The United States of American’s Global War on Terror in Iraq: International Humanitarian Law Approaches

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CONTENTS

INTRODUCTION

PREAMBLE

Branches of International Humanitarian Law

CHAPTER I  When and Where

1.1. The Global War on Terror in Iraq
1.2. Status of Iraq to June 28, 2004: Occupation

Application of International Humanitarian Law

United Nations Regulations

U.N. Security Council Resolutions
U.N. Charter

1.3. End of Occupation
Transfer of Power
Status-of-Forces Agreement

1.4. Internationalization of the Internal Armed Conflict

CHAPTER II  Actors

2.1. Principle of Distinction
Civilians and Combatants
Civilian Property and Military Targets

2.2. Combatants

2.2.1. United States of America

2.2.2. Terrorists

2.2.1. U.S. Central Command
2.2.1.2. Private Security Companies
2.2.1.3. Iraqi Security Forces

2.2.2.1. Al-Qaeda and Saddam Hussein
2.2.2.2. Al-Qaeda’s Organization in Mesopotamia
2.2.2.3. Iraqi Insurgency
2.2.2.4. Status of Al-Qaeda

Unlawful Combatants

Geneva Convention (III) relative to the
Treatment of Prisoners of War

Status of Combatants
Doubts on the Status of Combatants

Geneva Convention (IV) relative to the
Protection of Civilian Persons in Time of War

Status of Civilians
Derogations to the Status of Civilians
2.3. Protected Civilian Persons and Objects

2.3.1. Protected Civilian Persons

2.3.1.1. Victims

Killed Civilians
Wounded Civilians
Internally Displaced Persons

2.3.1.2. Categories

Ethnic and Religious Groups
Civilians Working for Foreign Governments
Government Officials and Politicians
Civilians Applying for the Iraqi Security Forces
Humanitarian Organizations and the U.N.
Media

2.3.2. Protected Civilian Objects

International Humanitarian Law
Categories
Places for Religious Worship
Cultural Property
Hospitals
Dangerous Installations

CHAPTER III Actions

3.1. Asymmetrical Warfare

3.2. Principles in the Conduct of Hostilities

Indiscriminate Attacks
Proportionality
Precautions in Attack

3.3. United States of America

3.3.1. U.S. Central Command

3.3.1.1. “Three-Block War”

Detention Facilities
Abuses in Detention Facilities
Prosecution for Taking Part in the Hostilities

3.3.1.2. Detention

Unlawful Combatants
Combatants/Prisoners of War
Civilians/“Security Internees”

3.3.1.3. Weaponry

Urban Warfare
Categories of Weapons
Depleted Uranium Weaponry
Cluster Bombs and Munitions
White Phosphorus Munitions

3.3.2. Private Security Companies

3.3.2.1. Tasks

3.3.2.2. Responsibility

3.3.3. Iraqi Security Forces
3.4. Terrorists
   3.4.1. Terrorism as a Method of Warfare
   3.4.2. Conduct in the Hostilities
      3.4.2.1. Abduction and Execution
      3.4.2.2. Suicide Attacks
      3.4.2.3. Improvised Explosive Devices

CONCLUSION

NOTES and BIBLIOGRAPHY

Regulations
Jurisprudence
Authors
INTRODUCTION

Many questions have been raised concerning the legitimacy of the Operation Iraqi Freedom, the reasons for going to war, *i.e.* the *jus ad bellum*. This paper however shall highlight the legality of the way the global war on terror in Iraq has being fought, *i.e.* the *jus in bello* between the United States of America (U.S.A.) and the affiliates of the terrorist network of Al-Qaeda. The Geneva Conventions, as the core of International Humanitarian Law, will be the point of reference of this study.

Already since the Iraqi invasion by the Coalition Forces, led by the U.S.A., the U.S.A. attacked the positions of the Iraqi Armed Forces, supposedly backed by Al-Qaeda terrorists. After the fall of the Iraqi regime of Saddam Hussein, growing insurgency involving Al-Qaeda members against the U.S.A.'s occupation emerged and continued after the handover of power to the new Iraqi authorities.

In their war on terror, the U.S.A. Armed Forces worked closely together with the new Iraqi Security Forces and with the hired private security forces. The relation between those forces needs to be examined in order to understand actions exercised by them and to comprehend the final responsibility the U.S.A. are facing. The terrorists on the other hand are qualified as unlawful combatants or unprivileged belligerents beyond any protection under the Geneva Conventions which only recognize the status of combatants or civilians. In the battle between the U.S.A. and Al-Qaeda generally fought in urban areas, many innocent victims have fallen and property has been destructed by their weaponry.

In order to stop Al-Qaeda from terrorizing the Iraqi population and preventing further attacks on the U.S.A. Armed Forces, the U.S.A. need information on the ground. That is why they detain terrorists but also civilians to gather intelligence, so they can capture other members of Al-Qaeda and prevent them from targeting. Nevertheless this campaign against terror has been discredited by ongoing abuses in the detention facilities where both terrorists and civilians are held.
PREAMBLE

Branches of International Humanitarian Law

International Humanitarian Law (IHL) is composed of conventional rules, customary law and *jus cogens*.

The codified branch of IHL is characterized by two sets of rules: the “Hague Law” limits or prohibits means and methods of warfare and the “Geneva Law” protects victims of armed conflicts, namely non-combatants and subjects no longer taking part in the hostilities. The Additional Protocols of 1977 attest to the unity and complexity of IHL. Fundamental ethical values, such as the respect of the human person and humanity, continuingly applicable in time of armed conflict and shared by IHL and human rights law, underlie the convergence and complementarity of IHL and human rights.¹

The customary nature of the IHL conventions reflects the intermingling of well-recognized principles, such as elementary considerations of humanity, and the treaty law. The *opinion juris* and State practice demonstrates the detailed and technical quality of the custom. The denunciation of conventional provisions does not exonerate the fulfillment of the obligations of the armed conflict by virtue of the usages and principles of the law of humanity. Because of its reflection of humanitarian principles, a great majority of codified humanitarian rules, already passed into the corpus of international law, has become international customary law and is hence binding for non-contracting Parties.² The International Committee of the Red Cross has made a comprehensive study of the IHL customary rules (cf. abbreviation “ICRC Rule + Number”).

Fundamental principles of IHL which States cannot derogate from acquire the status of *jus cogens*. Those peremptory norms represent obligations *erga omnes* for the States to be respected towards the international community. Consequently, States can invoke the legal protection of the peremptory principles of IHL as they are considered norms of *jus cogens* and impose obligations *erga omnes*, i.e. for every State of the international community.³

The International Court of Justice’s (ICJ) case law explains and interprets these branches. The fundamental general principles of IHL identified by the ICJ are related to the conduct of hostilities, the treatment of persons in the hands of the adversary and the implementation of IHL.
CHAPTER I

When and Where

1.1. The Global War on Terror in Iraq

The Operation Iraqi Freedom of the Coalition Forces led by the U.S.A caused the war on terror to be extended to the Iraqi territory. The U.S.A. built a case for war with Iraq based on the alliance between Iraq and Al-Qaeda. The disarmament of Iraq’s weapons of mass destruction would undermine Al-Qaeda’s stance on Iraq and reduce the threats from international terrorism, so considered the United Kingdom’s Foreign and Commonwealth Office in April 2002. The major combat operations of the Operation Iraqi Freedom ended on May 1, 2003, said U.S.A. President Bush aboard the USS Abraham Lincoln. To the Muslim world, the U.S.A. resort to the pre-emptive strike on Iraq, the occupation and the counterterrorist tactics inflicting collateral damage and civilian casualties seems very similar to what their Muslim brothers are facing in Palestine. Consequently, after the war against and the termination of the Iraqi regime, with its potential paramilitary links with Al-Qaeda, the Iraqi invasion and the extensive presence of the U.S.A. Armed Forces fuelled terrorism and Iraq became a fertile breeding ground for Al-Qaeda followers and a “target-rich environment for future jihadists”.

The sudden removal of a dictator of a strong state and replaced by a weak state, constituting a new terrorist haven, is as threatening to U.S.A. national security as a powerful regime. “Iraq is now the central front” in the global war on terror. The armed conflict between an intervening State and a terrorist organization in a host country is not an international armed conflict according to the 4 Geneva Conventions requiring armed conflict among States nor a non-international armed conflict because a State is intervening in the territory of a host State. On September 11, 2001 Al-Qaeda, not being a State actor, cannot declare war to a State and attack it because it does not have legal competence to do so, unless Al-Qaeda is acting on behalf of a State, i.e. Afghanistan and the Taliban government not recognized by the U.S.A.

Iraq is “serving as a real-world laboratory for urban combat”. Already in November 2003 (nine months since the beginning of the Iraqi War on March 19, 2003) Iraq remained deeply enmeshed in insurgency and U.S.A. forces faced growing guerrilla actions. Terrorists want to push the U.S.A. armed forces to use excessive force in order to alienate the U.S.A. from the Iraqi population. “Strategic success for the global war on terror depends on a decisive tactical victory over the armed insurgents of global terrorism in Iraq.” From then on adjustments to the U.S.A.’s military posture are necessary for focused operations on terrorists.

IHL applies to this armed conflict because of “the resort to force between two or more identifiable parties”. The fact that Parties to the conflict acknowledge the state of war or war has been declared, is less relevant for the application of IHL to armed conflict. According to President George W. Bush: “Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.” Ari Fleischer, Press Secretary of the White House, stated that “global terrorists transcend national boundaries and internationally target the innocent. The President has maintained the United States’ commitment to the principles of the Geneva Convention, while
recognizing that the Convention simply does not cover every situation in which people may be captured or detained by military forces, as we see in Afghanistan today.”

Within the border area between Iraq and Syria, Al-Qaeda is carving out new training grounds. Initially the Iraqi population did not want foreign volunteers, nowadays they are increasingly welcome. U.S.A. Special Operations Forces wanting to cut off the flow of foreign fighters coming from Syria entering Iraqi territory, are operating covertly within Syria. They gather intelligence, “identify and disrupt the lines of communications, sanctuaries and gathering points used by foreign Arab fighters and Islamist extremists seeking to wage war against American troops in Iraq”. The U.S.A. government is mounting pressure on the Syrian regime, both politically and militarily.

1.2. Status of Iraq to June 28, 2004: Occupation

Application of International Humanitarian Law

From the moment the U.S.A. Armed Forces invaded Iraq and came in contact with the Iraqi territory and population, the law of occupation applied and remained so “regardless of further tactical deployment of troops”. The U.S.A. troops had to assume their responsibility when entering the Iraqi territory. The tasks of an Occupying Power are “coextensive with its de facto control of territory”. The Occupying Powers are responsible for protecting the Iraqi population against violence of third parties, namely the insurgents.

After the defeat of Iraqi military forces, the U.S.A. Department of Defense put in place the Office of Reconstruction and Humanitarian Aid (ORHA), the post-war administration “headed by retired U.S.A. General Hay Garner, who reported to the Pentagon”. Article 42 of the 1907 Hague Conventions IV Respecting the Laws and Customs of War on Land states that: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.” The 1949 Geneva Conventions apply “to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance”. Both the U.S.A. and Iraq are parties to the Geneva Conventions, but not to its Additional Protocols of 1978.

A foreign military occupation lasted from April 2003 till June 28, 2004 under the Coalition Provisional Authority (CPA), the former ORHA, of which L. Paul Bremer III was the principal person in charge from May 6, 2003 till June 28, 2004. The Coalition Forces refer to the military forces “involved in the invasion and occupation from March-April 2003 onwards”. The hostilities persisting in Iraq since the invasion phase in March 2003 meet the conditions for an armed conflict.

United Nations Regulations

U.N. Security Council Resolutions

The existing occupation was recognized by the U.N. Security Council Resolution 1483 of May 22, 2003 calling upon the Occupying Power to fully comply with IHL, in particular the 1949 Geneva Conventions and 1907 Hague Regulations (1907 Hague Convention IV Respecting the Laws and Customs of War on Land). Only the preamble of this resolution refers to the Coalition Forces as the Occupying Powers of Iraq. However the substantive
paragraphs do not mention “Occupying Power” at all. Of course compromises at the drafting stage could explain this absence of terms.\textsuperscript{35} On April 25, 2003, D. Rumsfeld, U.S.A. Secretary of Defense suggested the U.S.A. “would become an occupying power at the moment the war was declared over”, \textit{i.e.} President Bush’s May 1, 2003 declaration on “the end of major combat operations in Iraq”.\textsuperscript{36}

Interpretation problems related to the Security Council Resolution 1483 seem to arise concerning the criteria under IHL for the status of the Occupying Power. During the drafting of this resolution, a letter of May 8, 2003 from the Permanent Representatives of the U.S.A. and the U.K. to the President of the U.N. Security Council recognizes the criteria (\textit{i.e.} authorities, responsibilities and obligations under IHL) of the Occupying Power under unified command (the “Authority”) and differentiates other States from the Occupying Power although they are already working or may work in the future under the Authority. The Security Council Resolution 1483 could take the status of the Occupying Power when it acts under Chapter VII of the U.N. Charter and is binding on member states.\textsuperscript{37}

\textit{U.N. Charter}

Article 24 of the U.N. Charter states “that the Security Council must act in conformity with the principles” of the U.N. as they are mentioned in Article 1 of the same Charter. Under Chapter VII the Security Council does not have this obligation and can derogate from the principles of justice and international law when it takes decision under this Chapter as it has done in its Security Council Resolution 1483.\textsuperscript{38} Article 1 (1) of the present Charter reads: “To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”\textsuperscript{39} Also Article 103 of the U.N. Charter justifies such Security Council Resolutions and reads: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter prevail.”\textsuperscript{40} However Article 103 of the U.N. Charter only refers to obligations under treaty law and not to customary international law obligations. The Security Council resolutions must respect \textit{jus cogens} norms and may not derogate from them. Judge Lauterpacht explained this norm in a separate opinion in the \textit{Genocide} case: “The concept of \textit{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 \textit{jus cogens}.” The law of occupation also includes peremptory norms, \textit{i.e.} \textit{jus cogens}, the Security Council cannot derogate from. Although the Security Council Resolution 1483, in its operative paragraph 5, explicitly “calls upon all concerned to comply fully with their obligations under international law, in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907”, some States, having contributed to the Stabilization Force in Iraq (SFIR), argue they are not Occupying Powers as the drafting process (cf. \textit{supra}) revealed.\textsuperscript{41}
1.3. End of Occupation

Transfer of Power

Notwithstanding the ongoing insurgency, the United States of America continue to transfer control of Iraqi territory to the Iraqi Security Forces. The CPA gradually transferred power to new Iraqi institutions it had created, such as the Interim Governing Council on July 13, 2003 and the Iraqi Interim Government on June 1, 2004. The U.N. Security Council Resolution 1546, adopted on June 8, 2004, determined the end of the Iraqi occupation under IHL on the June 28, 2004 and transferred power to the Iraqi Interim Government. This resolution “indicates that, regardless of how the situation is characterized, IHL will apply to it”. On June 28, 2004, the completely sovereign Iraqi Interim Government was invested with all government authority and replaced the CPA. Until the new permanent constitution drafted by an elected assembly the Transitional Administrative Law, passed on March 8, 2004 and prepared by the CPA, became the temporary supreme law of Iraq.

