whether intentional or not, against this type of operation represents an offence against the confrontation movement led by the Palestinian people, including all parties, against the Israeli occupation.

On the other hand, he was one of the first high-ranking Shia scholars publicly to condemn the attacks on the United States of 11 September 2001, probably the most horrific example of suicide attacks. As we shall see later, the weakness of Fadlallah's arguments is that he does not distinguish between suicide attacks by combatants (not pretending to be civilians) of either side during an ongoing war, and those against military objectives or civilians and civilian objects by persons pretending to be civilians.

The then Chief Mufti of Saudi Arabia, Sheikh 'Abd al-'Aziz ibn Baz, condemned suicide attacks, arguing that they might be regarded as self-murder and therefore be unlawful. He asserted that ''such attacks are not part of the *jihad*, and I fear that they are just suicides plain and simple. Although the Qur'an allows, indeed demands, that the enemy be killed, this has to happen in such a way that it does not run contrary to the religious laws''.[15] Sheikh Yusuf al-Qaradawi, one of

12 This coincided with the date of Baruch Goldstein's attack two years before on the Hebron mosque.

13 See ''An interview with Secretary General of Islamic Jihad'', *Al-Hayat*, 7 January 2003, p. 10. Shellah asserted that the act was an inspirational one for Islamic Jihad.

14 See http://english.bayynat.org.lb/islamicinsights/index.htm (last visited 17 December 2007).

15 *Ash-Sharq Al-Awsat*, London, 21 April 2001; Shaul Mishal and Avraham Sela, *The Palestinian Hamas: Vision, Violence and Coexistence*, Columbia University Press, New York, 2000, p. 109.

the leaders of the Muslim Brotherhood, not only rebutted the fatwa of ibn Baz but also justified such attacks and called them "martyrdom operations", as follows:

> These operations are the supreme form of *jihad* for the sake of Allah, and a type of terrorism that is allowed by *Shari'ah* … the term "suicide operations" is an incorrect and misleading term, because these are heroic operations of martyrdom, and have nothing to do with suicide … While someone who commits suicide has lost hope for himself and with the spirit of Allah, the *mujahid* is full of hope with regard to Allah's spirit and mercy. He fights his enemy and the enemy of Allah with this new weapon, which destiny has put in the hands of the weak, so that they would fight against the evil of the strong and arrogant.[16]

Sheik Qaradawi also justified such operations when the targets were civilians, reasoning that

> The Israeli society is militaristic in nature. Both men and women serve in the army and can be drafted at any moment. On the other hand, if a child or an elderly person is killed in such an operation, he is not killed on purpose, but by mistake, and as a result of military necessity. Necessity justifies the forbidden.[17]

He declared that "if everyone who defends his land, and dies defending his sacred symbols is considered a terrorist, then I wish to be at the forefront of terrorists".[18] The Sheik, however, condemned the September 11 attacks against the United States.[19] He distinguished between the suicide operations in Israeli-occupied territory and the September 11 attacks by stating that in the former the bomber is defending his land, which is a legitimate purpose, whereas in the latter the suicide bombers "travelled from their home countries to attack a place with whom they had no problem".[20] Surprisingly, he claims that scholars from around the world have agreed that the "martyrdom operations" carried out by the Palestinians are justified.[21] He continuously supports those operations.[22]

Other Sunni Muslim scholars of importance in this discussion are Sheik Tantawi, Grand Imam of al-Azhar in Egypt, and ʿAli Gumaʿa, the current mufti of Egypt, who tried to draw a distinction between military and civilians with regard

16 See Yusuf al-Qardawi, "Shari'yia al-'Amaliyat al-Istishhadiya fi Filastin al-Muhtalla" [The legality of martyrdom operations in the Occupied Palestine], *al-Islah*, Vol. 375 (15–18 August 1997), p. 44; available at: http://www.memri.org/bin/articles.cgi?Page=archives&Area=ia&ID=IA5301 (last visited 17 December 2007). Ibn Baz was severely criticized by Palestinian clerics and politicians, such as Sheikh Muhammad Isma'il al-Jamal, Sheikh al-Bitawi and Dr 'Abdulaziz al-Rantisi. See Reuter, above note 2, p. 123.

17 Ibid.

18 Ibid.

19 See http://www.qaradawi.net/site/topics/index.asp?cu_no=2&temp_type=44 (last visited 17 December 2007).

20 Ibid.

21 Ibid.

22 As recently as 28 March 2007, he urged the Palestinians to continue carrying out "martyrdom operations"; see http://www.qaradawi.net/site/topics/index.asp?cu_no=2&temp_type=44 (last visited 17 December 2007).

to ''suicide operations''.[23] However, Sheikh Tantawi has been rather inconsistent: after initially issuing a fatwa supporting such attacks,[24] he changed his views several times and has recently said that there is no Islamic basis for martyrdom operations.[25] During a conference arranged by Al-Azhar University he severely criticized Sheikh Qaradawi (who was also present there) for his fatwa on suicide attacks that kill civilians.[26] Scholars at the al-Azhar Centre for Islamic Research have published their own ruling in support of suicide bombings.[27] They were clearer than the Grand Imam on the subject.

Other notable Sunni ulama (the learned of Islam) who endorse the views of Sheikh Qaradawi are Suleiman ibn Nasser al-'Ulwan,[28] Salman ibn Fahd al-'Awdah,[29] Nasser ibn Hamd Al-Fahd[30] and 'Ajeel al-Nashami.[31] The first three are Saudis, while the fourth is from Kuwait. Some of the Saudi ulama have retracted

23 See Special Dispatch No. 580, 1 October 2003, available at http://www.memri.org/ (last visited 17 December 2007). In his interview he supported suicide attacks by bombers in Palestine, Afghanistan and Iraq. He considers these attacks to be legal because the idea is to liberate the said countries from the enemy. See ''Mufti Masr: al-'Amaliyat fi Al-Iraq wa Filasteen wa Afghanistan Muqawama wa laisat Irhaban'' [Egyptian mufti: Operations in Iraq, Palestine and Afghanistan are resistance and not terrorism], *Al-Sharq al-Awsath*, 26 April 2006.

24 See ''Leading Egyptian government cleric calls ''martyrdom attacks that strike horror into the hearts of the enemies of Allah'''', Special Dispatch No. 363, 7 April 2002, available at http://www.memri.org/ (last visited 17 December 2007).

25 ''Cleric condemns suicide attacks'', *BBC*, 11 July 2003, available at www.bbc.com (last visited 17 December 2007).

26 See ''Al-Tantawi laqqana Al-Qardawi darsan fi al-fatwa'' [Tantawi gave a lesson to Qardawi regarding his *fatwa*], *Al-Sharq al-Awsath*, 17 April 2002. Tantawi asserted that the bombers are allowed to target Israeli army soldiers, but that it is not permissible to target civilians (ibid.). However, as we shall prove below, even the first type of attacks are not allowed under the Islamic *jus in bello*. When a bomber disguises him or herself whether s/he targets soldiers or civilians, a perfidious act, which is strictly prohibited in war under Islamic law, is committed. But if a soldier who does not disguise her- or himself commits a suicide attack to kill and maim many enemy soldiers, his or her act would be warfare heroism. The latter act is not prohibited in Islamic law. Sheikh Tantawi has blurred the distinction between these two types. i.e., perfidy and warfare heroism.

27 www.memri.org/bin/articles.cgi?Page=archives&Area=ia&ID=IA5301 (last visited 17 December 2007); see http://www.mediareviewnet.com/default.htm (last visited 17 December 2007).

28 In an interview with a Kuwaiti-based magazine he described suicide attacks carried out by the Palestinians as ''the best cure'' and opined that no peace treaty is allowed with the Jews. See ''Al-'Amaliyat al-Istishhadyia Khair 'Ilaj'' [Martyrdom operations are the best cure], *al-Mujtama'a*, No. 1422, 17 October 2000, p. 59.

29 See his ''Al-Irhab wa al-'Amaliyat al-Istishhadiyya'' [Terrorism and the martyrdom operations], *al-D'awah*, No. 1838, 18 April 2002, p. 39. He gives examples of heroism in warfare to prove that the suicide operations carried out by the Palestinians are justified. But, as we shall see later, the analogy is wrong.

30 His justification is based on the principle of reciprocity (Qur'an 2:194 and 16:126), or rather his understanding of it. However, he forgets 16:127, which is what the Prophet (PBUH) himself followed. He also justified attacks with weapons of mass destruction (WMDs) on infidels. See his *Kuffar par 'Aam Tabahi Musalath karne ki Shar'i Haisiat*, trans. Hafiz 'Aamar Siddiqui as *Justification of Attacking Infidels with WMDs*, Dar-ul-Esha'at, Lahore, 2005, pp. 23–4. The Saudi authorities arrested him, but he was released in November 2003. He openly admitted that he had made mistakes in some of his previous fatwas. It is not clear which fatwa(s) he meant. He has not interacted with the media since then.

31 He expressed his views in an interview with the *Al-Rabitha* magazine of the Organization of the Islamic Conference (OIC). See ''La Ba'sa bi Ikhtiyar Tariqat al-Mout fi Halatin Wahidah'' [No problem in choosing to die in one situation], *Al-Rabithah*, No. 453, October, 2002, pp. 12–13. He, too, gives many examples of warfare heroism in Islam to prove that Palestinian suicide attacks are justified. The timing of both the above remarks is noticeable. Sheikh Salman's article was published on 18 April, the date of the suicide attack on the US embassy in Beirut. Dr 'Ajeel's interview was published in the October issue of *Al-Rabitha*, the month when the headquarters of US and French forces were attacked by suicide bombers.

their earlier opinions in favour of suicide attacks. The latest Sunni scholar from the Middle East who, like Qaradawi, justifies suicide attacks by Palestinians against Israeli civilians is Faisal Maulawi from Lebanon. He gives more or less the same arguments as Qaradawi in support of his views;[32] a new argument he is using is his misinterpretation of the principle of reciprocity mentioned in the Qur'an 16:126. Sheikh Nasser al-Fahd has resorted to this principle to justify suicide attacks, including those of 11 September against the United States. Lieutenant-Colonel Jonathan Halevi – a researcher on the Middle East and radical Islam and an adviser on Arab affairs in the Israeli Foreign Minister's office – alleges that there are sixteen Muslim clerics from the Middle East who support suicide attacks in one way or another.[33]

Thorough research into the legal history of suicide attacks is conducted by Bernard Freamon.[34] He argues that Shia ulama, reinterpreting the martyrdom of Husayn as extreme self-sacrifice, have revived his example in a way that eventually led to self-annihilatory violent behaviour (suicide attacks). In his opinion this has fundamentally altered the Shia conception of the religious law of martyrdom. Asserting that the new discourse was led by Imam Khomeini and Syed Hussain Fadlallah,[35] he points out that this "transformation of religious doctrine, championed by the Shia ulama and emulated first by Hizbu'llah, then by the Palestinians and later by Al Qaeda, resulted in the appearance of a new norm of jihadist battlefield behaviour – self-annihilation – a norm that is now accepted as a valid discharge of religious obligation under the law of military jihad by a great many Muslim jurists, Sunni and Shia".[36] His conclusion is swift. He remarks that "even though the logic of the new theology may be flawed, it is still undeniable that it has fundamentally altered the law of jihad in the entire Muslim world. What we now have is a new *fiqh* of the law of the military jihad".[37] It is unfortunate that the author, in reaching his conclusion, does not analyse the arguments of the literalist clerics mentioned above, and surprising that he calls the rulings of these clerics – who jumped on the bandwagon to issue their fatwas – "a new *fiqh*" of the military jihad.

32 He has issued three *fatwas* on "martyrdom operations". The first was serial no. 105, the second was no. 279 and the third was no. 593, issued on 18 March 2003. See his website http://www.mawlawi.net/Fatwa.asp?fid=105&mask=العمليات%20الاستشهادية (last visited 17 December 2007).

33 See Jonathan Halevi, "Al Qaida's intellectual legacy: New radical Islamic thinking justifying the genocide of infidels", *Jerusalem Center for Public Affairs*, available at http://www.jcpa.org/jl/vp508.htm (last visited 17 December 2007). This report is translated into Arabic, copied and displayed by www.aafaq.org. However, the motives of both websites (www.jcpa.org as well as www.aafaq.org) are dubious. For example, the original report does not give authentic information, is selective in choosing clerics who take a stand on the topic, and does not mention the original fatwas issued by them; it lists scholars who are not mentioned by the jihadis and omits more radical militants such as Ayman Al Zawahiri or clerics such as Faisal Mawlavi and many others.

34 Bernard K. Freamon, "Martyrdom, suicide, and the Islamic law of war: a short legal history", *Fordham International Law Journal*, Vol. 27, 2003, p. 299.

35 Ibid., pp. 317–53.

36 Ibid., p. 306.

37 Ibid., p. 368.

In Pakistan it has been very rare for ulama to write or give rulings about suicide attacks carried out by either the Palestinians or other global jihadists. Suicide bombings, for which extremists on both sides have been blaming each other, have been used to target innocent Sunni as well as Shia worshippers. In this connection Mufti Muneeb-ur-Raham, a leading Barelvi scholar and chairman of the Central Moon Sighting Committee, has written a fatwa regarding the prohibition of ''unjustified homicide'' in such attacks[38] and stating that suicide attacks [carried out in Pakistan] are strictly forbidden.[39] The fatwa is endorsed by fifty-eight other ulama of different backgrounds.[40] However, it mentions that it is specific to the Pakistani context[41] and that the situation in occupied territories, such as Kashmir and Palestine, is different. The fatwa seems to allow, albeit implicitly, suicide attacks in Kashmir and Palestine.[42]

According to another mufti in Pakistan, Muhammad Isma'il, the targeting of civilians in suicide attacks is not allowed, but suicide attacks as such are allowed during an ongoing war.[43] On 17 April 2007 a convention in Peshawar attended by more than 2,000 ulama issued a ruling regarding suicide attacks. They regarded such attacks as strictly illegal; however, they did not give legal arguments in support of their view.[44] These ulama were mainstream religious clerics representing some 1,000 seminaries.[45] The declaration does not give any detail. All these rulings, however, ignore the most necessary distinction between acts of perfidy and heroism in warfare, including suicide attacks.

The main points, explicit or presumed, of the opinions of the scholars considered above can be summarized as follows:

- authorization of suicide attacks in specific contexts, in particular by Palestinians in the Occupied Territories (Sheikh Fadlallah, Sheikh Qaradawi, and others);
- acceptance of killing and maiming civilians, and even women, children and the elderly, in militaristic societies such as Israel (Sheik Qaradawi);[46]

38 See Mufti Muneeb-ur-Rahman, *Qatl-i-Na Haq ka hukm* [Rule for unjustified homicide], n.d. Although the fatwa itself is undated, some of the muftis who signed it have put dates as well, ranging from December 2004 to March 2005. It was circulated in the press on 18 May 2005.

39 Ibid., p. 3.

40 There are four ulama from outside Pakistan. All the ulama have duly signed and stamped the fatwa.

41 The fatwa is designed to dispel the impression that such attacks are carried out by religious extremists who brainwash, instigate or encourage students in their seminaries. The most notable absentee is Mufti Taqi Usmani, who did not sign the fatwa despite the best efforts by the government. He is reported to have seen it in the global perspective instead of solely in the context of Pakistan. See http://www.dailytimes.com.pk/default.asp?page=story_3-7-2004_pg7_25 (last visited 17 December 2007).

42 The fatwa mentions that it had not been a crime to fight occupying forces to liberate one's country, but without giving any details. Ibid., p. 3.

43 See his *Hawa ki Nam* [In the name of Hawa], Jami'a Islamia, Rawalpindi, 2005, p. 409. The book is based on the rulings issued by the author, who avoids specifically mentioning whether he justifies such attacks in Palestine or elsewhere.

44 See ''Ulama convention opposes ''Sharia by force''', *Dawn*, 18 April, 2007, p. 1.

45 The convention was organized by the Jami'at-i-ʿUlama-i-Islam, Fazal ur Rahman group. The Maulana (religious scholar) himself was the leader of the opposition in the Pakistan National Assembly at that time.

46 Qaradawi allows the killing of Israeli women directly and the killing of elderly and children collaterally under the doctrine of necessity.

- acceptance of the fact that the attackers pretend to be civilians when carrying out the bombings;
- acceptance of the killing of the victims of such attacks by blowing them up (since Islam does not allow even the mere killing of civilians in war, their killing by blowing them up is therefore strictly prohibited, as we shall explain below. Mutilation of dead bodies is strictly prohibited in Islam (see below) – the mutilation of living people is also strictly prohibited);
- acceptance of the destruction of civilian objects and property;
- equation of such suicide bombings with heroism in warfare.

These are some of the points analysed below from the perspective of Islamic *jus in bello*.

## Evaluation under Islamic *jus in bello*

One of the basic principles of Islamic law is that, just as the goal must be legitimate, so too must be the means through which that goal is reached. For this reason Islam not only encourages Muslims to defend their faith, but also tells them how war should be waged. A distinction is made between suicide attacks during a war that are carried out by soldiers not pretending to be civilians, and those carried out by civilians. No one can call for the killing of civilians, women, children and the elderly, or for the kidnapping and killing of persons who have no relation to a specific incident, a jihad.

### The prohibition of suicide in Islam

Suicide is strictly illegal in Islam. The Prophet (PBUH) is reported to have said, "None amongst you should make a request for death, and do not call for it before it comes, for when any of you dies, he ceases [to do good] deeds and the life of the believer is not prolonged but for goodness."[47] Suicide in Islamic law is intentional self-murder by the believer. There is a *hadith qudsi* – a statement of the Prophet (PBUH) ascribed to God himself – in which he says that a wounded man takes his own life. God then says, "My servant anticipated my action by taking his soul (life) in his own hand; therefore, he will not be admitted to paradise".[48] In another saying of the Prophet (PBUH), he has given a stern warning to a person committing suicide, stating that the wrongdoer would be repeating the suicidal act endlessly in hell and would reside in hell for ever.[49] Any person carrying out a suicide attack should not forget that Allah has entrusted him with life and that it is not his personal possession to destroy as he pleases.

47 Muslim Ibn Al-Hajjaj, *Saheeh Muslim*, Dar Ehya Al-Turath Al-ʿArabi, 1955, Vol. 4, p. 2065, hadith no. 2682.
48 Ismaʿeel Al-Bukhari, *Saheeh Bukhari*, Dar Sahnun, Istanbul, 1992, Vol. 3, p. 32.
49 Ibid., Vol. 3, p. 212.

## Martyrdom

Imam Muhammad ibn al-Hasan al-Shaybani – known as the father of Islamic international law – has articulated the concept of allowed suicide attacks in war in his *magnum opus* treatise as follows:

> It is permissible for a person to plunge into a group of enemy forces, or to attack them in cases where he hopes that he will be saved in the end, or – if there is no such hope – in cases where he will inflict damage on the enemy, and demoralize them, or will encourage his own combatants, or due to an extraordinary power he might feel.[50]

A closer look at this ruling reveals that three conditions must be met for such an operation to be legitimate:

(1) there must be an ongoing, active war between the Muslims and their adversaries;
(2) the attacker might *not* die in the attack; and
(3) if he does die, his death must be caused by the enemy.

If he is killed, he will be a *shaheed* (martyr) in every sense of the word. Such was the action taken by Bar'a ibn Malik – the companion of the Prophet (PBUH) – in the *riddah* (''apostasy'') wars. Similarly, Sheikh ibn Taymiyyah has stated that according to the four leading jurists of the Sunni schools of *fiqh*, it is allowed for a Muslim soldier to penetrate the enemy's lines even if he knows he will definitely be killed, provided that would be advantageous for the Muslim army.[51] Maliki jurists – Al-Qasam ibn Muhammad, ibn al-Majshoon and Ibn Kuwaiz – also allow such attacks.[52] These are incidents of warfare heroism that are allowed and encouraged in Islam, but they are not suicide attacks carried out by soldiers pretending to be civilians. The scholars surveyed above appear to have ignored this distinction. Even in the very exhaustive book by Shaybani, no reference can be found to suicide attacks carried out by civilians.

It is important at this point to note that the martyrdom of Imam Husayn cannot be termed a suicide attack. Some authors say that he knew he would be killed but still opted to die.[53] He died a martyr as he fought valiantly against the army of the Ummayid governor. It was not a suicide operation. Fighting and embracing martyrdom is different than feigning to be civilian, cheating innocent civilians and killing them ruthlessly.

50 M. Ibn Al-Hasan Al-Shaybani, *Syar Al-Kabir*, quoted in a commentary by Sarakhasi, Dar al-kutub ʿElmiya, Beirut, 1997, Vol. 4, p. 250. Shaybani's original book is not available; the text is found only with Sarkhasi's commentary.
51 Ibn Taymiyah, *Majmuʿa Fatawa Sheikh al-Islam*, Dar ʿAalam Al-Kutub, Ryadh, Vol. 25, p. 540.
52 See Muhammad Tahir ibn 'Ashoor, *Al-Tahreer wa al-Tanweer*, Dar Sahnun, Tunisia, Vol. 1, p. 215.
53 See 'Ali Shariʿati, *Martyrdom: Arise and Bear Witness*, trans. ʿAli Asghar Ghassemy, Ministry of Islamic Guidance, Tehran, 1981, p. 144. He does not say explicitly that it was a suicide. He does say that Husayn had chosen *shahdat*. See his ''A discussion of *Shaheed*'', in Gary Legenhausen and Mehdi Abedi (eds.), *Jihad and Shahadat: Struggle and Martyrdom in Islam*, Institute for Research and Islamic Studies, Houston, 1986, pp. 239–40.

What of Bar'a ibn Malik, the companion of the Prophet (PBUH)? Can his action be considered as a suicide operation or heroism? It occurred in a battle against an army led by Musaylimah (known as "Musaylimah the Liar"), a man who also claimed to be a prophet of God, during the "apostasy" wars after the death of the Prophet (PBUH). Garrisoned in a fort, the enemy was putting up fierce resistance and the Muslims were suffering heavy losses in vain attempts to gain entry. Bar'a, who had always desired to die as a martyr, volunteered to be catapulted over a parapet by the Muslim soldiers so as to open the gates to the fort and let them in. The plan succeeded miraculously; Bar'a was not martyred and managed to open the gates. He received numerous injuries but recovered from them.[54]

Another incident cited by Sheikh Qaradawi and other ulama took place during the attack on Constantinople, when Hisham ibn 'Aamir penetrated the enemy lines to kill as many enemy soldiers as possible. In surprise, other Muslim fighters exclaimed: "Praise be to Allah! And be not cast by your own hands to ruin."[55] Such incidents are heroic operations that are certainly allowed in warfare.

## Authorization in certain contexts?

Sheikh Qaradawi and other ulama quote these and other incidents to prove the legitimacy of suicide attacks carried out by the Palestinians. The analogy is, however, wrong. Because they were great acts of battlefield heroism that gave the Muslims decisive victories, they cannot be called suicide attacks. Even if they did qualify as suicide attacks, they would be allowed, because the persons who carried out those acts were soldiers (and did *not* pretend to be civilians).

It may be argued that the principle of "breach of trust" cannot be applied in the relationship between Palestinian groups and Israel, because there is no agreement on a cessation of hostilities between the two sides. This argument cannot be accepted, because only the head of the Muslim state concerned has the authority to declare war; individuals or groups are not authorized to do so.[56] The

54 See details of the incident in Al-Qurtubi, *al-Jami'a li Ahkam al-Qur'an*, Dar al-kutub al-Misryyia, n.d., Vol. 2, pp. 362–363, and Ibn Jareer al-Tabary, *The History of al-Tabary: The Conquest of Arabia*, trans. Fred M. Donner, 1993, pp. 105–34.

55 The translation is taken from the English translation by Pickthall, above, unnumbered note. According to other commentators the verse is generally understood to outlaw suicide and other forms of self-harm. See *The Qur'an: A New Translation*, trans. Abdel Heleem, Oxford University Press, Oxford, 2004, repr. Oxford World's Classics series, 2005, p. 22. (The quotation in the text above is, however, taken from Pickthall, above, unnumbered note). See details of the incident in Tarmizi, *Sunnan*, hadith no. 2898, and Abi Dawood, *Sunnan*, hadith no. 2151. Abu Ayub al-Ansari, who was among those who witnessed this incident, stood and said, "How could you interpret this verse [2:195] in this way, which is revealed regarding the *Ansar*. Abu Ayub stated that when Islam became powerful, we told each other without informing the Prophet (PBUH) that since Islam has gained strength and has many allies; we seem to have neglected our businesses. Therefore, we should stay back to gain what is lost, when the verse [And be not cast by your own hands to ruin] revealed." Qur'an 2:195.

56 Imam Abu Yusuf, a senior Hanafi jurist and the Chief Justice of Haroon al-Rashid, formulated this principle in this way: "No expedition can be dispatched without the permission of the government." See Abu Yusuf, *Kitab al-Khiraj*, ed. M. Ibrahim al-Banna, Maktaba Farooqia, Peshawar, n.d., p. 385.

problem in Palestine is that there is an undeclared war between the state of Israel and Palestinian groups. Usually the Palestinian Authority urges restraint. It generally condemns every suicide attack on Israelis. Moreover, there cannot be any agreement between the Israeli government and any organization(s) within Palestine. Only a state is entitled to sign a treaty with other state(s), not individuals or organizations within a state.[57]

Sheikh Qaradawi's arguments that since the Israelis have occupied the land of the Muslims in Palestine and the Palestinians are militarily weaker, or that since the Israeli society is militaristic in nature, Muslims are allowed to carry out suicide attacks and women are legitimate targets for such attacks, are without foundation and thus unacceptable. For this would mean that Islamic *jus in bello* is applicable when Muslims invade or occupy an enemy's territory, but that Muslims are not bound by it when Muslim territory is invaded or occupied – in other words, that Islamic *jus in bello* is applicable only if Muslims are victorious, but not applicable if they lose the war. The implication is that we should follow one principle for situation one, because it suits us, but a different principle in situation two if the first principle is not to our benefit. If this were the case, then in Dworkin's parlance we would have no principles and no integrity at all.[58] On the contrary, under Islamic law Muslims have one and the same set of principles, whether they invade or occupy an enemy's land, whether they are weak or strong and whether they win or lose. The rules of Islamic *jus in bello* remain unchanged.

## Relevant principles of Islamic *jus in bello*

### The prohibition of treachery and perfidy

If a suicide bomber pretends to be a civilian or if a soldier feigns to surrender by waving a white flag, he will not be targeted by the armed forces he is approaching because he has non-combatant immunity. However, if that person then blows himself up to kill members of the enemy's armed forces, he commits treachery or perfidy[59] – an act which is strictly prohibited in Islamic law and in international humanitarian law.[60] He has violated the trust of the enemy, which in future may not trust genuine civilians or surrendering soldiers. Suicide attacks on civilians are likewise strictly prohibited, because of the immunity to which they are entitled in both bodies of law. However, if such attacks are carried out by soldiers against

57 A recognition by the state of Israel of a militant Palestinian group as the legitimate representative of the people of Palestine would mean the withdrawal of Israeli recognition from the current Palestinian Authority, which is the *de jure* government of the [future] state of Palestine. This would amount to a premature withdrawal of recognition, which is illegal in international law.

58 For discussion of Dworkin's theory, see my "How right is Dworkin's "right answer thesis" and his "law as integrity theory"?", *Journal of Social Sciences*, Vol. 2 (1) (August 2006), pp. 1–25.

59 The two words are used as synonymous in this work.

60 See Article 51 of 1977 Protocol I to the Geneva Conventions. See also Hans-Peter Gasser, "Acts of terror, "terrorism" and humanitarian law", *International Review of the Red Cross*, Vol. 84 (847) (September 2002), p. 555.

enemy soldiers without feigning civilian status, they are deemed to be a legitimate battle tactic.

The Prophet (PBUH) and his rightly guided successors have strictly prohibited treachery and perfidy. The Prophet (PBUH) is reported to have reiterated this ban on numerous occasions.[61] In the eighth year after his migration to Medina, he issued commands to his departing army and said,

> Fight with the name of God and in the path of God. Combat those who disbelieve in God. Fight yet do not cheat, do not break trust, do not mutilate, do not kill minors.[62]

On another occasion, while instructing the army led by ʻAbd ar-Rahman ibn ʻAwf, he said,

> O son of ʻAwf! Take it [the banner]. Fight you all in the path of God and combat those who do not believe in the path of God. Yet never commit breach of trust, nor treachery, nor mutilate anybody nor kill any minor or woman. This is the demand of God and the conduct of His Messenger for your guidance.[63]

Under Islamic law, if a Muslim commander or any of his soldiers give a pledge to an enemy soldier that he will be given quarter, then that pledge is binding on all Muslims and no derogation is possible. The Prophet (PBUH) strongly condemned anyone who broke his pledge and declared such a person to be a hypocrite. He also said that "on the day of resurrection anyone who has breached his pledge will be exposed by the hoisting of a flag and that the size of the flag will be according to his treachery. And remember that the biggest treachery is the one carried out by the leader of the nation".[64]

At the time of ʻUmar I, the Second Caliph, during a war between the Islamic state and the Persian empire, a Persian soldier took shelter at the top of a tree. A Muslim soldier told him in Persian "*ma tars*" (don't be afraid). His adversary thought that he was given a pledge and protection and came down. Sadly, he was killed by the Muslim soldier. The matter was reported to the Caliph, who issued a policy statement in which he used the same Persian words, declaring that anybody saying that to an enemy soldier and then killing him would be prosecuted for murder and sentenced to death.[65]

To cite another example, the Ummayad Caliph Amir Muʻawiyah was once preparing his army to march against the Roman Empire, although the peace treaty between the two was still in force, for he wanted to attack as soon as it had expired. A companion of the Prophet (PBUH), ʻAmr ibn ʻAnbasah, considered it treachery

61 ʻAbd al-Jalil, *Shuʻab al-Iman* (MS. Bashir Agha, Istanbul, No. 366), p. 558.
62 Imam Shoukani, *Nail al-Awtar*, Ansar Al-Sunah Al-Muhammadiya, Lahore, n.d., Vol. 7, p. 246.
63 Abdul Malik ibn Hisham, *Al-Sirah Al-Nabawyia*, ed. Mustafa Al-Saqa et al., Dar al-Maʿrifah, Beirut, n.d., Vol. 2, p. 632.
64 Muslim, above note 47, Vol. 3, hadith no. 1738, p. 1361.
65 See Badruddin ʻAyni, *ʿUmdah Al-Qari Sharh Saheeh al-Bukhari*, Idarat Al-Tabaʿat Al-Muneeriya, Cairo, n.d., Vol. XV, p. 94.

to prepare and dispatch the army to the frontier. He therefore hastened to the Caliph shouting, ''God is great, God is great, we should fulfil the pledge, we should not contravene it.'' The Caliph questioned him, whereupon he replied that he had heard the Prophet (PBUH) saying,

> If someone has an agreement with another community then there should be no [unilateral] alteration or change in it till its time is over. And if there is risk of a breach by the other side then give them notice of termination of the agreement on reciprocal basis.[66]

This tradition supports the Qur'anic verse which says, ''And if thou fearest treachery from any folk, then throw back to them (their treaty) fairly, Lo! Allah loveth not the treacherous.''[67]

So if there is the danger of a breach of trust by the enemy, it is possible to go ahead and openly proclaim to them that Muslims will not remain bound by the treaty. But this proclamation must be made in a manner that places Muslims and the other party on the same footing; no prior preparations should be made to confront the other party without warning, when they are caught unawares and unable to make counter-preparations for their defence.[68]

Islam is therefore redefining justice in the sense that the enemy's rights are safeguarded, that restrictions are placed on Muslims rather than on their adversaries, and that Muslims cannot prepare to attack the enemy before declaring their intention to dispense with the treaty. The best case in point is that of Mu'awiyah described above. If a suicide bomber commits treachery, he acts against the teachings of the Holy Qur'an and the Sunnah, two of the fundamental sources of Islamic law (the third being *ijmaʿ*).

## Non-combatant immunity

It is a well-established norm of Islamic *jus in bello* that civilians shall not be targeted or killed in war. Their immunity is evident from the Qur'an and many traditions of the Prophet (PBUH). As a general principle, in the event of war civilians must not be killed. The Holy Qur'an says, ''Fight in the way of Allah against those who fight against you, but begin not hostilities. Lo! Allah loveth not aggressors.''[69]

The reservation ''those who fight you'' in the original text of the verse is of extreme importance, because the Arabic word *muqatil* (pl. *muqatileen*) means

66 Shaybani, above note 50, Vol. 1, p. 185. According to Sarakhasi, it means that any act that resembles treachery in letter or spirit must be avoided. See also Imam Termidhi, *Sunnan*, Dar Sahnun (Gagri, Yayinlari), Istanbul, n.d., Vol. 4, hadith no. 1580, p. 143.

