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## FOREWORD

The *University of Nairobi Law Journal,* a student-run and edited journal has been published intermittently from the early 1980s. Coming soon after the collapse of the reputed *East Africa Law Journal* published jointly by the Faculty of Law, University of Nairobi and the East African Community, it has easily established itself as an avenue through which students and academic staff discuss issues of international, regional and national concerns. The demand for the journal in academia and legal practice is evidence of the obvious niche that it fills. The fact that research and publication are at the heart of any academic programme cannot be gainsaid and our students have not only recognized this fact but also actualized it in the face of seemingly insurmountable odds.

The current Board of Editors has put together a wealth of articles from scholars around the world. They have covered a broad range of issues ranging from women rights law to humanitarian law and the law of defamation. There is notably coverage of contemporary legal issues arising from terrorism, general international law and ethnicity. The scholarly menu that the current journal issue offers will intellectually nurture the readers.

I would like to congratulate the Editorial Board heartily for rising up to a challenge that has been avoided by many before them and for keeping the fire of intellectual intercourse burning in a very dark period of our Faculty and public Universities. It is a tribute to this group that the journal's publication comes soon after the re-opening of the Faculty of Law and the University of Nairobi after a closure for four and three months respectively. I challenge the students to keep up the good work and sustain the momentum so that the journal is published twice annually and the variety, depth and quality of its contents is assured.

**Dr. Patricia Kameri-Mbote**
*Chairperson Private Law Department*
*Faculty of Law, University of Nairobi.*

# EDITORIAL

We, as an *Editorial Board*, have on numerous occasions reiterated our belief that scholars *qua* scholars have a good reason to be consistently paranoid and that they must research and engage in meaningful discourse with a view to suggesting reforms to, say, existing social, economic and political institutions. One reason why we exist is therefore to publish these contributions for the benefit of all citizens and more so the intellectual community.

This issue fits our description of a serious forum for intellectual discourse. In it we carry articles that immediately remind of the current happenings at national, regional or even at global level. For instance, Dr. Kameri-Mbote investigates the concerns of the Kenyan women prior to the constitution writing and follows that up to the final document that is the Draft Bill of the Constitution of Kenya Review Commission. She ends by concluding that the hens have not come home to roost for the Kenyan women.

We had to have something on the land crisis in Zimbabwe. And this Professor Acheampong does quite well. His piece commences by addressing the concept of property rights from a jurisprudential point of view and then, informed by his philosophy on property rights, delves into the Zimbabwean land crisis. This jurisprudential analysis is fortunately bound in the same volume with a review of a textbook, which text, addresses the question of land tenure in Africa, again from a jurisprudential perspective.

Our readers will also not miss out on the legal issues surrounding the United States of America/United Kingdom invasion of Iraq. While treading carefully not to wallow in the politics behind the war in the gulf, our contributors (Ongoya, Okello, and Mwangi) confine themselves to the humanitarian implications in the conduct of the hostilities in the gulf. Dr. Kithure Kindiki analyses the principle of universal jurisdiction in international law in the eyes of the public good served in upholding the principle. His article argues that increased prominence of the principle has eroded the erstwhile doctrine of state sovereignty in international law. He concludes that gradual erosion of state sovereignty has not resulted just from the application of the principle of universal jurisdiction but also from the interplay of a host of other factors.

That African politics are ethnic prone is not in doubt. But, cant African constitutions be ethnic proof? This is the question to which a renowned political scientist Prof. Ali Mazrui prescribes a panacea. These and other articles not mentioned here should surely make interesting reading. We plan not to stop at

that. Issue No. II of our publication, which should be out soon, also comes with it similar invigorating weight. These two issues, we believe, testify to our aforementioned mission.

Publishing in a third world environment like ours is not a given. Alot is therefore owed to many. Notably, we are greatful to our new Dean Prof. Otieno Odek, our advisors Dr. P. Kameri-Mbote and Dr. Kithure Kindiki, our former Editor-In-Chief Kimathi Kamenchu and Mrs. Joy Asiema of Public Law Department. Also deserving our sincere gratitudes are; our predecessors, the current board of editors and the College of Humanities and Social Sciences, University of Nairobi.

**Osogo wa Ambani**
*Editor-In-Chief*

# 'OPERATION IRAQI FREEDOM': SOME HUMANITARIAN REFLECTIONS

Edward Okello Odhiambo*, Eunice Wanjiru Mwangi** & Elisha Z. Ongoya***

## 1 INTRODUCTION

> For the fundamental law of nature, man being to be preserved, as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred.[1]

"War in Iraq", "War in the Gulf", "It's all Bombardment", "Civilian Death Toll in Iraq Increases", "Baghdad Finally Falls", etc, were some of the showy press headlines during the second Gulf War in 2003. Not even the ethnic based magazines were left behind in this war-clouded event. The same period also witnessed the rising numbers of electronic gadget users in the manner of keeping abreast with the events in Iraq. The cyber space was not left behind in this orgy event and many times it made efforts to provide its consumers with the information on the war.

Everywhere it was just war in Iraq; people in the streets of Nairobi, Kampala, Kuala Lumpur, London, etc, could only think about or be heard talking about one thing during this time: the War in the Gulf. Press reports from the conflict area would also be saturated with warfare issues and many times they would publish information about the grenade-propelled rockets being used by the Iraqi soldiers, Iraqi combatants using ruses and perfidy to ambush their enemies and the US-led forces dropping the dreadful cluster bombs of the Rockeye type full of hundreds or thousands of bomblets.

These were the events that happened during the now dubbed "Operation Iraqi Freedom". It was christened as such by the allied forces because they intended to remove the Iraqi regime headed by the now deposed former president Saddam Hussein who was seen as a dictator and the lawless one, who had no respect for human rights and international legal instruments. He was also seen as a leader heading a legal hegemony, which was bent towards committing atrocities.