The end of the occupation implies that the responsibilities of the Coalition Forces as an Occupying Power as mentioned in the U.N. Security Council Resolutions will terminate. But the U.S.A. cannot simply handover control to the new Iraqi authorities in order not to be bound any longer by the Geneva Conventions “through the creation of puppet States”. The end of the application of the law of occupation takes place when the Occupying Powers no longer effectively control the occupied territory and population, i.e. “one year after the general close of military operations”. It is questionable whether the new Iraqi regime has taken over this effective control from June 28, 2004 onwards.

When the occupant withdraws from the territory, the occupation comes to an end but when his troops remain on the formerly occupied territory without legitimate power in its hands, the law of occupation may cease to apply depending on an international recognition. The President of the U.N.O. Security Council recognized the end of the application of the law of occupation and stated on June 28, 2004 that: “The members of the Security Council welcome the handover of full responsibility and authority for governing Iraq to the fully sovereign and independent Interim Government of Iraq, thus ending the occupation of the country”.

A Multi-National Force under unified command in Iraq, dominated by the U.S.A., was authorized by U.N. Security Council by its Resolution 1511 on October 16, 2003 “to take all necessary measures to contribute to the maintenance of security and stability in Iraq” in accordance with IHL. The Security Council authorized the continued presence and extended mandate of the Multi-National Force till December 31, 2006.

Status-of-Forces Agreement

A status-of-forces agreement (SOFA) normally determines the conditions governing the presence of foreign military forces in a sovereign state. This status, during the occupation, was circumscribed by the CPA Order No. 17 (Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors). After the end of the occupation, a status-of-forces agreement had to be signed with the newly elected Iraqi Government. The same CPA Order No. 17 stipulates that this order, determining the status of the Coalition Forces, “shall remain in force for the duration of the mandate authorizing the Multi-National Force under U.N. Security Council Resolutions 1511 and 1546 and any subsequent relevant resolutions and shall not terminate until the departure of the final element of the MNF from Iraq, unless rescinded or amended by legislation duly enacted and having the force of law”. In absence
of a SOFA, which should be negotiated between the U.S.A. authorities and the Iraqi Government whenever it would become sovereign, Coalition Forces can be prosecuted under Iraqi territorial jurisdiction when they commit offences punishable under Iraqi law or tried by the International Criminal Court (ICC) if the Iraqi transitional authorities ratifies the Statute of Rome of the ICC. According to Article 98 of the Rome Statute “the Court may not proceed with a request for surrender which would require the requested State (Iraq if it ratifies the Rome Statute of the ICC, which it has failed to do so) to act inconsistently with its obligations under international law (if the sovereign Iraqi Government signed a SOFA with the U.S.A. government)”.  

1.4. Internationalization of the Internal Armed Conflict

The continued presence of U.S.A. military forces after the handover of full sovereignty to the Iraqi Interim Government must be consented by the inviting state. The Iraqi authorities will do so by a request. If they fail to do this there is no intervention by invitation and the U.N. Charter’s prohibition of the use of force will be violated. Iraqi Interim Government, exercising the sovereignty, must also effectively control its territory, lest the legality of any invitation will be questioned. A government controlling the majority of the territory and fighting a rebellion can legally request foreign intervention. A government facing “an established insurrection” cannot. The Security Council Resolution 1546 recognized “the request conveyed in the letter of 5 June 2004 from the Prime Minister of the Interim Government of Iraq to the President of the Council, which is annexed to this resolution, to retain the presence of the Multi-National Force”. At the time of its request, i.e. June 5, 2004, the Interim Iraqi Government did not exercise the full sovereignty, it would exercise from June 28, 2004 onwards, so its invitation for outside intervention was illegal. Nonetheless the Security Council itself, by its Resolution 1546, adopted under Chapter VII, authorized “the presence of the Multi-National Force in Iraq at the request of the incoming Interim Government of Iraq”.  

Since the end of the formal occupation, the hostilities are considered an internal or non-international armed conflict. The applicable rules are Article 3 common to the Geneva Conventions of 1949, binding “each Party to the conflict” and customary IHL, including many provisions of the 1977 Protocols considered to being customary IHL as well. But notions of combatants, combatant immunity and prisoner of war are absent in internal armed conflict. But the internal character of the conflict is weakened by the presence of the non-Iraqis involved in terrorist/insurgent activities and the non-Iraqi Multi-National Force.  

Moreover “whenever a state chooses to send its armed forces into combat in a previously non-international armed conflict in another state – whether at the invitation of that state’s government or a rebel party – the conflict must then be considered an international armed conflict”. In the Tadic Case, the International Criminal Tribunal for the former Yugoslavia (ICTY) stated that “in case of an internal armed conflict breaking out on the territory of a State, it may become international (or depending upon the circumstances, be international in character alongside an internal armed conflict) if another State intervenes in that conflict through its troops”. Foreign armed forces can support government troops of another country against its insurgency. The belligerent relation between the armed forces of the third country intervening in the host country and the troops of the insurgent party is one of international nature. Even in the Nicaragua Case the ICJ qualified as internal the armed conflict between the Contras and the government troops of Nicaragua and determined that “the involvement of the United States itself attracted the regulation applicable to international armed conflicts,
hence the Geneva Conventions in a whole (or else the customary laws of war”). So the characterization as international of armed conflict “depends upon the direct involvement of more than one State” 67 So the intervention of outside States, supporting either the government armed forces or insurgent groups, internationalizes the internal armed conflict between those government forces and insurgents. Consequently the 1949 Geneva Conventions apply to all conflicts within the host State. Further distinctions between the international armed conflict during which the foreign State fights against the government armed forces or insurgents and the non-international armed conflict involving government troops and insurgents, are illogic, leading to the application of different rules of the law of war. “The general internationalization of the conflict in case of foreign intervention” benefits to the coherence of the law of armed conflict. 68

In Iraq the Iraqi Interim Government requested the U.S.A. government to intervene on June 5, 2005. The Iraqi Interim Government already anticipated the internationalization of its non-international armed conflict, from June 28, 2004 onwards through the handover of power, between the new sovereign Iraqi regime and the insurgents with international terrorists in its ranks. The U.S.A. responded positively on their invitation for outside intervention and kept its troops on the Iraqi territory. Consequently the 1949 Geneva Conventions as a whole applies to this internationalized internal armed conflict and the conflict is not ruled by Article 3 common to the same Conventions only.
CHAPTER II

Actors

2.1. Principle of Distinction

All warring parties to the armed conflict in Iraq, the U.S.A leading the Coalition Forces, the Iraqi Security Forces and the insurgent groups, are bound by IHL. Since the end of the formal military occupation on June 28, 2004, the initial international armed conflict continues under a different designation, namely a non-international (internal) armed conflict which has been internationalized (cf. supra). Regardless the definition of the conflict, all parties have to maximize civilian protection and minimize civilian harm by preventing unnecessary suffering and ensuring humane treatment.

Civilians and Combatants

The distinction between combatants, taking direct part in the hostilities, and civilians must be upheld. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians (ICRC Rule 1). On the one hand combatants do not enjoy the “protection against attack accorded to civilians”. A combatant or prisoner of war status cannot be granted. “Combatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. If they fail to do so, they do not have the right to prisoner of war status (ICRC Rule 106).” It is also prohibited to attack persons recognized to be hors de combat. “A person hors de combat is anyone who is in the power of an adverse party, anyone who is defenseless because of unconsciousness, shipwreck, wounds or sickness or anyone who clearly expresses an intention to surrender, provided he or she abstains from any hostile act and does not attempt to escape (ICRC Rule 47).” On the other hand “civilians are protected against attack unless and for such time as they take a direct part in hostilities” (ICRC Rule 6). If they do participate directly in the hostilities, they lose their combatant immunity from being targeted and are subjected to domestic law for their engagement in the conflict.

Civilian Property and Military Targets

The distinction between legitimate military objectives and civilian objects on which no attacks may be directed is also a fundamental rule of IHL. “In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action (1) and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage (2).” (ICRC Rule 8) IHL characterizes all objectives as civilian unless they meet the conditions ((1) and (2)) referred to in the above customary rule. “The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.” (ICRC Rule 7)
2.2. Combatants

2.2.1. United States of America

2.2.1.1. U.S. Central Command

The U.S.A. Department of Defense is the political organization of the U.S.A. Armed Forces. The three military departments (Army, Navy, with its Marine Corps as second armed service and Air Force) report to it. The military departments recruit, train and equip their forces. But the unified combatant commands are responsible for the operational control of the Armed Forces; in Iraq is this the U.S. Central Command. Together with the other coalition partners the U.S. Central Command, they form the Multi-National Force – Iraq, as authorized by the U.N. Security Council Resolution 1511. The Multi-National Force – Iraq englobes three units, namely the Multi-National Security Transition Command – Iraq, the TF-134 Detainee Operations and the Multi-National Corps – Iraq, respectively responsible for “organizing, training, equipping and mentoring Iraqi Security Forces throughout the country”; “coalition detention, interrogation, legal referral, operations above division level” (cf. infra), and coordination of detainee operations between the Department of Defense, Department of State, Coalitions Forces, Iraqi government, “inter-agency organizations and non-governmental human rights organizations”; and “command and control of operations throughout Iraq” which is divided in 6 areas of responsibility. Each area has its units reporting to the Multi-National Corps – Iraq, 4 of which are exclusively headquartered by the U.S.A. Armed Forces, namely the Multi-National Division – Baghdad, Multi-National Division – North, Multi-National Division – West, Logistical Support Area Anaconda. The Multi-National Division Central South is headquartered by the Polish Armed Forces and the Multi-Division – South East by “elements of the British Military”.

2.2.1.2. Private Security Companies

The private security/military companies, “also known as private security or risk management companies or defense contractors”, are manned by the world’s Special Operations Forces. The private military companies are registered under domestic law and hence are subjects of national law, not of international law. Both domestic law of some states and international law do not prohibit their establishment, but “some of their activities could be banned under the 1980 Mercenaries Convention” entered into force on October 20, 2001 forbidding the recruitment and the use of mercenaries. This army of mercenaries appears in Iraq and many of them are hired by the Coalition Forces. But private military contractors engaging in combat operations can only deal with legitimate clients like recognized States. They are considered as mercenaries when combating for illegitimate clients like rebel groups. Mercenaries join armed forces for “personal gain” and thus are directly taking part in the hostilities. They do not benefit from the combatant or prisoner of war status.

These private companies are “for-profit militias”, some roughly 20,000 added to the U.S.A. military presence of 130,000. A U.S.A. agency contracts with a prime contractor that has itself other security companies as subcontractors, which contracts also with different companies hiring security guards as independent contractors. Most of them are on the U.S.A. public payroll, “either directly through contracts with government agencies or indirectly through subcontracts with companies hired to rebuild Iraq”.
The private military contractors are, according to the 1949 Geneva Conventions, civilians authorized to accompany armed forces in the field. As civilians they may not be the target of military attack. However they could be an object of military attack when they perform tasks in “direct support of military operations as longs as they directly participated in the hostilities” and lose the legal protection civilians are granted by the Geneva Convention IV. The United States Navy Manual states that “civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy personnel or destroy enemy property lose their immunity and may be attacked. Direct participation may also include civilians serving as guards, intelligence agents, or lookouts on behalf of military forces. Direct participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person’s behavior, location and attire, and other information available at the time.