67 Qur'an, 8:58.

68 The termination of a peace treaty or its expiry means that relations between the two communities become hostile.

69 Qur'an, 2:190. Pickthall's translation of ''*wa la taʿatadu*'' differs from that of the majority of commentators (above, unnumbered note). For example, according to Mufti M. Taqi it means ''and do not transgress. Verily Allah does not like the transgressors.'' See his *The Meaning of the Noble Qur'an*, Maktab Maʿariful Qur'an, Karachi, 2006, Vol. 1, p. 60.

combatant. Thus, non-combatants must not be fought against. According to Muhammad ibn al-Hasan al-Shaybani (d. AH 189), it is prohibited to kill them because the Qur'an says, "Fight those who fight you" and "they do not fight".[70] Moreover, in the above verse the Qur'an commands Muslims not to transgress by "killing non-combatants" and "behaving degradingly towards those who are defeated". As explained below, the Prophet (PUBH) has strictly prohibited the mutilation of bodies in war, and also *sabran* killings (tying up a person while still alive to use as target practice and aiming at that person with a variety of weapons until the person is dead).[71]

After the conquest of Mecca, the tribes of Hawazin and Thaqif called for war against Muslims. At the end of the battle at Hunayn, the Prophet (PBUH) saw the body of a slain woman among the pagan dead. "Who killed her?" he asked. Those who were present answered, "She was killed by the forces of Khalid ibn Walid". The Prophet (PBUH) said to one of them, "Run to Khalid! Tell him that the Messenger of God forbids him to kill children, women, and servants". One of those present said, "Dear Messenger of God! But are they not the children of the pagans?" The Prophet (PBUH) answered, "Were not the best of you, too, once the children of pagans? All children are born with their true nature and are innocent."[72] The Prophet (PBUH) is also reported to have prohibited, in the strongest possible words in the Arabic language, the killing of women: "Never, never kill a woman or a servant."[73] There is complete unanimity (*ijma'a*) among Muslim jurists that women and children must not be killed.[74]

There are only two exceptions to the general prohibition on the killing of women and children: if they participate in hostilities,[75] and when the killing is unintentional.[76]

The Prophet (PBUH) has issued instructions on many occasions that cannot be quoted here because of the focus of this analysis. However, the

70 Shaybani, above note 50, Vol. 4, p. 186.

71 Abu Dawood, *Sunnan*, Dar Sahnun, Istanbul, 1992, Vol. 3, p. 137, hadith no. 2687. For more details see my "Non-combatant immunity in Islamic law", in *Hamdard Islamicus*, forthcoming.

72 Al-Tabrezzi, *Mishkat al-Masabih*, al-Maktab al-Islami, hadith no. 3955; Ibn Majah, *Sunnan*, Dar Ehya Al-Turath Al-ʿArabi, Beirut, n. d., Vol. 2, p. 101. In some of the reports there is an addition: "that she was not capable of fighting." Abu Dawud, *Sunnan*, ibid, Vol. 3, p. 122, and Shoukani, *Nail al-Awtar*, above note, 62, Vol. 7, p. 261.

73 Ibn Majah, *Sunnan*, above note 72, Vol. 2, p. 948, hadith no. 2842; Imam al-Nasa'i, *al-Sunnan al-kubra*, Dar Al-Kotob Al-ʿElmyia, Beirut, Vol. 5, p. 187, hadith nos. 8625 and 8626; Abu Bakr al-Baihaqi, *al-Sunnan al-kubra with al-Jawhar al-Naqi*, Dar al-Fikr, Beirut, n.d., Vol. 9, p. 83. This hadith is also quoted with slightly different wording in Abi Ja'far al-Tahwi's *Sharh Ma'ni al-Asa'r*, Dar Al-Kotob Al-'Ilmia, Beirut, Vol. 3, p. 222.

74 Abu Zakaryia Nawavi, *Sharh Saheeh Muslim*, Matba'at Mahmood Tofeeq, Vol. II, p. 48; see also Al-Qurtubi, *Ahkam al-Qur'an*, 1950, Vol. 1, p. 232.

75 This is in harmony with the general principles of Islamic law, such as, "What becomes lawful for a reason becomes unlawful when such reason disappears."

76 This is the situation of *tatarrus*, i.e. when the enemy uses Muslim prisoners, women and children, their own non-combatants, as human shields, then Muslims can attack the enemy but must take the utmost precautionary measures to protect the captives. See Abu Bakar Al-Sarkahsi, *al-Mabsut*, Dar Ehya Al-Turath Al-ʿAraibi, Beirut, 2002,Vol. 10, p. 154. The same applies to a night raid on the enemy. For further details, see my "Non-combatant immunity in Islamic law", above note 71.

instruction given by Abu Bakr – the first successor of the Prophet (PBUH) – is worth citing in full, as it is a mini-manual on Islamic *jus in bello*. When he ordered Yazid ibn Abi Sufyan to proceed to Syria, he accompanied him and instructed him as follows:

> O Yazid! … You will come across people who have secluded themselves in convents; leave them and their seclusion. But you will also come across people on whose heads the devil has taken his abode so strike their heads off. But do not kill any old man or woman or minor or sick person or monk. Do not devastate any population. Do not cut a tree except for some useful purpose. Do not burn a palm-tree nor inundate it. Do not commit treachery, do not mutilate [dead bodies], do not show cowardice, and do not cheat.[77]

Thus the killing of non-combatant civilians is strictly prohibited in Islamic law in all circumstances. Sheikh Qardawi's argument claiming that the militaristic nature of Israeli society justifies suicide attacks on Israeli women also is therefore unacceptable. The important point to note in these traditions is that at the time of the Prophet (PBUH) all able-bodied men used to take part in war because there was no regular army to fight the enemy, and society as a whole contributed to the war effort. This was true of both the Muslim and non-Muslim communities. It was during that time and in those very circumstances that the Prophet (PBUH) was urging Muslims not to kill women, children, servants and other civilians. The Prophet (PBUH) knew the situation, but he nonetheless commanded the Muslims to spare women and children.

## Reciprocity and reprisals

### *Reciprocity*

The principle of reciprocity is explained by the Holy Qur'an itself in 9:7, where Allah says, ''So long as they are true to you, be true to them.'' Thus there must be reciprocity in relations between the two communities. This doctrine is raised to the status of a principle by Muslim jurists. Imam Sarakhsi of the Hanafi school of thought has put it this way: ''Relations between us [the Muslims] and the non-Muslims are based on reciprocity.''[78] The principle is also expressed in the Qur'anic verse 5:58 regarding the breach of a peace treaty discussed above.

77 'Ali al-Muttaqiy, *Kanz-ul-'Ummal*, Haiderabad Daccan, Vol. II, No. 6259, on the authority of al-Baihaqiy.

78 See Shaybani, above note 50, Vol. 5, pp. 285, 286. Here the context is interesting. Shaybani mentions that a tax collector at the time of 'Umar asked him about how much tax to charge to businessmen coming from *dar al-harb* – literally the abode of war but technically from outside the territorial jurisdiction of the Muslim state. (See for a very fine discussion of the technical meaning of *dar al-harb* Sarkahsi, *Al-Mabsut*, above note 76, Vol. 10, pp. 85–94, and Sayyid Maududi, *Suud* (Urdu), Islamic Publications, Lahore, 1973, pp. 312–13.) 'Umar advised him to charge exactly the same as Muslim businessmen were charged by them. Sarakhasi gives the reason for this ruling and cites the above maxim. He further argues that if our own businessmen were not charged any tax, we should not charge any; and if the others charged us 5 per cent we have to charge them 5 per cent. Similarly ''their businessmen should be charged taxes only once every year even if they visited our land several times because they charge our businessmen only once a year; *because relations between us and them are based on reciprocity*.'' See Shaybani, above note 50, Vol. 5, pp. 285–6.

A further instance is verse 2:194, which says, "The forbidden month for the forbidden month, and forbidden things in retaliation. And one who attacketh you, attack him in like manner as he attacked you. Observe your duty to Allah, and know that Allah is with those who ward off (evil) ."

To understand this verse the context of its revelation is important. As is well known, the Prophet (PBUH) and his companions wanted to go to Mecca to perform *'Umrah* (literally, visit to Mecca, but technically the "minor pilgrimage" undertaken by Muslims whenever they enter Mecca) in the sixth year after *hijrah* (migration). When they arrived at Hudaibiyya outside Mecca they were stopped by the Meccan infidels. After some shuttle diplomacy both sides signed the famous peace treaty. They agreed, among other things, that Muslims could return that same year but should come the next year to perform '*Umrah*. It is reported that when the Muslims intended to do so the following year they were scared of betrayal, thinking that the infidels might not let them enter Mecca or might attack them in the sacred month,[79] a time when they would not be allowed to defend themselves. Therefore Allah explained to them that a sacred month is in exchange for a sacred month – that is, it is observed only on a mutual basis. Since the Muslims were in danger of being attacked by the Meccans in the sacred month of Zul-Qa'da, they were allowed to apply reciprocity if necessary in that very season, as the sacredness of months is only reciprocal.[80] Another interpretation of this verse [a sacred month is in exchange for a sacred month] is that it was compensation for the previous year.[81]

## *Reprisals*

The meaning of verse 2:194 is now very clear, as it means that the Muslims are allowed to defend themselves if attacked in the sacred month. However, it never meant that they are allowed to kill innocent civilians in suicide attacks. Indeed, killing the enemy's women and children in retaliation would be to kill innocent people intentionally, which is totally prohibited in Islam. In explaining this verse, Qurtubi (d. 1273) argues that if anyone is wronged he should get his due compensation from the one who harmed him, but this should not in any way harm that person's parents, sons or relatives.[82] This is why only the accused is punished in retribution and none of his relatives can be punished directly for his wrongdoing.

The important question here is whether reciprocity is allowed in the form of retaliation, especially if it would mean doing something that is explicitly forbidden. Our answer is a resounding "No!" Muslim jurists, in response to a

79 The ancient Arabs held four months of the year – Muharram, Rajab, Zul-Qa'ida, and Zul-Hijja – as sacred and thus considered it unlawful to wage war during those months.

80 Moulana 'Abdul Majid, *Tafsir-ul-Qur'an*, Darul-'Ishaat, Karachi, 1991, Vol. 1, p. 125; Muhammad Tahir ibn 'Aashoor, *Al-Tahreer wa al-Tanweer*, Dar Sahnun, Tunis, n.d., Vol. 1, p. 210.

81 This is the opinion of 'Abdullah ibn 'Abbas, Qatadha, Dahak and Suddi. See Ibn ʿAashor, above note 80, Vol. 1, p. 210.

82 Muhammad ibn Ahmad al-Qurtubi, *al-Jam'i li Ahkam al-Qur'an*, Dar al-Kutub al-Misria, Vol. 1, p. 240.

similar question, argue that the killing of enemy hostages is forbidden even if people belonging to the Muslim state have been murdered by the enemy, and even if there is express agreement that hostages may be beheaded in retaliation.[83] Thus acts that are forbidden in war remain so and are not legitimized for purposes of retaliation. This leads us to conclude that the principle of reciprocity does not apply to prohibited acts.

It is argued by Faisal Mawlavi and Nasser al-Fahd, discussed above, that Qur'anic verses 2:194 and 16:126 justify suicide attacks on the basis of reciprocity. Faisal Mawlavi interprets these verses as justifying the targeting of civilians in Israel, while Nasser al-Fahd's interpretation is that Muslims have the justification for killing as many US civilians as the number of Muslim civilians killed by the United States. In their interpretation both clerics have distorted one of the most fundamental principles of Islamic international law and also of public international law.

Verse 16:126, which says, ''If ye punish, then punish with the like of that wherewith ye were afflicted'', was revealed when the Prophet (PBUH) saw that the dead body of his uncle Hamzah had been badly mutilated by the enemy in the battle of Uhd. It must be remembered that Uhd was the second battle fought after the migration of the Prophet (PBUH) to Medina and revelation was still coming to him. As mentioned above, the Prophet (PBUH) had strictly prohibited mutilation; 16:126 must therefore be understood in terms of his total prohibition of it. It follows that those who interpret this verse to justify the targeting of civilians must also be justifying the mutilation of dead bodies.

### Prohibition on destroying civilian objects and property

The destruction of civilian objects and property is banned in war because this would amount to *fasad fi al-ardh* (mischief in land). Allah says, ''and do not act corruptly, making mischief in the earth''.[84] Allah hates *fasad* and attributes it to a *munafiq* (hypocrite): ''and when he turneth away (from thee) his effort in the land is to make mischief therein and to destroy the crops and the cattle; and Allah loveth not mischief''.[85] The instructions of Abu Bakr cited above forbid the damaging and destruction of civilian objects and property.

## Conclusion

Under Islamic *jus in bello* perfidy or treachery is prohibited, the intentional killing or targeting of women, children and other civilians is strictly banned, the principle of reciprocity is not applicable when it would entail acts that are prohibited in Islam, and the destruction of civilian objects and property is not allowed.

83 Imam Mawardi, *Al-Ahkam al-Sultaniya*, Matbaʿt Mahmoodyia, Cairo, n.d., p. 84.
84 Qur'an, 2:60.
85 Qur'an, 2:205.

However, heroism by individual combatants in warfare is allowed under certain conditions. Under Islamic law ''martyrdom'' attacks are allowed only if the following conditions are met:

- they may only take place during a war;
- they must be carried out by soldiers;
- the soldiers must not pretend to be non-combatants;
- the attacks must not harm civilians or civilian property; and
- the device used must not mutilate bodies.

When a suicide bomber targets civilians, he might be committing at least five crimes according to Islamic law, namely killing civilians, mutilating them by blowing them up, violating the trust of the enemy's soldiers and civilians, committing suicide and, finally, destroying civilian objects or property. In my opinion, because of the crimes committed he – or she – is not a *shaheed* (martyr). Those who call such a person ''*shaheed*'' are simply ignoring the teachings of the Qur'an and the Sunnah with regard to the Islamic *jus in bello* and are making a mockery of God's law.

A suicide mission is therefore contrary to the norms of Islamic *jus in bello* and has no place in Islamic legal thought. Such an act cannot be a norm of battlefield behaviour in Islam, for the established rules of Islamic *jus in bello* cannot be replaced by acts that are prohibited in war. The opinions of the ulama who endorse suicide attacks are their personal opinions; they are not binding on others. Their opinions have repeatedly tarnished the image of Islam and have given it a negative reputation. If they are accepted, then we shall have to revise the original treatises of our great doctors of Islamic law.

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# Human rights in Iraq's transition: the search for inclusiveness

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## Abstract

*The aftermath of the invasion of Iraq set unprecedented challenges to the United Nations in the political and in the human rights spheres. Since the first involvement of the United Nations under Security Council Resolution 1483 (2003), the United Nations, through its assistance mission (UNAMI), has provided support to the process of transition from a military occupation resulting from an unlawful invasion to a fully sovereign and independent state, an objective yet to be fully achieved. The article looks at this trajectory from the angle of the involvement of the Security Council, the legal context, the protection of human rights and the striving for reconciliation, sovereignty and inclusiveness.*

## The United Nations in Iraq: a chronology

When US and UK forces invaded Iraq at the end of March 2003, they did so without a mandate from the UN Security Council.[1] On 8 May 2003, a few weeks after the invading forces took Baghdad (9 April 2003), the United States and the United Kingdom addressed a letter to the president of the Security Council, in which they announced the establishment of a Coalition Provisional Authority (CPA) and gave details of its powers and areas of responsibility.[2] The letter also referred to the efforts aimed at restoring a national government. In particular, groups of Iraqis had been assembled in Nassiriya (15 April 2003) and in Baghdad (28 April 2003) to discuss

the future political arrangements. The letter gave a role for the United Nations principally in the area of humanitarian relief and reconstruction and ''looked forward'' to the appointment of a special co-ordinator.[3]

## The UN Assistance Mission for Iraq (UNAMI)

On 22 May 2003 the UN Security Council adopted Resolution 1483; it asked the Secretary-General to appoint a Special Representative, who was to have ''independent responsibilities'' which would involve inter-agency co-ordination and, ''in coordination with the Authority, the process of reconstruction and restoration of democratic government''. Five days later, on 27 May 2003, the Secretary-General announced his appointment of Sergio Vieira de Mello, then High Commissioner for Human Rights, as his Special Representative for Iraq, for a four-month term.

On 14 August 2003 the Security Council set up the UN Assistance Mission for Iraq (UNAMI) to enable the United Nations to carry out the mandate assigned to it by Resolution 1483. It also welcomed the establishment ''of the broadly representative Governing Council of Iraq'' on 13 July 2003 ''as an important step towards the formation by the people of Iraq of an internationally recognized, representative government that will exercise the sovereignty of Iraq''. Five days after the establishment of UNAMI, the attack on the UN office in Baghdad took place, taking a heavy toll in life and limb, including the life of the Special Representative of the Secretary-General. The subsequent evacuation by the United Nations of its international staff – following a second attack on 22 September 2003 – brought UN operations to a virtual halt, notwithstanding the heroic efforts of the UN national staff, many of whom continued to carry out a vestige of UN operations in their respective areas in increasingly dangerous circumstances. By this time the security situation had deteriorated to a point that started an exodus which continued into early 2004. Most international organizations, except for a few which had close links with the United States and the United Kingdom, left Iraq. UN staff were evacuated to Cyprus and then later in the year to Jordan. During this time there was much internal reflection on the direction the United Nations should follow. In early December the Secretary-General presented a report to the Security Council in which he gave the UN assessment of developments and the next steps the United Nations would take.[4]

1 ''The United Nations Secretary-General Kofi Annan has told the BBC the US-led invasion of Iraq was an illegal act that contravened the UN charter. He said the decision to take action in Iraq should have been made by the Security Council, not unilaterally.'' *BBC News*, 16 September 2004, available at http://news.bbc.co.uk/2/hi/middle_east/3661134.stm (last visited 10 September 2007).

2 Security Council document, UN Doc. S/2003/538.

3 Ibid. The letter stated, ''The United Nations has a vital role to play in providing humanitarian relief, in supporting the reconstruction of Iraq, and in helping in the formation of an Iraqi interim authority. The United States, the United Kingdom and Coalition partners are ready to work closely with representatives of the United Nations and its specialized agencies and look forward to the appointment of a special coordinator by the Secretary-General.''

4 Security Council document, UN Doc. S/2003/1149, circulated on 5 December 2003.

The Secretary-General also informed the Security Council of his decision to reconstitute UNAMI by setting up a core team under Ross Mountain, who was designated Special Representative *ad interim*. Under his leadership, the United Nations was to resume its presence and reorganize its activities in Iraq. The report gave a comprehensive account of developments prior and subsequent to the 19 August 2003 attack. Throughout the report the Secretary-General repeated his overriding concern for security, given that the level of violence in Iraq had continued to increase. The core team was to include a human rights component. Among other aspects, UNAMI was to relaunch efforts at reconstruction, given the outcome of the Madrid International Donor Conference on 23–4 October 2003.

## Preparing the transition

In the effort to support the quest for a transition process that would be acceptable to Iraqis at large, the Secretary-General's Special Adviser Lakhdar Brahimi visited Iraq from 6 to 13 February 2004 on a ''fact-finding mission''. He was mandated by the Secretary-General to assess the feasibility of holding direct elections before 30 June 2004 and/or the time frame for such elections. A ''technical report'' annexed to Brahimi's own report gives an assessment of the election processes that would be necessary in the transition. A transitional assembly and a provisional government would ensure the transition; the assembly would be elected and it would draft a constitution; similarly, a provisional government would be formed for the duration of the transition. A suggestion of the Coalition Provincial Administration for a caucus-style process to choose the assembly was rejected in favour of elections. These would take place some time before the end of 2004 or soon thereafter – in fact they took place on 30 January 2005.

Brahimi undertook two further missions to Iraq – from 26 March to 16 April 2004 and from 1 May to 2 June 2004. During the second mission he suggested the convening of a national conference after the handover by the CPA to the Iraq Interim Government, and during his third visit he facilitated an agreement among the Iraqis on arrangements for the transition and the institutions required to enable an interim government to assume power by the end of June 2004. Furthermore, in response to a request of the Interim Prime Minister, Ayad Allawi, the Secretary-General had provided additional support to the Preparatory Committee for the National Conference to assist in making ''the Conference as inclusive as possible to reflect Iraq's diversity and range of political opinions''.[5]

5 Report of the Secretary-General to the Security Council, UN Doc. S/2004/625, Para 29: ''To succeed, the Preparatory Committee must be given sufficient time to make the Conference as inclusive as possible to reflect Iraq's diversity and range of political opinions. It is equally important to ensure maximum transparency so as to allow the Iraqi people to keep themselves fully informed of the nature, scope and purpose of the Conference. Furthermore, the outcome of the Conference should be determined on the basis of a procedure agreed through genuine consultations. The United Nations will continue to assist the organizers of the Conference to achieve consensus among all stakeholders to these ends.''

## The end of the Coalition Provisional Authority

On 8 June 2004 the Security Council, anticipating the end of the CPA, adopted Resolution 1546 (2004), ''Welcoming the beginning of a new phase in Iraq's transition to a democratically elected government, and looking forward to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq by 30 June 2004''.

Shortly thereafter, on 14 July 2004, the Secretary-General announced the appointment of Asharf Jahangir Qazi as his Special Representative for Iraq, to head UNAMI.

Resolution 1546 provided the framework for UN involvement in Iraq between 2004 and 2007. The mandate consisted of two parts: in the first part, UNAMI was to provide assistance and to ''play a leading role'' in the realization of the ''transitional calendar''. This consisted of convening a national conference to select a Consultative Council, supporting the Independent Electoral Commission, the Interim Government and the Transitional National Assembly ''on the process for holding elections'' and promoting ''national dialogue and consensus-building on the drafting of a national constitution by the people of Iraq''. In the second part, UNAMI was expected to ''provide advice'' to the government of Iraq on a number of issues, including ''(iii) [to] promote the protection of human rights, national reconciliation, and judicial and legal reform in order to strengthen the rule of law in Iraq''.

During the period 2004 to 2007 the Secretary-General presented regular quarterly reports to the Security Council on developments in the situation in Iraq and on the activities of UNAMI.[6] These reports reflected the completion of most of the tasks mentioned in Resolution 1546. The National Conference was convened in August 2004. Elections were held on 30 January 2005, leading to the formation of the Transitional Government under Prime Minister Ibrahim al-Jaafari. On 15 October 2005 the referendum on the draft constitution took place, and elections to a 275-member Council of Representatives of Iraq were held on 15 December 2005; a government under Prime Minister Nouri Al-Maliki was subsequently formed.

On 1 August 2006 the Secretary-General informed the Security Council that, with the certification of the election results on 10 February 2006, the transition timetable set out in Resolution 1546 had been completed. An International Compact with Iraq had been set up a few days earlier, at the end of July 2007, on the initiative of the government of Iraq, for the purpose of achieving a national vision for Iraq which aimed ''to consolidate peace and pursue political, economic and social development over the next five years''.[7] The Secretary-General's Report expressed ''serious concern'' over the security and human rights situation, and referred to the announcement by Prime Minister

6 These reports are available at http://www.iraqanalysis.org/info/346 (last visited 22 November 2007).

7 International Compact with Iraq, 27 July 2007, available at http://www.iraqcompact.org/ICI%20Document.asp (last visited 22 November 2007).

Al-Maliki on 25 June 2006 of a national reconciliation plan, as a sign of the political will needed to confront crucial human rights problems. ''UNAMI looks forward to its continuing engagement with Iraqi ministries, judicial institutions and civil society organizations to support the establishment of a strong national human rights protection system.''[8]

The government formally requested the extension of the UNAMI mandate shortly thereafter: in a letter dated 3 August 2006, the Foreign Minister of Iraq said,

> ''While the political process envisioned by the Transitional Administrative Law and endorsed by the Council in resolution 1546 (2004) has formally come to an end, there remains much work for Iraqis to do to continue to build democratic legal and political institutions, to reintroduce the rule of law and civil society, to engage in a national dialogue to build peace and security and to rebuild Iraq's shattered physical and economic infrastructure for the benefit of this and future generations of Iraqis''.[9]

On 10 August 2006 the Security Council adopted Resolution 1700 (2006) – largely pro forma – by which it extended the mandate of UNAMI for a further twelve months.

## The current mandate of UNAMI

The current UN mandate in Iraq is enshrined in Security Council Resolution 1770 (2007), adopted on 10 August 2007. Shortly before the adoption of this resolution, the government of Iraq had formally requested the extension in a letter from the Foreign Minister to the President of the Security Council, stating,

> ''During the coming period, the interests of Iraq require that the role of UNAMI should be expanded and activated on both the humanitarian and political tracks, at home and in the region, and that the specialized United Nations agencies, funds and programmes should be brought back to work, each in its area of specialization, to reconstruct and stabilize the country, to contribute to the coordination and delivery of humanitarian assistance pursuant to the obligations contained in the Charter and to launch comprehensive campaigns to address the deterioration of the infrastructure''.[10]

The government specifically described a number of areas where support was needed:

8 Letter dated 1 August 2006 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2006/601: ''The announcement of a national reconciliation plan by the Prime Minister on 25 June provided a sign of political will needed to confront crucial human rights problems.''
9 Security Council document, UN Doc. S/2006/609, 3 August 2006.
10 Security Council document, UN Doc. S/2007/481, Annex.

"• Supporting the efforts of the Government of Iraq and the Council of Representatives to review the Constitution and implement its provisions;
• Advising the Government of Iraq and the Independent High Electoral Commission on the development of election and referendum processes;
• Supporting the efforts of the Government of Iraq with regard to national dialogue and comprehensive national reconciliation and ensuring respect for constitutional mechanisms in dealing with contentious cases;
• Supporting the efforts of the Government of Iraq with regard to the facilitation of regional dialogue;
• Protecting human rights and reforming the legal and judicial systems in order to strengthen the rule of law;
• Providing training sessions, workshops and conferences on topics relevant to Iraq, within Iraq;
• Organizing sessions for Iraqi diplomats at United Nations institutes and, in particular, the United Nations Institute for Training and Research (UNITAR);
• Conducting a general population census;
• Addressing the problem of Iraqi refugees and displaced persons, at home and abroad, and coordinating with States and the relevant specialized agencies in order to provide for their needs and create conditions conducive to their return to Iraq;
• Following up on implementation of the International Compact with Iraq and encouraging participating States to implement their commitments;
• Following up on implementation of the decisions of the International Ministerial Conference of the Neighbouring Countries of Iraq held in Sharm El-Sheikh and the three committees which arose from the Conference."

The resulting resolution (SCR 1770 (2007), which was adopted on 10 August 2007, spelled out the mandate of UNAMI on the lines of the content of the letter of the Iraqi Foreign Minister. It mandated the Special Representative of the Secretary-General and UNAMI, at the request of the Government of Iraq, to

"(a) Advise, support, and assist" the government in the implementation of various activities related to the national processes of national reconciliation, national security, and related issues, including the planning of a "comprehensive census".

"(b) Promote, support, and facilitate" a number of measures aimed at the reconstruction of the country and its institutions, including the provision of social services and the co-ordination of development activities and related funds,

> ''(c) And also promote the protection of human rights and judicial and legal reform in order to strengthen the rule of law in Iraq''.[11]

## '' … as the circumstances permit''

This chronology shows the developments in the situation of Iraq since the invasion. The reality during these years – as has been widely reported – has been fraught with problems. The term ''as circumstances permit'', for example, which is found in the main resolutions, refers to the security situation in the country, which is a serious obstacle to the achievement of the objectives set out in these mandates. This was stated explicitly in the current mandate in Resolution 1770 (2007);[12] in August 2006 the Secretary-General, in recommending the extension of the UNAMI mandate, spelled this out in his report of August 2006, stating,

> ''Despite severe operational and security constraints, UNAMI has further grown in size and has expanded its activities beyond Baghdad. However, in the light of the prevailing security situation which remains a matter of great concern, ''as circumstances permit'' will remain the defining operating principle for all United Nations activities in Iraq for the foreseeable future. There are a total of 396 international civilian and military personnel in Iraq, including up to 300 in Baghdad, 74 in Erbil and 22 in Basra. Progress has been made on the development of an integrated long-term United Nations complex in Iraq and new premises in Erbil and Basra have now been completed''.[13]

A number of obstacles have been described in the reports presented by the Secretary-General to the Security Council since the beginning of the involvement of the United Nations. The first two such reports, prepared under the first of these mandates (SCR 1483 (2003)) in 2003, are significant in terms of understanding the trend developing at the time. The first, circulated on 17 July 2003,[14] gave a complete assessment of the situation as it then stood, and was the first report on Sergio Vieira de Mello's activities. The second report, circulated on 5 December 2003,[15] completed the July report and set out a number of considerations with regard to future directions and priorities. It shed light on the manner in which the United Nations adapted its approach to the situation in Iraq as a result of the attack of 19 August 2003 and the subsequent evacuation from Iraq. The report concluded,

> ''Of paramount importance is the need to uphold the independent role of the United Nations, as set out in Security Council resolution 1483 (2003). The

11 UN Doc. S/Res/ 1770 (2007), Adopted by the Security Council at its 5729th meeting, on 10 August 2007, paragraph 2.
12 Ibid., paragraph 2.
13 Security Council document, UN Doc. S/2006/601, page 3.
14 Security Council document, UN Doc. S/2003/715, 17 July 2003.
15 Security Council document, UN Doc. S/2003/1149, 5 December 2003.

> legitimacy and impartiality of the United Nations is a considerable asset in promoting the interests of the Iraqi people.''

These reports, as well as others issued over time by the United Nations, including the human rights reports, although prepared using careful language, reflected a complex situation in the political, security, humanitarian and human rights sectors. A number of factors influenced and contributed to this complexity. The following parts of this article examine the legal context, the challenges to the implementation of the UN mandate, the development of the work of the Human Rights Office in this environment and the problem of ''inclusiveness'', otherwise known as national reconciliation.

## The legal context

The CPA governed Iraq through a variety of regulations, orders and so on. It created new ministries (among them the Ministry for Human Rights, the Ministry for the Environment and the Ministry for Displacement and Migration) reintroduced the Supreme Council of the Judiciary – to separate the judiciary from the Ministry of Justice – and a number of other institutions, such as the Iraqi Property Claims Commission.[16]

### New ministries

The creation of the new ministries was significant. They constituted a response to the particular needs of Iraq arising from the situation before and after the invasion. The Ministry for Human Rights provided a much needed outreach to victims of human rights violations and a bridge to the governmental structures. It worked well with Human Rights Office of UNAMI, and a number of modest improvements could be reported. A significant measure was the creation of a prison-monitoring department with the power to visit regularly prisons all over the country. The Environment Ministry had the huge task of cleaning up the country, including the military debris resulting from all the fighting that had taken place on Iraqi soil over the previous thirty years and which was continuing. It also included the repairing the damage to land and waters resulting from, among other

16 A complete list of regulations, orders, etc. issued by the Coalition Provisional Authority is available at http://www.iraqcoalition.org/regulations/index.html (last visited 22 November 2007).
The site defines the various issuances as follows:
Regulations – are instruments that define the institutions and authorities of the Coalition Provisional Authority (CPA).
Orders – are binding instructions or directives to the Iraqi people that create penal consequences or have a direct bearing on the way Iraqis are regulated, including changes to Iraqi law.
Memoranda – expand on Orders or Regulations by creating or adjusting procedures applicable to an Order or Regulation.
Public Notices – communicate the intentions of the Administrator to the public and may require adherence to security measures that have no penal consequence or reinforces aspects of existing law that the CPA intends to enforce.

causes, the use of depleted uranium. Another major challenge for the Environment Ministry was the regeneration of the marshlands in the south of the country. The Ministry of Displacement and Migration had a formidable mandate ranging from the expected return of refugees to Iraq – notably from Iran – to managing the plight of the hundreds of thousands of persons internally displaced during the previous regime. Its meagre resources were to be further stretched as a result of the internal displacement of hundreds of thousands as a result of the ongoing violence.

## CPA legislation

The legislative activity of the CPA – and indeed of the Iraq Interim Government that succeeded it – found only residual application.[17] This may be due to three main reasons: in the first place, it was – and remained – physically impossible to enforce the law because of the absence of the state structures normally entrusted with maintaining order and the administration of justice. Second, most Iraqis did not accept what they considered to be the law of the occupier. Third, the absence of social and civil security did not allow the development of normal life.

Perhaps the most significant legislative act of the CPA was the Law of Administration for the State of Iraq for the Transitional Period (TAL), enacted on 8 March 2004 for the purpose of organizing the transition to a sovereign and independent Iraqi government.[18] This law may be characterized as an attempt to foreshadow the constitution. The fact that it was the product of the occupation authority considerably reduced its influence among Iraqi legislators. Drafts prepared by the major parties played a more important role in the drafting process in 2005. Nevertheless, the law of administration ensured that some fundamental issues were on the agenda; these included a bill of rights, as well as the institutions to ensure the application of such rights, the guarantees regarding the representation of women and the protection of the several minorities that help to make up Iraq.