The 'liberation' of the Iraqi people from the shackles of tyranny and dictatorship

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* LL.B., University of Nairobi
** LL.B., University of Nairobi
*** LL.B., University of Nairobi

[1] Locke, J., Second Treatise on Civil Government, III, P.16.

saw the employment of hi-tech weapons among other events that occurred for about 40 days. This was the time that some people came to know of the existence of a legal regime known as International Humanitarian Law which is intended to govern warfare, that is, the means and methods of warfare in so far as the protection of the civilian population, civilian objects, treatment of captured combatants in the conflict and the protection of humanitarian organizations are concerned. Even though the 'liberation' war took place without the approval of the United Nations Security Council, parties to the conflict were obliged to comply with the rules of warfare.

It is against the backdrop of these events in Iraq during the second Gulf War that the authors of this article have set out to analyze the position of the law of war in relations to the events that occurred in Iraq. The first part of this discourse shall be concerned with the means and methods of warfare that were used in Iraq; the second part will deal with the treatment of the captured combatants (Prisoners of War); the third part shall deal with the state of the U.S belligerent occupancy in Iraq with a special emphasis being laid on the role of an occupying power in the territory; and the fourth part will finally deal with the role of humanitarian organizations and the media in the face of armed conflicts.

## 2 THE MEANS AND METHODS OF WARFARE

The general term 'means of warfare' is better suited to encompass the meaning of words arms, projectiles and any device that is capable of inflicting injury or suffering.[2] The terms 'methods of warfare' on the other hand may be understood as the modes of use of the means of warfare in accordance with a certain military tactic or concept.[3]

The means and methods of warfare are some of the cardinal principles, which constitute the fabric of International Humanitarian Law. This means that they are concerned with the protection of civilians, civilian objects and the distinction between combatants and non-combatants in an armed conflict, the aim here is to prohibit barbaric weapons, that is, weapons which discredit those who use them just as certain heinous acts bring discredit to those who commit them, however worthwhile the course they may be defending.

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[2] See generally Kalshoven, F. and Zegveld, L., Constraints on the Waging of War, An Introduction to International Humanitarian Law (I.C.R.C., Geneva, 2001) p.41.

[3] *Ibid.* p.44.

## 2(i) Humanitarian Principles relating to Civilian Population.

The first and the principle issue that we have to grapple with is the meaning of a civilian because not everyone who finds him or herself in a conflict region by any means automatically qualifies as a civilian. For purposes of clarity and consensus, we shall adopt the widely acceptable definition given by the humanitarian legal scholars which definition is captured by the provisions of Article 50 paragraph 1 of the First Additional Protocol (A.P 1) to the 1949 Geneva Conventions of 1977, which defines a civilian as a person who is not a member of the armed forces.

The concern to protect the civilian population as well as combatants against excessive and exceptionally cruel violence has been and still continues to be the main aim of, humanitarian law. Indeed, this concern dates back to the ancient times when the rules of humanitarian law began to emerge[4]. The fundamental idea underlying all humanitarian rules on methods and means of warfare has since this time been the concept of military necessity.

According to the traditional approach, only the use of those weapons and means of combat, which is necessary to attain the military purposes of war, purposes based on the ultimate goal of overpowering the enemy forces, are permitted. Accordingly, the civilian population and civilian objects do not constitute legitimate military targets as was recognized by the Lieber code of 1863.[5] Similarly, the Islamic legal culture and the moral theological postulates of the medieval scholars contemplated this principle by further extending it to the need for distinction between combatants and civilians in a conflict for the extensive protection of the civilian population. This explains why attempts have been made to prohibit indiscriminate warfare. Indeed this principle is now firmly established by Article 48 of A.P. 1 of 1977 which states:

> In order to ensure respect for and protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between civilian population and the combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

The overall validity of this principle today is beyond any doubt and has been recognized to constitute one of the few peremptory norms of humanitarian law and accordingly part of the *jus cogens* which is applicable in any conflict. This

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[4] Fleck, D., The Handbook on Humanitarian Law in Armed Conflict (Oxford University Press, Newyork, 1995) P.13.

[5] Pilloud and Pictet, I.C.R.C. Commentary 585, paragraphs 1823-4; *See also* Parks Air Force Law Review, 32(1990) P.7-8.

rule prohibits not only attacks against the general civilian population but also attacks likely to cause incidental loss of human life, injury to civilians or damage to civilian objects, which are excessive in relation to the expected military advantage.

## 2(ii) Means of Warfare Used in the Gulf War and the Protection of Civilian Population

As had been seen earlier, the means of warfare relates to the devices used to conduct hostilities. It is not in doubt that it is an objective of humanitarian law to regulate the types of weapons used in warfare. The overall effect of this is to protect civilians caught up in the hostilities, protect civilian objects and the natural environment. Here, the only legitimate purpose of any use of weapons is the disabling of enemy combatants.[6]

Accordingly, Article 23 of the Hague Regulations and Article 35 paragraph 2, A.P. 1 prohibit in nearly identical terms the use of weapons, projectiles and materials of war calculated to cause superfluous injury or unnecessary sufferings. Injuries can be said to be superfluous either if they are not justified by a requirement of military necessity or if the injuries normally caused by the weapons or projectile are manifestly disproportionate to the military advantage reasonably expected from the use of the weapon. The military advantage in this sense is judged only by reference to direct attacks upon military objectives, irrespective of the fear and terror caused among enemy personnel and the civilian population. Indeed this rule was confirmed by the ICJ in its *Advisory Opinion concerning the Legality of the Threat and Use of Nuclear Weapons* as follows:

> States must never make civilians be the object of attacks and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.[7]

The Court thus equated the use of indiscriminate weapons with a deliberate attack on civilians. This means that if a weapon is tested against this criterion and if it falls foul of it, its use would be prohibited without there being any need for a special treaty or even state practice prohibiting the use of that particular weapon.

Turning back to the issue at hand, it is not controvertible that weapons were used in the unpopular Gulf War by both sides to the conflict. The U.S together with her allies, for instance, used the anti-personnel cluster bombs of incendi-

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[6] *Supra*, note 4, p.113.