Military subcontractors are civilians and “not entitled to take a direct part in hostilities” lest they lose the protective status of civilians and this has serious implication for their legal status when they are captured and face criminal liability. Military subcontractors and non-State subcontractors are treated differently when captured. The first benefit from the prisoner of war status as the Hague Regulations guarantee: “Individuals who follow an army without directly belonging to it, such as […] contractors, who fall into the enemy’s hands and whom the latter thinks it expedient to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.” Similar provisions in the 1949 Geneva Convention III entitle supply contractors to prisoner of war status. Non-State subcontractors on the other hand are considered to be civilians when captured and consequently are not entitled to prisoner of war status. Nevertheless they are protected by the provisions of the 1949 Geneva Convention IV. If they do take direct part in the hostilities, they will benefit from the privileges of the prisoner of war status until a competent tribunal determines their status. When their status seems to that of a civilian, they may be tried for “their unlawful participation” to the hostilities. According to Article 68 of the 1949 Geneva Convention IV: “Protected persons 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 the installations used by them, shall be liable to internment or simple imprisonment, provided that the duration of such internment or imprisonment is proportionate to the offence committed. Furthermore, internment or imprisonment shall, for such offences, be the only measure adopted for depriving protected persons of liberty.” “Civilians can be held responsible under international law for violations of the laws of war committed during their unlawful participation.”

The private security guards violating IHL commit war crimes. Besides their individual responsibility the state having the authority over the private military companies “remains responsible under international law for the contractor’s actions”. Nonetheless the United States Field Manual states that “managing discipline of the contractor employees is the responsibility of the contractor’s management structure, not the military chain of command. (…) It is the contractor who must take responsibility and direct action for his employee’s conduct.”

2.2.1.3. Iraqi Security Forces

In order to fight against terrorism and insurgency, the Iraqi Security Forces include security and military forces. The Iraqi Ministry of the Interior controls the Iraqi Police Service, the
Iraqi Border Police and the Facilities Protection Service, respectively responsible for law and order operations; “managing transportation corridors in proximity to border outposts”; and protection of infrastructure against insurgent targeting. The Counter-Insurgency Force is attached to the Iraqi Police Service and fighting insurgency. The Iraqi Ministry of Defense controls the Iraqi Armed Forces with its 3 divisions, namely the Iraqi Intervention Force, combating terrorists and foreign anti-Coalition forces within Iraq, the Iraqi Counter-Terrorist Force and the Iraqi Counter-Terrorist Commandos unified in the Special Operations Force.\(^9\)

Article 59 (B) of the Iraqi interim constitution reads: “Consistent with Iraq's status as a sovereign state, and with its desire to join other nations in helping to maintain peace and security and fight terrorism during the transitional period, the Iraqi Armed Forces will be a principal partner in the multi-national force operating in Iraq under unified command pursuant to the provisions of United Nations Security Council Resolution 1511 (2003) and any subsequent relevant resolutions. This arrangement shall last until the ratification of a permanent constitution and the election of a new government pursuant to that new constitution.”\(^10\)

Also the Iraqi National Guard, known as the Iraqi Civil Defense Corps (ICDC), “were able to deploy operationally” with the U.S.A. Originally the ICDC was controlled by the Iraqi Ministry of Interior. The CPA Order No. 73, referring to the ICDC as “a component of the Iraqi Armed Forces”, empowers the Iraqi Ministry of Defense to control it but remained its units “under the operational control of local Coalition assets”.\(^10\)

2.2.2. Terrorists

2.2.2.1. Al-Qaeda and Saddam Hussein

The presence of the terrorist organization Ansar al-Islam in northern Iraq, headed by Abu Mud’ab al-Zarqawi and affiliated with the Al-Qaeda terrorist network, “an assemblage of Moslem fanatics from all parts of the world”,\(^102\) proved the alleged nexus between the regime of Saddam Hussein and Al-Qaeda and made a casus belli.\(^103\) Osama bin Laden’s fatwa (1998) against the U.S.A. made clear that Al-Qaeda and Saddam Hussein have a mutual enemy. Both have different ideologies but seemed to show some “willingness to be tactically flexible” to serve their ultimate goals.\(^104\) But the foreign volunteers invited by Saddam Hussein and his Baathist regime to fight during the 2003 war were not related to Osama bin Laden’s Al-Qaeda. Despite Saddam Hussein’s recruitment and equipment effort of “candidates for martyrdom”, few suicide attacks were carried out during that period. Only well into the occupation the impact of suicide missions of foreign jihadis grew substantially.\(^105\)

2.2.2.2. Al-Qaeda’s Organization in Mesopotamia

Tandhim al-Qa’ida fi Bilad al-Fafidayn (Al-Qaeda’s Organization in Mesopotamia), formerly Jama’at al-Tawhid wal-Jihad (Monotheism and Jihad), is founded by Abu Mus’ab al-Zarqawi and has 15 battalions (Kata’ib) carrying out operations under his flag.\(^106\) This Al-Qaeda network has pan-Islamic objectives and welcomes an upsurge anti-U.S.A. attacks to impede victory on the infidels and restore the (Abbasid) caliphate.\(^107\) In its October 13, 2005 communiqué Tandhim al-Qa’ida turned its focus on “collaborators working with the tyrannical occupation, whether Shiite collaborators or Sunni traitors”. By this way the internal (Iraqi) enemy was designated as “top priority target”.\(^108\) U.S.A. officials attribute the controversial attacks to this powerful and well-structured group.\(^109\) The mother network Al-Qaeda is “a hierarchical top-down group with defined positions, tasks and salaries”.\(^110\) Although Al-Qaeda is a decentralized organization and gives responsibility to the local cells,
its leadership defines the enemies and the rules of combat. So did Abu Mus’ab al-Zarqawi in 2005 and chose Iraqis as spokesperson (Aby maysa ra al-‘Iraqi) and head of the military operations in order to demonstrate resonance with the local population and its “patriotic credentials”.

### 2.2.2.3. Iraqi Insurgency

One can explain the continued intensity of insurgency and increasing recruitment by terrorist organizations by the persistent western occupation of Iraq, the political uncertainty after the January 2004 elections, the perception of new Iraqi regime as a client state of the U.S.A and the use of force by the U.S.A. military forces. Regular terrorist attacks have been launched in Iraq by resistance networks with involvement from foreign (non-Iraqi) volunteers linked with Al-Qaeda. Iraq operates as a magnet for young paramilitary jihadists coming from the region and beyond. The Iraqi resistance carried out by the remnants of the former regime, wanting to return to power, and by the Islamists from the Zarqawi network, pledging allegiance with Al-Qaeda, who want to restore the caliphate in Baghdad and to establish a State based on Islamic prescriptions, will show further fissures between the two factions as they carry out different objectives.

It is still not clear to what extent the suicide bombers are Iraqis or made up foreign paramilitaries. The Al-Qaeda affiliates are only a small proportion of the insurgents in Iraq as opposed to what the U.S.A. claimed. Perhaps ten per cent of the insurgents are paramilitary recruits form the Western Gulf States and North Africa and fit easily in Arab societies. They enter Iraq, the new centre of the war against Coalition Forces after Afghanistan, for training and combat experience. The near-daily use of suicide bombers is the major feature of the resurrection. “Supports of Saddam Hussein picked each target, Al-Qaeda related groups planned the operations meticulously in the light of its experience with suicide bombings in Africa and Saudi Arabia, Ba’athists, the so called Sunni nationalists, former supporters of the Ba’ath Party loyal to the ancient Iraqi regime of Saddam Hussein who are a small faction of the Iraqi insurgents and have already military training and weaponry, took charge of the financial and logistical side and procured vehicles, weapons and explosives, and then mercenaries or Arab “jihadis” who were prepared to commit suicide were entrusted with the actual implementation.”

### 2.2.2.4. Status of Al-Qaeda

**Unlawful Combatants**

“Terrorist are unlawful belligerents, meaning non-state actors whose actions, in time of peace, would qualify as armed, interstate hostilities if the same were attributed to a state; or whose conduct, in a time of legally recognizable armed hostilities, would otherwise be attributed to combatants but for the fact that they are intervening in international or internal armed conflict without legal status or authority to act as an armed force.” Only states and “recognized armed forces or groups under responsible command” have “the right to conduct armed conflict, lawful belligerency”. The terrorists have no legal right to wage war under international law as they lack organization and violate the IHL during the hostilities, i.e. they attack and kill civilians “in a time of international armed conflict”.

In his military order U.S.A. President G.W. Bush II concluded that “international terrorists, including members of Al-Qaeda, have carried out attacks on the United States diplomatic and
military personnel and facilities abroad and on citizens and property within the United States, on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces". Consequently they become “unlawful combatants”, as qualified by the U.S.A., and responsible for their war crimes. Even the European Parliament “agrees the prisoners currently held in the U.S. base in Guantanamo do not fall precisely within the definition of the Geneva Convention”. Only lawful soldiers benefit from the special treatment provided by the provisions of the Geneva Convention III. Thus “unlawful combatants” are, if captured, held for their criminal activity but still deserve humane treatment.

In its *Quirin* Case (1942) the U.S.A. Supreme Court defined combatancy where “lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful”. Hence unlawful combatants can be held administratively without trial as the *Quirin* Case opted. Their detention takes places without the privileges of a prisoner of war and they can be prosecuted for acts punishable under the domestic criminal legislation.

The alleged Al-Qaeda terrorists are considered as “illegal combatants” to avoid the protections of IHL, namely the 1949 Geneva Convention relative to the Treatment of Prisoners of War. Creation of unlawful combatants is a fiction to preclude those persons the rights of civilians and of prisoners of war. Unlawful combatants do not exist under IHL. One is either a civilian tried for participation in the hostilities under national and international criminal law or a combatant granted to prisoners of war status and subjected to the 1949 Geneva Conventions and particularly to its war crimes provisions.

**Geneva Convention (III) relative to the Treatment of Prisoners of War**

**Status of Combatants**

The Geneva Convention relative to the Treatment of Prisoners of War (Geneva Convention III) protects combatants “who are acting in their lawful capacity and are captured during a lawful engagement”. Article 4 of 1949 Geneva Convention III states that “A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces. (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war. […]” The 1907 Hague Convention IV respecting the Laws and Customs of War on Land determines similar conditions for lawful combatancy. Only during an international armed conflict the prisoner of war status is granted to combatants belonging to one party of the conflict when falling into the hands of the enemy.

On the one hand prisoner of war status is automatically granted to the members of regular armed forces because of “their link with their *de jure* or *de facto* government and the armed forces to which they belong”. On the other hand resistance fighters, not part of the armed
forces of a Party to the conflict, have prisoner of war status when fulfilling the conditions of Article 4A. (2) of the 1949 Geneva Convention III (cf. supra) and Article 1 of the Annex to the 1907 Hague Convention IV respecting the Laws and Customs of War on Land. Of course both Parties to the conflict accuse each other’s armed forces as a whole and not its members individually of gross violations of IHL. Combatants forfeit their protection as prisoners of war when, engaged in hostilities or in military operations prior to the targeting, they do not distinguish themselves from civilians, which constitutes a breach of IHL. Having lost their prisoner of war status they can be sentenced for war crimes, because of the breach of the principle of distinction under IHL, and under national law for having participated to the hostilities.

The U.S.A. treated combatants who do not fulfill those conditions as unlawful combatants. Still the U.S.A. acknowledge “that captured members of the Iraqi armed forces, but not Taliban or Al-Qaeda forces in Afghanistan, are entitled to prisoner of war status”. During the invasion in Afghanistan in 2001 the U.S.A. Administration stated that the 1949 Geneva Convention III applied to the Taliban armed forces but individual captured Taliban combatants would not necessarily be qualified as prisoners of war. “With respect to the Taliban, the Taliban also did not wear uniforms, they did not have insignia, they did not carry their arms openly and they were tied closely at the waist to al-Qaida”, they had not a responsible command and their regime was not recognized by the U.S.A., made that “they would not rise to the standard of a prisoner of war”.

Nevertheless many Iraqi soldiers violated IHL by feigning their combatant status and should not have been entitled to this protective status. They were dressed as civilians and thus unrecognizable as soldiers. The Iraqi regime was linked with the international terrorist network Al-Qaeda the affiliates of which are also dressed as civilians. Because of the increasing asymmetrical warfare, both Iraqi soldiers and the Al-Qaeda terrorist network concealed their identity in order to face the most powerful army in the world. In most of the cases terrorists were recognizable by wearing headscarves, so did the Fedayeen militia “which might qualify as a recognizable emblem.” This garment “may enable the wearers to be identified as belonging to a particular armed group, and thus distinguishing themselves from other fighters and also from civilians.”

Supposing that, by the nexus between the Saddam Hussein’s regime, the Al-Qaeda fighters “as members of militias or volunteer corps” formed part of the Iraqi armed forces, although like the Iraqi soldiers failed to respect the principle of distinction between members of armed forces and civilians reflected in a particular dress code, they should be treated as prisoners of war in case of capture by the Coalition Forces. Still confusion on the battlefield remains and “the distinction between combatants and civilians may not always be apparent”. During the Vietnam War the U.S.A. granted POW status to the members of the North Vietnamese Armed Forces according to the 1949 Geneva Convention III, while members of the Vietcong guerrilla were not granted this protective status. Nevertheless they were treated like POW on conditions that they were actually taking part in the hostilities and carried their arms openly. No conditions concerning the wearing of uniforms were imposed by the U.S.A. guidelines. State practice of wearing uniforms in the armies does not imply an IHL obligation to wear them. Wearing civilian clothes is illegal when belligerents adopt those means of killing or wounding the “individuals belonging to the hostile nation or army” treacherously, i.e. perfidy. When the combatants continue feigning the civilian status, they entail the loss of their prisoner of war status.
Doubts on the Status of Combatants

Article 5 of the Geneva Convention III states that: “The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”

The U.S.A.’s 1997 Army Regulation, a military manual reflecting the U.S.A.’s state practice, entitles a competent tribunal, not specifically a military one as it may be judicial or administrative in nature, in charge of determining the prisoner of war status “of any person not appearing to be entitled to prisoner of war status” and asserting ‘that he or she is entitled to treatment as a prisoner of war”. Besides enemy prisoners of war, retained personnel or civilian internees and the other detainees not classified in the latter categories are “persons in the custody of United States Armed Forces” and “shall be treated as enemy prisoners of war until a legal status is ascertained by a competent authority”. The competent tribunal “shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists”.