A number of these regulations and orders continue to apply in Iraq, notably Order no. 17 (Revised) promulgated on 24 June 2006, four days prior to the end of the CPA. This gave immunity to personnel of the Multi-national Force (MNF), and to ''Certain Missions and Personnel in Iraq'' including contractors, defined as ''non-Iraqi legal entities or individuals not normally resident in Iraq, including their non-Iraqi employees and Subcontractors not normally resident in Iraq, supplying goods or services in Iraq under a Contract'', and private security companies, defined as ''non-Iraqi legal entities or individuals not normally resident in Iraq, including their non-Iraqi employees and Subcontractors not normally resident in Iraq, that provide security services to Foreign Liaison Missions and their Personnel, Diplomatic and Consular Missions and their

17 The CPA legislation would require a separate analysis in regard to its consistency with the relevant provisions of international humanitarian law governing occupation.
18 Law available at http://www.cpa-iraq.org/government/TAL.html (last visited 22 November 2007).

personnel, the MNF and its Personnel, International Consultants and other Contractors''.[19] Section 5 of the Order gave the responsibility to the ''sending State'' to determine requests for waiver of immunity from the ''Iraqi legal process''.

Among these orders a number have been invoked as contributing to the chaos affecting law and order in Iraq. Notably, Order 2 of 23 May 2003 dissolved a number of ''entities'', among them the army, the air force, the navy, the air defence force and other regular military services.[20]

## Transition challenges

### Independence

Given the situation on the ground and the failure to secure an inclusive national Iraqi political base, discussed further below, the implementation of the UN mandate in Iraq presented several challenges. The main challenge in carrying out the mandate in Resolution 1546 (2004) lay in bringing about, through a credible transition that was itself sovereign and independent, a sovereign and independent government. This was not easy to accomplish, as it would be the product of and ultimately (at least de facto) under the authority of those who had invaded and occupied Iraq. In practical terms, although the CPA had passed on its ''authority'' to the Iraq Interim Government, the latter was still dependent on the (foreign) political will of the United States. Regardless of the references in the resolution, the exercise of powers which constitute sovereignty and independence had merely passed from the CPA to the US embassy. The Iraqi public – and political leadership, barring minor exceptions – was under no illusion as to who was in charge.

The independence of the UN's operation in Iraq was equally severely limited, as was its freedom of operation, due to the lack of security and the dependence on the security coverage of the US forces (and UK forces in the south). Security was made even more complicated with the continuing influx of violent elements, including al-Qaeda, and the actions of some private security groups, among them foreign contractors, who enjoyed immunity under CPA Order 17 (Revised). The qualification of ''independent'' in Resolution 1483 (2003) for the mandate of the Special Representative did not appear in the version of the same mandate given in Resolution 1546 (2004).

19 Order 17, available at http://www.iraqcoalition.org/regulations/index.html#Regulations (last visited 22 November 2007).

20 Order 2, available at http://www.iraqcoalition.org/regulations/index.html#Regulations (last visited 22 November 2007).

## The caveat requested by the Iraqi government

Another challenge to UNAMI in the implementation of its mandate consisted of the caveat ''as requested by the Government of Iraq'', given the fact that the ''government of Iraq'' itself was in serious need of the capacity building that would enable it to formulate the request for support in the areas covered by paragraph 7 of Resolution 1546 (2004).[21] The support for the reform of the judicial and legal sectors mentioned in the mandate of the Human Rights Office, for instance, was a classic example of this type of situation.

## The security situation

A third challenge was the security situation. The words ''as circumstances permit'' made any action by the United Nations contingent on the security situation. Although there was a gradual increase in the UN presence in Iraq, the international presence in Iraq remained – and remains – symbolic. International organizations still operated from Amman, Jordan, and a few conducted periodic visits to Iraq under very strict security conditions. Virtually all the international non-governmental organizations which had left during 2003–4 had not returned. Responsibility for the implementation of such activities as they might still run continued to be entrusted to national Iraqi partners. A notable exception which deserves recognition was Human Rights Watch. The Secretary-General, understandably, was extremely cautious in authorizing any presence in Iraq, even with the security guarantees extended by the Coalition Forces. Hence the mention in the letter of the Foreign Minister of Iraq to the Security Council, which led to Resolution 1770 (2007), that these organizations, ''the specialized United Nations agencies, funds and programmes should be brought back to work, each in its area of specialization, to reconstruct and stabilize the country, to contribute to the

21 Security Council Resolution 1546 (2004), paragraph 7, spells out the mandate of UNAMI:
''7. Decides that in implementing, as circumstances permit, their mandate to assist the Iraqi people and government, the Special Representative of the Secretary-General and the United Nations Assistance Mission for Iraq (UNAMI), as requested by the Government of Iraq, shall:
(a) play a leading role to:
(i) assist in the convening, during the month of July 2004, of a national conference to select a Consultative Council;
(ii) advise and support the Independent Electoral Commission of Iraq, as well as the Interim Government of Iraq and the Transitional National Assembly, on the process for holding elections;
(iii) promote national dialogue and consensus-building on the drafting of a national constitution by the people of Iraq;
(b) and also:
(i) advise the Government of Iraq in the development of effective civil and social services;
(ii) contribute to the coordination and delivery of reconstruction, development, and humanitarian assistance;
(iii) promote the protection of human rights, national reconciliation, and judicial and legal reform in order to strengthen the rule of law in Iraq; and
(iv) advise and assist the Government of Iraq on initial planning for the eventual conduct of a comprehensive census.''

co-ordination and delivery of humanitarian assistance pursuant to the obligations contained in the Charter and to launch comprehensive campaigns to address the deterioration of the infrastructure''.[22]

## The Human Rights Office

In these circumstances, with the return of UNAMI in 2004, the re-established Human Rights Office had to identify its modus operandi. The United Nations had given priority to human rights issues from the first days of its involvement in Iraq. The two reports presented to the Security Council by the Secretary-General in 2003 contain detailed assessments of the human rights situation in the country. A human rights officer was deployed as part of the core UN team that was to resume the presence in Baghdad with the Special Representative of the Secretary-General in August 2004.

### Mandate

The mandate of the Human Rights Office was described in Resolution 1546 (2004) paragraph 7(b)(iii) as to ''promote the protection of human rights, national reconciliation, and judicial and legal reform in order to strengthen the rule of law in Iraq''. Under Resolution 1770 (2007) the mandate is to ''promote the protection of human rights and judicial and legal reform in order to strengthen the rule of law in Iraq''. Working with and through national Iraqi organizations, mainly in Baghdad and Amman, the Human Rights Office re-established links with a number of Iraqi non-governmental groups. This was also accomplished by visits by the Office to the southern governorates and to the north, where these contacts were consolidated and new ones were made. Eventually the Human Rights Office established a presence in Basra and Erbil, in addition to its offices in Baghdad and Amman. The Basra office discontinued operations in 2006, when the security situation worsened in that area.

The Office advised the Special Representative of the Secretary-General on human rights aspects of his mandate – it became clear that, in the case of Iraq, human rights considerations were an integral part of the political dialogue. The problems inherited from the pre-invasion period required urgent and serious attention, as did those that arose after the invasion. The Office therefore needed to focus on supporting the transition of Iraq whilst a large part of it was under military attack; it also had to address the post-invasion human rights realities. For this reason the situation in Iraq, from a human rights operational standpoint, presented unique challenges. The Office was able to keep up to date on the day-to-day human rights situation around the country and to interact with networks of Iraqi groups and organizations in the area of human rights. These contacts were

22 Security Council document, UN Doc. S/2007/481, Annex.

further supplemented by regular encounters with representatives of key ministries and other authorities (including US military authorities).

## Reconstruction and the Human Rights Programme

This also enabled the Human Rights Office to develop activities in support of the general effort of reconstruction. To the extent that human rights issues were an essential component of national reconciliation, the Office needed to be up to speed on the human rights reality prevailing in the country. For this purpose, in addition to its ongoing monitoring work with individuals, civil society groups and officials, it formulated and supported initiatives by the Iraqi authorities. These included establishing a National Centre for Missing Persons in Iraq and a National Human Rights Institution, strengthening the civil police, strengthening monitoring of prisons by the Ministry for Human Rights and supporting national human rights groups.

A Human Rights Programme was compiled, composed of projects put forward by other agencies and programmes of the UN system. These projects were grouped according the various fields to which they related, such as education, health, the administration of justice and so on.[23] Through its interaction with other international partners and with the emerging Iraqi authorities, the Human Rights Office contributed to the overall UN effort in both the political process and that of reconstruction.

In late 2005, under the leadership of the Minister of Planning, sectoral working groups were established in Baghdad for the purpose of co-ordinating the needs of the concerned government ministries, thereby enabling the donor community to better rationalize support. One such sectoral working group was dedicated to the rule of law sector. Chaired by the Chief Justice, the working group was composed of high-level officials from the ministries of Defence, Interior, Justice, Human Rights, Labour, and Social Affairs and Planning. The Human Rights Office and the European Commission were designated as the lead donors for the purposes of ensuring co-ordination and support for this group.

## Monitoring

A fundamental task for the Human Rights Office was to establish an effective monitoring system to enable it to carry out its mandate. This required establishing contact with Iraqi civil society, itself very much in its infancy – with the exception of the Kurdish region – and made up of organizations of various levels of dedication. By the end of 2005 a valuable network of such organizations had been formed, and contact with individuals and groups was reasonably sound. It also required establishing contact with Iraqi and non-Iraqi authorities.

23 Available at http://www.uniraq.org/aboutus/HR.asp (last visited 1 December 2007).

These monitoring activities enabled the Office to establish a reasonably complete picture of the human rights reality prevailing in the country. It also enabled the Office to identify areas in which the root causes of the problems lay. Thus the Office maintained regular contact not only with its line Ministry, the Ministry of Human Rights, but also the Ministry of Interior, of Defence and of Justice, and with the Supreme Council of the Judiciary. Starting in July 2005, the Human Rights Office issued a bimonthly public report on the situation of human rights in Iraq. These reports, although carefully worded, illustrated the steady degradation in the human rights situation.[24] In addition, the quarterly reports of the Secretary-General to the Security Council included updates on the human rights situation, in which similar concerns were relayed.[25] Through its regular meetings with the authorities, civil society, and individuals and groups, the Office worked towards the inclusion of human rights issues at the decision-making levels of government and other authorities, in an effort to obtain action to address these problems.

In the rule of law area the problems identified were consistent with those in other sectors: lack of absorption capacity, severe limitations due to security problems, political uncertainty and so on.

## Humanitarian consequences of military operations and detention

In addition to the weaknesses in the national capacity, the human rights situation of was made worse by the military interventions in search of presumed terrorists. For a number of months a large part of Anbar governorate continued to be the theatre of military operations, which produced considerable adverse humanitarian consequences in terms of civilian casualties, displacement and so on. The so-called "new displacements" – to distinguish them from those that took place prior to the invasion – ran into hundreds of thousands. The use of certain measures, such as cutting off water and power, the targeting of families in search of individuals and the firepower used, including aerial attacks, all gave rise to serious allegations of violations of the law of armed conflict, including that relating to the protection of civilians and the disproportionate use of force.

Another serious human rights issue resulting (principally) from these military interventions was the taking into custody of large numbers of men, in the hope that some of them were terrorists who were being sought. These arrests produced thousands of detainees, mostly held under MNF custody in detention facilities (including Abu Ghraib and Camp Buca) run by them. In its report for the period 1 April to 30 June 2007, the Human Rights Office gave the number of Iraqis in detention as of the end of June 2007 as 44,235, made up of detainees, security internees and sentenced prisoners. Of these, 21,107 were held in MNF custody.[26]

24 The reports are available at http://www.uniraq.org/aboutus/HR.asp (last visited 20 October 2007).
25 The reports are available at http://www.un.org/documents/repsc.htm (last visited 22 November 2007).
26 Human Rights Report 1 April–30 June 2007, available at http://www.iraqanalysis.org/info/346, paragraph 57 (last visited 20 October 2007).

The human rights situation remained serious; arbitrary arrests and detentions, and summary executions continued to occur regularly. Allegations of torture remained rife and rampant, with evidence emerging from interviews and from observing that the bodies of many deceased bore signs of summary and arbitrary execution. The number of abductions remained high.

## Reconciliation, sovereignty and inclusiveness

The restoration in post-invasion Iraq of a sovereign and independent state presented extraordinary challenges. The official end of the occupation – as determined by Security Council Resolution 1546 (2004) – altered the technical nature of the governing structures in Iraq. The CPA had de facto power by virtue of the military conquest of Iraq and the removal by force of the governing regime; the process of restoring a sovereign government consistent with the resolution presented serious challenges, given the fact that the "fully sovereign and independent Interim Government of Iraq" itself resulted from the invasion and occupation of Iraq, contrary to – among others – Article 2 of the UN Charter.

The challenge was that of creating a fully sovereign and independent government out of a temporary (foreign) civilian administration governing during military occupation. The process of consulting the people of Iraq – an essential condition for a government to be fully sovereign and independent – was a particularly complex one, given the fact that the ousted regime had consistently violated human rights and acted against many of its own people. The reports of the Special Rapporteur of the Commission on Human Rights of the United Nations between 1992 and 2004 contained ample and well-documented evidence of these violations.[27]

### The absence of legitimacy

The process of establishing legitimacy in Iraq following the invasion was further complicated by the fact that the Iraqi people had no say in choosing their interim authorities – nor, for that matter, in getting their country invaded. The Interim Governing Council, which was appointed by the CPA, had no legitimacy (as far as "sovereignty" is concerned) and was certainly not inclusive. It was dissolved on 1 June 2004 in anticipation of the CPA itself handing over power (on 28 June 2004) to an Iraq Interim Government (the Allawi government). This government had been appointed under the CPA and was also neither inclusive nor "sovereign". The fact that these institutions were acknowledged by the Security Council did not necessarily make them acceptable to the Iraqi people.

27 The reports of the Special Rapporteurs on Iraq between 1991 and 2004 and related documents are available at http://www.ohchr.org/english/countries/iq/mandate/index.htm (last visited 20 October 2007).

The National Council, acting as a kind of legislative watchdog, was appointed by the National Conference convened on 17 August 2004. The conference was intended to reflect all sectors of the Iraqi people. It was convened following the recommendation of UN Special Representative Brahimi following consultations in Iraq and the dropping of the Bremer proposal for a regional ''caucus'' process. The National Conference did not produce the hoped-for inclusiveness. At the conference, the then newly appointed Special Representative Qazi emphasized – as he consistently did subsequently – the need to ensure the inclusion of all Iraqi groups in the process of national reconciliation and restoration of sovereignty and independence.[28] This was – and remained – an essential condition in the reconstruction of Iraq.

## The lack of inclusiveness

In the circumstances, with the US military campaign taking place within the mainly Sunni areas of Iraq, this inclusiveness was not likely to happen. The two attacks on Falluja in 2004 (April and November), and the military campaign in Ramadi, Haditha, Qa'im, Talafar and elsewhere produced further ''exclusion''. Furthermore, the absence of effective law enforcement and the administration of a severely limited justice system in most of the country (the Kurdish region being a notable exception, having different problems) did not produce the inclusion required for national reconciliation. The election of the Transitional Assembly at the end of January 2005 further exacerbated the lack of inclusiveness in the

28 See, e.g., Speech of the Special Representative of the Secretary-General United Nations Assistance Mission for Iraq, Inaugural session of the Kurdistan National Assembly, 4 June 2005/Erbil: ''The extraordinary diversity of peoples of this region, encompassing Kurds, Arabs, Turcoman, Assyrians and many others, is a priceless national asset. The Kurdistan National Assembly accordingly has a historic opportunity to demonstrate that the new era in Iraq will be one where democratic principles are enshrined in effective participatory institutions, where differences can be vigorously but responsibly debated in public, where political leaders are accountable to the electorate and where government is conducted with a compelling sense of public service and transparency. You have the opportunity and capability and, dare I say, obligation to provide a beacon and example to the rest of Iraq.''

Remarks of Mr Ashraf Jehangir Qazi to the Preparatory Meeting for the Conference for Iraqi National Accord , 19 November 2005: ''In the course of 2006, the Secretary-General has directed me to ensure that the work of the United Nations Assistance Mission for Iraq supports national reconciliation. Accordingly after the election and formation of the permanent government, we will devote our efforts in regard to the political process, human rights, humanitarian assistance and development and reconstruction as well as institutional capacity building to bolstering the work of those who are trying to bring Iraq's communities to a new level of mutual understanding and toleration. This will not be easy nor will it yield immediate results. We will continue to work with all Iraqis involved to ensure that the crimes of the past, and of the present, are dealt with fairly and transparently. It seems repetitive to say that Iraq's citizens have suffered too much for too long – yet it is glaringly true.''

Ambassador Ashraf Jehangir Qazi, Speech to the National Conference, 15 August 2004, available at http://www0.un.org/apps/news/story.asp?NewsID=11638&Cr=Iraq&Cr1 (last visited 1 December, 2007): ''Voicing deep regret over the loss of life and casualties suffered by the Iraqi people, he emphasized the importance of a broad and inclusive political process and moderation in advancing the political transition. The most immediate goal, he said, is the election of a ''credible and inclusive'' Interim Council to ensure successful elections by the end of January 2005 and the transition of Iraq to a constitutional democracy by the end of that year.''

political process of return to sovereignty, and deprived the drafting of the constitution of an essential requirement of its very raison d'être. The Iraqi Interim Government was in place until 7 April 2005, when, following the elections, the Transitional National Government (the al-Jaafari government) took over.

Thus the entire transition process envisaged at the end of the Coalition Provisional Authority failed to produce the essential element on which a sovereign Iraq could be built: the popular participation of the country in all its component elements. The participation of some Sunni groups in the 15 October 2005 referendum was an encouraging sign that this lack of inclusiveness was finally being reversed. The significant feature of the Sunni participation in the referendum was the massive rejection of the draft constitution, coming very close to a veto of the draft.[29] That dramatically showed the extent of the effect of the lack of inclusiveness in the political process up to then – and the urgent need to address it.

The elections of 15 December 2005 reflected a wider participation by Sunni groups. This was particularly significant, given the fact that the US military campaign – with a short lull during the polling – continued unabated in Sunni areas. The negotiations on the constitution would resume in a Review Committee, in accordance with Article 142 of the Constitution, to address the concerns of those – mostly Sunni – who had not participated in the constitution-making process in the Transitional Government.

By the time that this enhanced participation in the political process started to take place, the level of violence had assumed a life and a momentum of its own. The progress in restoring an inclusive political process was not reflected in the day-to-day life in the country.

## The failing administration

The Transitional National Assembly was unable to provide the country with a working system of administration of justice. That sector, in particular the police, was not functioning. Economic instability continued to create considerable unemployment and hardship. The absence of basic services such as electricity reflected the plight of the country. This lack of security – physical and economic –

29 Report of the Secretary-General to the Security Council, UN Doc. S/2005/766, 7 December 2005, paragraph 10: "In accordance with the Transitional Administrative Law, the referendum was to be considered successful and the draft constitution ratified if a majority of the voters approved and if two thirds of the voters in three or more governorates did not reject it. According to the final certified results released by the Electoral Commission on 25 October, 64.6 per cent of all eligible voters turned out to participate in the referendum, with 79 per cent voting in favour and 21 per cent against. A total of 9,852,291 votes were cast from 6,235 polling centres and more than 32,000 polling stations. Two governorates voted by more than two thirds to reject the constitution: Al Anbar (3 per cent yes, 97 per cent no); and Salahaddin (18 per cent yes, 82 per cent no). While a majority of voters in Ninewa rejected the constitution (45 per cent yes, 55 per cent no), the outcome fell short of the two thirds majority threshold required to qualify as a "no" vote. Thus, given that the majority of the electorate voted in favour of the constitution and only two governorates voted against it, the Board of Commissioners of the Electoral Commission decided that the draft constitution was adopted."

produced a situation of further lawlessness, violence and instability. The extent of the criminal element thus produced was – and continued to be – grossly underestimated. In the Transitional Government, the Ministry of the Interior further complicated the situation by giving the police force a partisan image by bringing in militias from the political parties which now formed part of the government. Several serious attacks on civilians were attributed to such units, so that the police force, rather than providing protection, was in such cases the perpetrator of violence against the very civilians whom it was established to protect.

The absence of functioning, internal accountability mechanisms in the Ministry of Interior – in spite of a Human Rights Department and an Inspectorate-General – gave such elements virtual freedom to operate. The Transitional National Government also manifested no political will to address this very serious situation. In late 2005, US forces raided a bunker in which the ministry was holding some 170 detainees, many of whom had been tortured. Investigations announced by the Prime Minister at the time, as well as subsequent reports of other sites of the unlawful detention of thousands of others, remained without any conclusion.[30] The Special Representative of the Secretary-General as well as the High Commissioner for Human Rights had offered international support to the government to conduct such investigations to support efforts at addressing illegal detention. This strengthened the view that the government was unable to carry out the basic obligation of protecting its own citizens against arbitrary arrest, detention and torture. It also exemplified the level to which the protection of the right to life had sunk, with ever-increasing reports of mass summary executions. The fact that the Minister of Interior was himself a former militia leader did not help. Thus by this time, Iraq faced a schizoid existence where on the one hand a political dialogue continued, while on the other the situation in the streets continued to deteriorate, giving rise to speculation about the existence of a civil war.

How is the continuing military intervention by US forces to be reconciled with the attainment of a sovereign and independent Iraq post-28 June 2004?

## The US military intervention and a sovereign Iraq

The military intervention had been justified by invoking the request of the Iraqi authorities – respectively the Interim and the Transitional Government – and the response of the US authorities – respectively Secretaries of State Colin Powell and Condoleezza Rice – as formulated in letters annexed to Security Council

30 See www.uniraq.org, Human Rights Reports: Report for 1 November 2005 to 31 December 2005, paragraphs 7 to 11; Report for 1 January 2006 to 28 February 2006, paragraph 28; Report for 1 March 2006 to 30 April 2006, p. 7. See also Amnesty International, ''Iraq: one year on, still no justice for torture victims'', public statement, 10 November 2006 (AI Index MDE14/038/2006/(Public)).

Resolutions 1546 (2004)[31] and 1637 (2005).[32] This exchange of letters confirmed the status of the thousands of detainees taken into custody in such military operations as that of "internment for imperative reasons of security". As such, they were to be protected by the provisions of the Fourth Geneva Convention relating to such a category of detainees. The numbers, duration and conditions under which such persons were held was not consistent with the provisions of the Fourth Geneva Convention, and the Human Rights Office of UNAMI repeatedly raised this issue with the Iraqis and the US military authorities.

In addition it should be borne in mind that the protection of civilian persons under international humanitarian law was additional to the protection of civilians rendered necessary by hostilities. The protection under this law was therefore supplementary to that afforded by international human rights law. This is particularly important with regard to protection of the right to life, and protection from arbitrary detention, torture and so on. Civilians are therefore to enjoy reinforced protection during abnormal conditions due to armed conflict. In its most recent report on the human rights situation in Iraq, the Human Rights Office sets out continuing disparities in the interpretation by the US authorities of the applicability of human rights law and international humanitarian law.[33]

## Concluding observations

The human rights situation was already very serious in the years leading up to the invasion. The reports of the Special Rapporteur of the Council for Human Rights documented the egregious violations reported during the period immediately following the 1991 Gulf war.[34] Prior to that, Iraq had been the scene of violations, notorious among them, but by no means alone, the chemical weapons attacks on the people of Halabja and Suleimaniya. The war with Iran had generated massive violations, as may be attested by the mass graves that are now a matter of record – testimony to the inability of the international community to address such situations.

The invasion created in the minds of many Iraqis the hope and expectation that they would no longer have to fear for their safety and security, and that a new era of freedom and respect for human rights was about to dawn. Sadly, this has not been the case; since the invasion, the human rights situation has continued to deteriorate. Already, in his first report under Resolution 1483 (2003),

31 UN Doc. S/RES/1546 (2004), Annex: Text of letters from the Prime Minister of the Interim Government of Iraq Dr Ayad Allawi and United States Secretary of State Colin L. Powell to the President of the Council of 5 June 2004.

32 UN Doc. S/RES/1637 (2005), Annex I, Letter dated 27 October 2005 from the Prime Minister of Iraq addressed to the President of the Security Council; Annex II: Letter dated 29 October 2005 from the Secretary of State of the United States of America to the President of the Security Council.

33 See Human Rights Report, 1 April–30 June 2007, paragraphs 68–81, available at http://www.uniraq.org/FileLib/misc/HR%20Report%20Apr%20Jun%202007%20EN.pdf (last visited 30 January 2008).

34 Reports of the Special Rapporteurs on Iraq between 1991 and 2004, above, note 27.

the Secretary-General had shared the concerns registered by Special Representative Vieira de Mello.[35] The December 2003 report confirmed further deterioration regarding human rights activities, largely attributed to the parallel deterioration in security.[36]

What went wrong? The serious human rights situation resulted from a number of complex factors. In the first place, on the purely civilian level, the state structures for the protection of the individual did not function. The dissolution of the police force and of the army created a vacuum in protection. The need for the reconstruction of these two essential arms of the state was underestimated and it was thus left to the foreign forces, mainly those of the United States and the United Kingdom, to provide protection. The absence or non-functioning of institutions of the administration of justice system created an environment in which crime expanded exponentially, including criminal acts perpetrated as acts of terror.

The general instability was further compounded by the ''war on terror''. The presence in Iraq of US forces in such large numbers provided an attraction for those groups who considered the United States their enemy. They made their way to Iraq where they targeted the US military and other installations, including those considered vital for the reconstruction of the country. Groups such as Al Qaeda, that had never set foot in Iraq before the invasion, now made it their battle ground in their war on the United States. The military engagement in the quest for terrorists compounded the threat by creating large numbers of detainees, held in US custody for prolonged periods. The great majority of these detainees being innocent, there was little doubt that several of them would be more prone to becoming terrorists once they were released.

A third factor was the failure to ensure a sufficiently inclusive political process; this strengthened the hand of those opposition elements that advocated violence, and weakened the more moderate groups. The political ''dialogue'' was partly conducted through acts of violence. Some of this violence deteriorated into what the media conveniently labelled ''sectarian'', namely, Shia vs. Sunni – not entirely correct.

A fourth factor was the presence of private security groups, many of them foreigners, whose lucrative income for providing security provided the best incentive to perpetuate insecurity. In the prevailing situation in Iraq, it was very easy to provoke fear and insecurity – especially when your own national police was either not protecting you or outright hounding you. The lack of security and the corresponding increase in violence brought about an exodus of international governmental and non-governmental organizations. In these circumstances, the main non-Iraqi presence remained that of US official and non- (or quasi-) governmental US organizations.

35 UN Doc. S/2003/715, Report of the Secretary-General pursuant to paragraph 24 of Security Council resolution 1483 (2003), 17 July 2003.

36 UN Doc. S/2003/1149, 5 December 2003, in particular paragraphs 14, 23, 83 and 96.

The restoration and reconstruction effort was further hampered by a lack of definition of the role of the United Nations and that of the United States. Two levels of communication persisted with the Iraqi authorities: a largely bilateral course followed by the United States and a multilateral one followed, in accordance with its mandate, by the United Nations, in which the United States also participated. There was no real co-ordination between these two levels of communication in so far as the reconstruction and restoration efforts were concerned. The military dimension, where the United States acted on behalf of the Iraqi authorities, complicated the relationship further.

Thus the situation in Iraq continued to deteriorate. The search for national reconciliation has emerged as the priority issue in the current mandate under Security Council Resolution 1770 (2007). The international community has yet to be given the opportunity to fulfil the objectives of the UN Charter and ensure the dignity of the people of Iraq.

© Photo courtesy of The Washington Note and Nir Rosen.

Since the beginning of the war in 2003, an estimated 4 million Iraqis have fled their homes. Although some of them went back in the second half of 2007, most are still internally displaced or in neighbouring States, particularly Syria, Jordan and the Gulf States.


25/04/2003 © ICRC/Johan Sohlberg

This photo shows a gathering in front of a mobile phone office, made available by ICRC in collaboration with Iraqi Red Crescent to civilian population to contact their relatives. After the attack on the delegation in Baghdad in October 2003, the ICRC limited its presence in Iraq to safer areas such as northern Iraq. From its office in Amman, it nevertheless carries out prison visits and health, assistance and sanitation projects in the most affected areas of Iraq. The projects are implemented either directly or through remote control mechanisms.

© UN Photo by Timothy Sopp

The UN's role in Iraq has been limited for political and security reasons. This photo shows a partial view of the United Nations mission in Baghdad that was destroyed by a truck bomb on 19 August 2003, killing at least 20 UN staff. This forced the UN to pull out of Iraq completely, until it agreed to help construct a new interim government in February 2004.

11/2002 © Federation/Christopher Black

The Iraqi Red Crescent is one of the main humanitarian organizations in Iraq. It has 300 offices and an outreach network of 100,000 volunteers and employees. Its work includes assisting society's most vulnerable members, providing health services, carrying out water and sanitation projects, and collecting and delivering ''Red Cross messages'', brief personal messages to relatives made otherwise unreachable by conflict.

09/04/2003 © ICRC/Benoît Schaeffer

On 20 March, 2003, the ''coalition of the willing'', led by the US and Britain invaded Iraq and ousted the government of Saddam Hussein within a few weeks. Since then, however, the presence of the foreign troops has encountered violent resistance.


© AP

Terrorist acts, such as suicide bombings and hostage taking, are a method of warfare often used by violent groups in Iraq. They are directed against foreign civilian targets, as well as against Iraqi clerics, political leaders, journalists, doctors, teachers and ordinary citizens.

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The Abu Ghraib torture photos went around the world in 2003, fanning the fires of anti-American sentiment in the Arab world and considerably damaging the image of the foreign troops in Iraq.

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About 23,000 internees were held by the multinational forces at the end of 2007, and many thousands more are held by the Iraqi authorities. Among them are children, women and elderly people.

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The statute of the Iraqi Special Tribunal was enacted by the Iraqi Governing Council on 10 December 2003. The Tribunal has jurisdiction over war crimes, crimes against humanity and genocide, as well as three crimes under Iraqi law. So far it has passed sentence on a number of former high-ranking leaders of the Baath party, including Saddam Hussein.

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After the fall of Saddam, Iraq fell into a state of chaos and violence. There was fighting between the foreign troops and insurgents, as well as between Sunni and Shia militant groups. In the second half of 2007 however, attacks finally became less frequent as temporary ceasefires and alliances were negotiated.

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INTERNATIONAL REVIEW of the Red Cross

# The ethos–practice gap: perceptions of humanitarianism in Iraq

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## Abstract

*This article summarizes a country study on Iraq conducted by the Humanitarian Agenda: 2015 project of the Feinstein International Center, Tufts University, between October 2006 and May 2007.* Based on a sample survey of perceptions of humanitarian action among Iraqis at the community level and among humanitarian agencies in the region, the study focuses on what Iraqis and aid workers believe to be true about the way in which the humanitarian apparatus has functioned or malfunctioned in Iraq, and why. Its findings confirm both the strength of the humanitarian ethos in Iraq and the operational value of principled humanitarianism, but call attention to significant gaps at ground level between ethos and practice.*

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> "During the attacks on Fallujah, poor people who had nothing went to donate their blood." "Iraqis want to help others. They're human. They have feelings. It's what Islam teaches."
> Interviews in Baghdad

Fieldwork for our study[1] on perceptions of humanitarianism in Iraq began inside the country in late October 2006. It was conducted by a team of three Iraqis from

* Humanitarian Agenda 2015 (HA2015) is a policy research project aimed at equipping the humanitarian enterprise to respond more effectively to emerging challenges around four major themes: universality, terrorism and counterterrorism, coherence, and security. As with all HA2015 materials, the Feinstein International Center welcomes feedback and criticism from all quarters. Please contact the author at ghansen@islandnet.com or the HA2015 lead researcher Antonio Donini at antonio.donini@tufts.edu.

various religious communities and the author/lead researcher. The Iraqi researchers were chosen for their prior exposure to humanitarian work and connections to various communities.

Interviews were held with people chosen for different perspectives. Those interviewed included Iraqis from various social strata across the spectrum of Shia, Sunni, Kurdish and other communities, and it was evident that many were in need of assistance or protection or both. Geographic coverage within Iraq included Basrah, Amarah, Wasit, Kut, Najaf, Baghdad (including Mahmoudia, Karrada, Sadr City and Doura), Abu Ghraib, Fallujah, Baqoubah, Kirkuk, Mosul, Suleimaniya and Erbil. While a few interviews were conducted through Skype voice-chat, most were held over tea in homes and offices.

In sum, the team conducted 225 semi-structured conversations and interviews, 165 of which were held inside Iraq at the community level, most with people who would not normally be accessible to persons perceived to be affiliated with the Multi-National Forces in Iraq (MNF-I). Apart from one focus group of seventeen participants, interviews were conducted confidentially and in private settings.