[7] I.C.J., Advisory Opinion of 8th July 1996- Opinion of Judge Guillaume, para. 5.

ary nature whereas the Iraqi government used the scud-missiles among other weapons.[8] These weapons are not prohibited by any treaty or state practice. However, their effects can be analyzed against the established criteria for the use of a weapon during armed conflict, that is, they must be discriminate and not capable of causing superfluous injury and unnecessary suffering.

The first analysis relates to the effects of cluster bombs, which were extensively used by the allied forces led by the US. In order to have a fuller undertaking of this analysis, we shall endeavor to make an in-depth examination of cluster bombs, that is, a dissection of how they operate, how they are used and their possible effects.

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

There are some types of cluster bombs that were widely used by the allied forces in this war. These are the Multiple Launch Rocket System (MLRS) made by the US and the Rockeye type of cluster bombs. The MLRS, for example, contains twelve (12) rockets with each warhead containing 644 bombs, giving a total of 7728 bombs deployed when the rockets are fired together. A salve of 12 rockets is said to deploy bombs over an area of 23 hectares of a midrange and almost twice that area at the maximum range of over 30 kilometers.[9]

It is evident that with their long range and wide area coverage, cluster bombs carry an obvious risk of indiscriminate effects, which, without saying more, goes against one of the established principles of humanitarian law, which is to the effect that weapons employed in any conflict should have a discriminate effect. This according to the authors of this article should make cluster bombs indiscriminate weapons, which should not be employed in the conduct of hostilities. Indeed the indiscriminate nature of these weapons was witnessed on several

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[8] Anderson, K., *Who Owns the Rules of War?* NEW YORK TIMES, 13th April 2003: *See also* Peter, F., *Surveys Pointing to High Civilian Death Toll in Iraq*, CHRISTIAN SCIENCE MONITOR, May 22nd 2003.
[9] Arkin, W.M., Durrant, D., and Cherni, M., *On Impact: Modern Warfare and the Environment, A Case Study Of the Gulf War* (1991), WASHINGTON GREENPEACE, Appendix A, P. 3-4.

occasions during the second Gulf War especially in densely populated areas where there were many Iraqi civilian casualties arising directly out of the aerial bombings by the allied forces.

The humanitarian objection to the use of cluster bombs is not on the indiscriminate nature alone. These weapons have reportedly had very high failure rates; up to 40 percent normally fail to explode depending on the states of the ground (the rate is usually higher on the soft ground) and on meteorological conditions especially if the soil is covered with snow). Once on the ground and unexploded, they are extremely unstable and the explosion can be triggered over by the slightest movement of the ground on which they are lying, such as vibrations caused by people walking or a moving vehicle. In fact, it is very risky to approach them as this might disturb the ground and trigger their explosion.

Clearing them is however very difficult and they cannot be neutralized. As a result of these problems, it is proper and appropriate for us to conclude that such weapons are extremely dangerous. Indeed, one need not be an Arms Control expert to discern from the foregoing discourse on cluster bombs that such weapons have high proclivity towards the elimination of humankind from the conflict gripped area and by extension the earth's crust in general. These are disasters waiting to happen and they normally affect human beings in the conduct of their daily activities. Therefore the use of cluster bombs cannot be embedded on any humanitarian ground thus making their employment in a conflict improper and inappropriate. Indeed, cluster bombs have caused many casualties among civilian populations when they have not exploded on impact or are left lying on or near the surface of the ground in an unstable condition.

During the second Gulf War, hundreds of thousand of cluster bombs were dropped by the allied forces. Indeed, the US described the use of cluster bombs against the Iraqi artillery by stating that the allies were attacking Iraq's "will to resist as much as their weaponry'. These weapons as we have seen before are very dangerous and are very indiscriminate in their efforts and they therefore qualify as prohibited weapons under the meaning of the Martens Clause.[10] How can deadly indiscriminate weapons such as cluster bombs be said to be outside the purview of the weapons prohibited by humanitarian law? It is a basic sense that these weapons cause superfluous injury and unnecessary suffering due to their burning effects. Their use in the war by the allies particularly in densely populated areas therefore was a fundamental breach of humanitarian norms governing the means of warfare. Moreover, the unexploded bombs pose

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[10] Sassoli, M., Bedeutung einer kodofikation fur das allgemaine volkerrecht uit besonderer Betrachtung der Regeln zum Schutze der zivilbevolkerung vor der Answirkungen von Feindseligkeiten, (Basel/ Frankfurt, a,m, 1990) P.427.

a great danger to the civilian population living in the areas against which the weapons were used just like the atomic bombs dropped against the Japanese cities of Nagasaki and Hiroshima by the U.S in the Second World War (1945) whose effects still continue to be felt.

The second and final close examination on the means of warfare employed in the second Gulf War will concern itself with the nature of weapons that were used by the Iraqis in an attempt to defend its integrity and repulse the allied forces. There is no controversy as to whether the Iraqi government used weapons to defend itself and repulse the allied forces. What remains for us to dissect and which needs a closer examination is the nature of weapons employees by Iraq. However, there are two mind-boggling questions that need immediate answers before we embark on a full dissection of the nature of weapons used by Iraq in the war; firstly, was Iraq entitled to the remedy of self defense? And secondly, does the remedy of self-defense extinguish the applicability of humanitarian norms in such circumstances?

To answer the first question, the answer seems to lie in the provision of Article 51 of the UN Charter, which specifically provides for the remedy of self-defense. It is a basic sense that Iraq had to defend itself to the hilt and the government could not wait for the allied forces to drive her out of Iraq. All in all, Iraq had to defend itself against the invading allied forces and involved the employment of weapons.

The second question, which is rather tricky, had up to the 20th century elicited different opposing views with one school of thought stating that humanitarian norms are extinguished if a country is under attack and it is defending it territory; and the other maintaining that the norms remain applicable in all situations.

No matter which school of thought any person in the 21st century might subscribe to, the general position concerning this matter is now settled. Within the context of Article 51 of the UN Charter, which in particular provides for self defense, the 1949 Geneva Conventions and the preamble to the A.P. 1 of 1977, the position is even more strongly reaffirmed that the application of the provisions of those instruments apply in all circumstances without any adverse distinction based on the nature or origin of the armed conflict. No reason or ground may therefore be invoked by Iraq to claim that the rules of humanitarian law were extinguished merely because it was defending its integrity against the invading powers.