Despite the general presumption of prisoner of war status for those persons taking part in the hostilities, serious doubts may arise under Article 5(2) of the 1949 Geneva Convention III concerning the prisoner of war status granted under Article 4 of the same Convention when a person falls into the hands of the enemy power, especially for the “legal recognition of combatants of guerrilla warfare”. Article 5(2) does not specify what “due process rights are applicable to prisoner of war status determination procedures”. Customary IHL recognizes a fair procedure affording all essential judicial guarantees (ICRC Rule 100).

Although the U.S.A. are not a party to the 1977 Geneva Protocol I Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflict, the U.S.A. demonstrate their willingness to recognize voluntarily Article 45(2) of this Protocol I as customary law.

Article 45 protects the persons who have taken part in the hostilities, when “a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner of war status before a judicial tribunal and to have that question adjudicated […].” This customary rule is contained in the above mentioned 1997 U.S.A. Army Regulation (cf. supra).
Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War

Status of Civilians

Unlawful combatants being persons who take direct part in hostilities “without being entitled to do so” and who do not comply with the conditions of a prisoners of war status as described in Article 4 of the 1949 Geneva Convention III, they do not benefit from this protective status when falling into the hands of the enemy. Nevertheless the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War could grant them a protection. Like the International Criminal Tribunal of Yugoslavia stated in the Delalic Case: “271. […] If an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, provided that its Article 4 requirements are satisfied.”

The application ratione personae of this Geneva Convention IV specifies that “persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”. But “nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State whose hands they are”. The preparatory work of the Geneva Convention IV explains its difficult wording of the exception on receiving the civilian protective status. On the one hand, when the international terrorists are nationals of States which are not a Party to the Geneva Convention IV, they are not protected by it; when they are nationals of neutral states or co-belligerent states, having normal diplomatic relations with the state in whose hands their nationals are found, and are on the territory of a belligerent state, they are not protected by the Geneva Convention IV; when they are nationals of co-belligerent state, having normal diplomatic relations with the state in whose hands their nationals are found, and are in the occupied territory they are neither protected by the Geneva Convention IV. A diplomatic protection guaranteed by their state would be sufficient to safeguard the rights of those international terrorists. On the other hand, when they are nationals of a neutral state, (not) having normal diplomatic relations with the state in whose hands their nationals are found, and are in the occupied territory, they are protected by the Geneva Convention IV. Consequently international terrorists fallen into the hands of the U.S.A. Armed Forces and held in the occupied territory of Iraq are protected by the provisions of the 1949 Geneva Convention III.

The protection ratione materiae the international terrorists receive depends on the territory where they find themselves under the control of the Party to the conflict or the Occupying Power, i.e. “Part III, Sections I, II and IV of the Geneva Convention IV for persons who end up in enemy territory (not for nationals of neutral states or co-belligerent states, having normal diplomatic relations with the state in whose hands their nationals are found, found on the territory of a belligerent (enemy) state), and Part III, Sections I, III and IV of the same convention for persons who end up in occupied territory (not for nationals of a co-belligerent state, having normal diplomatic relations with the state in whose hands their nationals are found in the occupied territory)”. 158
Derogations to the Status of Civilians

Still Article 5 of the Geneva Convention IV derogates to these protections in specific circumstances: “Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State. Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security requires, be regarded as having forfeited rights of communication under the present Convention [...]”. So, international terrorists found in the territory of the belligerent state, i.e. Party to the conflict, cannot benefit from the rights and privileges under the Geneva Convention IV since the exercise of their rights and privileges, if they were entitled to claim them, are prejudicial to the national security of that State. When these persons are in the territory occupied by the Occupying Power they only lose the advantage of their rights of communication under the Geneva Convention IV whenever “absolute military security it requires”. Presumably unlawful combatants have, by their “activity hostile to the security of the State/Occupying Power”, been directly participating in the hostilities “without being entitled thereto”. “In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.”

These minimum standards of humane treatment (“Civilians and persons hors de combat must be treated humanely.” (ICRC Rule 87)) provided without distinction (“Adverse distinction in the application of IHL based on race, color, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria is prohibited” (ICRC Rule 88)) are also reflected in customary IHL rules.

2.3. Protected Civilian Persons and Objects

2.3.1. Protected Civilian Persons

“Civilian are persons who are not members of the armed force. The civilian population comprises all persons who are civilians.” (ICRC Rule 5) “Civilians are protected against attack unless and for such time as they take a direct part in hostilities.” (ICRC Rule 6) “Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs.” “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited...” All persons and groups engaged in the hostilities must consider the principle of distinction to be of paramount importance.

2.3.1.1. Victims

Killed Civilians

Since the Iraqi invasion up to March 19, 2005 “67,365 civilians have been reported killed or wounded”. 24,865 civilians were killed during this period and “most occurred in highly-
populated areas in and around towns and cities”. 12,000 civilians were killed by insurgents “over 18 months up to June 2, 2005” and 10,500 of them were Shiite. Most of the deaths had security, military (non-active), political or government occupations. Others “encompass a wide cross-section of Iraqi society”. 169

The Iraqi Ministry of Health stated that the civilian casualties, since June 2004, are divided in two categories: “Casualties of car bombs and other clearly identifiable terrorist attacks are recorded as being caused by terrorist incidents. All other casualties are recorded as military action… The casualties may have been killed or injured by terrorist or coalition forces. Coalition forces include Iraqi police, Iraqi security forces, and the Multi-National Forces.” According to the Iraq Body Account data “the vast majority [of the dead recorded by mortuaries] did not die for reasons directly related to the insurgency but as the result of the crime wave scouring the capital’s streets”. 170

During the invasion phase, from March till May 1, 2003, “30% of civilian deaths occurred”. From May 1, 2003 onwards civilian deaths were “twice as high in year two (11.351) as in year one (6.215). The violent deaths caused by criminals, anti-occupation forces, i.e. “armed forces attacking military and other occupation-related targets” and unknown agents, i.e. “those who do not attack obvious military/strategic or occupation-related targets”, have risen over the entire period. 42.3% of civilian deaths are caused by U.S.A. led military operations, 36% by criminals and only 9% by anti-occupation forces. 9.270 civilians were killed by U.S.A. led force of which 6.882 (74%) occurred during the invasion phase and 2.388 after May 1, 2003. In the latter period 14.131 civilians were killed by non U.S.A. led troops including 1.047 “crossfire deaths also involving U.S.A led forces”. 171

Wounded Civilians

Of the 42,500 civilians reported wounded most of them had security (police) occupational activities. Limbs and head injuries constitute the major injury categories (70%). During the invasion phase 41% of the reported wounded civilians occurred.

Internally Displaced Persons

The Fallujah assault made 250,000 inhabitants flee the counterinsurgency by the U.S.A. military actions. In mid-April 2004 only 90,000 returned to their homes, the others remain internally displaced persons and are camped out in refugee settlements. 172 The Iraqi Ministry for Displacement and Migration (MODM) further supports voluntary return in “safe and dignified” conditions. 173 “A. Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand.” (ICRC Rule 129) 174 A total blockade was completed and denied access to civilians and media. Finally incendiary munitions mopped up the remaining insurgency. 175 “In case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated.” (ICRC Rule 131) 176 “Displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist.” (ICRC Rule 132) 177 “The property rights of displaced persons must be respected.” (ICRC Rule 133) 178 The Guiding Principles on Internal Displacement determine that “property and possession left behind by internally displaced
persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use”.

2.3.1.2. Categories

Ethnic and Religious Groups

Worshippers are the object of attack of terrorists. Insurgents have attacked Christian, Kurdish and Shiite Muslim communities, suspected as collaborators, in Iraq by (car) suicide bombs, improvised explosive devices (roadside bombs), murder and execution. Abu Mus’ab al-Zarqawi stated that “the al-Qaeda Organization in the Land of Two Rivers is declaring all-out war on the Rafidha [a pejorative term for Shiites], wherever, they are in Iraq” and continuing that “any religious group that wants to be safe from the blows of the mujahedeen must (disavow) the government of Ja’afari and its crimes. Otherwise it will suffer the same fate as that of the crusaders”. Women especially have been attacked by kidnappings, killings, intimidations in order to refrain them from working in public arenas so they should stay at home and obey conservative customs of Islam. Neighborhoods and religious sites have been brutally targeted.

Civilians Working for Foreign Governments

Iraqi and foreign civilians (suspected of) working for foreign powers in Iraq, such as the Multi-National Force or different foreign governments, are punished for the perceived collaboration by killings, abductions and beheadings “even though they were not directly engaged in the hostilities”.

Government Officials and Politicians

Assassination attempts, roadside bombs, suicide attacks have killed municipal, provincial and national government politicians and officials, their employees, their family members. Insurgent groups threaten, assault, abduct and kill them. Also judges have been targets of attack. All those people are viewed to have served U.S.A. interests.

Civilians Applying for the Iraqi Security Forces

Applicants for Iraqi police or armed forces are not yet members of those forces. Under IHL soldiers and police “engaged in military operations” are legitimate objectives. Although the groups of men signing up for Iraqi security forces have the intention to join, they still benefit from their combatant immunity.

Humanitarian Organizations and the U.N.

“Humanitarian relief personnel must be respected and protected.” (ICRC Rule 31) Iraqi and foreign staffs of humanitarian organizations and the U.N. have been targeted by insurgents carrying out killings, suicide attacks, abductions and executions. Médecins Sans Frontières commented on the attacks involving the International Committee of the Red Cross that “attacks seriously put in doubt the very possibility of providing humanitarian aid in Iraq”, continuing that “deliberately targeting civilians and independent aid agencies is a war crime. The perpetrators of this attack on the ICRC, an organization with a long history of providing humanitarian assistance to Iraqis, confront us with the question whether all aid organizations
could be targets. The attack was an attack on the very heart of humanitarianism”. Humanitarian relief workers have also been accused of collaboration.\textsuperscript{188}

**Media**

“Civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in the hostilities.” (ICRC Rule 34)\textsuperscript{189} Iraqi and foreign civilian journalists have been kidnapped, executed, attacked with bombs. Also their lodgings and new stations were under attack, e.g. attacks on hotels in Baghdad hosting international journalists.\textsuperscript{190} Civilian journalists are protected by 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War. War correspondents on the other hand are “persons who accompany the armed forces without actually being member thereof…. , provided that they have received authorization from the armed forces which they accompany”.\textsuperscript{191} They are also civilians, but enjoy the protection of 1949 Geneva Convention III, so in case of capture by enemy forces they are entitled to the prisoner of war status.\textsuperscript{192} War correspondents cannot be the object of military attack although they are at greater risks of collateral damage.\textsuperscript{193} Finally, the so-called embedded journalists are incorporated in the armed forces, follow the military operations of the military unit they are part of and are assimilated to war correspondents having the same protection of the 1949 Geneva Convention III.\textsuperscript{194}

2.3.2. Protected Civilian Objects

**International Humanitarian Law**

“Civilian objects are protected against attack, unless and for such time as they are military objectives.” (ICRC Rule 10)\textsuperscript{195} “In sieges and bombardments all necessary steps must be taken to spare, as far as possible, building dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.”\textsuperscript{196} “Civilian objects are all objects that are not military objectives” (ICRC Rule 9)\textsuperscript{197}

Insurgents may not entrench a mosque or store weaponry in it. “Each party to the conflict must protect cultural property: A. All seizure of or destruction or willful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited. B. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited.” (ICRC Rule 40)\textsuperscript{198}

**Categories**

**Places for Religious Worship**

Foreign jihadists targeted mosques.\textsuperscript{199} “Suicide and car bombs” were directed against “Christian churches”.\textsuperscript{200} Attacks on buildings of religious worship (e.g. Shiite Muslim mosques in Baghdad and Karbala\textsuperscript{201}) are illegitimate according to the Hague Regulations.\textsuperscript{202}
Cultural Property

Some of the attacks are carried on mosques having great significant importance to religious communities, e.g. the attack on the golden dome of the holy mosque in Samarra. Cultural property is defined as “(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular [...].” Registered cultural property is protected and immune “from any act of hostility.”


Customary IHL also protects cultural property and considers it as civilian and consequently not a legitimate object of targeting, unless it meets the qualifications of military objective, for example when insurgents are hiding in a mosque. “Each party to the conflict must respect cultural property: A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives. B. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.” (ICRC Rule 38)

Hospitals

“The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however only cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded.” Terrorists also have attacked hospital facilities, although they are not object of targeting.