In order to probe universality issues more deeply, one of our researchers with access to the al-Hausa seminaries in Najaf conducted twenty-seven interviews there with a range of clergy and students, including senior clerics. Additional standpoints were gathered through interviews with Iraqi and humanitarian staff of other nationalities of non-governmental organizations (NGOs) and the International Red Cross and Red Crescent Movement, the UN Assistance Mission to Iraq (UNAMI) and UN agencies, conflict analysts, donors and regional specialists in Iraq and Jordan.

## The findings

Humanitarian organizations cautioned the team that local perceptions of humanitarian action in Iraq would be conditioned by the extremely low profile of the humanitarian community in the country. Their concern was well-founded. Many interviewees reported having no direct contact with the aid apparatus. The low visibility of humanitarian efforts in Iraq should be borne in mind as perceptions are discussed below.

### The humanitarian impulse

There is no wholesale rejection of the humanitarian ethos in Iraq. The research team heard no evidence of a generalized antipathy towards humanitarian ideals. On the contrary, most of those with whom we spoke expressed unequivocal

1 The complete study and its recommendations, ''Taking sides or saving lives: existential choices for the humanitarian enterprise in Iraq'', is available at http://fic.tufts.edu/downloads/HA2015Iraq CountryStudy.pdf (last visited 20 November 2007).

solidarity with the goals and ideals of humanitarian work conducted for its own sake, sympathy with the efforts of "good" humanitarian work, and often a visceral understanding of neutrality, impartiality and independence. Although humanitarian ideals are in general warmly embraced in Iraq, our team heard with consistency that humanitarian action that falls short of the ideal is recognized as such and is prone to rejection.

A senior clergyman in Najaf mentioned with evident warmth the successive visits to Najaf by Sergio Vieira de Mello, the Special Representative of the UN Secretary-General, until his death in the bombing of the UN Baghdad headquarters. De Mello was remembered with affection in Najaf for his readiness to listen. Following audiences with Grand Ayatollah Ali al-Sistani, de Mello was given the honour of being taken to the tomb of the Imam Ali, one of the most revered shrines in Shia Islam.

There is widespread understanding among Iraqis of what principled humanitarian action is and is not. We heard repeatedly that there are strong strains of Islamic teachings and Iraqi traditions in the Fundamental Principles of the Red Cross/Red Crescent Movement and the IFRC/NGO Code of Conduct.[2] In several conversations people spoke with evident pride about how they or someone known to them had helped to meet the assistance needs of stricken civilians, sometimes from another religious community, during attacks in 2004 by the US military on Fallujah and Najaf. Many of the Iraqis with whom we spoke equated specific humanitarian principles with Qur'anic verses about "good" charity. A senior cleric in Najaf described humanitarian principles as "beautiful, but only a small part of Islam". The strong resonance between Islamic understandings of "good" charity (or help that is given in accordance with Islamic teachings) and principled humanitarian action underscores the importance of motives, such as providing assistance based on need alone.

An Iraqi physician and NGO worker described his understanding of "genuine" humanitarian action in this way: "You have to demonstrate allegiance to and solidarity with victims. Are you going to do it genuinely, and speak about it as you are living it? Or are you going to say the right things – use instrumentalized impartiality – to gain access?"

The many clergy engaged in conversation by our research team were particularly open to discussing similarities and differences between Islamic traditions of helping, such as the practices of *zakat* and *sadaqah* (prescribed and voluntary alms giving respectively), and the humanitarian ethos that underpins much of the Western- or Northern-dominated humanitarian apparatus. Some were candid in pointing out what they felt were the limitations of Islamic institutions in administering obligatory and voluntary donations. Others lamented the need to do things more "systematically', so that humanitarian efforts mounted by mosques and other faith-based community groups could do more effective

2 See Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, available at http://www.ifrc.org/publicat/conduct/index.asp?navid=09_08 (last visited 20 November 2007).

work on a scale comparable with that of international NGOs. As one imam put it, ''*al-Hausa* [the seat of the Shia tradition in Iraq] still doesn't understand that we can use this big number [from the collection of *zakat*] for big projects''. Some expressed the sentiment that it was time to focus on providing assistance to the needy in another way. Mention was made of the more systematic uses of *zakat* by Islamic institutions in neighbouring Iran, where large projects were possible.

Concerning protection, the team heard several examples of local imams intervening to resolve disputes over the allocation of resources such as frequently now arise between groups of displaced persons and host communities. In one instance a cleric calmed local residents who were protesting against the provision of a school building for housing for internally displaced persons, appealing on humanitarian grounds through Islamic teachings for greater understanding. In several interviews the team heard of clerics intervening with authorities on behalf of needy people entitled to various forms of assistance from local authorities. In others, interviewees described how local imams had opened channels with local sub-offices of the Ministry of Displacement and Migration (MoDM) to ensure that current lists of displaced persons were properly filed and processed.

Several clerics noted that Iraqis had traditionally sought refuge and guidance in religion and specifically from revered religious leaders who were now losing influence to more militant clerics and ''opportunists''. Since the 2003 invasion, the Grand Ayatollah Ali al-Sistani, Iraq's most senior Shia cleric, has issued edicts encouraging Shia participation in elections and forbidding reprisal attacks on Sunni communities. In failing health, al-Sistani is perceived by analysts in the region as being careful not to squander his declining influence by asking for more than can be achieved. The same tendency was reported among clergy at community levels in various parts of Iraq. Increasingly, ''pressures'' are being exerted on mosque committees and religious offices to conform more with the wishes and demands of religiously inspired political groups and militias.

Interviews at community level yielded mixed perceptions of the role of mosques and clergy in ensuring that assistance was based on need. Many established mosques continue to maintain lists of vulnerable persons in their communities, such as widows and other groups. Some respondents felt strongly that their imam knew best who in their community was most in need and that, as the most trusted and respected member of the immediate community, he was the best possible arbiter of targeting decisions and in any case much better than NGOs, city councils or parties. As with the protection activities of mosques, the research team heard of growing pressures on mosques and clergy from parties and militias, leading to increasing bias of various kinds in allocations of assistance.

## Co-operation

In Najaf many of the clergy consulted were open to the theoretical possibility of increased co-operation with the international aid apparatus. However, in many cases their enthusiasm was tainted by mistrust, evident in the examples they gave of low-quality or insensitive work by ''NGOs''. Quite often, though, it was not

clear whether they were discussing local or international NGOs, commercial contractors or authorities; these distinctions were thoroughly blurred, and it was apparent that their direct contact with "outsider" agencies had been limited at best. In addition, clergy sometimes responded hotly and with injured pride to the question of whether their own assistance efforts would accept "foreign" donations, even from other Muslims.

The tempered readiness to engage with the international humanitarian apparatus was also evident in conversation with a senior imam in Erbil and resonated, too, with the accounts given by operational NGOs regarding co-operative relationships they had variously nurtured with local mosques in Kirkuk, Sadr City and Fallujah in order to facilitate local distributions of emergency relief items. In the south, near Basrah, a European NGO began in late 2003 to cultivate a "friendly, neighbourly relationship" with the imam in the mosque down the street from its office, and, when insecurity began to increase, the imam gave an explicit warning during Friday prayers that the NGO was there to help and must not be touched. In each case, forethought and time were invested in building relationships with imams through respected local contacts. Initial approaches by the NGOs were self-consciously deferential, but trust emerged with time, familiarity and good performance by the NGOs in living up to their undertakings with quality work. The NGOs that had these experiences spoke in glowing terms about the access to communities provided by mosques, but also recognized that even with trusting relationships, the possibilities for greater co-operation with Islamic structures were limited by the lack of adequate systems.

## The ethos–practice gap

Apart from the resonance between Islamic teachings and the humanitarian ethos associated with the Western- or Northern-led humanitarian apparatus, strong evidence emerged that humanitarian principles are also well understood in Iraq partly because they are frequently seen as misused in ways that foster resentment. We heard many examples of aid being provided in ways that illustrated instrumentalization, politicization and militarization of humanitarian activity by international and Iraqi players. The prevailing acceptance of humanitarian ideals was frequently contrasted by Iraqis with the realities of aid in their communities and tempered by suspicions about the intentions and motives of agencies on the ground. Behaviour of individual aid workers and aid providers had left stronger negative impressions than positive impressions among those interviewed.

### Suspicions and misperceptions

Residents of areas afflicted by intense military activity held aid organizations and foreign and local aid workers in far lower estimation than in less-affected areas. In the worst-hit areas, people spoke of deep suspicion of local and international aid workers, who were regarded as "spies". In the south, it emerged in interviews that

suspicion of international aid workers had increased following the ''capture'' of two British soldiers travelling in an unmarked car in Arab clothing.[3] Also in the south, aid workers employed by Danish organizations were singled out as the focus for additional suspicion in some of the people we interviewed, owing to the uproar over cartoons in the Danish press that were perceived to have mocked Islam. Mention was made in three interviews north and east of Baghdad of how towns or neighbourhoods had been bombed shortly after visits by perceived ''aid'' agencies that had distributed coffee, chocolate and neckties. Others mentioned being ''insulted'' by the appearance of aid agencies alongside ''those who occupy us'', or of organizations motivated by a wish to ''put a nice face on the occupation''. Others spoke with evident anger of rejecting outright the assistance offered by US Marines shortly after military action in Fallujah.

As strong as it is, the resonance between Islamic and Iraqi ideals of assistance and protection and the Dunantist traditions underpinning much of the international humanitarian apparatus is overlaid with a pervasive unfamiliarity with Western- or Northern-led humanitarian action. Only a small handful of international aid organizations were present and operational in Iraq prior to the 2003 invasion. Their working environment was characterized by deep ambiguities even then.

Commenting on this lack of awareness in 2004, an international staff member of the NGO Co-ordination Committee in Iraq[4] put it this way: ''We have never explained who we are – as humanitarians – to the Iraqis; we have never sought their acceptance or their invitation to operate in the country. We have never explained how we operate and why we operate differently from the Coalition forces or other players.''[5]

Interviews also revealed that the ethos–practice gap was aggravated to some extent by the behaviour and cultural insensitivity of some international aid workers when their presence in the central and southern governorates was still viable. Some, for example, were cited in interviews for dressing inappropriately, not knowing that a man should not extend a hand to a woman, failing to keep promises and distributing Christian religious tracts and colouring books. On the other hand, examples of positive behaviour also emerged in interviews: east of Baghdad, aid workers believed by interviewees to be from Qatar or the United Arab Emirates were remembered for being polite and sympathetic, as were representatives of the American Friends Service Committee.

3 See ''British tanks storm Basra jail to free undercover soldiers'', *Guardian*, 20 September 2005, available at http://www.guardian.co.uk/uk_news/story/0,3604,1573935,00.html (last visited 20 November 2007).

4 See http://www.ncciraq.org/ (last visited 20 November 2007).

5 Cited in Greg Hansen, *Humanitarian Action in Iraq: Emerging Constraints and Challenges*, Humanitarianism and War Project, Feinstein International Center, April 2004, available at http://hwproject.tufts.edu/new/pdf/Hansen_report_Iraq_final.pdf (last visited 20 November 2007).

### Lack of neutrality

Neutrality is not an abstract notion in Iraq. Our research indicates an acute readiness among Iraqis to distinguish between aid providers that have taken sides and those that have not: however, readiness does not necessarily equate with ability. Insecurity for Iraqis in the central and southern governorates often engenders acute suspicion of the motives and affiliations of others in a context where the ''wrong'' affiliations can be toxic and life-threatening. In most cases, those with whom we spoke did not ascribe impure motives to organizations or aid workers simply because of their particular national origin. Rather, the real or perceived affiliation of a person or an organization is considered more important and will be scrutinized, be it affiliation with the ''occupiers'', the MNF, the government or, increasingly, with a particular sect, party or militia.

The current proclivity for scrutiny among the Iraqis we interviewed is rooted in genuine safety concerns. Real and perceived neutrality was frequently cited by recipients of assistance and by observers as an essential protection against targeted attack by armed members of various factions. It underscores that humanitarian principles are a preoccupation of many in local communities, and not an element of secondary or derivative importance valued only by humanitarian practitioners themselves. Lack of adherence to humanitarian principles – and blurred distinctions between the range of players and roles in Iraq – now have serious consequences for beneficiary communities and Iraqis involved in humanitarian efforts. Since 2004, the ability of aid workers to be *seen* to do principled work has been severely diminished by security threats and the ensuing low profiles adopted by nearly all Iraqi and international humanitarian organizations. The costs of low-profile working conditions and blurred roles are described in more detail below.

## Working amid the ''war on terror''

The ''with us or with the terrorists'' mentality that has infused the ''global war on terror'' has been felt in strange ways by humanitarian players in Iraq. In 2004, it was inconceivable to all but the International Committee of the Red Cross (ICRC) and a very small number of NGOs even to consider the possibility of making contact with non-Coalition armed groups in order to increase or maintain humanitarian access. That reluctance is beginning to change as Iraq becomes increasingly fragmented and as local power structures, such as militias, crystallize. In some areas these structures may constitute the only guarantor – or controller – of access. NGOs in particular now increasingly recognize the need to identify and establish contact with militia leaders, parties and insurgent groups as a first essential step toward asserting and safeguarding a space for humanitarian activity in local areas.

The schisms that began to develop in the humanitarian apparatus in 2001 and grew markedly worse in 2003 are alive and well among agencies engaged in

and around Iraq in 2007. Many Dunantist-leaning organizations,[6] whose organizational cultures stress close adherence to the principles of humanity, neutrality and impartiality, remain bitter over successive compromises, in their view, of principle with pragmatism in the Iraq context, and argue that the choices made and paths followed by the UN system and many NGO colleagues have had severe consequences for the entire humanitarian apparatus.[7]

Meanwhile, evidence of perceptions at ground level in Iraq suggests that many of the attempts by the humanitarian apparatus to adjust to the fallout from terror–counterterror and insurgency–counter-insurgency have ultimately proved maladaptive and self-defeating when measured against the gains and losses felt by the population. Some aid workers suggest that programme suspension or closure by some agencies helped to foster a climate of impunity for those under arms on all sides and served to confirm the perception that ''Western'' interests were political and military, and not humanitarian. Many describe a growing malaise and loss of motivation among the humanitarian community when much of it was displaced because of insecurity to Amman. Some aid organizations are seen by others to have become instruments in the ''global war on terror'' by embedding with controversial military forces, confirming for some the perception that the humanitarian community had been wholly compromised.

Pragmatist or Wilsonian organizations[8] in Iraq, or those tending to be more preoccupied with the technical aspects of delivering aid, are known to the more Dunantist groups as ''embeds'', and their compromises of principle with pragmatism have resulted in serious fault lines among assistance agencies since the beginning of the 2003 invasion. Surrender of principle to pragmatism has indeed ruled out working contact with the ''other'' sets of combatants in Iraq for many essential elements of the humanitarian apparatus – affiliated or embedded, or not – and has reduced the possibilities of winning over ''terrorists'', insurgent groups or militias to greater adherence to their obligations under international humanitarian law.

For agencies of all kinds, going underground with humanitarian action has undermined possibilities of building up relationships and acceptance among the population. For the pragmatists, working behind blast walls or from armed and armoured convoys has, in most of the central and southern governorates, shut down genuine access to communities, and has filtered information through distorting lenses; distortions thus become the reality to key decision-makers in the humanitarian apparatus.

6 ''Dunantist'' humanitarianism is named after the founder of the Red Cross, Henry Dunant. ''Dunantist'' organizations seek to position themselves outside state interests.

7 For a helpful discussion of the typology of humanitarian organizations and how they situate themselves in relation to humanitarian principles and political contexts, see Abby Stoddard, *Humanitarian NGOs: Challenges and trends*, HPG Briefing No. 12, Humanitarian Policy Group, July 2003, available at http://www.odi.org.uk/HPG/papers/hpgbrief12.pdf (last visited 20 November 2007).

8 ''Wilsonian'' humanitarianism characterizes most US NGOs. Named after the former US President Woodrow Wilson, who hoped to project US values and influence as a force for good in the world, the Wilsonian tradition sees a basic compatibility between humanitarian aims and US foreign-policy objectives. For details see Stoddard, above note 7.

## Coherence and political–military–humanitarian interactions

The research team heard strong indications that life-saving assistance and protection efforts in Iraq have been tainted by association or mis-association with a range of often flawed activities motivated by military or political objectives. Genuine humanitarian relief efforts have occurred simultaneously, and often in the same space as a range of well-resourced political, reconstruction and development activities. Many of these activities have been explicitly instrumentalized and underwritten by MNF governments and others to shore up the occupation and the structures which followed from it. The rush to consolidate the occupation and then to hand power back to an ill-equipped Iraqi state often led to an evident insensitivity to local realities and blindness to the hierarchy of needs. We heard numerous complaints of governance, democratization and similar activities that were perceived in local communities as being inappropriate, poorly timed, unresponsive to local needs or unfocused, or all of these.

As to whether the UN system has already passed the point of no return in terms of its image and acceptance among Iraqis as a humanitarian player, the evidence is mixed. Unicef, which continues to distribute through the Iraqi Red Crescent some of its standard items marked with the Unicef logo, had relatively good name recognition among several of those whom we interviewed in Iraqi communities, and appeared to be better known than most other organizations as an agency that did humanitarian work for children around the world. In a handful of our interviews specific mention was made of past Unicef work in local neighbourhoods, along with the ICRC, the Red Crescent and a few small European NGOs.

One international staffer with Unicef felt that most Iraqis readily recognized the Unicef name from the agency's long history in Iraq and was certain that Unicef was understood by Iraqis "somehow separately" from the United Nations. Another interviewee from Unicef in New York took the opposite view, suggesting that the United Nations would not be able to overcome the stigma attached to it by Iraqis because of the UN administration of the sanctions regime and the suffering associated with the Oil-for-Food Programme before the 2003 invasion.

It was evident from some of the comments heard in Iraqi communities that many were familiar with the humanitarian work of the United Nations in other countries through media exposure. But, as one woman asked, "Where are they now?" The withdrawal of the United Nations after the Canal Hotel bombing is well known in Iraq, as is its role in managing the sanctions regime. It would be a stretch to expect Iraqis to appreciate the inherent tensions that prevailed inside the UN system during the sanctions period, and it is doubtful that many would remember two successive UN Humanitarian Co-ordinators and the head of the World Food Programme in Iraq quitting in protest over the human suffering caused by the sanctions.

Problematic perceptions or misperceptions cut both ways in the rocky relationship between the United Nations and Iraq, at all levels. One junior

Jordanian employee of UNAMI was shockingly blunt when speaking about her Iraqi colleagues in a conversation about security issues: ''They can't be trusted. They love blood too much.'' In similar unguarded fashion, and again in a conversation about how to clear the UN security logjam in Iraq, a mid-level Western staffer of the UN Department of Safety and Security in New York felt that the problem lay with ''the Arab mentality, their culture''. Another UN employee who had been based in Iraq before and after the Canal Hotel bombing summed up the UN relationship with Iraq this way: ''It's like a jinx.'' The perceptions gap was acknowledged in 2004 by the incoming Special Representative of the Secretary-General for Iraq, Ashraf Qazi, who commented, ''There is every reason for the Iraqi people to see the UN mission in Iraq as a mission in their service and for them, and it will be my job to strengthen that impression there.'' An experienced UNHCR official questioned whether there had since been any change for the better in the way in which the United Nations was viewed by Iraqis, given the ongoing close affiliation with the MNF: ''It's eroded the moral soap-box we used to be able to stand on.''

## Donor failure

The extent of politicization of donor behaviour is a recurring complaint of operational humanitarian agencies. Donor responsiveness to life-saving assistance and protection work in Iraq has gone through several phases since 2003. In the months prior to the US-led invasion, donors committed generous funding to a preparedness appeal for US$193 million launched by the United Nations in anticipation of a massive displacement and refugee crisis that did not then materialize. Following the invasion, funding for major humanitarian programmes, including a UN Flash Appeal for $2.2 billion in April 2003, continued into early 2005 with some operational agencies being actively encouraged by donors to expand dramatically their presence in the country.

However, important sources of ''neutral'' funding fell off sharply in mid-2005. The European Community Humanitarian Aid Department (ECHO) closed its Baghdad office in May 2004, ceased funding new humanitarian activity in Iraq in April 2005 and closed its Iraq office in Amman the following July. ECHO's stated reasons for the closures were the inflow of large-scale reconstruction funding, coupled with what it perceived to be the impossibility of effectively conducting humanitarian operations in the central and southern governorates.

Funding problems compelled some operational NGOs to withdraw from Iraq completely as from late 2005 and even up to 2007, when it was clear that a renewed humanitarian response was necessary. Our interviews with a range of humanitarian organizations still operational inside Iraq indicate that since the escalation of intercommunal violence sparked by the Samarah Mosque bombing in February 2006, bilateral donors and ECHO had generally been unresponsive and resistant to operational innovations on the ground. Thus, at a time when

operational personnel have needed the greatest understanding and support, this was not forthcoming.

## "You are all corrupt"

In general, donors have not calibrated funding for humanitarian programmes to needs and have often been careless with funding for reconstruction. Donors have often accepted far less rigorous standards for needs assessment, monitoring and evaluation of reconstruction programmes in Iraq than for life-saving humanitarian programmes. Widespread perceptions of corruption and waste undoubtedly account for part of the credibility gap facing operational humanitarian agencies among Iraqis. The hastily expressed need of much of the international community to consolidate the occupation of Iraq led to creation of a rich donor pool and a climate of impunity for its use and misuse.

Careless use of resources by a variety of players has conditioned the way in which Iraqis understand assistance efforts. In our research in Iraqi communities we heard a remarkably consistent perception that all assistance efforts – international and national – are corrupt. At ground level, the wealth of riches showered on reconstruction and nation-building efforts since 2003, and the dissonance of that with the more immediate hardships of daily lives, has left many Iraqis feeling disillusioned and angry. Some with whom we spoke mentioned hearing through the media about the billions of dollars that had poured into Iraq, then voiced a litany of complaints about corrupt officials and contractors, abandoned, half-finished construction projects, an inadequate and unreliable electricity supply, skyrocketing costs for cooking fuel, shoddy school reconstruction and a wide variety of (to them) esoteric projects that left nothing tangible in their wake.

## The need for neutral donor funding

There is a need for perceptibly neutral donor funding for humanitarian programmes in Iraq. The readiness of Iraqis to scrutinize aid organizations underscores a need for donor funding for humanitarian action that can be perceived as neutral, impartial and independent. Such funding is also vitally important to many of the most capable international and Iraqi humanitarian organizations that continue to implement programmes.

Our research in Iraqi communities indicates that many Iraqis in the central and southern governorates are reluctant to be associated with assistance they perceive to be "tainted" by association with an out-of-favour combatant or political interest, less for political than for security reasons. This is especially true in areas most affected by military action. In responding to an offer of funding from a US-based NGO affiliated with the MNF, one Iraqi NGO pointed out, "We don't want to pollute our organization with your money."

The text box illustrates the lengths to which one Iraqi NGO has gone to protect itself from potentially dangerous associations. However, important international humanitarian responders feel likewise: in 2005 a large European

NGO suspended a major programme when a funding agency inadvertently revealed a contentious source of its donation. Since 2003, the NGO Coordination Committee in Iraq has rejected funding from governments that were contributing troops to the MNF, although ECHO funding – one perceived step removed from EU members of the US-led Coalition – proved acceptable. Going one step further, a Médecins sans Frontières worker pointed out that his organization would "refuse on principle any funding from institutions related to violence". A number of small organizations – including American, European, Asian and Middle-Eastern NGOs – have taken similar stances and struggle to adapt to changing conditions amid a shrinking pool of acceptable donor funding.

### An Iraqi NGO's "Rules for Donors"

During a discussion about their work and how it was supported, the head of a relatively large Iraqi women's assistance NGO active in several of the worst conflict-affected areas spoke of how her organization had asserted its security through establishing a set of "rules for donors". The rules were motivated by concern over staff and beneficiary safety connected to the real and perceived neutrality, impartiality and independence on which the organization depended.

The rules help to guide the organization's decisions about accepting funds from various sources, sometimes leading to rejection of sizeable offers of support from those considered "tainted". The NGO uses several creative means to be as self-reliant as possible, including gaining funds generated through women's employment initiatives to defray some of the costs of emergency relief projects.

The head of the organization recently asked, "Why do we have to act according to the habits of Northern countries in our work? People feel an obligation to try to behave like Westerners."

In order to be acceptable, donations:

– must not be from countries which occupy Iraq and directly or indirectly destroyed its infrastructure;
– must not be from organizations which have illicit aims of changing the values and traditions of Iraqi communities;
– should be from independent, neutral and non-political organizations, national or international;
– must not be conditional on changing our organization's way of doing things;
– must not aim to change the morals and values which come from the religious structures and ethics of Iraqi communities;
– must not aim to promote acceptance of the occupation forces;
– must not require us to enter the "Green Zone" in Baghdad; and
– must be evaluated for their effectiveness by Iraqi women in a way that is respectful to the women we help. For safety reasons, no faces should be shown in photos taken of our projects by donors or others.

## Militarized humanitarianism?

The perceived neutrality, impartiality and independence of genuine humanitarian action is threatened in Iraq by blurred distinctions between military, political, commercial and humanitarian roles. Our fieldwork in different regions of Iraq confirms that it is now often virtually impossible for Iraqis (and sometimes for humanitarian professionals) to distinguish between the roles and activities of local and international players, including military forces, political and other authorities, for-profit contractors, international NGOs, local NGOs and UN agencies. In some of our conversations it was clear that commercial contractors affiliated with the MNF had been mistaken for humanitarian NGOs. In many other interviews it was completely unclear what kind of agency or agencies were being discussed.

Conversely, assistance provided by local religious charities and mosques was often readily distinguished from assistance provided by other entities and, in many of our interviews, was described as vital. In contrast with nearly all other entities, religious offices and mosques are sometimes – but not always – able to provide assistance in relatively more open and visible ways. Local Islamic charities and mosques were identified in many of our conversations as the preferred option of first resort for those needing assistance or protection.[9] However, we heard several examples of ''pressures'' being exerted on local religious charities to conform more to the wishes and priorities of parties and militias.

## Security

Virtually all organizations interviewed for the study reported ever greater reductions in humanitarian access in late 2006 throughout the central and southern governorates and related declines in access to reliable information. Insecurity and uncertainty have engendered a culture of secrecy among many members of the humanitarian community. This has impaired effective co-ordination, stifled discussion of common strategies and inhibited the ethos of transparency associated with humanitarian work.

For some agencies, adaptation to an insecure environment has meant ''bunkerization'' or barricading themselves in, withdrawal, closure or becoming embedded with the MNF forces. Murders, kidnappings and other incidents have afflicted aid workers from a broad range of international and Iraqi humanitarian organizations, reflecting an equally broad spectrum of security strategies, programming methods and conditions, and adherence to humanitarian principles.

9 Our findings are consistent with a ''lesson learned'', identified in a review of humanitarian responses to Fallujah, according to which ''Religious actors are most likely to have access to the population, even during heavy fighting''. Cedric Turlan Kasra Mofarah, *Military Action in an Urban Area: The Humanitarian Consequences of Operation Phantom Fury in Fallujah, Iraq*, ODI–Humanitarian Practice Network, 8 December 2006.

The differential impacts on the security of indigenous and international agencies and personnel are discussed below.

Many agencies also reported increasing security-related stresses and inter-communal tensions within their own staff, with a resulting decline in effectiveness. Iraqi staff and their families continue to bear astonishing risks, and a handful of experienced, flexible and adaptable international organizations continue to cope within reduced capacities. Remote management and flexible partnership arrangements with Iraqi organizations keep some aid flowing, although donor funding for humanitarian action has generally been unresponsive to creative and contextually nuanced programming adaptation. Staff morale is being undermined at a crucial time in some agencies by uncertainties about donor funding and programme continuation.

Organizations that remain operational inside the central and southern governorates of Iraq have almost universally adopted a low-profile presence and various remote management arrangements in their efforts to maintain programming. Though far from ideal and fraught with difficulties, these arrangements have become increasingly necessary for continuing operations over time as the security threats facing ''outsiders'' have intensified in the places where humanitarian action is most needed. International aid organizations were the first to adopt the new measures, but, as inter-communal fragmentation continues, the growing tendency to regard many Iraqis from different communities as ''outsiders'' is impelling some larger Iraqi organizations to follow suit. There is a general hope and expectation among agencies that remote management will be a bridging measure until higher-profile activity and more conventional programming become possible on a localized basis.

## Security stances

In 2004 the author posed this question to staff of some thirty international NGOs in Iraq: ''If your office received a credible report of an imminent threat, would you approach the nearest Coalition compound, or the nearest mosque?'' Answers were evenly divided. The question, while loaded, was used to begin a conversation with staff about how their organizations approached security.

Insecurity has led to a dramatic downsizing of the humanitarian presence and programming in Iraq. Although many humanitarian organizations have withdrawn – fewer than half of those organizations canvassed in 2004 remain truly operational in Iraq – there is no discernible pattern among them in their approaches to security. Some withdrew in response to devastating targeted attacks or explicit threats; others were not attacked but judged continuing operations to be untenable, not worth the risks in relation to the humanitarian impact, or not cost-effective. Conversely, other organizations have continued to implement humanitarian programmes, even after suffering devastating attacks, by adapting to changing conditions. Still others have experienced no incidents and have also stayed.

Organizational culture and, ultimately, the value placed by the organization on the fundamental principal of humanity, appear to account for

outcomes of the *adapt/withdraw* dilemma more than any other single factor. Although the evidence is not clear-cut, organizations of Dunantist or faith-based leanings generally have demonstrated a greater willingness to adapt than pragmatist or Wilsonian organizations.[10] The variables are many and would merit much more in-depth study, but an attempt is made in the following section to probe the adapt/withdraw decision somewhat further.

There are doubtful benefits to populations in need in Iraq when humanitarian organizations opt for a bunkerized approach to security or ''embed'' themselves with MNF forces. Some agencies that have withdrawn have relied relatively more heavily on protective and deterrent strategies than on acceptance strategies. There is no evidence that bunkerizing or aggressive security stances have been either a guarantor of programme survival or a useful tool to gain access to people in need. In one instance, a local councillor complained to our research team of never having an honest conversation with a visiting aid agency, whose representatives repeatedly arrived in his office under escort by well-armed personnel of Western security contractors. Others with whom we spoke rejected as ''dangerous'' the possibility of approaching bunkerized or escorted humanitarian organizations for fear of being perceived, rightly or wrongly, to be sympathetic with the MNF. Some organizations that originally accepted protection from the MNF, or appear to have done so by visibly strengthening their compounds or using private security contractors, have since withdrawn from Iraq on the stated grounds of insecurity of personnel or insufficient humanitarian impact weighed against high security costs.

In most of Iraq – less so in the three northern governorates – co-location with MNF forces, or accepting MNF or other visible armed escorts, means that many Iraqis for whom the neutrality (or affiliations) of aid is important are rendered at least partly inaccessible. Wholesale reliance for security on the MNF or private Western contractors implies – or corroborates – a commonality of purpose between some aid agencies and military forces.

Many Iraqis at the community level find such coherence unacceptable and, in the words of one beneficiary, ''un-humanitarian''. Likewise, there is little doubt among Iraqis as to the political allegiances and purposes of social welfare offices operated by, or under the armed protection of, various militias and parties. However, in many areas such offices are becoming welcome providers of life-saving assistance.

## Presence and acceptance

Acceptance strategies[11] do not render humanitarian workers immune from targeted attack in Iraq, but do contribute to greater adaptability and longevity of

10 For definitions see Stoddard, above note 7.

11 Acceptance strategies entail convincing others that there is no need to harm you, and good reason to safeguard you. Protective strategies involve the defence of people and premises, or becoming a

humanitarian programmes. Some Iraqi and international NGOs that have taken an independent course in their approach to security, relying relatively more heavily on relationships with and acceptance of their work by communities, have also decided to cease operations. However, others have stayed to continue vital programmes. Flexible agencies that have invested considerable time and resources into understanding local (in addition to national) contexts and trends, building up relationships and supportive networks, and nurturing staff professionalism appear to have a comparative advantage in Iraq over less well-rooted agencies.

There is no substitute for presence. The low visibility of assistance and protection efforts in Iraq reinforces misperceptions about humanitarian work and the lack of acceptance of humanitarian organizations. Humanitarian action in Iraq has gone steadily more underground since the bombing of the United Nations' Baghdad headquarters in August 2003 and, soon after, the bombing of the ICRC office there. Insecurity for aid operations and personnel grew steadily worse throughout 2004 and 2005, leading to the evacuation to safer locales of virtually all international staff in the central and southern governorates and the widespread adoption of a low-profile presence and remotely controlled, managed or supported operations. Attacks targeted Iraqi staff with much greater frequency in 2005 and 2006 due to the near-absence of foreign aid workers and the far greater exposure of national staff.