Having fully and satisfactorily answered those questions the issue remaining to be dissected is the one concerning the nature of weapons used by the Iraq. It is a well-known fact that Iraq used anti-personnel landmines extensively before the commencement of the war. They were placed in the desert and also at the Iraqi port in Basra.

Although no civilian casualties were reported, these weapons are indiscriminate in nature on the basis that they cannot actually be targeted at the military objectives for they are placed in advance on the assumption that combatants may pass in that direction. They also frequently have unforeseen effects especially when they move from their original emplacement by the effects of the weather. It is therefore evident that the anti-personnel mines are dangerous and indiscriminate in their effects. Their placement at the Basra port of entry and in the desert was therefore a contravention of humanitarian principles particularly the Ottawa Convention which banned the production, stockpiling and use of anti-personnel landmines.[11]

Finally, it has to be determined whether Iraq was justified in attacking Kuwait City. Barely twelve hours after the so-called 'decapitating attack' by the allied forces, the Iraqi government responded by dropping scud missiles in Kuwait City. Although no causalities were reported the attack was seen as unjustified in the circumstances.

It is our view that Iraq was not justified in attacking Kuwait because Kuwait was not at war with Iraq. The provision of air bases by Kuwait to the allied forces did not really put Kuwait in the position of 'Iraq's enemy'. All military tactics ought to have been made against the allied forces alone. This therefore leaves us with one form of conclusion that the attack on Kuwait city was unjustified and was thus a breach of the established norms of humanitarian law.

**2(iii) Methods of Warfare and the Civilian Population in the second Gulf War.**

Apart from the regulation of the means of warfare, humanitarian law also aims to regulate the methods of warfare during armed conflict. The regulation of the methods of warfare calls for the application of various cardinal principles, either before, during, or after the conflict.

First, non-combatants may never be made the objects or targets of attack nor may any party to the conflict to shield legitimate military objectives from attack

[11] The Convention Concerning Blinding Laser Weapons and Anti-Personnel Land Mines of 1996.

use them. Secondly, military operations, whether undertaken by the attackers or defenders, must be done with care in order to distinguish between combatants and non-combatants. Moreover, military officials must refrain from operations likely to produce collateral damage that is excessive relative to the military advantage sought.

To start with the first cardinal principle of targeting military objectives only as opposed to civilians or civilian objects, we have to pay homage to the provisions of Articles 42 through 52 of A.P 1 dealing with military objectives. The principle of military objectives states that attacks shall only be launched against military objectives. The definition of what constitutes a military objective has been given by the aforementioned articles of A.P 1. Military objectives for purposes of the Protocol means the following: Armed forces with paratroops in the desert (Article 42 paragraph 3 A.P 1) but not crew members parachuting from an aircraft in distress (Article 42 paragraph 1 A.P 1), objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offer a definite military advantage (Article 52 paragraph 2 A.P 1 ). In this category would therefore be included industrial plants, transport facilities, buildings or warships all of which are used by the members of the armed forces.

Protocol 1 of 1977 requires objects, which may be deemed as military objectives not to be installed in civilian areas. The principle stated by this article aims at protecting the civilian population. In the same vein, parties to the conflict are prohibited from using civilians as shields or shelling them in order to render certain areas or points immune from military operations.[12] This stems directly from the principle that neither the civilian population nor the individual civilians shall be involved in hostilities and this immunity to civilians cannot be abused by the parties for military purposes.

Having restated the position of humanitarian law relating to military objectives, we now have to turn back to the 'liberation war' with the sole objective of establishing whether the above stated principle was complied with by both parties to the conflict. First and foremost it is trite knowledge that Iraq installed military objectives in densely populated areas or near the safety zones or hospitals. Several cases of troops being concentrated in or near civilian areas were reported. The sole reason that was being advanced was that Iraqi forces were using civilians as shields. As we have seen above from the principle stated from Protocol 1, this was, without saying more, a contravention of humanitarian

[12] See Article 28 to the Fourth Geneva Convention Relative to the Protection of Civilians of 12th Augus 1949.

principles which have been established over the years and now codified in A.P 1. In fact, this explains one of the reasons why there were many civilian casualties in the war.

Another related requirement to this principle is that requiring states to take positive measures to protect cultural property, hospitals and other areas of civilian importance by marking them so that they are immune from attack. With respect to this requirement just like the principle of locating military objectives away from the vicinity of civilian areas, this principle was never respected by Iraq. In fact, not even a single object was marked by the government to protect such objects from attack. To the contrary, in some cases, Iraqi forces were launching from the mosques and hospitals, which were supposed to be safety places immune from military operation. In some cases it would be improper to conclude that a party to a conflict has acted in contravention of the established norms but in this case, it would be proper and appropriate for us to hasten to make the conclusion that the Iraqi government acted in flagrant contravention of the established humanitarian norms.

Thirdly, Iraq was under a legal duty to take a positive action by taking all necessary measures intended to ensure the safety of civilians. This calls for the duty to evacuate the civilian population or civilian objects from the vicinity of military objectives to the maximum extent feasible.[13] In the 'liberation war', the conduct of the Iraqi government of shelling off the civilian population or using civilians as shields really proves the point that the above required measure was not taken. Moreover, the installation of military objectives within the civilian population or civilian object further proves that Iraq was not interested in the safety of its civilian population. Not even a single evacuation process was conducted by the government, thus leaving the civilian population to its own fate during the conflict. The conduct of Iraq during the war where the civilian population was left to its own fate when the danger arose was, without any doubt, a breach of this duty to protect and by extension a breach of humanitarian principles.

Having discussed the Iraqi breaches in the war, our main task now is to examine the extent to which the allied forces were bound to comply with humanitarian principles in the face of Iraqi breaches. However, to examine the extent of compliance by the allied forces one needs to determine whether the allied forces were justified in striking the military objectives located in densely populated areas.