Dangerous Installations

Terrorists also attack petroleum pipelines and refineries. “Particular care must be taken if works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, and other installations located at or in their vicinity are attacked, in order to avoid the release of dangerous forces and consequent severe losses among the civilian population” and the natural environment. (ICRC Rule 42) Decisions to attack such installations, becoming military objectives, necessitate precautions in attack. “Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.” (ICRC Rule 43) “Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimise, incidental damage to the environment. [...]” (ICRC Rule 44)
CHAPTER III
Actions

3.1. Asymmetrical Warfare

“Each party to the conflict must respect and ensure respect for IHL by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control.” (ICRC Rule 139)

The inequality of the warring parties and the asymmetry in warfare makes it more difficult for the military weaker party to overcome its adversary’s military strength. The “asymmetry in precision compels the disadvantaged side to respond asymmetrically.” Still the terrorists resorting to acts of terrorism as a method of warfare, which is prohibited, must respect the principle of proportionality, namely balance the anticipated military gain and collateral civilian damage against each other. They have recourse to unlawful methods of warfare such as perfidious attacks without accepting any body of laws and rules. The U.S.A. military forces also avoid open confrontation and counter by special covert operations, less visible to humanitarian observers as well, but “carried out be lawful combatants wearing uniforms” otherwise it would be perfidious actions. Nevertheless, asymmetrical warfare implies unconventional warfare, being defined by the U.S.A.’s Defense Department as “a broad spectrum of military and paramilitary operations, normally of long duration, predominantly conducted by indigenous or surrogate forces who are organized, trained, equipped, supported and directed in varying degrees by an external source. It includes guerrilla warfare and other direct offensive, low visibility, covert, or clandestine operations, as well as the indirect activities of subversion, sabotage, intelligent activities, and evasion and escape.” Thus Special Operations Forces and Special Forces under the control of the U.S.A. Special Operations Command and including the “US Army Special Forces, US Army Rangers, special mission units, the 160th Special Operations Aviation Regiment, Civil Affairs and Psychological Operations Forces, US Navy SEALs, US Air Force special tactics teams, and fixed wing and rotary wing air assets” are engaged in such unconventional warfare.

“Counterinsurgency is proving to be a bloodier affair than conventional combat.” The U.N. Security Council and the U.N. Human Rights Commission insist on the observation of the obligations laid down by international law in general and by human rights law, refugee law and international humanitarian law in particular when combating terrorism. The Al-Qaeda terrorist organization must be combated by all means in accordance with the Charter of the U.N. The war on terror does not justify “totalitarian methods.” But aggressive U.S.A. military tactics to fight insurgents and terrorists may create more of them.

3.2. Principles in the Conduct of Hostilities

The law applicable in armed conflict governs questions concerning the unlawful loss of life in hostilities. IHL, as a lex specialis in contrast with the lex generalis, i.e. international law, determines the arbitrary deprivation of life during the conduct of hostilities. International human rights law protects the right not to be arbitrarily deprived of one’s life and also during armed conflict through the use of certain weaponry.
The obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity.” (ICRC Rule 140) The principle of reciprocity, i.e. the exceptio non adimpleti contractus can not be invoked either by the U.S.A. or the terrorists to excuse them to apply the obligation imposed by IHL.

**Indiscriminate Attacks**

Indiscriminate attacks and attacks causing disproportionate civilian harm are prohibited by IHL. “Indiscriminate attacks are prohibited.” (ICRC Rule 11) “The use of weapons which are by nature indiscriminate is prohibited.” (ICRC Rule 71) “Indiscriminate attacks are those (a) which are not directed at a specific military objective; (b) which employ a method or means of combat which cannot be directed at a specific military objective; or (c) which employ a method or means of combat the effects of which cannot be limited as required by IHL; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.” (ICRC Rule 12)

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Precision attacks are also subject to the rule of distinction and discrimination. “Unguided weapons are less accurate the higher the altitude or the greater the distance from the target” than guided weapons. Consequently, less precise munitions like fragmentation weaponry (cluster bombs) are less acceptable than those intelligent weapons. The principle of proportionality is an additional restriction on attacks that should be carried out respecting the principle of discrimination between military and civilian objectives. Armed forces should compare the anticipated military advantage and the probability of civilian harm. The de facto nexus between the accuracy of precision strikes and the certainty of “less explosive force needed to achieve the desired probability of damage” corresponding to the anticipated military gain is not a matter of IHL. Despite “the greater a strike’s precision”, the proportionality should always be calculated in the preparation of attacks.

**Proportionality**

Both Multi-National Force/Iraqi government forces and insurgents must abstain from using “violence to life and person, in particular murder of all kinds (cf. decapitation), mutilation, cruel treatment and torture (cf. Abu Ghraib), taking of hostages, outrages upon personal dignity, in particular humiliating and degrading treatment (cf. Abu Ghraib) and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court” that affords the defendant all judicial guarantees. The insurgents on the other hand are forbidden to use measures of terrorism against the civilian population.

The principle of proportionality implies the prohibition of “launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated (1) (ICRC Rule 14)” and obliges combatants to use select
means of attack avoiding or minimizing harm to civilians (2). Those requirements must be met before launching an attack expectedly causing incidental civilian casualties or harm. Explosive weaponry, such as “air- or ground-launched bombs, improvised explosive devices and artillery, cause the greatest number of killed and wounded compared the injury-to-death ratio of small arms fire.

Precautions in Attack

Conventional forces using heavy firepower are designed for the battlefields, while Special Operations Forces can deal more easily with urban warfare situations. Only the enemy’s military may be neutralized and must be distinguishable from the civilian population which may not be attacked. Though urban environment is civilian in nature, military operations are conducted in those settings. Civilians are involuntarily involved in the hostilities in urban areas. Thus, major military offensive strategies must be replaced by surgical targeting and weapons technology in order to respect with diligence the provisions of IHL, i.e. civilian immunity from attack, unless the civilian directly takes part in the hostilities through “acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.”

“The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited.” (ICRC Rule 70) The 1868 St Petersburg Declaration considers “that the progress of civilization should have the effect of alleviating as much as possible the calamities of war; that the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men; that this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; that employment of such arms would, therefore, be contrary to the laws of humanity”. The 1980 Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects repeats in its Preamble that international law limits “the right of the parties to an armed conflict to choose methods or means or warfare” and “prohibits the employment in armed conflicts of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”

IHL imposes legal obligations upon the warring parties to reduce unnecessary suffering of the combatants as well of those not taking part in the hostilities and to protect the latter. Feasible precautions “to ensure the lawfulness of a military attack” should be taken by both attackers and defenders respectively, verifying if the objectives are military and protecting civilian population and objects under their control against the effects of attack. “Each party to the conflict must do everything feasible to verify that targets are military objectives” (ICRC Rule 16) “In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.” (ICRC Rule 15) "The parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attack."
3.3. United States of America

3.3.1. U.S. Central Command

3.3.1.1. “Three-Block War”

Military operations are conducted in urban settings, where in one block armed forces are fighting with the enemy soldiers, in another block insurgents are suppressed and in the final block humanitarian aid is facilitated. Individuals from the 3 blocks, i.e. armed forces, insurgents and civilians, are captured and interrogated for “strategic, operational, or tactical reasons”.

Detention Facilities

Until May 2003, i.e. the end of the major combat operations, the U.S.A. Armed Forces had their own detention and interrogation facilities. From June 2003 onwards detention and treatment of individuals has been commended to the U.S.A. Military Police with its different Brigades. After the military victory on the regime of Saddam Hussein, the U.S.A. “set up a network of prisons and detention facilities in Iraq where individuals apprehended during the military operations are held and interrogated”. The U.S.A. has 10 major detention facilities around Iraq: Abu Ghraib Prison, known as the Baghdad Central Correctional Facility or BCCF, Camp Bucca in Umm Qasr, Talil Airforce Base south of Baghdad, known as Whitford Camp, Al-Rusafa, the former Deportations’ Prison or Tasfirat in Baghdad, Al-Kadhimiyya in Baghdad for women, Al-Karkh in Baghdad for juveniles, Al-Diwaniyya Security Detainee Holding Area, the Tikrit detention facility, the Mosul detention facility and the MEK or Ashraf Camp nearby al-Ramadi. In the al-A’zamiya district of Baghdad is located a detention centre dealing with terrorism cases in Iraq. The U.S.A. also holds temporarily detainees on board of U.S.A. warships.

“Persons deprived of their liberty must be held in premises which are removed from the combat zone and which safeguard their health and hygiene.” (ICRC Rule 121) International human rights obligations need to be respected and a State must prosecute perpetrators even when the violation of the terrorist suspects’ fundamental rights takes place outside its territory and “under the jurisdiction of a third State”. Those rights include the right not to be tortured, not to be treated cruelly, inhumanely or degradingly and “the right to life and physical integrity”. The Human Rights Committee stated that “… the Article 2 obligation requiring that States Parties respect and ensure the Covenant [International Covenant on Civil and Political Rights] rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, (…) either in the country to which removal is to be effected or in any country to which the person may subsequently be removed”. The Coalition Forces can extradite all terrorist suspects under their control, i.e. the Occupied Territory till the handover on June 28, 2004, from then onwards to third countries for interrogation unless there are potential violation of their fundamental rights committed by those states. This international trade in terrorists involves Arab countries like Algeria, Egypt, Jordan, Morocco, Pakistan, Qatar, Saudi-Arabia, and Yemen, where the suspected terrorists could be tortured “to elicit intelligence”. In addition, customary IHL forbids secret detention because persons deprived of their liberty should stay in connection and correspond with their relatives. Detainees are being held incommunicado, without judicial guarantees.” For reasons of
imperative military necessity, and then only as an exceptional and temporary measure”
delegates of the International Committee of the Red Cross may be prohibited to have access to such detention facilities. “Arbitrary deprivation of liberty is prohibited.” (ICRC Rule 99)

Abuses in Detention Facilities

“In military operations with purpose of stopping terrorist activities, there has been a tendency for counter-terrorist forces to violate basic legal restraints. There have been many instances in which prisoners were subjected to mistreatment or torture. In some cases, excesses by the government or by intervening forces may have contributed to the growth of a terrorist campaign against it. External states supporting the government have sometimes contributed to such excesses.” said A. Roberts. The Geneva Conventions are restraints to be respected, e.g. during interrogation of detainees and give protection to the alleged terrorists “whether they are members of armed forces or civilians (“illegal fighters”)” because military deployment and operations are involved to fight terrorism. Captured insurgents and civilians on the battlefield are reported being summarily executed, tortured and mistreated by U.S.A. military forces. Enemy combatants or civilians captured can not be coerced in order to obtain viable information, according to the Geneva Conventions.

Civilians, persons hors de combat (ICRC Rule 87) and members of armed forces must be treated humanely in detention. All individuals captured by the enemy during armed conflict benefit from the status of either prisoner of war (1949 Geneva Convention III) or as interned civilians (1949 Geneva Convention IV). The ICTY affirms that “there is no gap between the Third and Fourth Geneva Conventions. If an individual is not entitled to the protection of the Third Convention as a prisoner of war… he or she necessarily falls within the ambit of [the Geneva Convention IV], provided that its art. 4 requirements [defining protected persons] are satisfied.” Thus all persons taking part in an armed conflict of international nature can not “be detained without reference to the Geneva Conventions.”

Suspected insurgents held at Abu Ghraib prison and other detention facilities on the Iraqi territory are reported being tortured and mistreated, so revealed an U.S.A. military investigation. The ICRC reported that abuses in the Abu Ghraib detention facility appeared to be mounting to torture practices and were “systematic” and in some cases “part of the standard operating procedures by military intelligence personnel to obtain confessions and extract evidence”. Both U.S.A. military and civilian personnel are “credibly alleged to have abused, tortured or killed detainees”. Murder of prisoners of war and civilians is prohibited. (ICRC Rule 89) “Persons deprived of their liberty must be provided with adequate food, water, clothing, shelter and medical attention.” (ICRC Rule 118) Every person in the power of the adverse party should be treated humanely and indiscriminately. “The convictions and religious practices of civilians and persons hors de combat must be respected.” (ICRC Rule 104)

Because of media reporting on mistreatment of Iraqi detainees by U.S.A. Coalition Forces, the U.S.A. conducted their own investigation “into the 800th MP Brigade’s detention and internment operations”. Finally Major General A.M. Taguba issued his report on February 28, 2004 and described “incidents of sadistic, blatant, and wanton criminal abuses… inflicted on several detainees…[which were] systemic and illegal” and presented a list of offences such as “physical abuse, videotaping and photographing naked male and female detainees, posing detainees in various sexually explicit positions for photographing, forcing detainees to remove their clothing and remain naked for several days at a time, a male MP guard having sex with a
female detainee and using military working dogs, without muzzles, to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee”. The Taguba Report noted that all prisoners of war and civilian internees should get the “full protection of the Geneva Conventions, unless the denial of these protections is due to specifically articulated military necessity”, for example “no visitation to preclude the direction of insurgency operations”. Ill-treatment during interrogation by psychological and physical coercion has been systematic “with regard to persons arrested in connection with suspected security offences or deemed to have an ‘intelligence’ value”. Following methods are used: “hooding, handcuffing with flexi-cuffs, beatings and other forms of physical abuse, solitary confinement, threats, denial of fresh air, being packed naked, acts of humiliation such as being made to stand naked against the wall of the cell with arms raised or with women’s underwear over the head while being laughed at by guards, including female guards, and sometimes photographed in this position, and being subjected repeatedly over several days, sometimes naked, as well as exposure while hooded, to loud music or excessive heat”. The U.S.A. military prohibits certain activities: “Current operations and deployments place United States Armed Forces into USCENTCOM [United States Central Command] AOR [Area of Responsibility] countries where local laws and customs prohibit or restrict certain activities which are generally permissible in western societies. Restrictions upon these activities are essential to preserving U.S./host nation relations and combined operations of U.S. and friendly forces. In addition, the high operational tempo combined with often-hazardous duty faced by U.S. forces in the region makes it prudent to restrict certain activities in order to maintain good order and discipline and ensure optimum readiness.”