Transparency – the practice of being open to scrutiny – is usually understood by humanitarian organizations as a necessary foundation for building the community relationships that are essential for effectiveness, accountability, and differentiation from providers of instrumentalized assistance. The ''Western'' or 'Northern' humanitarian presence in Iraq has diminished in scale, but it has also become ''hidden'' to the extent that it is virtually invisible to populations in the central and southern regions. Local humanitarian organizations do only somewhat better, and are not immune to serious difficulties.

Aid workers in Iraq and Amman use the terms ''covert'', ''surreptitious'' and ''furtive'' to describe the extremes to which low-profile humanitarian operations have been taken by international and Iraqi organizations in response to threats and attacks. As an Iraqi NGO worker put it, ''Low profile puts us in the shadow.'' The low-profile approach provides a greater measure of safety for humanitarian workers, and has arguably bought agencies more time and more access. However, the benefits have come at an immense cost to acceptance. Our research among Iraqis indicates that perceptions of the humanitarian enterprise are far more positive among those who report direct contact with local or international assistance or protection work than among those whose impressions are formed second-hand through rumour and media.

''hardened target.'' Deterrence strategies use counter-threats of retaliation through diplomacy, armed guards or military force. See Koenraad van Brabant, *Operational Security Management in Violent Environments*, Good Practice Review No. 8, Humanitarian Practice Network, Overseas Development Institute, June 2000.

Those who have received assistance from local or international humanitarian organizations or have seen them at work generally feel more positively disposed toward the humanitarian community than those who have only heard about it. We also found that those who had been exposed to assistance activities before humanitarian organizations adopted low profiles tended to remember the names of the organizations well.

Low-profile working methods and conditions increasingly hinder relations between staff and between agencies. Inter/intra-communal tensions are increasingly reflected within humanitarian organizations, even among staff of different backgrounds who have worked well together for years. Working relationships are under mounting strain as low-profile approaches dictate that staff work from their homes, with less frequent face-to-face contact within and between organizations. The trend has deepened for many agencies whose staffs are increasingly confined to their own neighbourhoods or communities. Lack of trust between Iraqi staff, and also between Iraqi staff and international staff in remote offices, was identified as a challenge by a number of organizations in late 2004 but now afflicts Amman-based organizations as well as those inside Iraq.

Perceptions of communal bias in decisions on resource allocation and personnel management are also becoming a pressing problem. Some organizations are in the early stages of addressing the issue but have been isolated in their efforts, owing to community-wide reticence in talking more openly about the problem and how it might be addressed. For the moment, then, agency staffs reflect the make-up and tensions of the wider community, intentions to the contrary notwithstanding.

Some Iraqi staff of local and international humanitarian NGOs lament the "lack of courage" of the international humanitarian apparatus, arguing that international organizations have not done enough to remain operational on a scale commensurate with needs. Under current conditions, however, they also frequently discourage visits by international aid workers; such visits can entail acute risks for Iraqi facilitators. Some international NGO staff in Amman with several years of experience inside Iraq recognize the potential risks of a foreigner's presence to Iraqis and to the programmes they implement. However, they also observe with hindsight that humanitarian agencies could have been more creative and assertive in "pushing their way through" the spate of attacks against aid workers in 2003 and 2004, and insist on the need for close monitoring of the rapidly changing situation in order to exploit new opportunities for increased access and activity.

The opposite view of the involvement of international aid workers in Iraq is also frequently held, particularly among international staff with limited experience in conflict areas or among those with little or no direct exposure to Iraq outside fortified facilities. Since 2004 there has been a much stronger tendency among international humanitarian staff (as well as among donors and policy-makers) to treat insecurity in Iraq as a nebulous, generalized, persistent and insurmountable challenge, rather than as a series of serious incidents, each of which can be analysed, placed in (an often localized) context and used as a spur to

adaptation. Inadequately nuanced understanding of the dynamics of insecurity has possibly become a rationalization in some organizations for reduced assertiveness, creativity and engagement. There has been a sharp decline since early 2004 in the number of international humanitarian workers in Amman with any depth of experience in the country; only a handful remain. As an Iraqi aid worker observed, ''In 2003 aid agencies tended to send their best people to Iraq because of the high profile of the emergency. But those people didn't fit the situation after the invasion. Now the best people are needed because the needs are more basic and acute.''

Physical and psychological distance from the action also extracts a high cost in terms of the motivation and emergency mindset of some international staff. This was evident as early as 2004, as agencies began to withdraw their international staff from the country. Isolation from communities in need was even then taking a toll on the sense of solidarity with affected populations that, for many aid workers, is an inducement to creative problem solving and the willingness to take risks. Of late, however, the problem has grown considerably, and now even affects some Iraqis working with humanitarian organizations in Amman. Movement constraints inside Iraq may now mean that more Iraqi aid workers are cut off from the communities they have been working to help.

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# Crossing the desert – the ICRC in Iraq: analysis of a humanitarian operation

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## Abstract

*For almost 60 years, the International Committee of the Red Cross (ICRC) has been doing its best to provide humanitarian assistance to those groups in Iraq that need it most. This article describes the humanitarian operations of the ICRC in Iraq from 1950 to the present day, in particular the support it has given to different minorities in the country and its humanitarian responses to the various armed conflicts. It shows that the legal framework that provides the basis for the ICRC's humanitarian activities also limits its ability to take action in situations beyond the scope of its mandate. In armed conflicts the ICRC faces the risk of being used by governments for their own ends. The challenge for the ICRC is to strike a balance between meeting its treaty-based obligations and exercising its right of humanitarian initiative, and to avoid selecting the recipients of its aid on the sole basis of opportunities made available by governments.*

Iraq has been permanently in the headlines for around thirty years, which would seem to make it the ideal testing ground for a study of armed violence and its consequences for human life. There are indeed not many states in which the

* This article reflects the views and opinions of the author and not necessarily those of the ICRC.

succession of various types of conflict paints such a broad medium-term picture of the many different facets of modern warfare.

In such circumstances it is also worthwhile trying to analyse the types of assistance given to the war victims. This becomes even more apposite when the humanitarian player through which the charitable work is channelled can also be observed over the long term, through the various stages in the history of war in a given state. That is the case of the International Committee of the Red Cross (ICRC) with regard to its involvement in Iraq.

In almost sixty years of working in Iraq, the ICRC has had to deal with a large number of distressing situations. These have engendered as many different responses by the organization, and today they form a virtually unparalleled corpus of experience.

This article therefore sets out, first, to trace the history of the ICRC's activities in that Middle Eastern country from the 1940s until the present day. It then goes on to attempt to determine the main features that shed light on that piece of humanitarian history.[1]

## History of a humanitarian action

### Assistance for the Jewish minorities in Iraq

The first steps taken by the ICRC in Iraq were closely bound up with the Second World War. At the time, its task was to visit Italian prisoners of war held in that country, which was occupied by the Allied Forces.[2] In accordance with their mandate, the ICRC delegates carried out several inspections of the camps in which those people were held. In parallel, the ICRC also reviewed the living conditions of some Iraqi civilians held by the opposing forces, especially in Vichy France.

However, the activities of the ICRC in Iraq did not really take off until the 1950s, in connection with the situation within the Hashemite kingdom.[3] Shortly before, there had been a radical change in the geopolitical situation in the Middle East with the proclamation of the state of Israel on 14 May 1948, followed by the war in Palestine. The Israeli victory raised, among other things, the issue of the Jewish minorities in the neighbouring Arab states, where some of them had lived for several thousand years.

1 For the period up to 1965 this article is based on ICRC archives that are already open to the general public. For the period following 1965 the information has been taken solely from the ICRC's public documents. The decision to use that material was driven by a concern to ensure that readers outside the ICRC who are interested in starting a critical discussion on this text should have access to the same sources as those used by the author.

2 The anti-British republican coup d'état by Rachid Ali el-Gaylani on 3 April 1941 (with the backing of Germany and Vichy France) led to British military intervention. The monarchy was restored on 1 June 1941 and the country was occupied by the Allied forces.

3 The monarchy was overthrown – and King Faycal II and his entourage were assassinated – on 14 July 1958, following the republican coup d'état by General Kassem.

After 1948 those groups saw their status deteriorate suddenly, to the point where their governments considered them second-class citizens with limited individual freedom, and subjected them to discrimination or harassment. In the case of Iraq – where in 1950 there were around 135,000 Jews – a wave of "fifth column psychosis" (as the ICRC delegate, de Cocatrix, put it)[4] swept through the country during the war in Palestine, leading to "latent persecution" of the Jewish community. As in other neighbouring countries, the Jews were finally left with no choice other than to try to emigrate to the new state of Israel. Yielding to a request by the rabbinate in Baghdad, in March 1950 the Iraqi parliament passed a law authorizing Jews to leave the country, provided that they formally relinquished Iraqi nationality. The law also placed a restriction on the goods that the emigrants were allowed to take with them. Between spring 1950 and summer 1951 an airlift made it possible for more than 110,000 people to emigrate to Israel.

In March 1950, during a tour of the Middle East by the president of the ICRC, Paul Ruegger, the question of the situation of the Jewish minority in Iraq was taken up with the Iraqi authorities. In order to deal with this issue in greater detail, in August the ICRC carried out a special mission to Baghdad, which had been prepared well in advance. During the talks with representatives of the Iraqi government and of the Iraqi Red Crescent, the ICRC was in principle authorized to set up a system allowing Red Cross messages to be exchanged between the Jewish community in Iraq and their relatives in Israel. Despite several letter-based appeals by the ICRC, which stressed the fact that the exchange of civilian messages is a traditional ICRC activity enshrined in the Geneva Conventions,[5] the project was not pursued as it was vetoed by both the Iraqi and the Israeli governments.

By contrast, the ICRC won a minor victory concerning Jewish political detainees in Iraq. In July 1950 the Iraqi authorities had reported uncovering a "Zionist plot" and arrested several suspects. They were imprisoned with other Iraqi Jews who had been accused of being "communists" or of having committed "terrorist" acts. Following a request by the Israeli representative at the United Nations in October 1952, the ICRC succeeded – with the assistance of the Iraqi Red Crescent – first in getting family messages through to the political detainees (whose names it had obtained from the Iraqi authorities), and then relief parcels. It also informed the Israeli government regularly of the releases that took place once the prison sentences had been served; however, the ICRC was never authorized to visit those people. That kind of activity came to an end in the early 1960s, when a conflict of quite different dimensions that was to keep the ICRC busy for two decades began to loom on the Iraqi horizon.

4 The information on this matter has been taken from file B AG 233-098-001 in the ICRC Archives (hereafter AICRC).

5 Reference was made to Article 25 of the Fourth Geneva Convention of 12 August 1949, according to which all persons in the territory of a party to a conflict, or in a territory occupied by it, shall be enabled to give news to members of their family and to receive news from them. A state of war still existed between Israel and Iraq, as no armistice had been signed by the two countries at the end of the 1948–9 war in Palestine.

## The Kurdish minority

At the time of his republican coup d'état in 1958 General Kassem was given the support of the Kurdish minority in return for a promise to safeguard the specific linguistic and regional features of Iraqi Kurdistan. That tacit agreement was not upheld and the tension between the Arab and Kurdish communities grew in the following years, finally degenerating in September 1961 into an open armed revolt in northern Iraq. Civil war then raged, claiming a large number of victims. On 28 September the ICRC was contacted by representatives of Kurdish associations, which wanted it to make representations to the Iraqi authorities to get them, on the one hand, to respect the law of war and, on the other, to authorize the ICRC to visit Kurdish detainees and, more generally, to come to the aid of civilians. They also indicated their willingness to make it easier for the delegates to have access to Iraqi soldiers in rebel hands.[6]

As the conflict escalated and on the basis of Article 3 common to the four Geneva Conventions, in June 1962 the ICRC suggested to the Iraqi Red Crescent that it send medical and relief teams to provide assistance for the Kurdish civilian population. The offer of services was immediately turned down on the grounds that the national authorities were already providing the aid needed by the victims of the events. A mission to Baghdad in December 1962 did nothing to change the situation, as the government officially denied that there were any Iraqi soldiers in Kurdish hands[7] and gave no indication of being open to possible intervention by the ICRC in Iraq. The National Society openly said that, despite the obvious needs, there was nothing that it could do without risking reprisals from the regime.

The downfall and assassination of General Kassem on 9 February 1963 and the accession to power of the Baath party provided the opportunity for talks with the Kurdish rebels. A truce lasted a few months. However, on 10 June the fighting began again in Kurdistan with such intensity that the ICRC even spoke of a "war of extermination".[8] In view of the situation, a new offer of services was addressed to the Iraqi government on 3 July. In order to stave off another refusal by the authorities in Baghdad, the International Committee simultaneously made an official appeal to the heads of the Red Lion and Sun Society in Iran and the Turkish Red Crescent asking them to obtain authorization from their respective governments to provide relief for Kurdistan via their territory. These three initiatives all met with a point-blank refusal.[9] However, that did not prevent the

6 The ICRC sent capture cards from the Kurds and, during the conflict, was given in return more than a hundred names of prisoners and Red Cross messages. These messages were transferred to the Iraqi authorities but were apparently never sent to the people to whom they were addressed. Moreover, the ICRC also took successful action to obtain the release of foreign nationals taken captive by the Kurds.

7 Following this denial, in January 1963 the ICRC president, Léopold Boissier, approached General Kassem directly and asked him to give the families in question a selection of a dozen capture cards from among those given to the ICRC by the Kurdish rebels.

8 Meeting of the Presidential Council on 27 June 1963, AICRC, A PV.

9 The Iraqi government stated that its national services were able to meet the needs. As for the two national societies, they pointed out that nothing could be done without previously having obtained the backing of the authorities in Baghdad.

ICRC from making further formal representations to the Iraqi government by sending a memorandum on 14 July 1965 proposing joint relief action with the National Society and visits to detainees by one organization or the other. No reply was ever received.

Nonetheless, and since it was unable to use ''legal'' channels, in spring 1963 the ICRC undertook to send relief (medicines, clothing, blankets, tents, etc.) supplied by private or Red Cross associations to the representatives of the Kurdish associations which had contacted it. Those associations took sole charge of distributing the goods, which were conveyed to Kurdistan by private carriers via Iranian territory. This was the only concrete activity that the ICRC was able to carry out until summer 1966, when an agreement was reached between Baghdad and the Kurdish leader Barzani that opened up prospects of the provision of autonomy for the Kurds in the new constitution of Iraq.

It was too good to last. Although the Kurds were given the right to participate in the government (their language even became the second in the country), in March 1974 they again rebelled against the central government. The resumption of hostilities prompted the ICRC to offer its services to the parties once again (but it received no reply from the Iraqis) and to provide the victims with medical aid (which was still being sent via Iran). However, following the 1975 Algiers Agreement between Iraq and Iran, the ICRC had to reconcile itself to the need to put an end to that activity at the request of the Tehran government. At the same time the ICRC also had to give up supervising the repatriation to Iraq of Kurdish refugees in Iran, a role that the authorities in Baghdad had conferred on it one month previously. The only consolation was that in January 1975 the ICRC had been able to visit around 160 Iraqi soldiers who were held captive by the Kurds. Those people were then directly placed in the hands of the Iraqi authorities by the Kurdish guerrilla forces and repatriated by the National Society. It was not until the second Gulf war that the ICRC again played an active humanitarian role on behalf of Iraqi Kurdistan.[10]

## The Iranian minority

Long before the signature of the 1975 Algiers Agreement, which provisionally settled the territorial disputes between the two states, in spring 1969 there had been friction on the border between Iran and Iraq. The dispute was over the Shatt Al-Arab river, and a number of Iranian nationals who had settled in Iraq had been sent back to their country of origin. Families were thus divided by the border.

Following a mission to Tehran in June 1969 and another to Baghdad in August, the ICRC was allowed to implement a programme aimed at reuniting separated families in Iraq. Following an agreement concluded with the Iraqi authorities, in the autumn a delegation was set up in Baghdad and in October the delegates were able to transfer the first group of Iranian nationals to Iraq. In all,

10 During the first Gulf war (the conflict between Iraq and Iran), the ICRC carried out some evaluation missions in Iraqi Kurdistan, but was unable to provide any kind of humanitarian assistance.

around 150 people were able to return home thanks to the ICRC. As the situation seemed to have returned to normal, the ICRC closed its delegation in March 1970. However, one year later, the Iranian government and the Iranian National Society asked the ICRC again to come to the aid of some 50,000 Iranian nationals who had been forced to leave Iraq. Following a mission to Iran to visit the camps in which the deportees were accommodated, in February 1972 the ICRC visited Baghdad; its task was to suggest to its government contacts and the Red Crescent Society that the National Societies of the two countries meet to find an agreeable solution to the humanitarian problem. A first meeting was held at ICRC headquarters in Geneva in May, followed by another in Baghdad in July. In the course of 1973, the ICRC continued discussions with the authorities of the two countries on the subject of the Iranians deported from Iraq. However, the following year it looked as if its services would no longer be needed.

## The Iran–Iraq war

Far from having been resolved, the border problem on the Shatt Al-Arab river grew worse and on 22 September 1980 Iraq attacked Iran. The next day the ICRC reminded the belligerents of their obligations under the Geneva Conventions. Then, on 26 September, the ICRC was authorized to send delegates to Iraq.[11]

During the eight years of that exceptionally bloodthirsty international conflict and in accordance with the mandate conferred upon it directly by the Geneva Conventions, the Baghdad delegation recorded and visited tens of thousands of Iranian prisoners of war (without ever being given access to all of them, particularly if they had been taken captive right at the start or right at the end of the war), gave them medical assistance if necessary (and supervised the repatriation of the prisoners who were seriously wounded or ill), and allowed them to communicate with their families by means of Red Cross messages. In that initiative alone, the ICRC had to handle more than 11 million messages written or received by prisoners of war. The ICRC delegates also visited Kurdish civilians or civilians from Khouzestan (Arabistan) with Iranian nationality who had taken refuge in Iraqi territory and were interned in camps.[12] Books and educational materials were distributed to these people and efforts to restore family ties were made on their behalf.

As far as the Iraqi civilian population was concerned, the ICRC's main task during those war years was to record tracing requests for members of the Iraqi army or Iraqi civilians who had been reported missing, and to transmit the requests to the relevant authorities via an ad hoc committee which dealt with war victims. All in all, more than 65,000 requests were forwarded before that activity was broken off in March 1985 because of the unwillingness of the belligerents to fulfil their obligations in that respect.

11 The ICRC already had an office in Tehran, which was opened in April 1978.

12 At the request of the Iraqi authorities, the ICRC undertook to look for countries willing to take a number of Iranian citizens who had taken refuge in Iraq.

The ceasefire which came into effect on 20 August 1988 did not, however, put an end to the ICRC's involvement, since, apart from continuing the traditional activities referred to above, the task was then also to prepare the repatriation of all prisoners of war. However, that operation progressed slowly in the face of the ill will of the parties concerned – also as far as the priority repatriation of badly wounded or sick people was concerned.[13] It was not until 15 August 1990 that Iraq announced its decision to release all prisoners of war taken captive during the conflict with Iran. From that date onwards mass returns took place on both sides of the border.[14] In parallel, as well as those who were still alive, dead soldiers were also returned home, with the ICRC also playing the role of intermediary in the repatriation of the dead bodies. It is worth noting that that type of operation carried on long after the collapse of the regime of Saddam Hussein, which had meanwhile once again become the focus of the world's attention.

## The invasion of Kuwait and the second Gulf war (1990–1991)

Iraqi troops invaded Kuwait on 2 August 1990. That same day, the ICRC responded by reminding the belligerents of their obligation to comply with the Geneva Conventions. On 23 August the ICRC then formally requested the Iraqi authorities to allow it to carry out its mandate in Iraq and Kuwait. In view of the international embargo, the aim was also to obtain authorization to send food and emergency medicines into Kuwait and Iraq and to participate in transferring foreign nationals who wished to leave the two countries or to facilitate communication between them and their families abroad.

Despite persistent efforts throughout the rest of the year – including at the level of the ICRC president – the ICRC obtained nothing from the government in Baghdad, which claimed that the events did not constitute an international conflict but were merely a political crisis in which the ICRC had no authority to intervene.[15]

Finally, on 31 January 1991, after the start of the conflict with the Coalition forces, the ICRC finally managed to send a first convoy (soon followed by others) of massive aid to Iraq.[16] The aim was to make up for the serious shortages of food and medicines affecting the Iraqi civilian population, particularly in the capital. Particular attention was also paid to drinking water. In February mobile water treatment units were set up in Baghdad, while ICRC medical engineers also endeavoured to get the existing plants back into working order. The outbreak of the Shiite rebellion in the south of the country and then that of the Kurds in the north prompted the ICRC to broaden its field of activity to include

13 This was despite an agreement signed by the belligerents at ICRC headquarters in November 1988.
14 The returns continued in fluctuating numbers until May 2003! All in all, more than 95,000 prisoners of war from both sides were repatriated.
15 Christophe Girod, *Tempête sur le désert. Le Comité international de la Croix-Rouge et la Guerre du Golfe 1990–1991*, Bruylant, LGDJ, Brussels and Paris, 1995, pp. 32–3.
16 The Baghdad delegation had nonetheless previously given emergency assistance to the people and the hospitals in the town.

hundreds of thousands of victims in those two areas. Food, first aid materials and medicines were distributed and ICRC medical teams were deployed from March onwards.[17]

The armed conflicts in Kurdistan also led to visits to Iraqi soldiers taken prisoner by the Kurdish *peshmerga*, or combatants. The ICRC made it possible for those detainees to return to their families; however, it was unable to intervene on behalf of the *peshmerga* taken captive by the Iraqi army.

In parallel, as soon as the international hostilities were halted on 28 February 1991, the ICRC began to record the identity of the Iraqi prisoners of war or those who were members of the Coalition forces and to make sure that each of them wanted to be repatriated. Visits were made to some 85,000 Iraqi soldiers. During the following weeks, the ICRC organized the repatriation of those tens of thousands of men. As in every conflict, the issue that then arose was that of the missing persons and tracing them. Meetings on that matter between former warring parties are still being held today under the auspices of the ICRC.

## From one war to another

In the years that followed the second Gulf war, the ICRC continued its humanitarian work in Iraq. It was mainly concerned with providing medical assistance – with a major health component – in connection with the international embargo imposed on the country, as well as protection work and work to restore family ties. From 1993 to 2002, between 77 per cent and 91 per cent of ICRC expenditure in Iraq was channelled to those two areas.

The inter-Kurdish tensions which emerged in May 1994[18] and were soon to turn into an open conflict, especially between the two main political parties (the Kurdistan Democratic Party – KDP – and the Patriotic Union of Kurdistan – PUK), led to the ICRC intervening and co-ordinating the activities of the Red Cross Movement in northern Iraq. The task was to provide relief (by distributing goods in conjunction with the Iraqi Red Crescent) and to protect the civilian population, which was the first to suffer as a result of the hostilities.[19] The ICRC delegates also visited enemy combatants who had fallen into the hands of the various Kurdish factions.

## From 2003 until today

On 20 March 2003 a military coalition led by the United States invaded and, having toppled the regime of Saddam Hussein, occupied Iraq. As in 1991, the ICRC was the only international humanitarian organization to continue to operate

17 P. E. Michel (ed.), *The Gulf 1990–1991: From Crisis to Conflict. The ICRC at Work*, ICRC, Geneva, 1991.

18 It was not until 1998 that the two groups reached an agreement on the formation of a government and an interim parliament in Kurdistan. The peace treaty between the KDP and the PUK was not signed, however, until April 2002.

19 Besides the inter-Kurdish conflicts, the Turkish army also made sporadic incursions into Iraqi territory in its fight against the Kurdistan Workers' Party (PKK).

throughout Iraqi territory when the fighting was at its worst. In that new international war its delegates' priority was to provide medical assistance for the hospitals on behalf of the war wounded and to keep the basic health services running (particularly the water supply). Emergency aid was also given to displaced persons or social institutions. Finally, the ICRC visited hundreds of prisoners of war and civilian detainees who had fallen into the hands of the occupation troops.

Although the hostilities officially ended on 1 May 2003, and a new Iraqi government was formally established in June 2004 after a period of military occupation, the international conflict gave way to internal unrest which gradually began to look like a latent civil war. In those conditions the ICRC continued its humanitarian mandate on behalf of the victims of the events in Iraq, first from a location in that country and then, following a vicious car-bomb attack on its delegation in Baghdad on 27 October 2003, by "remote control" from the neighbouring Jordan.[20]

## Analysis of a particular operation

That brief historical review of ICRC activities in Iraq over a period of nearly 60 years gives rise to several questions which have to do with the very nature of humanitarian work in a situation of latent or open violence.

The first question relates to the scope that an organization such as the ICRC has to see its humanitarian work through, while taking account from the outset of the intrinsic limits to that room for manoeuvre. Those limits are determined by the "legal" framework in which the organization evolves and which comprises two distinct lines of force. One is linked to a right and the other to a duty. In the former case, the main aspects of the ICRC's mandate are derived, as everyone knows, from a body of international humanitarian law comprising the four Geneva Conventions of 1949 and their two Additional Protocols of 1977. It is on the basis of those legal texts that the ICRC justifies its work on behalf of victims of war and is legitimized in the eyes of the members of the international community which have signed those conventions governing that kind of work. These are clearly two weighty advantages for any organization wishing to work in the context of armed violence. Nonetheless, some of those advantages are counterbalanced by the constraint often imposed on the ICRC by the belligerent states not to go beyond their treaty-based mandate; in other words it is not to make use of the second option open to it, namely its right of humanitarian initiative, which is based merely on an awareness of the duty to help victims.

In the case of Iraq, and particularly during the conflict with Iran, the authorities in Baghdad constantly reminded the ICRC that they agreed to its presence on their territory only within the framework of its activity directly

20 The ICRC keeps a permanent presence in Iraqi Kurdistan, however, and its delegates regularly make the trip from Jordan to support the hundreds of Iraqi nationals ICRC employees who worked directly in Iraq.

connected with the Geneva Conventions and its immediate beneficiaries (Iranian prisoners of war first and foremost). As a result, any request which went beyond that treaty-based legal framework came face to face with a point-blank refusal from a government which remained very intransigent with regard to any interference in its internal affairs.[21]

In that example, which can, moreover, be applied generally to all contexts in which it operates, the ICRC had to adapt its policy in such a way as to strike a balance between what it is authorized to do and what it might be prohibited from doing, between what is lawful and what is taboo. In that extremely difficult balancing act, the ICRC has always also had to bear in mind the need to fulfil its treaty-based mandate and therefore to maintain its presence among the primary beneficiaries of its services. It has to weigh up the interests, asking itself each time if it runs the risk of jeopardizing assistance to victims covered by the Geneva Conventions and their Additional Protocols by asking to be given access to others who are certainly victims but outside the ICRC's official sphere of competence. In this case, the tension between its right and its duty went right to the heart of the matter. And it was all the more painful because it meant that a selection had to be made among the victims in need of humanitarian aid.

That leads us to ask what types of victims the ICRC worked for in the sixty or so years that it was present in Iraq.

It appears first of all that the people who benefited from the attention and/or the support of the ICRC (at least until 1991) could be categorized as ethnic minorities. Regardless of whether they were Jews, Kurds or Iranians (in that case also during the Iran–Iraq war) or whether they extolled their difference (Kurds) or not (Jews), those categories of people were considered to be and treated by the central government as aliens, regardless of their nationality. Whether it actually existed de facto or was connected to a particular occurrence (Palestine war), it is also a distinction common to every type of regime in the country and is not without repercussions for the possible ways open to the ICRC to assist those minorities.

Whereas, as we have seen, the ICRC was able to act without too many difficulties on behalf of people protected by the Geneva Conventions in international armed conflicts (in particular the Third and the Fourth Conventions) – that is, the Iranian nationals – that was not true for those people who come to light solely because of the ICRC's right of initiative, particularly within the context of the non-international armed conflicts in Iraq and even less outside the treaty-based framework. The results are therefore not really positive if one considers the first thirty years of ICRC activities in former Mesopotamia. The

21 Moreover, the lack of reciprocity by Iran must be considered an aggravating factor, causing the government in Baghdad to take an even tougher stance with regard to the ICRC requests. Having been prevented for years from carrying out its work protecting Iraqi prisoners of war, the ICRC was actually dependent on that difficult situation, which inevitably had a bearing on the discussions that it was able to have with the regime of Saddam Hussein. The latter had every opportunity to counter any new humanitarian initiative by the ICRC in Iraq, even by drawing attention to its lack of action among the enemy.

ICRC continually found itself confronted by the unwillingness of the authorities regarding intervention on behalf of Jews and Kurds (additional evidence of the inferior position attributed to those communities). In the case of the Jews, despite a certain pugnacity the ICRC only obtained authorization to restore family ties (with the bonus of sending a small amount of material assistance) between the Jewish "political"[22] detainees and their relatives. As far as the Kurds were concerned, the failure was even more striking as, faced with the stubborn refusal of the government to recognize a situation of war – thus putting a stop to any legal intervention by the ICRC – the organization was forced to "act" outside the legal framework by virtually smuggling medicines into Iraqi Kurdistan.

The lack of tangible results can thus largely be attributed to the attitude of the Iraqi governments to ICRC requests, which was intransigent to say the least. However, was there not also a certain self-censorship by the ICRC itself, preventing it from asking more of the government in Baghdad? The answer is surely positive in the case of the Jewish minority. The delegates in Iraq promptly informed headquarters that any request to intervene on behalf of the Jews in Iraq inevitably raised the problematic question of what the ICRC was doing for the Arab communities which were also in a difficult position. The delegate de Cocatrix summed it up in the following words: "Whenever we mentioned the Jewish minority, the Iraqi authorities never failed to tell us that it was strange for us to want to take such great care of the Jews who were willing to leave the country for Israel while apparently not being greatly concerned about the fate of the 800,000 Arabs who had lost everything and who were being prevented from returning home."[23] Since the ICRC was not able to help the latter (who were also completely outside the scope of its mandate at the time), did it "tone down" its efforts to assist the former?

In the case of the Kurds, it looks as if it was the over-cautious approach of the ICRC that crushed the hope of developing an initiative to assist them. Despite the explicit acknowledgement that the events constituted a civil war (a situation in which the ICRC's right to intervene has been recognized since 1921, in certain circumstances), the ICRC entrenched itself in a wait-and-see position which entailed obtaining the approval of the central government before it did anything. However, the ICRC later pointed out that in other situations – such as in the Algerian war – it had dared to face the possible resistance of the legitimate government by limiting itself to informing it that it had sent delegates to the opposing party. The fact nonetheless remains that that precedent and others were not used to advantage in the case of Iraq. Was this because the ICRC had been

22 We have placed the term "political" in quotation marks because the ICRC may only assist people who have been officially accused of "Zionist" or "communist" activities. However, it might well be asked whether the reasons why Jews were in prison in Iraq at the time were not all political in nature, irrespective of the charges made against them.

23 Note to the ICRC No. 1589, 25 April 1951, AICRC B AG 233 098-001. The Iraqi authorities went as far as to ask questions that were deemed to be "improper", such as the "Jewish" influence on the ICRC or the number of Jews on the Committee, Report on the mission to Iraq from 2 to 6 and from 19 to 21 September 1954, 16 November 1954, ibid.

somehow ''constrained'' to take an interest in the matter, at the instance of Kurdish associations supported by hundreds of petitioners (many of whom came from Eastern Bloc countries) who had appealed directly to it?[24]

The situation regarding the Iranian minorities deported from Iraq in the early 1970s is more difficult to analyse. The ICRC was clearly given the opportunity to act directly on their behalf, as it was allowed – for the first time – to establish a physical presence in the country.

However, the outcome of that action raises a number of questions. The ICRC actually helped no more than a hundred or so individuals to return to Iraq. Although that is commendable in itself, it was later revealed that tens of thousands of others also needed its services. In those conditions, why was it so quick to close its delegation in Baghdad? Did it do so voluntarily? Was it under pressure from the Iraqi government? Since the ICRC's public documents do not mention the matter, it will perhaps not be possible to find an answer to that question until the archives for that period are opened.

Finally, the minorities in Iraq were not all in the same situation. For some of them, the ICRC did nothing – despite calls for help. That is particularly true of the Assyrians or Assyro-Chaldeans. Having been contacted by the representatives of the Assyrian community abroad with regard to the imprisonment of some of their people in Iraq, the ICRC did no more than ask for additional information about the living conditions of that minority. Moreover, no official mention was made of that Christian group during the various discussions with the Iraqi authorities.