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[13] See Article 58(a) A.P. 1

To determine this, recourse has to be made to the provisions of Article 51 paragraph 8 of A.P 1 of 1977, which now expressly confirms that the violation of international legal obligations by the adversary does not exempt the attacker from his legal obligation with regard to the civilian population. This provision also applied to the conflict such that the allied forces were under an obligation to comply with the principles of humanitarian law regardless of Iraqi breaches. In this case, they were under a duty to weigh the military advantages of attacking military objectives located in civilian areas against the probable cost of civilian deaths and injuries. In so doing, they also had to take into account the nature of their weapons and the extent of damage that can be caused by them.

Back to the conflict, we find that the allied forces on many occasions struck military objectives that were located in civilian areas thereby causing many civilian casualties. This was constantly done despite having been informed of the breach on the part of Iraq. Even if they alleged that they were not aware of the breaches by the Iraqi government, it is still our contention that they were under a duty to cancel or suspend their military operations upon getting to know of the breaches or realizing that such attacks would cause casualties among civilians and/or civilian objects. The types of weapons used as has been discussed before in the article clearly showed that they were breaching this principle because in this case there was every reason to suspect that the use of such weapons would lead to civilian causalities.[14]

The second cardinal principle deals with the distinction between combatants and non-combatants and refraining from causing unnecessary excessive collateral damage. This principle is intended to protect the civilian population as well as civilian objects that are indispensable for the survival of civilian such as water installations and supplies, basic shelter, electric power supply etc [15] Accordingly, a specific military objective is a precondition for an act of force to be justified under humanitarian law.[16]This principle calls for the use of weapons that limit combat purely against military targets. Accordingly, all methods of warfare which damage the civilian population or civilian objects such as the practice of indiscriminate area bombing, scorched earth strategies or attack aimed at demonstrating military strength or intimidate the political leadership of the adversary are all prohibited.

During the 'Operation Iraqi Freedom', it is not in doubt that the allied forces used indiscriminate weapons, which struck the civilian population areas, civilian objects as well as the military objectives. No attempt was made to separate

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[14] *Supra.* Note 8.
[15] See Articles 14 and 54 A.P. 1
[16] Heydte, Military Objectives, EPIL, 3, 276-9.

the civilian population from the military objectives or to give them early warn ings. Since the commanders of the allied forces failed to do so or in the alter native improve their ability to hit solely military targets, the obvious expecte result in the circumstances was that many civilians were killed and many civilia objects were destroyed. A closer examination of this situation would bring ou clearly the facts as they occurred in densely populated areas.

Mr. Mahmoud Ali Hamadi lived with his family in one of the suburbs of Baghdad Until April 5th 2003, he did not know that he would be left familyless by a U.S stray missile that missed its target and landed at his front gate thereby killing his wife and three children.[17] Indeed on this particular 'dark day', one hundred (100) villagers were killed by the U.S bombings and strafing including 43 peo ple in one house. This is another reason explaining why the civilian death toll in the conflict was high and made the 'liberation war' the deadliest campaign for non-combatants that the US forces had fought since the Vietnam War.

Coming from the principle of distinction is the principle of proportionality, which prohibits the carrying out of an attack if the expected collateral casualties would be excessive, compared with the value of military objective sought to be struck Military necessity and proportionality of the means employed thus become conditions of the lawfulness of the use of specific weapons.[18] This position is reinforced by the provisions of Article 57 paragraph 2 A.P I and Article 26 of the Hague Regulations that prohibit attacks which may affect the civilian population. It further provides for maximum precaution or effective warning to the civilians before such an attack can be launched. Such an attack would therefore be unlawful if the civilian casualties are excessive in relation to the concrete and direct military advantage anticipated.

In the 'liberation war' there were lots of civilian casualties caused by stray missiles that hit civilian populated areas. Casualties were also caused by missiles that hit their military targets but had their incidental effects being felt beyond their target. The issue to be determined is whether the collateral damage would have been avoided by the allied forces in the foregoing circumstances. In the first place, we opine that the damage would have been avoided had cluster bombs that are indiscriminate in nature not been used in the conduct of hostilities. Further, we are of the view that the military success sought by the allied forces might have been gotten even without attacking some of the targets which were located within the vicinity of civilian population or objects.

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[17] Peter, F., *Surveys Pointing to High Civilian Death Toll in Iraq*, CHRISTIAN SCIENCE MONITOR, May 22nd 2003, p. 2.

[18] See the Preamble to the St. Petersburg Declaration of 1868; *See* also Kalshoven, Recuel des Cours, 191 (1985 II) 206, 212.

Secondly, the civilian injury and sufferings could have been avoided by sus pending or canceling the bombing in the civilian populated areas or by giving early warnings to the civilians to enable them leave those 'danger zones'. Ac cordingly, the failure by the allied forces to meet all these requirements mean that the civilians were left on their own fate in the face of imminent danger from the bombings. The unexploded bomblets further make the safety of civilians in the affected areas to be uncertain, for the unexploded bomblets can explode a the slightest movement of the ground upon which they lie.

## 2(iv) Means and Methods of Warfare and the Environmental Effects in Iraq.

> Considering the environmental consequences, our actions must become second nature to us all in every choice and every decision we make; if it does not, all the laws and regulations, government programs and market incentives in the world will not be enough to save us from environmental disaster...[19]

These were the wise words coming from the UN Secretary General during his address to the Sasakawa Environmental Prize Ceremony held in New York in 1997. The Secretary General Kofi Annan thus underscored the importance of the environment and the nature of actions we as the world community must take to protect the environment and not to destroy it.

The importance of the environment explains why the international community has adopted many international legal instruments concerning the environment. The environmental protection cuts across all international legal instruments meaning that humanitarian law is no exception is this regard.

Accordingly, humanitarian law prohibits the means and methods of warfare that cause widespread, long-term and severe damage to the environment. The meanings of the terms, widespread, long-term, and severe damage have been given by the Convention on the Prohibition of Military or Any Other Use of Environmental Modification Techniques (ENMOD Convention) as follows:

> Widespread damage is that which affects an area which encompasses several hundred square kilometers; long-lasting or long-term damage is that damage that lasts for several months of approximately a season; and severe damage means serious or significant disruption or harm to human life, economic resources or other assets.[20]

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[19] UN Secretary General, Kofi Annan, in his address at the United Nations Environmental Programme (U.N.E.P.), Sasakawa Environment Prize Ceremony,( New York,) 12 November 1997, ( SG/ SM/ 6390).
[20] For a Text of the Understanding Provided by the UN Committee on Disarmament, see UN DOC CCD/520 (1976) September, Annex A.