**Prosecution for Taking Part in the Hostilities**

Nonetheless the captured (non)Iraqi insurgents can be prosecuted under domestic Iraqi law for taking part in the hostilities. The Iraqi Penal Code (Law No. 111 of 1969) remains in effect and punishes different categories of insurgent activities offending the internal security of the state/property, endangering the public/life and physical safety of persons and affecting the individual freedom and its deprivation. The Occupying Power may repeal or suspend these domestic Iraqi criminal laws “in cases where they constitute a threat to its security” or an obstacle to international legal standards. Pursuant to the CPA’s Order No. 3 the insurgents may be prosecuted. “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 in their own language. The effect of these penal provisions shall not be retroactive.” Both Iraqi and foreign insurgents are subject to the Iraqi criminal law and the Transitional Adminstrate Law of the Occupying Force. Still combatants captured and held in detention cannot be convicted for having taken part in the hostilities, but they can in case they committed war crimes.

**3.3.1.3. Detention**

**Unlawful Combatants**

Detention of the insurgents by the occupation forces is concentrated in three major locations, the U.S.A. controlled Abu Ghraiib near Baghdad and Camp Bucca near the Kuwait border and finally the U.K. controlled Al-Shuaiba near Basra in the South of Iraq. Five per cent of the detained insurgents do not have the Iraqi nationality. On the one hand, the U.S.A.’s position on the Global War on Terror displays further engagement in its international armed conflict
with Al-Qaeda and designates IHL as the appropriate legal framework for the detention and transfer of Al-Qaeda prisoners. On the other hand, the alleged Al-Qaeda terrorists are considered as “illegal combatants” to avoid the protections of IHL. Because they were no party to the Geneva Conventions and did not meet the requirements of lawful combatancy, Al-Qaeda detainees could not be treated as prisoners of war. Nevertheless the U.S.A. Armed Forces “continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity”. Those unlawful combatants must “for the most part” be treated “in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate”. U.S.A. Secretary of Defense D. Rumsfeld continued that the Geneva Conventions “did not apply precisely’ in Iraq but were ‘basic rules’ for handling prisoners”. This illegal combatants are deprived of every right guaranteed by the 1949 Geneva Conventions and can be held indefinitely.

Because the conflict in Iraq can be described as a traditional war, contrary to the war in Afghanistan against Al-Qaeda who is not a High Contracting Party to the Geneva Convention, the U.S.A. automatically applied (from the beginning of the conflict) the 1949 Geneva Conventions to the individuals captured during the international armed conflict and its subsequent military occupation. Later on the U.S.A. administration made some adjustments to its policy and considered Iraqis in the power of the Coalition Forces as prisoners of war whilst some non-Iraqi prisoners seized by U.S.A. armed forces in Iraq are not protected by the 1949 Geneva Conventions. “The correct legal formulation is, it is submitted, that armed and unarmed hostilities, wherever occurring, committed by persons other than those entitled to be treated as prisoners of war or peaceful civilians merely deprive such individuals of a protection they might otherwise enjoy under international law and place them virtually at the power of the enemy… International law deliberately neglects to protect unprivileged belligerents because of the danger their acts present to their opponents.”

On several occasions (November 8, 2004 (Hamdan v. Rumsfeld), January 19, 2005 (Khalid v. Bush) and January 31, 2005 (In re Guantanamo Detainees Cases), the U.S.A. District Court for the District of Columbia issued decisions regarding the legality of detention of enemy combatants, accused of linkage with Al-Qaeda and held at Guantanamo Bay, a U.S.A. naval base in Cuba, on the basis of the U.S.A. Constitution, federal statutes and international law and their status. In its November 8, 2004 and January 31, 2005 judgments following the Supreme Court’s decision of June 28, 2004 (Rasul v. Bush), the District Court ruled that the Guantanamo Bay U.S.A. naval base may be considered as the equivalent of U.S.A. sovereign territory. Of course fundamental rights incorporated in the U.S.A. Constitution, namely in its Fifth Amendment (“the right not to be deprived of liberty without due process of law”) and the 1949 Third (treatment of prisoners of war) and Fourth (the protection of civilian persons in time of war) Geneva Conventions, being self-executing, are granted to the non-U.S.A. detainees held at Guantanamo Bay. Nevertheless in its January 19, 2005 decision, the District Court did not recognize the constitutional rights of the non-resident detainees, captured outside U.S.A. territory during armed conflict. Judicial evaluation of the rights of detainees and the conditions of their detention, by virtue of the U.S.A. constitutional system, is an exclusive responsibility of Congress (legislative power) and the President (executive power). The military, with the President as its Commander in Chief, can only capture, detain or charge individuals as U.S.A. enemy combatants when Congress has given authority to do so. Although the President exercises his powers independently under the U.S.A. Constitution, the U.S.A. Supreme Court Justice Robert Jackson stated in his “concurring opinion in the Youngstown Steel Case (1952) that ‘when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb…”.”
Customary IHL prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment”. Consequently, an Executive Act cannot violate this established customary worldwide accepted rule of law that can not be derogated from. But the U.S.A. Justice Department “has concluded that customary international law cannot bind the Executive Branch under the Constitution, because it is not federal law” and that according to a “Supreme Court precedent, any presidential decision in the current conflict concerning the detention and trial of Al-Qaeda or Taliban militia prisoners would constitute a controlling Executive Act that would immediately and completely override any customary international law”. Moreover, the doctrine of military “necessity and self-defence could provide justifications that would eliminate any criminal liability” by U.S.A. officials torturing Al-Qaeda prisoners in order to obtain “intelligence vital to the protection of untold thousands of American citizens”. Consequently the U.S.A. President’s inherent powers permit to evade the prohibition on torture practices and the laws of war.

Moreover, the doctrine of military “necessity and self-defence could provide justifications that would eliminate any criminal liability” by U.S.A. officials torturing Al-Qaeda prisoners in order to obtain “intelligence vital to the protection of untold thousands of American citizens”. Consequently the U.S.A. President’s inherent powers permit to evade the prohibition on torture practices and the laws of war. But the U.S.A. Administration stated, in the aftermath of the Abu Ghraib scandals, that “the President made no formal declaration with respect to our conflict in Iraq because it was automatic that Geneva would apply... The war in Iraq is covered by the Geneva Conventions, so our policies there must meet those standards, in addition to the torture convention”. In addition, the passed amendment of Senator J. McCain forbids torture of detainees in U.S.A. custody during their interrogation, but the President, as Commander in Chief, reserves the right to bypass the law in order to protect and defend the country.

Non-Iraqis can be legally returned to their country but “No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”. When the unlawful combatants or “security detainee” are transferred from the U.S.A. government to the government of another state, one talks about rendition, not about extradition which is “a rendition from one country to another through a legal process normally on the basis of a bilateral treaty”. Torture has been outsourced. So, some of the captured individuals in Iraq during the armed conflict and its subsequent occupation by the U.S.A., are characterized as terrorist suspects and are transferred to other countries or “detained outside the national territory of the State holding them”. Those rendered terrorists not enjoying the protections of the prisoner of war status are protected by the 1980 Convention Against Torture.

**Combatants/Prisoners of War**

Al-Qaeda terrorists are not members of the armed forces, yet could be considered as voluntary militias. When they meet the requirements of Article 4A. (2) of the 1949 Geneva Convention III (cf. supra), they could benefit from the prisoner of war status. When they fight alongside the armed forces of a belligerent Party, in casu Iraq, they should have been granted prisoner of war protection “until such time as their status has been determined by a competent tribunal”. As soon as the competent tribunal denies the prisoner of war status, those individuals/Al-Qaeda terrorists engaged in belligerent acts “do not enjoy combatant privilege and may therefore be prosecuted for the mere fact of having engaged in combat”. Still these “unprivileged belligerents” can have protection under Article 4 of the Geneva Convention IV.

The combatant privilege entitles the combatant to participate directly in the hostilities, to a prisoner of war status “upon capture and immunity from prosecution by his captor for his lawful acts of war. Nevertheless when at the moment of capture or surrender the combatant
violates the principle of distinction, he loses his prisoner of war status and may thus be tried for participation in the hostilities.\(^{310}\)

Prisoners of war can not be interned in other than “premises located on land”.\(^{311}\) The United States Army Regulation 190-8 (AR 190-8) requires that enemy prisoners of war are interned on land, but expressly authorizes to detain these prisoners of war on naval vessels also civilian internees and other detained persons in three cases: 1. When picked up at sea, they may be temporarily held on board as operational needs dictate, pending a reasonable opportunity to transfer them to a shore facility or to another vessel for evacuation to a shore facility; 2. They may be temporarily held on board naval vessels while being transported between land facilities; 3. They may be temporarily held on board naval vessels if such detention would be appreciably improve their safety or health prospects.\(^{312}\) Moreover the 1949 Geneva Convention III adds that “prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger […].”\(^{313}\) “Prisoners of war shall be released and repatriated without delay after the cessations of active hostilities”,\(^{314}\) unless indictment for criminal offences.\(^{315}\)

Transfer of prisoners of war from the occupied Iraq for trial in the U.S.A. or somewhere else for violations of IHL is allowed by a U.S.A. Federal Statute (18 U.S.C. § 2441).\(^{316}\) “Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.”\(^{317}\)

The U.S.A. are a party to the Convention Against Torture, but according to a classified memorandum the President did not respect this Convention for having made a reservation relative to Article 16 of the Convention Against Torture obliging States “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment”, when signing the Convention Against Torture, the U.S.A. only condemn that kind of torture defined in Article I of the U.S.A. Constitution, lest their own Constitution is violated.\(^{318}\) This limitation/reservation only exists for this Convention, other “acts of violence or intimidation and… insults and public curiosity” vis-à-vis prisoners of war being prohibited according to the 1949 Geneva Convention and constituting grave breaches.\(^{319}\)

Civilians/“Security Internees”

Civilians suspected of unlawful combatancy or terrorism must be treated in accordance with the Geneva Conventions.\(^{320}\) Unlike combatants, civilians protected by the 1949 Geneva Convention IV and falling into the power of the enemy cannot be detained unless “the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment” even so when the civilians directly took part in the hostilities.\(^{321}\) Detention of civilian internees is also possible when they are suspected and accused of offences by Occupying Power.\(^{322}\) “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of
intimidation or of terrorism are prohibited”\(^{323}\). According to Article 27 of the 1949 Geneva Convention IV “protected persons are entitled, in all circumstances, to respect their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against acts of violence or threats thereof and against insults and public curiosity”\(^{323}\). Photographing, videotaping naked detainees, in explicit sexual positions, eating pork, ... are enormous insults to Muslim habits and customs. When these recordings are divulged, one violates the Geneva protections against public curiosity (cf. supra)\(^{324}\). On the one hand, the release of images, “even with obscured faces and genitals, would be inconsistent with the obligation of the United States to treat [the] individuals depicted humanely and would pose a great risk of subjecting those individuals to public harm and curiosity.” On the other hand, the “dissemination of such photographs may serve the fundamental policy of the Convention that its provisions be enforced by exposing breaches thereof.”\(^{325}\). Moreover “rape and other forms of sexual violence are prohibited”. (ICRC Rule 93)\(^{326}\). In addition, “no physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.”\(^{327}\)

Other grave breaches constitute “wilful killing, torture or inhuman treatment, including biological experimenting, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, ... or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention [IV]”\(^{328}\). In its Human Rights Report (September 2005) the United Nations Assistance Mission for Iraq (UNAMI) expressed its concern that “mass detentions of persons without warrants continue to be used in military operations by MNF-I. Reports of arbitrary arrest and detention continue to be reported to the Human Rights Office. There is an urgent need to provide remedy to lengthy internment for reasons of security without adequate judicial oversight.”\(^{329}\)

As after June 28, 2004 power was handed over to the sovereign Iraqi government, the conflict became internal. U.N. Security Council Resolution 1546 authorizes the MNF to intern/hold protected persons in detention in Iraq “where this is necessary for imperative reasons of security”. So does the 1949 Geneva Convention IV: “If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment. Decision regarding such assigned residence or interment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention.”\(^{330}\) The CPA Memorandum No. 3 specifies procedures for arrest and detention for both criminal detainees and “security internees”, the latter held for “imperative reasons of security”, detained by the MNF after the handover of power and states that the “operation, condition and standards of any internment facility established by the MNF shall be in accordance with Section IV of the Fourth Geneva Convention (with chapters on Places of Internment, Food and Clothing, Hygiene and Medical Attention, Religious, Intellectual and Physical Activities, Personal Property and Financial Resources, Administration and Discipline, Relations with the Exterior, Penal and Disciplinary Sanctions, Transfer of Internees, Deaths and finally Release, Repatriation and Accommodation in Neutral Countries)”\(^{331}\). IHL uses the terminology of civilian internees instead of “security internees”\(^{332}\).