Nonetheless, the question is not so much about the ICRC's concern or lack of concern for the Iraqi minorities as about its lack of interest in the rest of the Iraqi population. That can be seen particularly with regard to political detention.[25] It was already aware in the late 1950s of the situation of the Iraqi nationals held as political detainees, particularly after the coup d'état by General Kassem, the ill-treatment to which they were subjected and the complete absence of legal guarantees;[26] its assistance had even been called for by members of the Iraqi Red Crescent. Yet the ICRC entrenched itself behind a range of arguments that was simultaneously legal and political. On the one hand, there was no legal framework for an intervention because there was no real conflict; on the other hand, the risk of ''putting the government's back up'' or ''turning it against the ICRC'' (these terms were actually used) by presenting an initiative that might be perceived as inappropriate was far too great. In those conditions the ICRC took no official steps in that respect. And if the possibility of being able to take action in Iraq one day

24 It might also be asked whether the ICRC's wait-and-see approach to Iraq did not mirror that of Swiss federal diplomacy. In 1958, for instance, the head of the Department of Foreign Affairs, Max Petitpierre, did not wish to intervene – contrary to the wishes of the Swiss legation in Baghdad – in a request against politicians being sentenced to death by the Kassem government, as he did not wish to interfere in internal Iraqi affairs. It should be noted that in 1961 Max Petitpierre became a member of the ICRC Committee.

25 See file AICRC B AG 225 098-001.

26 A delegate was to go so far as to compare the trials in Iraq with those held during the French Revolution!

was envisaged, it would be on behalf of the members of the Baath party taken prisoner after Abdul Salam Arif seized power in November 1963.

## On war and humanitarian action

The Iran–Iraq war and then the two other Gulf wars also raise questions about another aspect of humanitarian action – its possible instrumentalization by a government. Again, the problem is not limited to Iraq alone and can be applied to other contexts in which the ICRC operates.

As we have seen, in 1980 the ICRC established a permanent presence in Iraq. With government backing, the ICRC was to concern itself once again with a minority, but this time a minority that was protected by international humanitarian law – Iranian prisoners of war and Iranian civilian detainees. In that respect, the physical presence of the ICRC in Iraq did not lead to an increase in the number of categories of victims possibly in need of ICRC protection. In other words, no formal action on behalf of Iraqi beneficiaries and, first and foremost, the political detainees was reported during the 1980s (at least that is what the ICRC's public documents reveal). The explanation for that "silence" has been given above – the systematic opposition by Baghdad to any possible ICRC action that went beyond its treaty-based mandate.

A two-part question might be asked: in what way was the ICRC's attitude (and particularly its reticence with regard to the internal situation in Iraq) useful to the Iraqi authorities, and in what way did the Baghdad government take advantage of the presence of the ICRC for its own propaganda or even perhaps for its own preservation?

Although it is difficult to answer the first part of that question, it is nonetheless apparent that the account of the ICRC's activities during the Iran–Iraq war, as published in the ICRC's public annual reports, stigmatizes one of the adversaries far more than the other.[27] Obviously, the ICRC's "criticism" is based on actual facts. However, on the issue of the use of chemical weapons, for example, one may rightly wonder why the various appeals by the ICRC place the two belligerents on an equal footing while only one of them was making extensive *manifest* use of combat gas.[28] In that context, not raising the internal problems that might be encountered by one of the parties to the conflict could ultimately do nothing other than operate in that party's favour.

27 It is worth noting the use of the terms "difficulties" (Annual Report, 1981, p. 48), "serious difficulties" (Annual Report, 1982, p. 65), "repeated violations of the Conventions" (Annual Report, 1983, p. 57) in descriptions of the activities in Iran. The equivalent terms are not found with regard to Iraq, where more neutral wording is used ("the matter was not always settled" – Annual Report, 1981, p. 48).

28 In 1983 Iraq used chemical weapons against the Iranian army as well as against civilians, particularly Kurds. That did not trigger any reaction by the international community worth noting, despite the fact that Iraq had signed the 1925 Geneva Protocol in 1931. The pretext put forward by Baghdad, and taken up for a time by the US Reagan government, was that chemical weapons had been used by the Iranian army. A number of specialists, including the International Crisis Group, showed that allegation, which was never substantiated, to be unsound.

As to the instrumentalization of the ICRC by the Iraqi regime, similarly the absence of archived documents does not make it very easy to understand. In authorizing the ICRC to set up a base in the country after years of closure following the start of the conflict with Iran, was not the Iraqi regime using this as a pretext to show the world how willing it was to behave in a thoroughly humane fashion, and hence making an attempt to win back some sympathy? Likewise, Iraq had everything to gain from listening to the ICRC and from showing greater respect for the Geneva Conventions – particularly in the strategic media issue of prisoners of war – something its neighbour did not do, thus coming in for severe criticism by the ICRC and, as a result, by a section of the international community.

Finally, still from the same perspective, it may be asked if the work carried out by the ICRC in Iraq after 1991 – and the publicity given to that country – did not also ultimately (and involuntary) serve as a propaganda tool for the regime of Saddam Hussein, enabling it to denounce, in unison with the ICRC but for other motives, the disastrous consequences for human life of the UN embargo. The Iraqi government was thus easily able to pass itself off as a victim. And it was perhaps thanks to that orchestrated victimization that the regime managed to hold on to power for around ten more years.

## Conclusion

During the last sixty years of its history, Iraq has encapsulated all the different types of modern warfare. From civil war to international conflict via internal unrest or the struggle against ''terrorism'', the macabre list nonetheless constitutes a remarkable basis for the observation of the humanitarian response that an organization such as the ICRC is able to offer over a lengthy period.

The first thing that needs to be said is that, irrespective of the conflict context, for legal and/or political reasons the action taken by the ICRC focused for a long time on a single group of victims at a time. In other words, it was not until the early 1990s that it was able to carry out a global action for a majority of Iraqi citizens. While that situation is largely due to the attitude of the Iraqi authorities, which were opposed to any humanitarian initiative that went beyond the strict framework of the international conventions that it had signed, the ICRC nonetheless bears some of the responsibility in that it subjected itself to a degree of ''self-censorship'' with regard to its potential scope for action,[29] by not choosing to be more insistent and firmer in its demands (particularly in the case of the Kurds) for fear of upsetting the Baghdad government. The stance taken by the ICRC was the result of a choice which tended to minimize the risks and maximize the chances of actually being able to do something for the victims of violence. It was

29 That self-censorship did not necessarily have only negative consequences for the ICRC. For example, the hypothesis could be put forward that its limited commitment to the Jewish minority in Iraq – which it attempted to justify as an act of impartiality – allowed the ICRC in return to maintain a certain image and position in the Middle East, which was at the time largely hostile to Israel.

thus constantly torn between the right to act and the duty to do so. Moreover, that calculation was made in a hostile environment, in the face of governments that were ready to seize on the slightest wrong move by the ICRC and turn it to their advantage, especially if it ventured to tackle issues relating to internal policy. In those conditions it is not surprising that when the Iraqi authorities demonstrated greater open-mindedness and addressed the wishes of the ICRC, those gestures concerned only members of minority groups (as in the case of the Iraqi Jews, in particular) – in other words, with regard to people wrongly or rightly considered to be ''aliens'' or on the fringe of ''true'' Iraqi society. Moreover, the conciliatory attitude of Baghdad at the time was not without an ulterior motive, as was the case during the Iran–Iraq war, when the aim of the regime of Saddam Hussein was to clean up its image by showing the international community that it was willing to work together with a humanitarian organization based in its country and consequently to respect in advance that organization's precepts and recommendations. Ultimately, it was therefore a mixture of weighing up ICRC interests and striking a balance between treaty-based obligation and humanitarian initiative, along with the real opportunities for intervention made available by the Iraqi government which determined the selection of the victims, and, as an immediate corollary, caused certain categories of victim to be neglected.

It was only because of external circumstances – in this case the invasion of Iraq by the Coalition troops during the second Gulf war, followed by the disturbances in the north and south of the country – that the ICRC finally managed to provide actual relief to a wider group of Iraqi citizens. Whereas relief for the Kurds and the Shiites was carried out without any real consent by Baghdad, because protected areas had been set up the Iraqi government came to terms with the ICRC's presence in the territories still under its control – but again essentially for propaganda purposes and for reasons relating to internal stability.

To conclude are a few words on the situation after March 2003, when one of those mysterious reversals in history was observed. After more than fifty years of friction with the Iraqi government, regardless of whether it was monarchist or ''republican'', at the very moment when a more ''democratic'' state – one that was therefore in a better position to really work with the ICRC – gradually began to be established, the ICRC considered itself obliged to leave Baghdad because of the armed violence directed against it and to move its delegation so that it could operate partly out of neighbouring Jordan.

Was this a return to the starting point? The answer would be ''yes'' if humanitarian activities were perceived as always developing in a continuous straight line. However, the history of the ICRC in Iraq shows that, over the long term, humanitarian action does not work like that. Rather, it proceeds in stages, with ups and downs depending the internal and external circumstances. In particular, the circumstances must be understood as including the very evolution of the violence; in the case of Iraq, the violence gradually took on the most extreme forms. However, that must not be allowed to exonerate the ICRC,

particularly with regard to its decisions to help or not to help one group of victims or another. The relevant question in that case is whether, throughout the many years of its experience in Iraq, it always chose the victims that needed it the most.

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INTERNATIONAL REVIEW of the Red Cross

# A neutral, impartial and independent approach: key to ICRC's acceptance in Iraq

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## Abstract

*The article describes the context of the ICRC's operations in Iraq, where the Iran–Iraq War in the 1980s, the Gulf War in 1990–1 and the effects of sanctions preceded the 2003 conflict and the spread of sectarian violence. The many serious attacks, including the bombing of the ICRC delegation in Baghdad in 2003 and continuing threats to the ICRC delegates, led to a low-visibility presence and required a new modus operandi in which a real presence on the ground was backed up by remote-control mechanisms for assistance activities in the most insecure areas. Projects to cover essential needs by ensuring water supplies and sewage disposal and supporting health facilities exemplify this new ICRC operational framework. Whereas remote control and support operations enabled programmes of increasing scope and size to be implemented, they could not replace a direct physical presence on the ground, and acceptance-building had to be reinforced through networking and communicational aspects. The authors argue, however, that there is still room for independent, neutral and impartial humanitarian action in Iraq – despite inherent security risks.*

Continuous conflicts and internal disturbances in recent decades, as well as political unrest and its consequences, have left Iraq shattered and with many of its

* This article reflects the views of the authors and not necessarily the views of the ICRC. The case studies on water and sanitation activities are based on the existing reports from the expatriate and Iraqi engineers in the field and at headquarters who worked on developing the Iraq programme over the years.

internal problems unresolved. Its geostrategic position in the Middle East and its wealth of natural resources continue to expose it to regional and international interference. The 2003 invasion and the current ongoing conflict have inflicted immense suffering on the entire population. There is still a long way to go to restore law and order completely and to achieve political reconciliation. The delivery of humanitarian assistance by the military and by some humanitarian organizations embedded with the military has unquestionably blurred the distinction between military and humanitarian roles. Like other humanitarian agencies, the ICRC has paid a heavy price in Iraq with the bombing of its delegation and the assassination of its staff.

## The context

After the two wars in the 1980s and in 1990–91, a comprehensive and tightly enforced economic blockade was the cornerstone of the UN Security Council's Iraq policy.[1] The Iraqi population had to bear part of the burden, in spite of the ''oil for food'' programme,[2] launched in 1996, which rapidly appeared very limited in its scope and impact.

The prevalent crisis was sparked by the events of 11 September 2001, which led to the ''war on terror'' and to Iraq subsequently being labelled part of an ''axis of evil''. In early 2003 the United States announced that diplomacy had failed and that it would proceed with a coalition of allied countries (''coalition of the willing'') to ''rid Iraq of its weapons of mass destruction''.[3] On 20 March the invasion of Iraq (''Operation Iraqi Freedom'') was launched. The Coalition forces made very rapid progress and the Iraqi army was quickly overwhelmed. Baghdad was reached on 9 April, and by the end of the month the invasion phase was considered over. Saddam Hussein had disappeared and his regime had fallen.[4]

1 See UN Security Council Resolution 661, 6 August 1990.

2 On 14 April 1995, acting under Chapter VII of the United Nations Charter, the Security Council adopted Resolution 986 establishing the ''oil-for-food'' programme, providing Iraq with an opportunity to sell oil to finance the purchase of humanitarian goods and allowing for various UN-mandated activities concerning Iraq. The programme, as established by the Security Council, was intended to be a ''temporary measure to provide for the humanitarian needs of the Iraqi people, until the fulfilment by Iraq of the relevant Security Council resolutions, including notably resolution 687 (1991) of 3 April 1991'', see www.un.org/Depts/oip/background/index.html (last visited 25 February 2008).

3 Statement by President George W. Bush at the UN General Assembly on 12 September 2002, available at www.whitehouse.gov/news/releases/2002/09/20020912-1.html (last visited 25 February 2008). In a statement on 6 February 2003 he confirmed that ''the United States, along with a growing coalition of nations, is resolved to take whatever action is necessary to defend ourselves and disarm the Iraqi regime'', statement available at www.whitehouse.gov/news/releases/2003/02/20030206-17.html (last visited 25 February 2008).

4 Saddam Hussein was captured by the US Army's 4th Infantry Division and Task Force 121 on 13 December 2003, and was subsequently tried and sentenced to death. His execution took place on 30 December 2006. Saddam Hussein's two sons, Uday and Qusay, were killed in action by Coalition forces on 22 July 2003. Most people on a US list of most-wanted 55 former leaders of the Ba'ath party have meanwhile been captured or killed. Izzat Ibrahim ad-Douri, vice-chairman under Saddam Hussein and allegedly a major leader of the insurgency, is today considered to be the most wanted person by the United States and the Iraqi government.

## From anti-occupation resistance …

The security vacuum that followed the Iraqi army's defeat gave rise to considerable chaos, violence and revenge attacks, as well as massive looting of hospitals, museums and military arsenals. The Coalition forces were not capable of coping with this situation as violence increased, notably in the city of Baghdad and in the so-called Sunni Triangle.[5] Deadly bomb attacks began to occur on a very regular basis. An attack on the UN's Iraq headquarters on 19 August 2003 killed UN High Commissioner for Human Rights, Sergio Vieira de Mello and at least twenty-one other colleagues, and on 27 October an attack on the ICRC headquarters in Baghdad claimed the lives of two of its employees. Anti-occupation militants grew in strength. Increased criticism was heard of the inability of the Coalition Provisional Authority (CPA) to restore public services to the pre-war level. On 31 March 2004, the killing in Fallujah of four private military contractors and the subsequent mutilation of their bodies[6] triggered a major US military operation to "pacify" the city. In parallel, Shia militias, in particular members of the "Mahdi Army" and followers of the cleric Muqtada al-Sadr, started to attack Coalition forces in Kufa, Kerbala and Najaf and in the Sadr City area of Baghdad. The kidnapping phenomenon began to spread, and videos of beheadings shocked the civilized world. On 28 June 2004 the CPA transferred formal sovereignty to the Iraqi Interim Government, thus restoring it to the Iraqi people. Opinion polls showed, however, that a large majority of Iraqis continued to view the United States as an occupier.[7]

Under UN Security Council Resolution 1546 of 8 June 2004, the Iraqi Interim Government was given "full authority and responsibility by 30 June 2004" to rule Iraq.[8] The Multi-National Force – Iraq (MNF-I) remained in the country with extensive powers assigned to it by the UN mandate.

## … to sectarian violence

Divergences continued after the elections for a transitional National Assembly took place on 30 January 2005, and the following period was marked by heightened sectarian violence. Negotiations on the new constitution highlighted a widening rift between the Sunni Arabs on the one hand and the Shia and Kurds on the other.[9] The political confrontation between these groups was increasingly accompanied by acts of violence, mostly affecting civilians. Pictures that appeared

5 A densely populated region north-west of Baghdad that is inhabited mostly by Sunni Muslim Arabs. The corners of the roughly triangular area are usually said to lie near Baghdad (to the east), Ramadi (to the west) and Tikrit (to the north). It also contains the cities of Baqubah, Mosul, Samarra and Fallujah.

6 Their burned bodies were hung over a bridge across the Euphrates. See e.g. http://news.bbc.co.uk/2/hi/middle_east/3585765.stm (last visited 25 February 2008).

7 See www.globalexchange.org/countries/mideast/iraq/2050.html (last visited 25 February 2008).

8 UN Security Council Resolution 1546, 8 June 2004, para. 1.

9 Although the Sunni Arabs finally took part in the referendum on 15 October 2005, they did so to reject the constitution.

in 2004 showing physical and sexual abuse and humiliation of Iraqi prisoners by US armed forces personnel in Abu Ghraib prison severely damaged the US image in Iraq. Allegations of serious ill-treatment of Sunni Arab detainees in police stations and in facilities under the responsibility of the Ministry of Interior created further mistrust between the communities.

The December 2005 general election and the subsequent formation of a government did not help to prevent a widening spiral of sectarian tension. On 22 February 2006 the bomb attack at the Shia Askariya shrine in Samarra left the revered mosque's golden dome in ruins and unleashed a wave of sectarian violence of unprecedented intensity, particularly in the city of Baghdad.[10]

The nascent Iraqi army and security forces could not cope with the extreme levels of violence. In addition, rising tension between the United States and Iran was not conducive to bringing security and stability to Iraq. In 2007 the three-dimensional momentum started by the US military "surge", followed by the decision by Sunni Awakening Council forces to fight al Qaeda and by Muqtada Al Sadr to suspend Mahdi Army operations, helped to improve security in previously troubled areas, including Baghdad. For the first time since 2003, fatality figures in Baghdad started to decrease, although they still remained at a high level. But these security improvements are fragile. They are not uniform throughout Iraq, and political reconciliation remains behind schedule. Most Iraqis fear that the current tentative stability may be shattered at any moment.

## Divisive and cohesive elements

Past and present internal conflicts, especially the Kurdish dispute and the brutal ongoing Sunni–Shia sectarian violence, have placed the unity of Iraq under tremendous strain. In 2007 the effects of the internal conflict, with its additional international component, continue to bring suffering and misery to many parts of Iraq. Its geographical focus has moved north, in particular to the provinces of Ninewa, Diyala and Tameem. The south of the country has largely been spared high levels of violence, although the population there too is exposed to isolated security incidents and the Basra area remains unstable.

The area administered by the Kurdistan Regional Government (KRG) remained comparatively calm, but serious tensions with occasional security incidents have occurred in Kirkuk and the so-called "grey areas", the disputed ethnically mixed areas.[11] In the mountainous areas on the northern border of Iraq, where the local population lives in fear of shelling and a Turkish ground offensive, tension has continued to run high.

10 See www.washingtonpost.com/wp-dyn/content/article/2006/02/22/AR2006022200454.html (last visited 25 February 2008).

11 International Crisis Group, "Iraq and the Kurds: resolving the Kirkuk crisis", Middle East Report no. 64, 19 April 2007, available at www.crisisgroup.org/home/index.cfm?id=4782 (last visited 25 February 2008).

The conflict scenario in Iraq today is as complex as ever. At the risk of simplification, the confrontations may be categorized as follows: Sunni Arab and Shia militias and groups versus MNF-I and the Iraqi armed and security forces; sectarian Sunni–Shia violence; and Sunni and Shiite Arabs versus Kurds (a rather latent dispute over the fate of the "grey areas" and Kirkuk). But clashes also occur *within* Sunni Arab and Shiite militias in various parts of the country.[12] At regional level there are *inter alia* aspects of a "proxy war" between the United States, other countries in the area and Iran, as well as the Kurdish issue involving Turkey, Iran and Syria. On a broader scale there are the effects of international geostrategic dynamics, including the so-called "global war on terror" primarily between the United States and the "jihadists". Despite all the entrenched divisions described above, some cohesive tendencies have also emerged. Many observers believe that the Kurds, whilst insisting on their special status, have an interest in keeping Iraq united. Claims for independence for the southern part of Iraq have practically disappeared. Kurds and Shia know that they need to engage with the Sunni Arabs. In addition, many Sunni indicate their willingness to accept the new Iraqi political realities. It is nevertheless very difficult to predict where the conflict in Iraq is heading.

## The major humanitarian crisis facing the ICRC

A large proportion of the Iraqi population continues to live in constant fear of being kidnapped, assassinated, caught up in an explosion or arrested. Civilians continue to bear the brunt of the hostilities, with numerous casualties, lost livelihoods and large-scale displacements inside Iraq and to neighbouring countries; the host communities are overwhelmed by the flood of internally displaced persons (IDPs) and refugees. The security improvements witnessed in some parts of Iraq in the second half of 2007 have not had any significant impact on the number of families displaced, many of whom are still afraid that conditions are not right for them to return in safety. The limited numbers of people who have returned often face problems in accessing their property and many may never go back home. The high levels of displacement have had a drastic effect on Iraq's demographic configuration, with unpredictable consequences for all levels of society.

Since 2003, hundreds of thousands of people have been arrested in connection with the conflict. Most are released shortly after arrest, but others may remain in custody for years. With the introduction in February 2007 of the Baghdad Security Plan, a joint Coalition–Iraqi operation to impose law and order,

12 Although in general terms most of the Shia areas today appear relatively calm and stable, tensions mainly in relation to political and financial disputes do exist, particularly in Basra. But other intra-Shia tensions (often with religious undertones) also regularly affect cities like Kerbala and Najaf. After decades of "oppression", the Shia seem to be affirming their newly acquired majority role.

the number of arrests began to rise sharply.[13] Issues relating to treatment and general conditions of detention have repeatedly given rise to serious public criticism of the detention system in Iraq.[14]

## The ICRC's positioning and security

The ICRC's permanent presence in Iraq started in the early 1980s, during the Iran–Iraq War. It was reinforced at the time of the 1990–1 Gulf War, when the ICRC remained the only international organization present in Iraq.

During those two conflicts, tens of thousands of prisoners of war and civilian internees were visited by ICRC delegates in different locations, under the terms of the Third and Fourth Geneva Conventions, and tens of thousands of people were repatriated under its auspices.[15] During the system of sanctions the ICRC developed assistance projects and a regular presence throughout Iraq and became a reference institution for the humanitarian situation there.[16] Over the years, the ICRC's programmes gradually shifted to aspects not covered by the ''oil for food'' programme – that is, the rehabilitation of the public infrastructure, and training and capacity-building in the health sector.[17] Beside these activities, protection activities in favour of third-country nationals without diplomatic representation, prisoners of war from the Iran–Iraq War and persons unaccounted for after the 1990–1 Gulf War remained the foundation for the ICRC's presence in Iraq.[18]

The conditions set by the ICRC for its work, the procedures it follows and the networking it developed with the relevant technical ministries over the thirteen years of economic sanctions, in particular the health and national water

13 Whereas the total number of persons held in internment facilities under US/MNF-I authority was around 13,000 at the beginning of 2007, by the end of the year it had risen to about 23,000. The number of persons detained by the Iraqi government likewise drastically increased and, according to the Ministry of Justice, Iraqi prisons are filled to capacity. With the inception of the Baghdad Security Plan the ministries of Defence and the Interior started to arrest large numbers of people, and their role in that field changed substantially. They opened new detention facilities, while old ones were closed down or handed over to the Ministry of Justice. Iraqi prisons and other places of detention were estimated to be holding 10–15,000 persons at the end of 2007. Approximately 2,000 more people are detained in the north under the direct responsibility of the Kurdish Regional Government.

14 See *Human Rights Report*, 1 January–31 March 2007, UN Assistance Mission for Iraq (UNAMI), paras. 66–78, available at http://i.a.cnn.net/cnn/2007/images/04/25/un.report.pdf (last visited 25 February 2008).

15 See Christophe Girod, *Tempête sur le désert: Le Comité international de la Croix-Rouge et la guerre du Golfe 1990–1991*, Bruylant, Brussels, 1994.

16 See ICRC report, ''Iraq 1989–1999: a decade of sanctions'', 14 December 1999, available at www.icrc.org/web/eng/siteeng0.nsf/iwpList322/4BBFCEC7FF4B7A3CC1256B66005E0FB6#a4 (last visited 25 February 2008).

17 In October 1991, some 15 months after the adoption of Security Council Resolution 661 (1990) and the imposition of trade sanctions, the ICRC sent a special mission to Iraq to assess the needs of the population and determine appropriate responses. The report on the findings of this mission was transmitted to the members of the Security Council in November 1991. See also ICRC report, ''Iraq 1989–1999'', above note 16.

18 Ibid.

authorities, helped to consolidate its reputation as a reliable and efficient humanitarian agency.

During the acute phase of the conflict in 2003, the ICRC was once again the only major humanitarian organization still present and working in Iraq.[19] Thereafter the ICRC strove to honour its commitment to maintain a real physical presence on the ground in Iraq, whilst at the same time developing a remote-control modus operandi in those areas of the country where access was most difficult. It increased its staff and built up a corresponding infrastructure, using both its medical and its water and sanitation activities as vectors of acquired expertise to carry out other humanitarian activities.[20]

As outlined above, the ICRC suffered from a blurring of the lines caused by the close association of some other humanitarian agencies with MNF-I. After the assassination of an ICRC delegate on 22 July 2003,[21] the UN bombing of 19 August and the subsequent attack on the ICRC delegation in Baghdad on 27 October in which two ICRC employees were killed, it moved part of its staff to the Jordanian capital Amman and kept only a core staff in Iraq. Nevertheless, it kept some options open for international staff movements in the country, reserved mainly for detention-related activities. From 2004 onwards, contacts in connection with its assistance programmes were re-established in all major governorates. The brutal assassination of another ICRC employee in January 2005 was a dramatic setback, and the organization took the difficult decision to curtail its activities in Iraq greatly for a period of several months.

### *New operational framework in high-risk areas*

Although Iraq was considered a high-risk environment which stretched the traditional threshold of the organization's security concepts to the limits, after long internal consultations the ICRC decided to stay in the country whilst at the same time adopting a new operational framework. This was implemented and fine-tuned throughout 2006 as the general security situation steadily became much worse. The delegation significantly decreased its staff exposure by reducing its visible presence and by limiting movements to the absolute minimum needed. At the same time the delegation reinforced its various assistance programmes, in part through remote-control mechanisms, as well as though its direct implementation of detention-related activities.

In the strong belief that neutral, impartial and independent humanitarian action is welcomed by the Iraqi population,[22] networking efforts were significantly stepped up in order to promote greater acceptance of the ICRC.

19 See *Annual Report 2003*, ICRC, Geneva, p. 264.
20 Ibid.
21 This was the second fatality, since another ICRC delegate had been killed by crossfire in Baghdad on 8 April 2003.
22 See also *Coming to Terms with the Humanitarian Imperative in Iraq*, Feinstein International Center, January 2007.

## Concentration on protection activities

### Detention-related activities

The number of persons held in detention in Iraq in relation to the conflict varies from year to year. Throughout 2006 the ICRC closely monitored the welfare of some 30,000 detainees/internees held by the Iraqi authorities and the multi-national forces in Iraq.[23] It is the only international organization visiting MNF-I Theatre Internment Facilities. It also visits people in the custody of the Kurdish Regional Government in northern Iraq, where it has access to all places of detention. The ICRC is still in discussions with the Iraqi government over the signing of a general agreement which would allow it access to all Iraqi places of detention. In the meantime the Ministry of Justice has allowed visits to places of detention under its authority, and a first visit took place to one such place of detention at the end of 2007. A main challenge for the ICRC in this regard remains finding ways to ensure the safety and security of its expatriate delegates during their stay in Iraq and their visits to such places.

Protection activities relating to internment by UK and US/MNF-I forces continued throughout 2006 and 2007, when the security situation was at its worst. Apart from the traditional monitoring of treatment during, and general conditions of, detention, particular attention was paid to the lack of legal status of the detainees and to restoring contact with their families. The ICRC has reinforced its dialogue with MNF-I on key legal aspects and has made its first contacts on the same subject with the Iraqi authorities. It has also launched an allowance programme for family visits to two internment facilities in the south and the initiation of a similar programme for the two internment facilities in Baghdad is under discussion.[24] Red Cross messages between detainees and family members are collected and distributed and a rapid follow-up telephone call system has been installed so that delegates can provide families of detainees with news and information.[25] As for MNF-I temporary places of detention – that is, prior to arrival in the Theatre Internment Facilities – the ICRC has most recently been granted access in principle to brigade or divisional holding areas. The first visits to such places of detention were carried out in February 2008.

In the north of Iraq the ICRC has continued its regular visits to persons deprived of liberty in all places of detention and has intensified its dialogue with the relevant authorities of the Kurdish Regional Government on key detention issues. The ICRC's approach is based on a combination of individual and structural interventions, with special attention to judicial guarantees.

23 *Annual Report 2006*, ICRC, Geneva, p. 324.
24 In 2007, the ICRC financed 31,186 family visits to 11,622 detainees/internees.
25 In 2007 the ICRC, together with the Iraqi Red Crescent Society, collected some 42,800 Red Cross Messages and delivered some 33,300.

### Missing persons and protection of the civilian population

In order to clarify the fate and whereabouts of missing persons, the ICRC facilitates dialogue between the parties through various mechanisms related to the three recent international conflicts. It supports structures that will eventually facilitate the collection of data on persons unaccounted for and enable families to be informed of the fate of their missing relatives. In order to increase the storage capacity of Iraqi morgues, the ICRC carries out repairs, installs mortuary fridges and distributes body bags and other supplies.[26] Training to enhance the expertise of forensic teams is also provided, together with the necessary working materials. This programme, first introduced at the Medico-Legal Institute in Baghdad, has meanwhile been expanded to other governorates and to some main hospitals as well.

To find means of achieving effective respect for the civilian population in Iraq remains a major challenge. Since early 2007 the delegation has systematized its collection of information on the protection of the civilian population, working with both internal and external sources. Through its improved overview of alleged violations, the ICRC is also increasingly able to monitor events linked to the conduct of hostilities by the various parties to the conflict.

Moreover, security constraints in recent years continued to limit access to the civilian victims of the conflict and made it difficult to document directly violations of international humanitarian law or to establish a sustained dialogue with various armed groups who could have an influence on the protection of civilians. The ICRC continued to call for greater compliance with humanitarian law by all parties, particularly with regard to the protection of civilians and the work of medical personnel.

## Water and sanitation activities

The basic water, sanitation and health facilities in Iraq remain largely inadequate in terms of both quality and quantity. The main reasons are frequent power cuts, lack of maintenance (owing to shortages of skilled manpower), spare parts, water purification chemicals and generator fuel, damage caused by the fighting and the effects of sabotage and looting. Another factor is the prevailing insecurity, which hinders national reconstruction efforts. The poor state of the water and sanitation systems represents a potential public health hazard in many parts of the country.

The ICRC has been responding to water and sanitation needs in Iraq since the end of the 1990–1 Gulf War. Initially it focused on providing emergency assistance at the individual level. During the period of sanctions, ICRC material assistance was brought in for the emergency repair and maintenance of water and sanitation facilities in order to benefit larger numbers of people. From 1999 onwards the ICRC extended these activities to rehabilitate the water, sanitation and other essential facilities in hospitals and primary health-care centres

26 In 2007 the mortuary fridges in nine hospitals and medico-legal institutes were repaired or replaced.

throughout the country.[27] In the months leading up to the US-led military offensive in Iraq launched in March 2003, the ICRC prepared to respond to potential increased needs in the water and sanitation sectors by allocating additional skilled manpower and material resources. The ensuing military operations and the spate of looting that engulfed Iraq at that time left Iraq's already dilapidated infrastructure in an even worse state of disrepair.

## Modus operandi: direct implementation or remote control

The ICRC's water and sanitation activities are carried out either directly by ICRC staff (mainly in northern and southern Iraq) or under a remote-control modus operandi suitable for the management of water and sanitation projects. Whilst there are areas where the ICRC can work in a traditional or direct manner – which is the organization's preferred and most frequent working method – there are others where the remote-control modus operandi must be applied. In 2007 alone, 2.7 million people (over 50 per cent of them women and 30 per cent children) were direct beneficiaries of these ICRC activities.

Direct implementation entails on-site ICRC supervision and often on-site ICRC involvement, at least in certain project phases, such as evaluation and assessment. The ICRC only applies the remote-control procedure to types of projects that meet strict technical and financial risk criteria and are well known from previous interventions, thus enabling the organization to draw on its first-hand experience in the project decision-making process. The remote-control model is based on the mobilization of an extensive network of competent local contractors and consultants, working in close collaboration with ICRC engineers.[28]

The key to the success of the remote-control model is based on the following factors:

highly experienced, motivated and committed ICRC Iraqi employees;
– strong collaboration with and ownership by the relevant local authorities;
– an extensive network of local contractors/consultants throughout the country;
– and strong control mechanisms, whereby separate entities are involved in needs assessment and project design, implementation, monitoring and evaluation.

In 2007, fifty-four water and sanitation projects were carried out under direct ICRC supervision and seventy-eight projects under remote control; twelve projects were in the process of being transferred from remote-control implementation to direct ICRC supervision. In accordance with the prevailing security situation, the majority of the remote-control projects were undertaken in western and central parts of the country most affected by the violence (Anbar, Baghdad, Diyala, Ninawa and Salah Ad Din provinces), while most of the directly

27 In 2007 the ICRC provided essential equipment for 73 emergency rooms (in 69 hospitals and medical facilities) and 27 operating theatres (in 27 hospitals). It also supplied 55 war-wounded kits – sufficient to treat over 5,500 war wounded – to 28 different hospitals, as well as medical material and consumables to 84 hospitals and 12 primary health care centres.