If any of these thresholds is crossed, then the ENMOD Convention is breached. In the humanitarian legal regime, the protection of the environment is captured by the provision of Article 35 paragraph 3 and Article 55 of A.P 1 which prohibits severe damage to the environment and it covers both intentional and purely unintentional and incidental damage to the environment.

The duty to protect the environment during armed conflict was also recognized by the delegates who attended the Rio de Janeiro conference on the environment. At the end of the conference, the delegates passed certain principles on biodiversity and the environment. Principle 2A of the Rio Declaration provides that war is inherently destructive of sustainable development and states shall therefore respect international law providing protection for the environment in times of armed conflict and co-operate for its further development.

All these measures make it obligatory for the states to take environmental consideration into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. There is no defense that a party was acting in self defense and the destruction was occasioned at the spur of the moment when environmental considerations could not have been taken into account or that the area that was destroyed by the warfare has no vegetation or human population.

Indeed this position has been reaffirmed by the ICJ in its *Advisory Opinion Concerning the Legality of the Threat and Use of Nuclear Weapons.* The court had this to say in relation to environmental degradation:

> One cannot argue that the rule on proportionality is not violated based on the sole fact that the attacks took place in an area that has little or no human population.[21]

Therefore a destruction of the environment, not justified by military necessity and carried out wantonly is clearly contrary to the existing international law.[22] With the position of the law having been fully established, our main task now is to establish the extent to which both parties to the 'liberation war' complied with the law. In the first place, there is no doubt that Iraq was badly bombarded by the allied forces, that buildings were bombarded, that bare land was bombarded, etc.

However, while it may be argued that the bombardments might have been caused by military necessity, it is important to examine whether the bombardments were really called for and justified in the circumstances. To determine this,

[21] *Supra.* Note 7 paragraph 30.

[22] See the General Assembly Resolution 47/37 of 25th November 1992 on the Protection of the Environment

recourse has to be had to the proportionality of the bombardments and the effects in relation to the military advantage that was expected by the allie forces. In Iraq, many places, structures, etc. were badly bombarded and we completely destroyed; stray missiles landed on bare land with some causir casualties among the civilian population. No measures were taken to reduc the bombardments or use weapons that do not cause a lot of environment degradation.

In our view, the effects caused by the use of highly dangerous cluster bomb were disproportionate to the military advantage that the allied forces reaso ably expected from the war. Furthermore, the presence of the unexploded clu ter bombs still poses a great danger to the environment thus leading to enviro mental degradation. It is unpalatable for the allied forces to argue that the env ronmental degradation was not intentional because the provisions articles 3 and 55 of A.P 1 of 1977 state that they were applicable whether the act environmental degradation is intentional or unintentional. Moreover it is an e tablished principle that the proof of a 'guilty mind' (mens rea) is not essential f 'any person' to be found guilty of committing an environmental offence.

On the other side of the conflict as it is well known now was the Iraqi gover ment trying to defend its integrity and repulse its enemies. In an attempt succeed in doing so, Iraq embarked on the 'scorched earth strategy' to preve the movement of the fast advancing enemies from the southern part of Ira This strategy is based on the setting ablaze of oil fields and from the fire em nated a thick smoke which no doubt affects both the human life and the env ronment. At the same time the' scorched earth strategy' interferes with the nat ral resources on which the fire is set. Therefore, just like the allied forces, th Iraqi government was in breach of international environmental law and humar tarian principles as the damage was uncalled for, unjustified and exceeded th battlefield damage to be regularly expected in war.

## 3 REGARDING PRISONERS OF WAR

Prisoners of War (hereafter "POWs") are members of the armed forces of or of the parties to the conflict who fall into the hands of an adverse party durir an international armed conflict. They retain their legal status as members of th armed forces as indicated externally by the fact that they wear uniforms, th they continue to be subordinate to their senior officers who are themselv POWs and that at the end of the hostilities are to be returned to their count

in Times of Armed Conflict.

without delay.[23] The legal provisions relating to the POWs are contained in the 3rd Geneva Convention. [24]

The Convention is careful to provide that it applies to POWs who are captured in a properly declared war; and also in all cases of partial or total occupation of territory by a belligerent, even if the occupation meets with no armed resistance[25]. Article 4 of the Convention gives a very wide definition of a P.O.W for the purposes of the Convention in order to cover every person likely to be captured in the course of the hostilities and who should be entitled the privileges covered by the Convention. It outlines the following categories of persons;

i. Members of the armed forces of a party to the conflict together with militias or volunteer corps forming part of such armed forces.
ii. 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.
iii. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power.
iv. Persons who accompany the armed forces without actually being members thereof such as civilian members of the military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces.
v. Members of crews including masters, pilots and apprentices of the merchant marines and the crews of civil aircrafts of parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law.
vi. Inhabitants of a non-occupied territory, who on approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves in the regular armed units, provided they carry arms openly and respect the laws and customs of war.

Paragraph B of Article 4, provides for categories of other persons who shall likewise be treated as POWs under the Convention. These are:

i. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying power considers it necessary to intern them by reason of such allegiance, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces which they belong to and

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[23] Gasser, P. G., International Humanitarian Law- An Introduction, (I.C.R.C., Henry Dunant Institute, Haupt 1993)
[24] Geneva Convention Relative to the Treatment of Prisoners of War of 12th August 1949.
[25] Stone, J., Legal Controls of International Conflict, (Maitland Publications PTY Ltd, Sidney, 1959).

which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

ii. The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent powers in their territory.

The subsequent chapters of the convention go further to specifically outlin the treatment of the POWs in relation to various aspects, for example, Genera Protection of POWs such as humane treatment[26], captivity[27], quarters, foo and clothing of POWs[28], financial resources of POWs[29] among many othe provisions.