On the one hand persons detained already before June 28, 2004 “may be held indefinitely”, on the other hand individuals who are detained and interned since the handover “must be either
released from internment or transferred to the Iraqi criminal jurisdiction no later than 18 months from the date of induction into an MNF internment facility”, according to the same CPA Memorandum.\footnote{333} But the indefinite detention of security internees captured before June 28, 2004 is based on a provisional legislation. The U.N. Working Group on Arbitrary Detentions assesses that “with regard to derogations that are unlawful and inconsistent with States’ obligations under international law, the Working Group reaffirms that the fight against terrorism may undeniably require specific limits on certain guarantees, including those concerning detention and the right to a fair trial. It nevertheless points out that under any circumstances, and whatever the threat, there are rights which cannot be derogated from, that in no event may an arrest based on emergency legislation last indefinitely, and it is particularly important that measures adopted in states of emergency should be strictly commensurate with the extent of the danger invoked.”\footnote{334} Normally “internment shall cease as soon as possible after the close of hostilities.”\footnote{335}

The U.S.A. Central Intelligence Agency (CIA) has already transferred many non-Iraqi prisoners out of Iraq.\footnote{336} “Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.”\footnote{337} Article 76 of 1949 Geneva Convention IV stipulates that “protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein.”\footnote{338} But the protection of these persons/non-Iraqi nationals is limited during the occupation period when they are “definitely suspected of or engaged in activities hostile to the security of the State,” namely the Occupying Power and are “regarded as having forfeited rights of communication”.\footnote{339} According to Article 4 of the 1949 Geneva Convention which determines the persons protected by its provisions, applies also to non-Iraqi nationals of a state having normal diplomatic relations with the U.S.A. If Iraqi immigration law consents with deportations of those persons protected by the Geneva Conventions and “deemed to be illegal aliens”, Iraq cannot invoke these provisions of his immigration law for its failure to protect those individuals as prescribed in the Conventions.\footnote{340} Despite this extraterritorial detention, IHL remains applicable on “protected persons whose release, repatriation or re-establishment may take place after such dates [one year after the general close of military operations] meanwhile continue to benefit by the present Convention [IV]”.\footnote{341}

\subsubsection{3.3.1.4. Weaponry}

\textbf{Urban Warfare}

The unpredictability of urban-based insurgency necessitates other than heavy firepower responses.\footnote{342} U.S.A. military forces repeatedly use aggressive tactics and shoot indiscriminately in residential areas. These indiscriminate and disproportionate attacks violate IHL.\footnote{343} For each military action the question should be raised whether it is effective and whether its generated destructive power contributes to a direct military gain.\footnote{344} “Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited.” (ICRC Rule 13)\footnote{345} Substantial military force, including tanks, artillery, strike aircraft, assault helicopters, short-range ballistic missiles and cluster bombs cause civilian casualties, refugees and massive structural damage.\footnote{346} In order to save innocent Iraqis, the U.S.A. military better uses manpower instead of firepower, special operations forces and snipers instead of tanks and artillery.\footnote{347}
According to the U.S.A. Doctrine for Joint Urban Operations, military operations take place in “a topographical complex and its adjacent natural terrain, where manmade construction or the density of non-combatants are the dominant features.” Urban warfare requiring adequate U.S.A.’s tactics in order to retake towns and villages, such as Fallujah, Karbala and al-Qa’im, are varying substantially. Initially the U.S.A. Air Force massively bombed their targets. Then elite troops entered the areas and were backed by tank units and helicopters. The local population was forced to leave their homes and goods and was evacuated in “large and exposed empty lots.” Military action necessitates precaution in order to avoid “collateral damage to civilians and structures”.

“Precision and high-power, high-technology weaponry cause a higher-ratio of child-to-adult deaths than relatively primitive devices such as handheld firearms and manually-triggered roadside bombs”, because “stand-off weapons” create a greater distance between the combatants and their intended objectives. Consequently bystanders are most likely to be caused unintended harm. Aerial bombings during the invasion phase, i.e. from March 20 till May 1, 2003, caused sixty nine per cent of all aerial killings. Their destructive power is a direct consequence of “their general indiscriminateness, however precisely targeted”.

Weapons “incapable of distinguishing between civilian and military targets” are illegitimate.

Categories of Weapons

**Depleted Uranium Weaponry**

During the war in Iraq about 3.000 tons of depleted uranium (DU), known as “silver bullets”, in munitions exploded primarily in highly populated areas, especially in cities. These weapons are used to burn through tank armor: once exploded the tiny particles containing depleted uranium can be inhaled by individuals and cause major health problems that kill indiscriminately. Generally tank units fire such munitions, e.g. “on March 28, 2003, a tank unit fired two 120mm DU rounds down the main road of urban Kifl, creating a vacuum effect that ‘literally sucked guerrillas out from their hideaways into the street, where they were shot down by small arms fire or run over by the tanks.’” The effects of depleted uranium munitions on environmental and human health conditions are indiscriminate because they contaminate them. The prohibition of such indiscriminate weaponry is “cardinal” according to the International Court of Justice. Customary IHL also prohibits “launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated”. (ICRC Rule 43) “Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such [feasible] precautions.” (ICRC Rule 44)

**Cluster Bombs and Munitions**

Cluster bombs on the one hand are dropped by U.S.A. aircraft, open in the air, fragment into smaller bomblets and scatter over a substantial area. Most of these sub-munitions explode directly upon their impact, but five up to thirty per cent do not ignite. Cluster munitions on the other hand, “contained in artillery projectiles or rockets, are fired from armed forces on the ground, scatter in bomblets of which many fail to ignite. These unexploded bombs are similar to landmines although the 1997 Ottawa Convention on the Prohibition of the Use,
Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction does not ban these weapons under its scope.\textsuperscript{360} Still such bomblets may be indiscriminate and thus prohibited.\textsuperscript{361} Cluster bombs considered in their “post-attack state, not as direct weapons of bombardment” are causing many civilians and children deaths by its unexploded ordnance, acting as mines.\textsuperscript{362} “The use of weapons which are by nature indiscriminate is prohibited” (ICRC Rule 71)\textsuperscript{363} When such weaponry is used in densely populated zones, its use is considered to be indiscriminate as the ICTY qualified them in its \textit{Galic} Case “attacks which strike civilians or civilian objects without distinction… as direct attacks against civilians”.\textsuperscript{364}

\textbf{White Phosphorus Munitions}

White phosphorus munitions were used during the Fallujah assault in November 2004. Its incendiary capability dislodges enemy combatants/insurgents out of their hiding places in order to make them more vulnerable for high explosive munitions attacks. Fired into the air enemy positions can be illuminated since this weaponry ignites when it comes in contact with oxygen. It also creates “smoke screens to cover military maneuvers and to dislodge insurgents then “exposed to high explosive ordinance”. Rests of this munitions falling down and ignited can fall down on individuals and burn through their skins and clothing. U.S.A. military officials acknowledged that white phosphorus munitions “proved to be an effective and versatile munition. We used it for screening missions at two breeches and, later in the fight, as a potent psychological weapon against the insurgents in trench lines and spider holes when we could not get effects on them with high explosive munitions. We fired ‘shake and bake’ missions at the insurgents, using white phosphorus to flush them out and high explosive munitions to take them out”.\textsuperscript{365}

The U.S.A. are party to both the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare and the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and of Their Destruction (CWC). In order to forbid the use of white phosphorus munitions under the CWC, white phosphorus should be considered a toxic chemical or precursor and should be used for purposes prohibited under the CWC.\textsuperscript{366} A toxic chemical means “any chemical which trough its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals”.\textsuperscript{367} A precursor is “any chemical reactant which takes part in any stage in the production by whatever method or toxic chemical”.\textsuperscript{368} It is not white phosphorus inherent toxicity that harms humans, but “after coming into contact with oxygen” its ignition causes heavy burning wounds.\textsuperscript{369} White phosphorus munitions are not classified as chemical weapons, but its direct use against insurgents could do so.\textsuperscript{370} “The use of poison or poisoned weapons is prohibited.” (ICRC Rule 72) The U.S.A. state that only weapons designed to kill or injure by its poisonous effect are prohibited, not those which incidentally poison.\textsuperscript{371}

Another effect is that of a riot control agent meaning “any chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure”.\textsuperscript{372} The use of white phosphorus munitions is not the reflection of an intention to kill or temporary incapacitate by the exposure to “toxic chemicals produced in the fire and smoke generated by detonation of white phosphorus munitions”.\textsuperscript{373} Moreover “each State Party [to the CWC] undertakes not to use riot control agents as a method of warfare”, i.e. “the smoke’s chemicals dislodged the insurgents, who were then exposed to high explosive ordinance”.\textsuperscript{374} Riot control agents can only be used for non-military purposes, such as “law enforcement including domestic riot
control.” Nonetheless U.S.A. Secretary of Defense D. Rumsfeld considers the use of riot control gas for military purpose “perfectly appropriate”, e.g. “when there are enemy troops, in a cave in Afghanistan, and you know there are women and children in there with them, and they are firing out at you, and you have the task of getting at them. And you would prefer to get at them without also getting at women and children, or non-combatants.” Similar situations may occur during Iraqi urban warfare.

The U.S.A. are not party to the 1980 Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons. Nevertheless customary international law relative the use of incendiary weapons is binding for the U.S.A: “If incendiary weapons are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.” (ICRC Rule 84) The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person hors de combat.” (ICRC Rule 85) But the U.S.A. consider the use of white phosphorus munitions, being incendiary weapons, against combatants permissible despite its anti-personnel use.

The U.S.A. but not Iraq are party to 1980 Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. “White phosphorus munitions are not by nature indiscriminate weapons because they can be directed at specific military objectives and used in ways that minimize incidental loss of civilian life and damage to civilian property.” The intention to use white phosphorus munitions was to dislodge insurgents to make them vulnerable to high explosive munitions attacks and not to destroy the enemy “through incendiary-related death and injuries”.

3.4.2. Private Security Companies

3.3.3.1. Tasks

The U.S.A. government outsources tasks which are not essential to warfare and makes a clear distinction between offensive operations of military forces and defensive duties of private protectors. The private security industry defends the CPA’s employees and facilities, supply convoys as well as the reconstruction efforts. Moreover the privatization of detention facilities and prisons means that many private security employees work in that sector. Although those companies perform privatized “military-style tasks, often on behalf of the U.S.A. government”, they are not under the command of the armed services. The military leadership only has a mere coordination, not a control relationship with them. The U.S.A would be “responsible for violations by other irregular forces that fight alongside their own forces, where these could be said to fall under their ‘overall control’”. Only those tasks required to be performed by the Department of Defense are exercised by the Department of Defense itself.

The companies assume a defensive role, not an offensive one. But the distinction between both tasks is blurring. If the security guards support military forces during hostilities, they could be treated as “illegal/unlawful combatants”. Many Iraqi civilians consider private security employees as U.S.A. soldiers. Also the insurgency seems unconcerned about the difference, as the private military contractors often wear the same U.S.A. Army fatigues except the insignia. Those contractors perform “activities previously carried out by military
personnel” and because of their involvement in these tasks they become “valid objects of attack by virtue of their direct participation in hostilities.”

Nonetheless the lack of oversight of all the security companies, of “uniform rules of engagement”, of comprehensive standards for screening and training new guards, the civilian contractors are working in a conflict zone and need more protection. The private security industry is already lobbying for wearing heavier weaponry by security guards. Draft rules would “give them the right to detain civilians and to use deadly force in defence of themselves or their clients”. Besides these safeguarding proposals, private security guards still have the right to abandon their positions whenever the situation seems too unsafe. They are not subject to the Uniform Code of Military Justice (except during a declared war) and cannot be “prosecuted under civil laws or declared AWOL (Absence Without Official Leave)”. The Iraqi Interim Government adopted legislation immunizing private security guards from prosecution in Iraq. Their license can still be revoked and they can be dismissed from work.

Foreign private security companies shooting at Iraqi civilians undermine the relations between the Multi-National Force in Iraq and the Iraqi civilians. The U.S.A. military forces are often blamed for the behavior and “indiscriminate shootings/actions of the foreign security contractors.” In Abu Ghraib, thirty six per cent of the identified abuses involved contractors.

3.3.3.2. Responsibility

The privatized military firms also conduct interrogations in several detention facilities. Under the Geneva Conventions and customary IHL torture and inhuman treatment of prisoners committed by them are recognized as war crimes. Irrespective of their nationality or place where the war crimes are committed, states are obliged to punish perpetrators of such acts. Despite their immunity from prosecution in Iraq, war crimes considered as crimes of “universal jurisdiction” do not allow protection by immunity agreements and consequently licensed military contractors can be held responsible for such crimes before Iraqi courts. A U.S.A. military field manual points out that: “Contractor employees are not subject to military law under the UCMJ [Uniform Code of Military Justice] when accompanying US forces, except during a declared war. Maintaining discipline of contractor employees is the responsibility of the contractor’s management structure, not the military chain of command.” Thus only during a declared war private security guards with U.S.A. nationality can be tried by U.S.A. military courts. The U.S.A. military contractors can also be prosecuted under U.S.A. federal law. The U.S.A. War Crimes Act (18 U.S.C. 2441) defines war crimes as graves breaches of or as violations of common Article 3 of the 1949 Geneva Conventions, such as torture, inhuman treatment, “outrages upon personal dignity” or “humiliating and degrading treatment”. The Anti-Torture Statute (18 U.S.C. 2340) prohibits torture committed outside the U.S.A., for example by contractors serving as military interrogators. The Military Extraterritorial Jurisdiction Act ((MEJA) Public Law 106-778) “authorizes Defense Department law enforcement personnel to arrest suspected offenders and specifies procedures for the transfer of accused individuals to the United States”. Only contractors working for the U.S.A. Defense Department can be prosecuted under the MEJA, not those working with the Iraqi Department of the Interior.
3.4.3. Iraqi Security Forces

“UNAMI [United Nations Assistance Mission for Iraq] received consistent reports of excessive use of force with regard to persons and property, as well as mass arrests carried out by Iraqi police and special forces acting alone or in association with the MNF [Multi-National Force]”. “Mass detentions of persons without warrants continue to be used in military operations by Iraqi police, special forces of the Ministry of Interior and by MNF-I.” 398 The Multi-National Force and Iraqi Security Forces work closely together through a partnership, coordination and consultation in order maintain security and stability, deter terrorism and protect the territorial integrity of Iraq respecting the prescriptions of IHL. 399 The strong collaboration between the MNF-I and the Iraqi government forces suggest some kind of awareness of the alleged abuses carried out by the Iraqi government forces. 400