28 More than sixty local companies working with the ICRC in central Iraq alone.

implemented projects were located in the south (Basra, Maysan, Muthanna and Thi Qar provinces) and the north (Arbil, At Ta Mim, Dahuk and Sulaymaniyah provinces). The projects being transferred to more direct ICRC supervision were mainly located in the centre and south (Babil, Kerbala, Najaf, Qadisiyah and Wasid provinces).

### Case study 1: Baquba water treatment plant, Diyala province, central Iraq

#### The facility and its services

This facility is one of the main water treatment plants in Baquba City, the capital of the predominantly Sunni province of Diyala, which also continues to be the scene of some of the heaviest fighting in the current conflict. It serves more than 300,000 people. Built in 1958, the plant had been supplying poor quality water for several years, endangering the health of users. It had also been functioning well beyond its design capacity, particularly throughout the hot summer months, thus increasing the risk of breakdowns.

#### Initial assessment

A thorough ICRC assessment early in 2006 showed that the Baquba facility, like so many other water treatment plants across Iraq, suffered from chronic infrastructure deficiencies. Many component parts of the plant's treatment cycle were either out of order or dysfunctional. Among the problems were faulty suction equipment to extract raw water from the Diyala River, dysfunctional piping, filtration, chemical purification and electrical and sludge removal pumping systems, and unhygienic storage tanks. As a result the water had a bad odour and taste and constituted a potential health hazard.

#### Response to avert emergencies

The plant was completely overhauled by the ICRC, starting in 2006. Faulty or worn out components, e.g. pipes, valves and electrical components, were repaired or replaced; new pumps were installed and the electrical system was improved.

#### Results

Today, the Baquba water treatment plant is in good working order and provides a reliable supply of safe drinking water in sufficient quantity for the region's more than 300,000 residents, thus diminishing the potential threat to public health posed by the poor quality of water supplied by the plant before it was overhauled.

#### Modus operandi

The whole project was conducted in remote-control mode.

## Case study 2: Urfali water treatment plant, Sadr City, Baghdad

### The facility and its services

This complex – comprising two adjacent compact units – is located in the district of Urfali, on the outskirts of Sadr City, a densely populated and predominantly Shiite suburb of Baghdad. Established in the 1980s, it serves the water needs of some 10,000 people, including patients and medical staff at the 1,200-bed Al-Rashad psychiatric hospital, the largest health-care facility of its type in Iraq, as well as an old people's home and various residential neighbourhoods in the area.

### Initial assessment

An ICRC assessment during the first half of 2007 showed that the complex was operating below 40 per cent of its capacity and that the quality of the water it produced was sub-standard. One of the two compact units was completely out of order, while the other was only partly working, owing to dysfunctional high-lift pumps designed to inject purified water into the main supply networks. In addition, several purification, filtration and electrical components were either not working to full capacity or had broken down.

### Response to avert emergencies

The ICRC restored the pumping capacity of the two compact units and improved the water treatment process by reactivating and upgrading the chemical treatment units, cleaning the sedimentation tanks, and repairing or replacing worn out filtration and electrical components.

### Results

Since the complex has a good backup generator and significant water storage capacity, it is now able to supply clean drinking water for at least six hours daily – even during power outages. This is well above the average for most parts of Baghdad city. The improved quality and increased reliability and quantity of the water supply from the Urfali water treatment plant has lessened the need to deliver water by tanker to the areas and facilities it serves. There, too, the potential threat to public health posed by the poor quality and insufficient quantity of water supplied by the plant before it was overhauled has been reduced.

### Modus operandi

The whole project was conducted in remote-control mode.

Remote-control action is a complex response to ensure programme implementation in areas of high staff security risk. Working with trusted implementing partners and with periodic short visits by ICRC expatriate staff to places inside Iraq allows the ICRC to continue with a range of activities and increase progressively the level of competence and responsibility of the ICRC's local staff. However, the downside cannot be overlooked: contacts remain limited in space and time, which also limits co-ordination. Even with the permanent presence of ICRC local staff, contacts with interlocutors can sometimes be difficult, depending on the prevailing local security and political developments. Moreover, where a high profile cannot be displayed, reputation-building must be accomplished and acceptance generated by other means. The challenge for the ICRC is to define its identity on the basis of this severely restricted and often invisible action. Networking by expatriates and communication measures play a crucial role in doing so.

Despite the relative success of the remote-control and support operations, the ICRC remains convinced that for maximum programme impact such an approach cannot compete with a direct physical presence on the ground. In this regard, much remains to be done to increase access for ICRC international staff to the many parts of Iraq where security risks are still high. A permanent presence is limited to the Kurdish north, whereas for the rest of the country delegates travel in and out and are at best present in the ICRC's offices.[29] As for the organization's invaluable local Iraqi staff, they are able to carry out their duties in many other areas considered safe enough for them and where their activities do not expose them to incalculable security risks.

## Rehabilitation or construction of health facilities

ICRC activities to build, repair or upgrade health facilities in Iraq began in 1999. Since then hundreds of hospitals and primary health care centres have been rehabilitated all over the country, especially in areas worst affected by the hostilities, where such facilities are hard-pressed to cope with the daily influx of wounded. Also a number of primary health care centres have been built in certain areas which previously had no medical facilities.[30]

29 In addition to the ICRC team based in Amman, by the end of 2007 some 400 national staff and 17 expatriates were based in Iraq in seven offices (Baghdad, Basra, Dohuk, Erbil, Khaneqin, Najaf, Sulaymaniyah).

30 In 2007, the following were examples of projects to rehabilitate or build health centres:
– Al Smood PHCC (Nainawa province): 40 patients in consultation per day benefited from the rehabilitation of the centre (modus operandi: direct supervision);
– Hadithah district (Al Anbar province): the three PHCCs of the district (in total: 215 patients in consultation per day) were rehabilitated as well as the Hadithah General Hospital, the referral hospital with 120 beds for a catchment population of 220,000 people living in 19 villages (modus operandi: remote control);
– Fallujah Physical Rehabilitation Centre (Al Anbar province): the building of this new centre started in

During 2007 alone the capacity of Iraq's emergency medical services was maintained by intensified ICRC support to almost 100 health facilities which received emergency room and operating theatre equipment, as well as drugs and medical consumables. In an integrated approach the water and sanitation systems of numerous hospitals and primary health care centres treating the wounded were repaired or upgraded and a number of main hospitals were supplied with water on a daily basis. In addition, wounded patients from mass casualty events received appropriate treatment through the rapid provision of material (within 48–72 hours) to the hospitals concerned.

There are currently up to 130,000 physically disabled persons in Iraq who are in need of artificial limbs or other orthopaedic appliances or walking aids. Physical rehabilitation centres there have been supported by the ICRC to enhance their capacity to fit disabled patients with such appliances.

## Distribution of relief supplies

In early 2007 the delegation set up a team to reinforce the organization's response to needs for economic security. This assistance programme, which consists of the distribution of food parcels and hygiene kits as well as other essential household items, targeted both internally displaced persons and vulnerable local populations. In 2007 the ICRC provided emergency relief for more than 730,000 people, which was distributed by its field teams, the Iraqi Red Crescent branches or local non-governmental organizations (NGOs).

Many displaced persons take refuge in ''host communities'' which are themselves affected by the conflict situation. The living conditions of the local population are at times as difficult as those faced by many displaced persons, whose arrival places an additional burden upon them. The needs in this field in Iraq are enormous and cannot be met by the ICRC alone.[31]

September 2007 and should take six months. The centre will have the capacity to produce 500 orthopaedic devices/year (modus operandi: direct ICRC supervision);
– in Basra province (southern Iraq), the ICRC implemented a large-scale primary health care centre (PHCC) rehabilitation or construction programme, mainly in the poorest areas of Basra, benefiting populations comprising more than 50 per cent women and 30 per cent children. This programme included in particular the following projects: reconstruction of the PHCC in the Qadissiyah locality (70 patients in consultation per day), rehabilitation and extension (additional surface of 170 sq m) of the PHCC in the Al Singer locality (120 patients in consultation per day), reconstruction of the PHCC in the Hay Al Hussein locality (150 patients in consultation per day), construction of the PHCC in the Al Shaibe locality (80 patients in consultation per day);
– in September 2007, work started on the reconstruction of the Basra PHCC, located in the centre of the town (300 patients in consultation per day), which was scheduled to be completed in March 2008. The programme also included the construction of a new community-based PHCC in the Hay Al-Jihad neighbourhood, for a population of some 17,500 people until then deprived of health services (completed March 2007). Since its opening, the new PHCC has received an average of 70 patients per day, more than 50 per cent of whom are women and 40 per cent children (modus operandi: direct ICRC supervision).

31 The goal for 2007 was fixed, in accordance with the delegation's estimated overall capacity, at 10,000 assisted families per month, and after some early logistical problems the delegation managed to ensure a regular flow of supplies on that scale. Initial experience with this programme is mixed, often depending

Over the years the Iraqi Red Crescent Society has played a pivotal role in implementing the ICRC's economic security programme. In discussions in November 2007, however, the two organizations failed to agree on the ICRC's minimum standard requirements for assessments, stock and distribution management and reporting, and their co-operation agreement for the distribution of food parcels and other emergency relief items planned for 2008 could not be renewed. By the end of the year the ICRC could therefore no longer count on the national society's support in distributing emergency assistance, and has since then been increasing its own direct distributions and working through local NGOs and authorities.

## Conclusion

Since 1980 the ICRC delegation in Iraq has continued to maintain an uninterrupted operational presence on the ground in the most difficult of security situations. The commitment and courage of its Iraqi staff have been a fundamental element in ensuring this continuity.

The ICRC's response to the complex operational environment in Iraq, with its associated high risk for staff security, has been twofold. On the one hand, it has remained committed to its traditional principles of neutral, impartial and independent action, firmly convinced that adherence to them increases its acceptance by the Iraqi population, who differentiate between this approach and that of the UN and some other organizations that have relied on the Multinational Force for security and logistical support. On the other hand, it has developed innovative remote-control mechanisms to ensure a continuation of its humanitarian activities in the high-risk areas of Iraq.

Besides being true to the Fundamental Principles of the International Red Cross and Red Crescent Movement, the ICRC's neutral, impartial and independent humanitarian response has very pragmatic implications in Iraq. It is not simply a matter of protecting the lives of staff distributing humanitarian relief. In some cases it is also a means of safeguarding the lives of vulnerable Iraqis who rely on that assistance and have said that they fear attacks if they are viewed by armed groups as having collaborated with organizations assisting in the "occupation" of Iraq. This danger is further accentuated by the blurred distinction between military units which, in furtherance of military objectives, also distribute humanitarian relief, and some humanitarian organizations that rely heavily on military support for their presence in Iraq.

The development of a remote-control modus operandi has been part of a learning-by-doing process in which the ICRC has developed an innovative

on the reliability of implementing partners when the ICRC works with them; it is currently being fine-tuned on the basis of lessons learned. The programme has even been further developed to include the implementation of small production projects handled by vulnerable residents and IDPs alike. Monitoring indicates that its impact is positive, and the ICRC plans to expand it.

response for geographical areas where the security risk is highest. The success of this approach would not have been possible without the extensive network developed by the ICRC.

The recent experience of the ICRC in Iraq and some other institutions and organizations, although needing further development in many respects, has nonetheless made a difference to the lives of many hundreds of thousands of Iraqis. Maintaining a presence and proximity on the ground, taking action wherever possible, not only allows us to carry out humanitarian work but also serves as a basis for increasing our knowledge and understanding of a complex situation and keeping track of humanitarian needs. Often solutions can be found by incorporating local components in the humanitarian response. A presence on the ground provides opportunities for humanitarian dialogue, on which a positive perception and consequent acceptance often heavily depend. Such a presence on a broader scale also enables a balanced stance to be maintained among the various communities by addressing their needs, however different they may be from one place to another.

To continue and develop a humanitarian operation in a high-risk environment like Iraq, which often goes beyond the traditional threshold of the ICRC's security concepts, has required a willingness to take calculated risks. The delegation in Iraq is one of the few in the world to which ICRC staff are assigned on a voluntary basis. As the situation there evolves, the ICRC's action will probably be hindered for years to come by restrictions on access and security concerns in a high-risk theatre of operation, and consequently remain in some ways incomplete. The response to the protection and assistance needs of many victims in Iraq is therefore likely to be insufficient, leaving them isolated and dependent on their own exhausted coping mechanisms.

The accumulated frustration and growing fatalism of the Iraqi population may well be reflected by a sense of hopelessness among the humanitarian community. Yet the daily, very serious, violations of international humanitarian law cannot and should not be accepted as inevitable. More and more Iraqis are rejecting the prevailing situation as unbearable and inadmissible, often at tremendous personal risk. There is a real need for the international humanitarian community to take meaningful action in support of such great Iraqi courage.

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# Iraq's refugees: ignored and unwanted

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## Abstract

*The article provides a brief overview of the scale and characteristics of Iraq's refugee population as well as their protection and assistance needs in asylum countries. It also reviews their relative impact on neighbouring states and the sustainability of recent returns.*

Despite recent notable improvements in the security situation inside Iraq and the beginning of limited returns, it is unclear whether this significant change will be sustainable, given the failure to address the underlying causes of the displacement and the undeniable difficulties that returnees are facing upon their return. A contributing factor to the return has been the lack of adequate international assistance and attention to those displaced, which has forced hundreds of thousands of Iraqis to become impoverished and increasingly vulnerable. Many of those refugees who have returned had little choice; they either took the opportunity of improved security conditions inside Iraq, however fleeting, or faced increasing destitution and indignity. At the same time the welcome mat is wearing thin as Iraqi refugees overwhelm the basic infrastructure of their host communities, raising concerns about the potential for further destabilization of the region. If Iraq does not awake from its nightmare of sectarian violence, particularly when multinational forces are being phased out,[1] the international community will not have the option to continue to ignore the mounting humanitarian needs of Iraq's displaced.

* The article has been provided in a personal capacity and does not necessarily reflect the views of the organization.

## Refugee numbers

While acknowledging that refugee estimates are open to interpretation and debate, it appears that there are at least 2 million Iraqi refugees in the region, with another 2 million internally displaced. The fact that refugee figures are often used as an indicator of progress, or lack thereof, in Iraq makes dealing with displacement figures even more contentious. What is clear is that the current displacement is the largest displacement crisis in the Middle East since 1948. The generally accepted figures include more than 1 million Iraqis in Syria, 450,000–500,000 in Jordan, 200,000 in the Gulf States, 50,000 in Lebanon, 40,000–60,000 in Egypt, 60,000 in the Islamic Republic of Iran, and another 10,000 in Turkey.[2] Of this total UNHCR has registered over 227,500,[3] or some 10 per cent of the estimated population of Iraqis in the region. It should be noted that hundreds of thousands of Iraqis had left Iraq prior to 2003, either as a result of persecution or discrimination or in search of better economic, health or educational opportunities.[4]

1 The Multi-National Forces in Iraq (MNF-I) consists as at December 2007 of United States (154,000), United Kingdom (4,500, to be reduced to 2,500 in spring 2008), Georgia (2,000, to be reduced to 300 in summer 2008), Australia (550 combat troops and 1,000 personnel engaged in Iraq-related operations; all 550 combat troops to be removed by mid-2008), South Korea (933, to be reduced to 600), Poland (900, planned withdrawal mid-2008), Romania (397), El Salvador (280), Bulgaria (155), Albania (120), Mongolia (100), Czech Republic (99, to be reduced to 20 in summer 2008), Azerbaijan (88), Denmark (50), Armenia (46), Macedonia (40), Bosnia & Herzegovina (43), Estonia (35), Kazakhstan (29), Moldova (11), Latvia (7), Fiji (as part of UNAMI) (223). Withdrawn (and date of withdrawal): Nicaragua (February 2004); Spain (late April 2004); Dominican Republic (early May 2004); Honduras (late May 2004); Philippines (around 19 July 2004); Thailand (late August 2004); New Zealand (late September 2004); Tonga (mid-December 2004), Iceland (2004), Portugal (mid-February 2005); Netherlands (March 2005); Hungary (March 2005); Singapore (March 2005); Norway (October 2005); Ukraine (December 2005); Japan (July 17, 2006); Italy (November 2006); Slovakia (January 2007); Lithuania (August 2007). Information available at http://en.wikipedia.org/wiki/Multinational_force_in_Iraq, and http://news.bbc.co.uk/2/hi/middle_east/3873359.stm (last visited 20 February 2008).

2 Figures are derived from government estimates and cross-checked with independent surveys where possible. Given the urban character of the Iraqi refugee population it is extremely difficult to obtain precise figures. As an example, on 1 October 2007 the Foreign Minster of Syria told the UN General Assembly that there were "1.6 million Iraqi refugees in Syria". Other estimates have considerably lower figures.

3 UNHCR registration figures: this figure includes 150,000 in Syria, 52,000 in Jordan, 10,000 in Lebanon and 10,500 in Egypt respectively. In addition there are 54,000 Iraqis from pre-2003 in Iran, with another 3,000 registered new arrivals.

4 In early 2003, UNHCR estimated a total of more than 30,000 Iraqis in Syria, while more than 250,000 were estimated to be in Jordan. At the time of the 1991 Gulf War, Jordan was the only country that accepted Iraqis. Since that time it is believed that the population of Iraqis in Jordan has never gone below 130,000. According to a recent survey by the Danish Refugee Council/UNHCR in Lebanon, 30 per cent of respondents arrived prior to 2003. According to the Brookings Report commissioned by UNHCR on Syrian refugees, two waves of Iraqi refugees have come to Syria over the past 25 years. The first wave came in the 1970s and 1980s; many of those refugees were Sunnis who opposed the Saddam Hussein regime, while others were Shia fleeing persecution. Following the first Gulf War and the Iraqi government's repression of Shia in the south, the Syria–Iraq border remained closed throughout the 1990s and only reopened in 2001–2. The second wave of Iraqi displacement began in 2003 as a result of the US invasion. Information available at www.brookings.edu/papers/2007/0611humanrights_al-khalidi.aspx (last visited 20 February 2008).

**Table 1.** *Registration (as of 31 December 2007, UNHCR had registered over 227,500 Iraqis in the region), cumulative numbers*

| | Estimated Iraqi population | Total registered | Cases | Female principal applicant | Registered in 2007 | Average case size |
|---|---|---|---|---|---|---|
| **Syria** | 1.0–1.5 million | 147,050 | 39,096 | 21.6% | 106,528 | 3.5 |
| **Jordan** | 450–500,000 | 51,229 | 24,077 | 26.7% | 31,210 | 2.0 |
| **Lebanon** | 50,000 | 9,721 | 5,306 | 6.0% | 6,432 | 2.0 |
| **Turkey** | 5–10,000 | 4,276 | 2,157 | 21.3% | 3,091 | 2.0 |
| **Egypt** | 20–40,000 | 10,132 | 3,959 | 27.2% | 8,169 | 2.5 |
| **Iran** | 60,000+ | 3,673 | | 9.0% | 3,305 | |
| **GCC*** | 200,000+ | 1,816 | 767 | | | 2.5 |

*Gulf Co-operation Council (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and United Arab Emirates).

**Table 2.** *Percentage registered with UNHCR by religion (as of 31 December 2007)*

| Of the total registered | Sunnis | Shia | Christians | Islam unspecified | Sabean-Mandean | Yezidis |
|---|---|---|---|---|---|---|
| **Syria** | 53.3% | 21.8% | 17.0% | 2.1% | 4.6% | 0.9% |
| **Jordan** | 56.0% | 26.0% | 15.0% | 1.0% | 1.0% | 0.1% |
| **Lebanon** | 30.0% | 57.0% | 12.0% | 0.7% | 0.1% | 0.1% |
| **Turkey** | 35.9% | 6.3% | 18.8% | 31.0% | n/a | n/a |
| **Egypt** | n/a | n/a | 2.0% | 98.0% | n/a | n/a |

## Characteristics of the Iraqi refugee population

Iraqi refugees largely come from an urban background and have gravitated in exile to the region's largest cities, particularly Damascus, Amman, Cairo and Beirut. When Iraqis first arrived, most brought resources with them and many were not in need of assistance. They did not register with UNHCR and they were not housed in camps, and they remained hidden and anonymous in their respective urban sanctuaries. Several years on, that situation has changed and hundreds of thousands of refugees are no longer able to look after themselves. While they are not starving, many see their lives wasting away as their savings and assets are exhausted and they sink into idleness and poverty. All face a terrible choice: should they return home, with all its hazards, or remain in exile, without access to stable employment and basic services? As their vulnerability increases, so does the push factor for families to return to Iraq.

It should be noted that in reviewing the data derived from UNHCR registration figures in this paper, there is likely to be a bias towards the most vulnerable and minorities. While many Iraqis who still have the means to support their families will hesitate to register, those in most need, particularly those who see little prospect of returning to Iraq even if the situation were to improve or

those with support networks in the West (such as many Christians and Sabean Mandeans), will approach UNHCR for assistance and protection. For almost all refugees, registering with UNHCR and subsequently queuing for assistance is both a humiliating and a demeaning experience.

Of the 250,000[5] Iraqis refugees registered with UNHCR across the region, the following are some of their main characteristics:

- Over 80 per cent originate from Baghdad, with fewer than 5 per cent fleeing from each of the following provinces: Ninewa, Diyala, Kerbala, Basrah and Anbar. In Egypt 93 per cent of those registered originate from Baghdad. In Lebanon the proportion is just over 60 per cent. The urban origin, particularly Baghdad, of the refugees is hardly surprising given that much of the sectarian violence has occurred in the mixed Sunni and Shiite areas, which are overwhelmingly urban. These include Iraq's largest cities: Baghdad, Mosul and Basra. It also includes mixed towns in northern Babil province (Yusufiya, Latifiyya, Mahmudiyya), in Salah ad-Din province (Balad, Dujeil, Samarra) and in Diyala (Muqdadiya, Baquba).
- 75 per cent to 90 per cent of Iraqis reside in the region's capitals, making this the world's largest urban refugee population.
- Some 50 to 60 per cent of those registered are Sunnis, with Shiites representing less than 25 per cent of the total in each country. The exception is Lebanon, where close to 60 per cent of those registered are Shiite. The proportions of Christians (15–18 per cent) and Mandeans (3 per cent) registered are much higher than their relative proportions in Iraq, where their combined totals are less than 5 per cent. Recent registration figures highlight a growing proportion of Sunnis and a decreasing number of Christians (from Baghdad, Mosul and Basra) and Sabean Mandeans (Baghdad, Basra, Amara, and Nasiriyya).[6]
- The gender breakdown across the region for all Iraqis is approximately 53 per cent male to 47 per cent female, with the notable exception of Lebanon.[7] The average case size increased throughout 2007 as entire families, rather than individuals, registered; 20 per cent of families cited females as the principal applicant.
- The proportion of vulnerable Iraqis registering has increased. UNHCR is identifying larger numbers of severe medical cases and chronic illnesses, survivors of torture and trauma, children or adolescents at risk, women at risk and older persons. In Damascus 36 per cent of those registered are identified as having specific needs. Many displaced Iraqis have been exposed to terrifying experiences of terror and violence, with approximately 22 per cent of Iraqis registered with UNHCR reporting personal traumatic events. This,

5 By 21 February UNHCR had registered almost 250,000 Iraqis, including 165,000 in Syria.

6 This could indicate that those minorities who could have fled have now fled and the remaining population to be displaced inside Iraq has decreased.

7 According to UNHCR registration figures, 72 per cent of Iraqis registered in Lebanon are male. The majority is of working age and may have been attracted to Lebanon by the availability of "informal" work.

compounded by the difficulty of daily life, has led to high rates of psychological fragility and distress. Many Iraqis who crossed into Syria, and to a lesser extent Jordan, have special needs due *inter alia* to chronic illnesses or injuries or their situation as survivors of torture and trauma, children or adolescents at risk, women at risk, and disabled and older persons.

A convenience sample survey conducted by UNHCR found that among Iraqi refugees registering with UNHCR between 31 October and 25 November 2007, the prevalence of depression and anxiety was high – 89 per cent and 82 per cent (n=384) respectively. Every survey respondent reported experiencing at least one traumatic event with the mental health and trauma data analysed by the Centers for Disease Control (CDC), based in Atlanta. Among respondents,

- 77 per cent reported being affected by air bombardments and shelling or rocket attacks;
- 80 per cent reported being witness to a shooting;
- 68 per cent reported interrogation or harassment by militias or other groups, with threats to life;
- 22 per cent had been beaten by militias or other groups;
- 23 per cent had been kidnapped;
- 72 per cent had been eyewitnesses to a car bombing;
- 75 per cent had someone close to them who had been killed or murdered.

Although respondents were asked questions about any exposure to such events in the previous ten years, virtually all reported events dated from 2003 to the present. All the reported events took place within Iraq itself. Respondents were also specifically asked about torture. Of the 120 surveyed,

- 16 per cent reported being tortured (a finding similar to the figure reported in the UNHCR database of 135,000 refugees),
- 61 per cent reported being beaten with fists and 58 per cent with other objects;
- 18 per cent reported being given electric shocks;
- 5 per cent had objects placed under their nails;
- 6 per cent had burns inflicted.

## Syria survey

A survey undertaken by UNHCR Syria[8] and IPSOS Market Research in November 2007 of 754 families, comprising 3,553 family members, indicated that

- most of the refugee population are well educated, 31 per cent have completed a university education, and fewer than 3 per cent are uneducated or illiterate;

8 Sister UN Agencies UNICEF, UNFPA and WFP all contributed questions to be included in the research, and the Centers for Disease Control (CDC) added the Hopkins Checklist Depression Scale (HSCL-D) and Harvard Trauma Questionnaire (HQD).

- 33 per cent only have funds to last for three months or less and 24 per cent are relying on remittances from relatives abroad to survive;
- the children of 46 per cent had to drop out of school, with 10 per cent of children working;
- 19 per cent could not afford treatment for their illnesses and 17 per cent have a chronic illness;
- 96 per cent rent accommodation, with 62 per cent paying between US$100 and US$300 per month; and
- 63 per cent had family abroad, 34 per cent of whom were in Sweden, 24 per cent in the United States, 16 per cent in Australia, 13 per cent in Germany and 13 per cent in the United Kingdom.

In contrast to the previous survey in May 2007, in which 73 per cent said that they expected family members to join them, in November only 36 per cent had that expectation. Significantly fewer Iraqis are registering with UNHCR in the hope of being resettled (27 per cent in May, 15 per cent in November), whereas many more state that the primary reason for registering is to receive the UNHCR Refugee Certificate (24 per cent in May, 40 per cent in November).[9]

## Jordan survey

In Jordan, a survey conducted by the Norwegian Research Institute (FAFO)[10] in conjunction with the government in mid-2007 placed the number of Iraqis at 450,000 to 500,000. The survey also indicated that

- the majority of Iraqis have arrived as family units and 77 per cent of them arrived after 2003. The average size of an Iraqi family is 4.1 persons. Two-thirds of families have children under 18 years of age;
- 20 per cent of families are female-headed families and are often found among the poorer population;
- only 35 per cent of those surveyed were registered with UNHCR;
- Sunni Muslims represent over 60 per cent, 17–18 per cent were Shiite, 12–15 per cent Christian and 5 per cent others, including Sabean-Mandean and Yezidis;
- 22 per cent of Iraqi adults are employed;
- the Iraqi population has a higher prevalence of chronic diseases;
- only 22 per cent of the poorest section of the Iraqi community surveyed had a valid residence permit; 56 per cent overall had a valid residence permit;
- 42 per cent survive on remittances from Iraq. This means that a large segment of Iraqis in Jordan are at risk of becoming vulnerable with the depletion of savings and/or cessation of transfers;

9 It is worth noting that registration figures reached a three-month high in January 2008, following the announcement by UNHCR of an expanded food and cash assistance programme. It is clear that in an urban environment, refugees will determine the effectiveness of assistance and protection being offered before deciding whether to register.

10 See http://www.fafo.no/ais/middeast/jordan/Iraqis_in_Jordan.htm – 8k (last visited 20 February 2008).

- 20 per cent plan to emigrate to a third country, with 58 per cent having no intention of returning to Iraq;
- 95 per cent of those Iraqis who wish to return to Iraq will do so only when the security situation improves.

### Lebanon survey

A similar survey of 1,020 Iraqi households comprising 2,033 individuals was conducted by the Danish Refugee Council in Lebanon,[11] where it is estimated that there are 50,000 Iraqis. The results indicated that

- 78 per cent of Iraqis entered the country illegally and 60 per cent were 29 years of age or younger;
- of children aged from 6 to 17, only 58 per cent were enrolled in schools;
- 10 per cent of the Iraqis surveyed are suffering from chronic illnesses;
- the majority of Iraqis in Lebanon – 78 per cent – live in the Lebanon Mountains, while 20 per cent live in the south and in the eastern Bekaa valley;
- finally, more than half of the respondents reported never feeling safe in Lebanon.

## The protection needs of Iraqis

Since January 2007 UNHCR has granted refugee status on a prima facie basis to all Iraqi nationals from central and southern Iraq. Its offices throughout the region hold registration interviews to confirm the origin of Iraqis and their degree of vulnerability, facilitate their referral for protection and assistance, as well as assessing whether the applicant should be excluded. The granting of prima facie status is based on the following assumptions:

(a) Individuals from central and southern Iraq who flee targeted human rights violations or generalized violence will not find an internal flight alternative in those areas. This is due not least to the reach of both state and non-state actors, as well as the grave security situation prevalent in central and southern Iraq. In addition, an individual who relocates to an area other than that of his/her origin will probably face serious and continuing difficulties, given the lack of protection from local authorities, communities or tribes, ethno-religious hostilities and lack of access to even the most basic services.

(b) The targeted and extreme forms of violence underpinned by religious, ethnic or perceived political affiliations clearly amount to persecution within the meaning of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (hereinafter referred to as "the 1951

11 See www.drc.dk/index.php?id=1689 – 48k (last visited 20 February 2008).

Convention'').[12] The fact that persecution could be the act of state or non-state agents does not alter this conclusion. As pointed out earlier, there is no feasible internal flight alternative available for the vast majority of those displaced, and thus flight out of Iraq is the only option for them to find safety.

(c) Even where an individual may not face targeted persecution or the risk thereof at the personal level, the generalized violence and the lack of effective law, order and security throughout most of central and southern Iraq provides a basis for valid claims for international protection. The fact that the authorities are not in a position to extend protection meaningfully and the general lack of internal flight alternatives anywhere in the country reinforce this conclusion.

(d) The need for international protection resulting from generalized violence has been recognized in regional instruments and the practice of UNHCR. Regional instruments provide wider criteria for the refugee definition than that contained in the 1951 Convention. UNHCR's mandate has likewise been extended in a number of UN General Assembly Resolutions to include persons who flee situations of armed conflict and generalized violence.[13] The Executive Committee, in ExCom Conclusion No. 22,[14] has recognized that large-scale influxes could give rise to refugees within the meaning of the 1951 Convention, as well as individuals who are compelled to seek refuge due to external aggression, occupation, foreign domination or events seriously disturbing public order in part of, or the whole of, the country of origin. The conclusion calls for all such persons to be ''fully protected''.

(e) In view of the objective situation there, Iraqis who leave the central and southern parts of their country and are unable and/or unwilling to return there can be presumed to have international protection needs, making them persons of concern to UNHCR. The size of the outflow as a whole makes individual refugee status determination clearly unrealistic at the present time. While there may indeed be individuals who, if subject to personal refugee status determination, would not meet the refugee criteria or be excludable, the vast majority fall within both the 1951 Convention criteria and those of the extended definition. On this basis, Iraqis from central and southern Iraq who have fled the country as a result of the events which have taken place since April 2003 should be considered as refugees on a prima facie basis.

(f) Individuals who left prior to the events in 2003 or those whose initial departure may have been unrelated to the present circumstances could, if

12 1951 Convention and Protocol relating to the Status of Refugees, Article 1A: ''the term ''refugee'' shall apply to any person who: … (2) … owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it''.

13 See www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?docid=46deb05557 (last visited 20 February 2008).

14 Protection of Asylum-Seekers in Situations of Large-Scale Influx, (No. 22 (XXXII) – 1981), see www.unhcr.org/cgi-bin/texis/vtx/excom/opendoc.htm?tbl=EXCOM&id=3ae68c6e10 (last visited 31 January 2008).

they are unwilling or unable to return, also have valid claims *sur place* to international protection on the basis of the current conditions as summarized in this article.