Common article 3 and Additional Protocol II both do not contain any provisions relating to Prisoners Of War and as such, it follows that POW status only arises in instances of international armed conflict. 'Operation Iraqi Freedom' is an international armed conflict and the provisions of the 3rd Geneva Convention apply. All the parties in the conflict are signatories to the Geneva Conventions. Both parties have been reported as having captured POWs from the other side. More than 8,300 Iraqis are being held as POWs by the Americans and the British.[30] Iraq is also said to have captured 5 members of the US Army's 507th Maintenance Company after they veered off course near Nasiriya. Iraq also captured 2 U.S helicopter pilots.[31]

Both parties to the conflict were under an obligation to apply the provisions of the 3rd Geneva Convention in the treatment of the captures prisoners. However, there were reports that both had violated the provisions. Of particular concern was the broadcasting of the footage and publishing of photographs of the POWs. It is reported that the 5 U.S soldiers captured by Iraq were shown on Iraqi TV and were asked to provide their names, ages, and why they had come to Iraq.[32] U.S and its British and Australian allies are also not blameless as pictures of surrendering and captured Iraqi troops, some in humiliating positions, have been widely reproduced in news media in the west[33].

The broadcasting of the photographs of POWs has been said to be a violation

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[26] Part II, 3rd Geneva Convention (Articles 12-16)
[27] Part III; Section 1 3rd Geneva Convention (Articles 17-24).
[28] Chapter III (Articles 25-28)
[29] Section IV (Articles 58-68)
[30] Charter, D. & Evans, M., *Allies Dispute Status of Militia Prisoners*, TIMES, 1st April 2003.
[31] Fannaini, S. & Eggen, D., Prisoners *Images are Tough Issues for Iraq and U.S*, WASHINGTON POST, 25th March 2003.
[32] *Ibid.*
[33] Williams, F., Red *Cross Says Both Sides Flout the Geneva Rules*, FINANCIAL TIMES, 25th March 2003.

of Article 13 of the 3rd Geneva Convention, which provides that:

> Prisoners Of War must at all times be humanely treated. Any unlawful act or omission by the detaining power causing death or seriously endangering the health of a Prisoner Of War in its custody is prohibited and will be regarded as a serious breach of the present convention. In particular, no Prisoner Of War may be subjected to physical mutilation or to medical or scientific experiments of any kind, which are not justified by the medical, dental, or hospital treatment of the prisoner concerned and carried out in his interest. Likewise, Prisoners Of War must at all times be protected particularly against acts of violence or intimidation and against insults and public curiosity, measures of reprisal against Prisoners Of War are prohibited.

The broadcasts are a breach of the duty of the Detaining Power to protect POWs against public curiosity. They are however some differing opinions as to what exactly is meant by the Convention by the phrase public curiosity. It is argued that the convention does not specifically forbid prisoners from being photographed.[34] However, this may be qualified by the circumstances in which the prisoners are photographed. If the POWs are in cruel or humiliating positions, then that is a blatant violation of the convention. Broadcasting the photographs creates an added obligation to the determining authority to control its media, as the media is not directly bound by the convention.[35]

Another aspect of the rights of POWs is in relation to their right to be visited in their detention camps by the I.C.R.C and other relief organizations. Detaining powers are obliged under Article 125 of the Third Geneva Convention to allow representatives of religious organizations, relief societies, and any other organization assisting Prisoners of War to visit the detention camps. The special position of the I.C.R.C is recognized and it is to be respected at all times. This provision was also violated during the Iraqi war. Both parties accused each other of failing to disclose where the POWs were being detained and further, of failing to provide adequate and humane living conditions. As reports by *the Independent Newspaper* dated 27 March 2003 indicated, the British and American soldiers were building an internment camp close to the Kuwaiti border to hold thousands of POWs from Saddam Hussein's forces. If the detention facilities are unknown as to their location, then it is impossible for ICRC delegates to visit and assess their conditions.

However, we do not wish to indicate that the parties to the Iraqi conflict were violating the rules of International Humanitarian Law left, right and center. The

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[34] *Supra* note 31.

[35] This shall be discussed in greater detail in the discussion on the role of the media late below.

I.C.R.C delegates are reported to have met senior officials from both Wash ington and Baghdad to discuss access to the POWs and there is no indicatic that the parties were unwilling to co-operate, in fact, each party has expresse an intention to adhere to the Geneva Convention.[36] The I.CRC is reported a having visited Iraqi POWs held by the US[37] while Iraqi authorities did agree t grant access to POWs by the ICRC.[38]

Another notable adherence is the indication by the U.S to hold hearings t determine the status of the Iraqi prisoners in their custody as it claimed that nc all the 8,300 Iraqis being held were POWs.[39] This is in line with the provision c Article 5 of the 3rd Geneva Convention, which provides that if there is a doubt a to whether a person is a POW; such a person shall be accorded the protectio of the Convention until such a time as their status has been determined by a competent tribunal.

## 4 OCCUPATION

### 4(i) Legal Confines of The Occupancy

On April 11, 2003, the International Committee of the Red Cross, a leading bastion (and arguably chief custodian) of International Humanitarian Law sen an urgent appeal from its Geneva headquarters calling on American troops tc protect hospitals and water supplies in the city of Baghdad, arguing that tc comply with the obligations of an occupying power, the United States was duty bound to direct its military to stop the looting of essential public utilities.[40]

The conclusion to be drawn from this supplication was the fact that the Unitec States of America had taken up a position of belligerent occupancy in Iraq fol- lowing the almost one month old armed conflict that had been raging betweer the states of Iraq on the one hand and the allied powers led by the Unitec States of America on the other. Like all other material aspects of an armed conflict, belligerent occupation is a kind of alien occupation that has attracted a substantial attention of the international legislative machinery such that it may only be exercised within an established framework of rules.[41] The rather tech-

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[36] Buncombe, A., *Soldiers Build Secret Camp to Intern Thousands of Iraqi Captives*, THE INDEPENDENT, 27th March 2003.