As the insurgency in Iraq continues after the end of the occupation, the Multi-National Force remains entitled “to take all necessary measures to contribute to the maintenance of security and stability in Iraq” 401 and supports the Interim Iraqi Government in its efforts to fight the insurgents. Consequently, after the end of the occupation in June 28, 2004 and if the Interim Iraqi Government consents, the Coalition Forces can hold the prisoners in accordance with IHL. 402 But suspected insurgents have been mistreated by Iraqi authorities in detention 403 and under the control of the Iraqi Ministry of Interior detainees are held in several facilities exercising instruction from the Ministry to torture and treat inhumanely. The detainees are subject to beatings with plastic cables, electric shocks, submitted to extremely high temperatures and have their nails pulled out. Even extrajudicial executions have been carried out by Iraqi security forces. 404

Iraq is not a Party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Of course customary IHL prohibiting torture and ill-treatment is binding on the new Iraqi regime. Nevertheless, the interim Iraqi Constitution in its Article 35 forbids “all forms of torture, mental or physical, and inhuman treatment”. Article 127 of the Code of Criminal Procedure does not allow the use of any illegal means to influence the accused to secure his statement. Mistreatment, threatening to harm, inducement, threats, menace, psychological influence, and the use of narcotics, intoxicants and drugs are all considered illegal means.” Article 333 of the Iraqi Penal Code continues and criminalizes “any employee or public servant who tortures, or orders the torture of an accused, witness, or expert in order to compel that person to confess to committing a crime, to give a statement or information, to hide certain matters, or to give a specific opinion will be punished by imprisonment or detention. The use of force or threats is considered to be torture”. 405

The U.S.A. State Department confirmed in its Country Reports on Human Rights Practices it knew about what happened in detention facilities controlled by the Iraqi Ministry of Interior, such as “hanging inmates upside down until they lost consciousness, beating with wooden and plastic sticks, weapons, and electric cords, and the use of “electric shocks to sensitive parts of the body” and stun guns. 406 Another former Iraqi commander claimed that “the prison on al-Nasr Square, next to the TV-tower, it is the largest prison under the responsibility of the Interior Ministry. Members of the U.S. forces visited this prison every day. The U.S. troops knew everything about the torture”. Moreover, the continued transfer of detainees formerly held by U.S.A. forces into the hands of the Iraqi forces, being aware of abuses and torture practices, the principle of non-refoulement keeps applying. 407 In analogy with the Nicaragua Case, the U.S.A. could be held accountable for violations of IHL by the Iraqi government
3.4. Terrorists

3.4.1. Terrorism as a Method of Warfare

In order to avoid air strike retaliation, Tandhim al-Qa‘ida recommends “quick, sharp armed operations in the heart of the targeted towns”. The terrorists should not directly confront their stronger counterparts and take “static positions”. They should leave the targeted cities that are about to be cordoned by the U.S.A. and Iraqi military forces. Then they should attack their enemy from the outside with “rockets and snipers”. In the long term the insurgency re-conquers and pacifies those towns.

Al-Qaeda orchestrates bombings to incite a civil war in Iraq. Foreign terrorism (Irhab), as opposed to national resistance (Muqawama), was blamed for violence causing many Iraqi civilian casualties, i.e. fellow Muslims. The U.N. Security Council considers acts, methods and practices of terrorism contrary to its principles. Terrorism “as an intentional strategy” is prohibited by customary IHL and practice: “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.” (ICRC Rule 2) “Violence to life and person, cruel treatment, torture, the taking of hostages, summary executions and other forms of murder or punishment without judicial safeguards, outrages upon personal dignity, and humiliating and degrading treatment” are specific prohibitions. Consequently “all measures” of “terrorism” are prohibited peremptorily. Terrorism occurring during an armed conflict and constituting grave breaches of IHL, is prosecutable as war crimes. Insurgent groups, with Al-Qaeda terrorists in their ranks did not sign the 1949 Geneva Conventions, they are not bound by IHL, so they argued, defending their conduct claim. But terrorist actions are considered to be war crime when committed during wartime. Al Zawahiri, the right hand of Osama Ben Laden, explained “the need to inflict the maximum casualties against the opponent, for this is the language understood by the West, no matter how much time and effort such operations take… The targets as well as the type and method of weapons used must be chosen to have an impact on the structure of the enemy and deter it enough to stop its brutality.” In Iraq tactics such as ambushes, improvised explosive devices, mortar attacks, suicide bombings, kidnappings and beheadings took place.

Terrorism in se is legitimate when constituting a direct military advantage anticipated and “justified by necessity and proportionality”. Yet, terrorist acts directed against the civilian population are forbidden. The International Military Tribunal of Nuremberg concluded that “methods like […] collective punishments, taking and killing of hostages, mass murders and torture, aimed at terrorizing the population, constituted war crimes.” They even use children to keep informed, to transfer messages and to distract Iraqi security forces. Sometimes children participate in terrorist attacks. “Children must not be allowed to take part in hostilities.” (ICRC Rule 137)
3.4.2. Conduct in the Hostilities

3.4.2.4. Abduction and Execution

Members of the U.S.A. Armed Forces and non-Iraqi civilians, such as contractors, journalists, humanitarian relief workers and diplomats have been repeatedly abducted by al-Zarqawi’s al-Tawhid wal-Jihad and subsequently killed or beheaded.\textsuperscript{422}

“Wilful killing, torture or inhuman treatment, taking of hostages and extensive destruction of property” are graves breaches of IHL.\textsuperscript{423} Thus hostage taking is prohibited.\textsuperscript{424} Combatants and prisoners of war, civilians and neutrals can not be taken hostage.\textsuperscript{425} Thus hostage taking and killing of hostages violate IHL.\textsuperscript{426} The International Convention Against the Taking of Hostages does not apply during armed conflicts for acts of hostage-taking.\textsuperscript{427}

Protected persons “shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity”,\textsuperscript{428} especially when releasing images showing hostages begging for their release.

3.4.2.5. Suicide Attacks

Under IHL attacks against armed forces are lawful, but under Iraqi law perpetrators can be prosecuted before criminal courts. Police forces are civilian and “may not be subject to attack unless they directly participate in hostilities”, e.g. when they are “formally attached to the state’s armed forces or take on military functions, including participating in military operations against insurgents”. When soldiers and policemen are captured during combat they no longer participate in the hostilities and must be treated humanely. Insurgent groups have shown otherwise, they torture and summarily execute them.\textsuperscript{429}

As methods of warfare, suicide attacks do not violate IHL and are very discriminate because a suicide bomber can detonate himself with accuracy but its use is indiscriminate and disproportionate. Suicide bombers attack civilians or civilian objects, military objectives surrounded by civilians and are not distinctive. Perfidy blurs the distinction between enemy combatants and non-combatants by feigning non-combatant status in order to deceive and betray the confidence of their enemy. This is contrary to the provisions of IHL. “Killing, injuring or capturing an adversary by resort to perfidy is prohibited.” (ICRC Rule 65)\textsuperscript{430} Suicide bombers themselves, feign civilian status and carry out their attacks.\textsuperscript{431} U.S.A. military forces fear perfidious attacks, are more suspicious towards civilians and are more likely to fire upon them.\textsuperscript{432} They even wear army or police uniforms, obtained by joining the Iraqi military or police forces. Thus insurgent infiltration is a huge threat to Iraqi security.\textsuperscript{433} “Improper use of the flags or military emblems, insignia or uniforms of the adversary is prohibited.” (ICRC Rule 62)\textsuperscript{434}

Military facilities, such as military recruiting centers, and police stations “used for military purposes” are legitimate military targets under IHL. Civilians applying for the security forces outside of these buildings enjoy combatant immunity. Bombing these objectives is indiscriminate and cause disproportionate civilian harm to the applicants because “the expected civilian cost far outweighed any anticipated military gain”. Consequently these perfidious attacks are unlawful under IHL.\textsuperscript{435}
3.4.2.6. Improvised Explosive Devices

Not all vehicle bombs are suicide attacks, they can also be triggered mechanically, so do roadside bombs when military convoys pass over or near them.\textsuperscript{436} The use of tele-commanded improvised explosive devices to destroy passing U.S.A. Armed Forces is in accordance with IHL until they are placed in highly populated areas causing many civilian casualties. The principle of proportionality must be respected.\textsuperscript{437} The Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices also condemns “the indiscriminate use of weapons” by “placement of such weapons (a) which is not on, or directed against, a military objective. In case of doubt as to whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used; or (b) which employs a method or means of delivery which cannot be directed at a specific military objective; or which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. 10. All feasible precautions shall be taken to protect civilians from the effects of” such weapons.\textsuperscript{438}
IHL restrains the conduct of hostilities during the war on terror in Iraq. “IHL itself preserves a certain universal ethical foundation based on a minimum of essential humanitarian norms which constitute the common legal heritage of mankind.”

From the invasion on, the IHL applied and remained applicable during the occupation of Iraq by the U.S.A., even after the new Iraqi Interim Government was invested with complete sovereignty. Hence, the former Occupying Power can not evade its own responsibilities regarding the laws of war by the creation of a new regime. The internal armed conflict defined between the new Iraqi regime and the insurgency, with Al-Qaeda in its ranks, has become international because of the continued presence of the U.S.A. Armed Forces, continuing to work closely together with the Iraqi Security Forces and private security contractors responsible for their own actions. As military action is no longer exclusively attributed to the state prerogatives will the disorganized market of private security companies further dictate the conditions of violent intervention during wartime?

During combat and upon capture, the U.S.A. considered the Al-Qaeda terrorists as unlawful combatants not enjoying the protection of the Geneva Conventions. Nevertheless they can benefit from the prisoner of war status when meeting the conditions set forth in the 1949 Geneva Convention III, if not they are still protected by the 1949 Geneva Convention IV, so are other civilians held in detention for intelligence gathering and they must be treated humanely. The concept of illegal fighters already existed long before the war on terror and justified their repression. Although this notion reflects a political choice, maybe IHL needs to be reformed, namely to take into account the new private actors in armed conflict, i.e. the (inter)national terrorists and private security companies. Is there enough international support and political courage to innovate IHL or will the global war on terror continue to be fought in the present structures of the Geneva Conventions?

During the urban warfare, the U.S.A. Armed Forces were facing guerrilla actions exercised by the terrorists. Improvised explosive devices and suicide attacks indiscriminately targeted them, as well as the protected persons neighboring and supporting the military super power. The U.S.A. responded aggressively using weaponry, such as depleted uranium, cluster and white phosphorus munitions, thus violating the basic principles of IHL, also harming and killing innocent victims. Both the U.S.A. and Al-Qaeda must respect the basic principles of humanity guiding their actions. So every armed conflict is ruled by the law of war, whatever the actors of the conflict proclaim. Still, would it not be utopian to conceive that the implementation of IHL takes place exactly in accordance with the spirit of the law?
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In 1988 Ceris introduced a Master of Arts in International Politics. Over the years, Ceris has created intensive courses, entitled Post Graduate Certificates and devoted to EU external relations, conflict prevention & conflict management, security in the Mediterranean and the Middle East. Finally, Ceris will shortly be introducing a new Master of Arts in Development Policy Implementation and Governance.

The courses offered are all part-time and organised on Friday evenings and Saturday mornings. They are given in English, though certain courses on the MA in International Politics are delivered in French. Currently, it is also possible to follow the MA in International Politics as part of a ‘distance learning’ programme, with this format being set to develop in the years to come.

The education that Ceris provides is distinctive in two respects. First of all, it offers a very high level of university education organized in partnership with leading European universities, in particular the Collège d’Etudes Interdisciplinaires de l’Université Paris Sud that sponsors the Master of arts in International politics. The quality of the education owes much to the team of invited lecturers. Over the years, Ceris has developed a network of EU or Nato key experts and professors drawn from universities renowned for their excellence. For this reason, it boasts a first rate academic team that few universities would be in a position to offer. Each year the MA in International Politics course is run by thirty or so experts, notably from the London School of Economics and Political Science, the Universities of Oxford, Cambridge, Warwick, Kings College in London, l’Institut d’Etudes Politiques in Paris, l’Institut Universitaire de Hautes Etudes Internationales, Geneva and American universities, such as Johns Hopkins.

The second special feature lies in Ceris' international audience. Those following the courses come from around forty different countries. Two thirds are from European Union Member States or countries applying for membership, with the third coming from North and South America, Sub-Sahara Africa, South and East Asia. More than 85% of them have a professional occupation. The largest group is made up of civil servants from European institutions (the European Commission, Parliament, Council, the European Social and Economic Committee, Committee of the Regions). Then there are diplomats posted in Brussels and working either in bilateral embassies or in missions or permanent representations. Senior managers from the private sector working in lobbying or for interest groups, most frequently in conjunction with the European Commission or Parliament, make up the third significant group. Finally, there are members of staff from NGO’s and foreign journalists accredited by the European Union or Nato. Sixty percent of attendees are aged between 25 and 34, though students aged 35 and over account for twenty-five to thirty percent. We should add that Ceris each year reserves several places for graduates fresh from university, who are destined for international careers.
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CHAPTER I
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Actions

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International Humanitarian Law Approaches

NOTES AND BIBLIOGRAPHY


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