(g) The protection situation in the countries of the region in which large numbers of Iraqis are present varies. Turkey, Iran and Egypt are signatories to the 1951 Convention, although UNHCR regularly undertakes individual refugee status determination under its mandate as needed in light of the absence of functioning national refugee status determination mechanisms. Syria, Lebanon and Jordan are not parties to the 1951 Convention and there is no structured protection regime for the protection of and assistance to Iraqis. In these three countries, Iraqis are permitted entry and stay on the basis of national legislative provisions relating to foreigners generally.[15] As a result, only short periods of legal stay are possible. Many Iraqis thus eventually fall into a situation of unlawful stay. Beyond permitting short stays, no specific supportive services are provided and Iraqis are left to fend for themselves. This leaves large numbers without possibilities for lawful work, some becoming increasingly destitute as they run out of resources. Many women and children are reported to have resorted to prostitution to survive. There are also reports of person-trafficking out of the region. While Iraqis may be able to access health facilities in Syria there are reports that, in Jordan, some are apprehensive of approaching government health centres for fear of being identified as ''illegal''. Their unlawful status and the accumulation of unpaid fines[16] has also reportedly created reluctance to notify law enforcement agencies of common crimes committed against them and they therefore become increasingly exposed to criminal elements.

## The impact of the Iraqi refugees on neighbouring states

The countries adjoining Iraq, particularly Syria and Jordan, have demonstrated remarkable generosity in receiving such large numbers of Iraqis despite already hosting hundreds of thousands of Palestinian refugees for over 60 years. Both Syria and Jordan have estimated the costs of hosting the Iraqi refugees at up to US$1 billion per year.[17]

15 Jordan introduced a visa requirement for Iraqis in mid February 2008.

16 In Jordan, people who overstay their visas are charged 1.5 Jordanian dinars or just over US$2. For every year overstayed the fine is up US$761. As part of the introduction of the visa regime, those Iraqis who wish to leave permanently will be fully exempted from accumulated fines, while those who wish to stay will have two months to rectify their residency and will have their fines halved. Iraqis who leave Jordan and intend to return or new arrivals will have to obtain a visa from offices that will be opened in Iraqi.

17 Mukhaimer Abu Jamous, secretary-general of Jordan's Interior Ministry, said in April 2007 that 750,000 Iraqi refugees were costing his government $1 billion a year, stretching to the limit the resources of a country of just 5.6 million. On 12 February Agence France-Presse (AFP) reported: ''Hosting our Iraqi brothers depletes the infrastructure and has cost the government more than 1.6 billion dinars (2.2 billion dollars) during the past three years'', Planning Minister Suheir al-Ali told visiting UN High Commissioner for Refugees Antonio Guterres.

According to Syria's Prime Minister the influx of 1.5 million Iraqis equals the burden of 300,000 Syrian families who consume US$1billion dollars a year in diesel, electricity, water and sanitation, and household gas.[18] Prices for oil, electricity, water and kerosene have gone up by 20 per cent, low standard rents have tripled since 2005 and subsidies have been scaled down. If the situation is difficult for Syrians, it is catastrophic for the most vulnerable Iraqi refugees, particularly single-female-headed households, the sick and the elderly. In Jordan, which already lacks water for its own population, authorities estimate that Iraqis are putting an unsustainable strain on the on the Jordanian water sector. Furthermore, the demand for fuel has increased by approximately 9 per cent. Since Jordan imports 97 per cent of its oil needs, this is leading to rising prices for an overstretched supply. While Jordan has accommodated more than 24,000 Iraqi students through the assistance of UNHCR and other donors, it predicts that by 2010 there may be from 50,000 to 100,000 Iraqi students in Jordanian schools. In addition both Jordan and Syria point to an urgent need to expand their respective health, transport, sanitation and security services.

Apart from the economic and social impact of hosting up to 2 million Iraqis, authorities throughout the region claim that there is a marked rise in criminality, including prostitution, and remain concerned about the possibility that a long-term presence of the refugees, perhaps bringing their sectarian rivalries with them, could exacerbate social problems. In Lebanon, ongoing political instability makes many Lebanese wary of hosting another refugee population whose prospects of returning to their home country in the short term appear remote.

## Difficult legal environment for Iraqis in the region – access to territory

Throughout the region the legal status of Iraqi refugees is ambiguous. States scarred by decades of hosting Palestinian refugees without sufficient international recognition or support, compounded by security concerns, do not recognize Iraqis as refugees or offer them any comparable legal status. Until recently most states in the region did not require Iraqis to obtain a visa but upon arrival provided a two- to three-month entry permit, which in many cases was easily renewable. The description of fellow Arabs as refugees was viewed negatively, as Iraqis were welcome as ''guests''. Clearly, with an overwhelmed social infrastructure and a lack of international solidarity, a general feeling of resentment has been developing in Syria and Jordan. Restrictions, at first informal and subsequently formal, began to be introduced vis-à-vis Iraqis wishing to enter neighbouring states.

18 See Xinhua news agency article, 27 August 2007.

## Jordan

Jordan had introduced tougher entry requirements, in particular for single males, following the multiple suicide bombings in Amman in November 2005 which killed sixty-three people. Especially during the early phases of the influx, many Iraqi professionals – including doctors, university professors and businessmen – found it relatively easy to obtain Jordanian residence permits. However, hundreds of thousands of other Iraqis have only been given two-month tourist visas which have to be renewed by exiting and re-entering the country or else a fine of $2 is paid for each day overstayed.[19] In mid February 2008, Jordan introduced visa requirements for Iraqis. While the introduction of visas is another unfortunate indicator of an increasingly restrictive asylum space, the move largely regularizes the existing restrictive entry procedures introduced in late 2006, particularly for young Iraqi males, which resulted in Syria being the only remaining escape route for Iraqis.[20]

## Syria

In an attempt to stem the influx of Iraqis, estimated at up to 2,000 per day, Syria introduced a visa requirement for Iraqis in October 2007.[21] This was the first time that Syria had imposed any visa requirement on a fellow Arab state and underscored its increasingly desperate position. Up to that point Iraqis could enter on a valid passport and were allowed to stay for a renewable period of three months. Syria simultaneously hardened its stance vis-à-vis Iraqis wishing to renew their three-month visa, calling into question the legal residence of over 1 million Iraqis and overnight creating a push factor for refugees to return. The Syrian government has made it clear that it had been impelled to take these steps by the massive pressure it faces hosting Iraqi refugees. Refugees say they are now being given an exit stamp when they try to renew their visas, with many unwilling to risk imprisonment by staying on illegally. From discussions with government officials, it is understood that Iraqi refugees currently living in Syria will not be forcibly returned to Iraq. The most pressing concern for Iraqi refugees at present is what they should do when their visas expire. In the past, they would go to the Syrian border to renew their visa for three months. UNHCR hopes that Syria can

19 Prior to the introduction of the new visa requirements Iraqis who entered Jordan, for whatever reason, were usually granted a two-week stay. When it was over, they would file an application at the Jordanian Interior Ministry and obtain another month of temporary residence from the Directorate of Residency and Borders. Temporary residence could then be extended to a maximum of two months for a 20 dinar fee and a mandatory medical check-up. It would be extremely rare to get another extension unless one has investor or businessman status and a minimum of 50,000 dinars ($70,000) in a Jordanian bank.

20 See http://hrw.org/english/docs/2007/10/16/syria17265.htm (last visited 20 February 2008).

21 The new regime, explained in a regulation issued by the Ministry of the Interior on 6 September, entered into force on 10 September. On 13 September, the first day of Ramadan, the Syrian government announced that entry restrictions for Iraqis would be lifted for the duration of Ramadan. UNHCR observed that some 5,000 persons used this opportunity to cross the border into Syria.

establish centres within the country where refugees could renew their visas, particularly for the most vulnerable and those with children at school.

### Egypt

Iraqis can obtain temporary permission to stay in Egypt but do not have easy access to jobs, health care or schools. Like Iraqis throughout the region, they live on the fringe of society. Many of them live in and around Cairo, with a large concentration in Sixth of October City (where UNHCR has just relocated its office), a 30-minute drive from the capital. On the basis of the registration and documentation issued by UNHCR, Iraqi refugees are granted six-month renewable legal residence permits by the government of Egypt and are effectively protected from *refoulement* (forced return). Unfortunately, however, as with most other countries in the region, this does not entitle them to work or have access to basic services.

## UNHCR's response

The Syrian and Jordanian governments, supported by their respective Red Crescent societies, remain the primary providers of assistance to Iraqi refugees. While UNHCR and its partners have substantially increased their respective programmes, they are still extremely modest compared with the tremendous needs. Despite its limited capacity, UNHCR and its partners had achieved the following by the end of 2007, including programmes set up for 2008.

- The number of Iraqis registered with UNHCR throughout the region increased from 60,000 in 2006 to almost 230,000 by the end of 2007. While registration or any certificate provided by UNHCR does not confer formal status recognized by the government, it does entitle the vulnerable refugees to access international assistance, with the possibility of a small number being accepted for resettlement.
- The number of resettlement referrals submitted by UNHCR increased from fewer than 1,000 in 2006 to some 21,500 by the end of 2007. While resettlement programmes represent a valuable and high-profile demonstration of international burden-sharing, fewer than 5,000 of the 21,500 referrals made by UNHCR departed before the end of the year. At least 15 per cent of the cases referred for resettlement were women at risk, while another 10 per cent were survivors of torture and other traumatic events.
- In collaboration with the World Food Programme (WFP), some 155,000 refugees will benefit from food aid in February 2008, a dramatic increase from 51,000 during November–December. If sufficient resources are provided, this figure will climb by the end of December 2008 to 362,800, or some 91 per cent of UNHCR's projected registered caseload. The composition of the food basket of basic and complementary foods reflects closely what Iraqis have been receiving inside Iraq.

This is in response to the consistent feedback from Iraqis that they wish to have the same ration as in Iraq.

- To date, needy refugees have had to queue outside the UNHCR offices in Damascus to receive their financial assistance but a cash assistance programme through cash dispensers (ATMs) was recently set up in Damascus to target the most vulnerable 7,000 families. This number is expected to increase rapidly, as UNHCR is currently identifying up to 100 new very needy cases each week, especially female-headed households, widows and people with disabilities and chronic illnesses. Each eligible family will receive US$100 a month in financial assistance, plus US$10 for each dependent. The programme will cost around US$1.5 million a month. Unfortunately the cost of a modest apartment in Damascus is between US$200 and US$300 per month, so even this assistance is not sufficient to keep the most vulnerable out of poverty and only marginally reduces the strength of the push factor on Iraqis to return.
- In collaboration with the national Red Crescent societies and health ministries in Syria and Jordan and the Jordanian Ministry of Planning and International Co-operation, UNHCR supported more than ten primary health centres and Red Crescent clinics. This support facilitated some 250,000 medical consultations in the second half of 2007. In Syria, more than 20 per cent of consultations resulted in hospitalization, with 15 per cent of these requiring surgery and/or long-term treatment. Agreements were also reached with hospitals in Syria and the King Hussein Cancer Foundation in Jordan to enable Iraqis to access what would normally be prohibitively expensive cancer treatment.
- In conjunction with the relevant ministries of education, UNICEF and UNHCR supported efforts to double the number of Iraqi children attending publicly run schools in Syria and Jordan. By the end of 2007 more than 43,000 Iraqi children in Syria and 25,000 Iraqi children in Jordan were attending school, with some 28,000 being provided with school uniforms.
- Several safe houses or women's refuges for survivors of rape and domestic violence were established and supported, and UNHCR Beirut opened a new centre for the rehabilitation of victims of torture and violence for refugees and asylum seekers.
- UNHCR outreach teams undertook ongoing house visits and community consultations to identify the extent of the problem of sexual and gender-based violence (SGBV), with referrals of identified survivors for psycho-social support and material assistance.
- UNHCR intervened on behalf of hundreds of Iraqis in detention, particularly in Lebanon (including securing the release of at least 70 refugees in 2007[22]).

22 In February 2008 an agreement was reached with Lebanese authorities to release up to 600 detained Iraqis and to regularize their status. The decision will likely benefit thousands of Iraqis in Lebanon considered to be residing illegally in the country.

- Distribution of non-food items such as heaters and blankets was launched in January 2008 for over 100,000 refugees in Syria. Similar programmes were also undertaken in Jordan and Lebanon.
- Offices throughout the region have been reinforced to facilitate the identification and referral of the most vulnerable Iraqis for appropriate assistance and protection response. In 2007 the number of national and international staff throughout the region increased to over 350.

## Challenges in the provision of assistance and protection

The very nature of the urban refugee caseload has meant that assistance has often been responsive to Iraqis in need coming forward themselves. The concept of requesting assistance is seen by many as dishonourable and demeaning to their family's name. While UNHCR and its partners are expanding their outreach, identifying those most in need is extremely difficult. In addition it has been difficult for many non-governmental organizations (NGOs) to receive authorization to work directly with Iraqi refugees. This has meant that the scope for assistance, support and outreach to the refugee community, normally extended through NGO partnering, is seriously circumscribed. The implementation of strict visa regimes and the likelihood that increasing numbers of Iraqis will choose to stay illegally in neighbouring countries will create its own protection problems, with the sustainability of stay becoming ever more precarious as access to public services and the informal market is impeded.

### Detention and *refoulement*

Until the recent agreement was reached with the Lebanese authorities, Iraqi refugees in Lebanon had enjoyed only very limited protection, many living in fear of imprisonment or forced return. UNHCR's protection challenges there were the greatest in the entire region. While in March 2007 there were fewer than 100 Iraqi refugees in detention in Lebanon, by December 2007 this number had increased dramatically to over 600 as a direct result of the proliferation of checkpoints due to the worsening security situation. Half of those refugees had been detained beyond the duration of their original sentence. The conditions of detention are bad. Prisons are overcrowded, health is substandard and prison violence targeting Iraqis was often reported. There was, seemingly, no provision for judicial review of administrative detention, which had the effect of leaving detainees without any legal remedy. Iraqis were sometimes released after UNHCR's intervention but not regularly, reliably or quickly. Given the increasing potential for arrest, many Iraqis refused to leave their homes unless absolutely necessary, and often did not approach UNHCR or the authorities. In comparison, Syria and Jordan combined detained fewer than 50 Iraqis in 2007. In Egypt the few detention cases involve asylum seekers from Iraq arriving or attempting to depart without valid documentation (including visas).

In view of the potential risks of detention, the majority of Iraqis in Lebanon and those with expired permits elsewhere do everything possible not to be noticed, aware that host governments see them as illegal residents. Without legal status throughout the region, Iraqi refugees are vulnerable to exploitation and abuse by employers and landlords, who act in the knowledge that Iraqis have no recourse to the authorities when their rights are violated. Moreover, the constant fear of being arrested and detained forces Iraqi refugees to adopt coping mechanisms that have further undesirable consequences. For example, since children are less likely to be detained than their parents, some Iraqi refugee families opt to send their children out to work to provide for the family instead of sending them to school. Most Iraqis released from detention are returning to Iraq, as this has become the only means of being released. Others are choosing to return because of the fear of being arrested by the authorities, rather than feeling that there is an improvement in the security situation.

## The position of European states vis-à-vis Iraqi refugees

With the continued efforts by the European Union (EU) to secure its external borders, access to the territory of EU member states and therefore to the asylum procedures is extremely difficult. This affects Iraqis just as it affects others seeking protection. The principal route for Iraqis to enter the EU continues to be via Turkey into Greece, but it is by no means a safe one. In recent months there have been consistent, troubling and well-documented reports of push-backs of Iraqis from Greece to Turkey and from Turkey to Iraq.

In 2006 Iraqis were the single largest group of asylum applicants in the EU, representing about 9.5 per cent of all asylum claimants there. The same is true for the first nine months of 2007, but the proportion is growing: during the first nine months of 2007 (data not yet complete), it rose to 20 per cent. If the current trends continue, the number of applications from Iraqis in the EU in 2008 is likely to be around 36,000 – twice as many as in 2007, notwithstanding EU efforts to prevent irregular crossing of its external border. In 2007 the main increases were in Sweden, where 14,000 applications were made during the first nine months of 2007, compared with 9,065 during the whole of 2006. This represented more than half of all applications by Iraqi asylum seekers in the entire EU. In Greece there were 4,483 applications during the first nine months of 2007, compared with 1,415 in 2006. Greece has not recognized protection status for any Iraqi refugees and the United Kingdom's rate of recognition for Iraqis in 2006 was just 12 per cent, despite UNHCR's recommendation that all Iraqi asylum seekers from central and southern Iraq should be considered refugees on the basis of the 1951 Convention criteria.

On 12 July 2007 the European Parliament adopted a second resolution on the humanitarian situation of Iraqi refugees (the first was on 15 February 2007). The resolution included a number of provisions relevant to the protection of Iraqis in the EU, including *inter alia* calling on member states to "overcome their

position of non-action regarding the situation of Iraqi refugees and to fulfil their obligations under international and Community law''. Unfortunately the Council of the European Union, at its meeting of ministers of foreign affairs on 15–16 October 2007, adopted conclusions on Iraq which made no mention of protection within the EU.[23] Given the lack of serious humanitarian consideration by the majority of member states to the plight of Iraqi refugees, it is hardly surprising that those countries in the region that have to bear the brunt of the refugee disaster have also started to close their doors.

## Asylum and resettlement

UNHCR exceeded its 2007 target of 20,000 by referring more than 21,500 Iraqis (6,854 cases) for resettlement by the end of 2007. In 2007, referrals were made to sixteen resettlement countries, including 15,400 to the United States – which received 72.5 per cent of all referrals made.[24] Almost 20 per cent (17.5 per cent) of those cases referred for resettlement are women at risk, with another 10 per cent being survivors of torture and trauma. Others considered for resettlement include torture victims, urgent medical cases, female-headed households, members of minority groups and people associated with international organizations. Even if all resettlement targets were met, this would only provide a durable solution for less than 1 per cent of the estimated 2 million Iraqi refugees in the region. In 2007, resettlement departures offered a durable solution for fewer than one quarter of 1 per cent.[25]

As the International Rescue Committee recently noted in its report on Iraq's refugees, the response of the majority of states to the crisis in Iraq has been strikingly ungenerous. The numbers of Iraqis accepted globally on refugee resettlement programmes between 2003 and 2006 actually fell.[26] Although the resettlement response is speeding up as more Iraqis complete the process, the number of those who have actually departed is still unacceptably low. Referrals, where they are not matched by departures, have created a high level of expectation

23 See www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4697795d2 (last visited 20 February 2008).

24 Other countries accepting significant resettlement referrals included Australia with 1,871, Canada with 1,512, Sweden with 938, UK with 295, New Zealand with 266, Finland with 255, Netherlands with 236, Brazil with 108 (mainly from Jordan's Ruweyshid camp), and Denmark with 69.

25 Some 8,000 Iraqis were referred by UNHCR's office in Amman, 7,702 by UNHCR Damascus, 3,280 by UNHCR Ankara, 1,464 from Beirut, 319 from Cairo and 500 by other offices, including those in the United Arab Emirates. Following the strengthening of UNHCR offices and an immense effort by teams throughout the region, all UNHCR offices exceeded their ambitious 2007 targets for referrals. This is quite a significant achievement, given that fewer than 1,000 Iraqis were referred for resettlement in 2006 and only 672 in 2005. The monthly departure list received from the International Organization for Migration (IOM) indicates that 4,575 refugees departed in 2007 (figures at end-November). The main countries of departure include the United States, 2,378; Canada, 747; Sweden, 745; Australia, 456; and Netherlands, 122.

26 According to UNHCR sources only 404 refugees were resettled to third countries in 2006, compared with 1,425 in 2003.

among the refugees. Frustration is increasing and is giving rise to staff security concerns. There is not only the problem of delayed departures, but also quite a significant rejection rate on referrals (over 30 per cent in the case of some major resettlement countries).[27] UNHCR continues to believe that resettlement needs for Iraqi refugees in the Middle East remain considerable, ranging between 80,000 and 100,000 persons.

## The level and sustainability of returns

While the reported level of violence is down, returns appear to have been triggered as much by the exhaustion of refugees (and their savings) as by the introduction of stringent visa and residency restrictions in neighbouring countries. Given the lack of resettlement opportunities and limited opportunities for local integration, the only truly durable solution for the majority of Iraq's refugees will eventually be their voluntary repatriation to a safe and stable Iraq. But in the absence of significant political progress there, this will remain a long-term objective. Although exile in neighbouring countries may be safer, it is certainly not better, and the vast majority of Iraqis still want to return to Iraq when the conditions permit.[28]

While border guards report tens of thousands crossing per month, this includes all categories of Iraqis and not only returning refugees. Despite the hardship of exile, the perilous nature of life in Iraq means that there has not been the flood of returnees that some had predicted: the numbers of Iraqis entering Syria at the end of 2007 were in excess of those returning, although it is important to note that a large number of Iraqis continue to cross the border to and from Syria for business (drivers, merchants, etc.) and may not necessarily be fleeing the violence. Some Iraqis also travel through Syria to further destinations, for instance for the Hajj, Umrah and Ashura festivals, or because onward flights are cheaper from there. In addition, December saw Iraqis travelling to join family members (either in asylum or back in Iraq) for the Eid festival and Christmas.

Baghdad may now be safer than it was, but many Iraqis continue to worry that the gains of the US troop surge are temporary and predicated on a massive US presence. They point out that Iraq's political leadership has failed to use the relative calm to engineer any real reconciliation between the majority Shiites and the Sunnis. While US troops have battled al Qaeda in Baghdad, Anbar and Diyala, the Iraqi parliament has made little progress on critical legislation in more than a year. And partly because of widespread government corruption, improvements in basic services such as electricity, water and fuel have lagged behind security gains.

27 If we compare the departures with UNHCR submissions to these countries, we find that Sweden has a high ratio – around 80 per cent of persons submitted to Sweden have already departed. The ratios for the other top five countries are Netherlands, 51 per cent; Canada, 49 per cent; Australia, 25 per cent; and United States, 16 per cent).

28 The notable exception being religious minorities, particularly Christians and Sabean Mandeans, who appear more hesitant to return.

So while there is a trickle of refugees going home, many Iraqis continue to leave Baghdad.

On 3 December 2007 the Iraqi Red Crescent Society stated that between 25,000 and 28,000 Iraqi refugees had returned home between mid-September and the end of November, the majority of them – some 20,000 – returning to Baghdad. In addition, the Iraqi Ministry of Displacement and Migration states that some 10,000 internally displaced Iraqi families have returned to their homes – mainly in Baghdad. Unfortunately many of those who have returned were unable to go back to their old neighbourhoods because they are now run by sectarian militias or have been looted and destroyed. The said Ministry is, however, still overloaded with property dispute cases from Saddam Hussein's time, when thousands were forcibly relocated, and lacks the requisite mechanisms to settle the new cases. Priority would be given to those who wish to return from neighbouring countries, such as Syria and Jordan, where Iraqi exiles are living in difficult conditions.

Initial surveys and calls received by UNHCR's hotline in Damascus indicate that the reasons for such movements are mixed. UNHCR staff have spoken to a wide range of refugees before they left Syria, and some said they were returning for one or more of the following reasons:

- security had improved, and they want to be reunited with family and friends;
- unable to work and lacking adequate assistance, they have exhausted their savings and feared the winter period when the cost of living rises sharply;
- ability to access food rations and other government services;
- residency pressures: their residence permit has expired and cannot be renewed;[29]
- desire to collect income, pension or rent, or check on (or sell) properties, following rumours that unclaimed properties would be confiscated by the government – they then hope to return to Syria;
- a lack of assistance and/or timely opportunity for resettlement;
- returning to Iraq for the start of the (delayed) school year.

Consistently there is, however, a real concern among the returnees about longer-term security, and many say that they are only returning to areas where they feel secure because of the local security arrangements in place. According to a report released on 22 November 2007,[30] UNHCR found that only 14 per cent of respondents said that they were returning to Iraq from Syria because they believed that the security situation had improved, as opposed to 70 per cent who cited financial and visa reasons. A similar review in Egypt, where refugees have to deregister with UNHCR prior to returning to Iraq, found that many were stating that they had no future in Egypt without access to employment and/or education for their children. In Lebanon the situation is similar: a survey of 41 refugees who

29 Families unable to pay for the renewal of their visas in Syria have chosen to return to Iraq instead of remaining in Syria illegally – or have received an ''exit stamp'' when they have attempted to renew their visas.

30 See www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=SUBSITES&id=4795f96f2 (last visited 20 February 2008).

asked that their files be closed so that they could be repatriated revealed that their decision to return was largely related to the cost of living in Lebanon (61 per cent) and fear of arrest due to their illegal status (56 per cent).[31] Fewer than 30 per cent attributed their main decision to return to improved security in Iraq. Perhaps tellingly, there have so far been few returnees from Jordan, the preferred destination of educated, middle-class Iraqis.

The vast majority of the returning refugees have returned to the capital, Baghdad, where their well-being is far from assured.[32] Returnees are finding an altered landscape, with neighbourhoods largely ethnically homogenous, reshaped by sectarian strife and blast walls, where many find their homes torched, looted, destroyed or occupied by squatters. This has resulted in secondary displacement as many have been forced to find sanctuary elsewhere, leading to a rise in the number of internally displaced.[33] The brewing housing crisis extends to millions who abandoned their homes but stayed in Iraq. In Baghdad alone, more than 300,000 people are estimated to have left one neighbourhood for another, as Sunnis fled west and Shiites to the east, often moving into recently evacuated houses. UNHCR has also received reports that Palestinians who had already been subjected to discrimination and violence have been displaced by returnees.

While the Iraqi government,[34] as well as UNHCR, is providing some funds and materials to assist returnee families, the needs are far in excess of what has

31 Multiple answers were possible.

32 On 27 November a convoy organized by the Iraqi Ministry of Transport for an estimated 800 returnees left Damascus. UNHCR and partner agencies subsequently interviewed 30 families who returned on the convoy, as well as commissioning a Rapid Assessment which covered some 6,000 internally displaced persons and refugee returnee families in 27 districts (eleven governorates) throughout Iraq. The main findings were *inter alia* that the majority of returnees (84 per cent) originated from and were returning to Baghdad Governorate, 30 per cent returned to their places of habitual residence, and 70 per cent to alternative places as a result of secondary displacement; 62 per cent of the respondents returned definitively to Iraq. Others undertook "go and see" visits to explore the security and employment situation. Others returned to collect remittances and/or school documents for their children and then go back to Syria. Others went to collect their pensions or food rations.

33 The main return area is Baghdad, but people have also returned to other places. In discussions at the community level it has been reported that people are returning, depending on their affiliation, to Sunni- or Shia-controlled areas. Sunni areas are reported to be Salah-Addin, Al-Ramadi and Samarra. Shia areas are Basra, Nasiriya, Missan, Al-Hulla and Najaf. Areas in western and southern parts of Iraq are being deemed safe by refugees, who say they can even travel through Anbar province to Baghdad quite safely now. The highest concentration of returnees is indeed in Baghdad, although reports from initial returnees indicated that the majority could not move back to their original homes and suffered secondary displacement. Baghdad's Doura neighbourhood continues to be the main return area (this was once a Christian area, but many Christians in Syria are opting not to go back there). The general feeling is, however, that many areas in Baghdad are not safe and the security situation could change dramatically. Reported mixed areas of return are Zoyuna and Al-Mansour.

34 The Iraqi government is paying each family that returns from abroad 1 million Iraqi dinars, or about $821, approximately enough for four months' rent in a middle-class Baghdad neighbourhood. It is also reported that returnees will in addition receive a monthly payout of about $120 for six months after their return. Iraq's internally displaced are entitled to 150,000 dinars, or $23, of government money a month. The government has aid programmes that could help, but they are often viewed with deep suspicion. To apply for the food programme the displaced would have to return to their place of origin to cancel the family's registration with the local council, but many are afraid to enter areas from which they were displaced.

been planned or is available.[35] In view of the mixed results of the first organized convoy, it remains unclear whether the government will organize additional voluntary repatriation convoys from Damascus or any other neighbouring state in the near future. Refugees waiting for word of the conditions in their neighbourhoods have received "conflicting" information about those who have returned.

### UNHCR's position on returns

While the reports of limited returns to Iraq are welcomed, they should not be taken as a sign that large-scale return to Iraq is possible at the present time, as the security situation remains volatile and unpredictable. Ensuring that return to Iraq can take place in safety and dignity and will be sustainable remains a challenge. Before the return of Iraqis to the centre and south can be encouraged or even promoted, there are key requirements against which the feasibility of returns is measured and which should be, or should have a reasonable expectation of being, fulfilled in the foreseeable future. From UNHCR's perspective, the core of voluntary repatriation is a return in safety and to conditions of physical, legal and material security.

The absence of accurate baseline data and the lack of comprehensive monitoring, information and reporting along routes and in areas of return make it particularly difficult to establish the extent to which current movements have been safe, dignified or voluntary. It is therefore important to obtain accurate information about return trends while providing immediate assistance to vulnerable returnees and planning for possible larger returns. To ensure that current and possible future return movements are sustainable, it is also essential that efforts be intensified to bring about reconciliation among all Iraqi factions. UNHCR cannot promote or encourage the return of refugees from abroad until the underlying causes of the violence which led to the displacement are addressed and there is a real, substantive and durable change. Until that occurs, the principle of non-*refoulement* (ban on forced return) must be respected.

## Non-Iraqi refugees

Unfortunately, non-Iraqi refugees in Iraq remain forgotten and unpopular in the midst of the violence and strategic manoeuvring over Iraq. Iranians, Syrians, Sudanese and Palestinians remain trapped in the midst of a maelstrom. UNHCR has registered over 41,000 non-Iraqi refugees who are in need of continued assistance and protection. The situation of Palestinian refugees inside Iraq and in neighbouring countries is particularly desperate. Many of the 34,000-strong

35 UNHCR is contributing US$9.5 million to a US$11 million budget aimed at immediately helping around 5,000 families or some 30,000 individuals. The assistance includes supplies such as household items, stoves, blankets and mattresses.

Palestinian community in Iraq who had been living there since 1948 and have known no other home are believed to have fled to other countries. Many today face harassment, threats of deportation, media scapegoating, arbitrary detention, torture and murder. Despite the difficulties in leaving Iraq, UNHCR believes that the Palestinian population in Iraq may have decreased to 10,000–15,000. A group of 340 Palestinians stranded in the no-man's land between Iraq and Syria, are becoming increasingly desperate, living in tents at an insecure scorpion-infested desert site. Some have harmed themselves and gone on hunger strike, and the general level of despair is acute. In mid-November last year, after an upsurge in violence, other groups of Palestinian refugees fled Baghdad for the Syrian border with the intent of at least joining them. Knowing that the Syrian authorities would turn back any further groups of Palestinian refugees entering the no-man's-land, the Iraqi authorities refused to allow the latest groups to leave its borders and have gathered them together in an open area approximately 2 km east of the Waleed border post. This group currently consists of 1,649 people, a total of 490 families. It is critical that neighbouring states and resettlement countries provide an urgently needed humane solution for those Palestinians remaining in Iraq or trapped at its borders before more are kidnapped, raped or killed. Brazil's acceptance of over 100 Palestinians stuck in a desolate camp on the Jordanian–Iraqi border for over four years, with Chile accepting a similar number from another border camp, are concrete examples of non-traditional partners recognizing the scale of the humanitarian catastrophe in Iraq and coming forward to assist. Sadly, despite persistent appeals by UNHCR and other agencies, thousands of Palestinians remain trapped in Baghdad and in grave danger from hostile militias.

## Conclusion

Meanwhile, the international community needs to acknowledge the concerns of refugee-hosting countries about the long-term nature of the Iraqi refugee crisis and address these concerns by providing meaningful assistance to governments, local and international NGOs, and international relief efforts, including through the United Nations. Countries outside the region must also offer to resettle significant numbers of the most vulnerable Iraqi refugees to relieve the burden on refugee-hosting countries in the Middle East and to help persuade them to continue to offer protection to the Iraqi refugees in their territories and at their borders. The security, political, social and financial impact on Iraq, the region and the rest of the world will be felt for many years. The Iraqi displacement is a huge and long-term challenge to the stability of the entire Middle East and must be addressed. We are witnessing the largest long-term population movement in the Middle East since Palestinians were displaced after the creation of the state of Israel in 1948. The international community has provided billions of dollars in funding for recovery and development programmes for Iraq – many of which have not been implemented because of security concerns – yet humanitarian needs

inside Iraq and in neighbouring states remain grossly neglected. UNHCR and other humanitarian agencies continue to lack the funds required to cope with the increasing needs of Iraqis and non-Iraqi refugees both within and outside Iraq. A lack of internal and external flight options will inevitably lead to ever greater vulnerability and exploitation of those most at risk. Ensuring that Iraqis seeking safety are not forced or coerced back into danger owing to a lack of assistance and protection and making sure that they are provided with access to secure and humane living conditions is the international community's responsibility, not just the responsibility of countries in the region. The year 2008 will be pivotal in determining whether the necessary conditions for the return in safety and dignity of Iraq's displaced are attained. If the international community continues to ignore Iraq's unwanted refugees and treat them as an annoying indicator of less than optimal performance in Iraq, then it will confirm a perception that where Iraq is concerned humanitarian considerations – including the provision of protection space by host countries – are not a priority. Whatever the debate on Iraq, the voluntary return of the displaced in safety and dignity and their successful reintegration has to be a primary indicator of progress. Any other indicators are secondary.

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