

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.

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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 2004⁸ 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 detention 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/openssl.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 code²⁰ 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.