[37] *Supra* note 30. It is reported that the I.C.R.C. began to visit a camp near the Southern town of Umm Qasr, in Iraq.

[38] Loeb, V., Red *Cross Loses Contact of P.O.W.s*, WASHINGTON POST, 12th April 2003.

[39] Editorial, *Stick to the Rules*, FINANCIAL TIMES, 2nd April 2003.

[40] Jane, P., *Aid Groups Urging Military to Protect Essential Services*, NEW YORK TIMES 12th April 2003.

[41] Other Non-belligerent types of occupation could be discerned from the situations in Namibia in the 1960s, Western Sahara, East Timor and these are really not the concern of International Humanitarian Law.

nical issue of the precise moment when the invasion of Iraq turned into ai occupation is not always easy to determine.[42] Article 42 of the 1907 Hague Regulations attempts to volunteer a pointer to the solution for this conundrun by providing that a territory is considered occupied when it is actually placec under the authority of the hostile army.

In spite of the technical difficulty of ascertaining the factual situation that coulc constitute the actual placement under the authority of the hostile army, it cannc be gainsaid that the state of affairs subsisting in the state of Iraq from about the 9th of April 2003 constituted belligerent occupancy as recognized within the norms governing the conduct of armed conflicts and specifically those of ai international character since it had the key distinguishing characteristics of bel ligerent occupancy, to wit:(a) It was by a belligerent state, (b) it entailed occupa tion of an enemy belligerent state (c) the occupancy occurred during the course of an armed conflict, and (d) it took place before any general armistice agree ment was concluded between the warring parties.[43]

The question that invites examination is whether the body of law governing belligerent occupancy is at variance or in consonance with the legal regime reigning in the course of the actual state of hostilities between the warring states Jean Pitet, a leading luminary in the realm of International Humanitarian Law while acknowledging that the hostility phase and the occupancy phase consti tute two phases of an armed conflict still maintains the opinion that the Geneva Law governing occupations is not substantially different from that which applies during the preceding invasion phase. The learned author notes;

> There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol, which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets. When it withdraws for example, it cannot take civilians with it, for that would be contrary to Article 49, which prohibits the deportation or forcible transfer of persons from occupied territory.[44]

From the above wisdom of the author, it could be discerned that the United States of America, as an occupying power in Iraq was still governed by the corpus of norms in both Customary International Law and Conventional Law

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[42] See Roberts, A., *What is a Military Occupation?* (1984) British Year Book Of International Law, P. 25

[43] These definitional characteristics of a belligerent occupation attract a consensus from a number authors e.g. Graber, The Development of the Law of Belligerent Occupation 1863- 1914, (1949) p. Feilchenfeld, The International Economic Law of Belligerent Occupation, (1942) P. 6; Glahn, V., Th Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation (195 p. 28; Roberts, A., *Ibid.*

[44] Pictet, J., Commentary on Geneva Convention IV, (1958) P.21.

that were binding upon it from the moment it entered a state of armed conflict with the Saddam Hussein regime that it eventually ousted.

To ascertain the substantive rules defining and regulating belligerent occupation, attention is paid to the Hague Regulations which have been laid out as the first codification of international rules relating to belligerent occupation and which themselves were built on Customary International Law.[45] Further reliance is also placed upon the Geneva Conventions on the Protection of Victims of War, signed in Geneva on August 12, 1949.[46] Article 2 Common to the four Geneva Conventions, which deals with the field of application of each of the four conventions that provides thus;

> "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting parties, even if the state of the war is not recognized by one of them. The Convention shall also 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 (emphasis added). Although one of the powers in conflict may not be a party to the present Convention, the powers who are parties thereto shall remain bound by the Convention in relation to the said power, if the latter accepts and applies the provisions thereof." [47]

The provision seems to have lent authority to Jean Pictet *(supra)* in arguing that the occupational phase of an armed conflict is by and large subject to the rules of the conflict's hostility phase since Article 2 was intended to define the material field of application of the Conventions in their entirety.

## 4(ii) Duties Of The Occupying Power

In addition to the Hague Regulations of 1907, Articles 27-34 and 47-78 of the Fourth Geneva Convention specific to the Treatment of Civilians in an armed conflict are also dedicated to address and regulate the conduct of occupying powers with respect to protected persons and thus form an instrumental basis of interrogating the specific acts and omissions of the United States of America in the period following the cessation of hostilities and the subsequent assumption of authority over the state of Iraq[48]

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[45] Fleck, D., *supra* note 4, p. 240; Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, Vol. XXII, p. 497.

[46] United Nations Treaty Series, Vol.75, pp. 31-417.

[47] Common Article 2, The Four Geneva Conventions on the Protection of Victims of War signed at Geneva on 12th August 1949, U.N.T.S., Vol. 75 pp. 31-417.

[48] As already noted, Article 42 to the Hague Regulations treats the actual exercise of authority as an integral aspect of belligerent occupancy.

It need not be overemphasized that in positive terms, like any other aspect of an armed conflict, the occupant's powers are not infinite. These powers are limited and, broadly put, the powers include the continuance of orderly government and the exercise of control over and utilization of the resources of the country so far as necessary for that purpose and to meet its own military needs.[49]

On April 10th 2003, it was reported that the Red Cross, the last International aid agency working inside Baghdad had suspended its operations after one of its workers was critically wounded in an attack on a convoy attempting to re-supply the city's hospitals.[50] Vatche Arslanian, a Canadian logistics expert was reported to have been seriously wounded and had to be abandoned after colleagues trying to rescue him were forced back by gunfire. Without more, this gloomy report does not reflect a case of an orderly government. It is a scenario of public disorder in all its manifestations.

The above incident occurred barely two days after the International Committee of the Red Cross had reported that a shortage of water in Baghdad was threatening the ability of hospitals to carry out operations and depriving the population of sanitation. It was further reported that the casualties in the capital could only reach one hospital, Al-Kindi hospital, where surgeons were working nonstop and running short of anesthetics and equipment.[51] This apparent chronology of horrifying events took place in full glare of the provisions of Article 55 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in the time of war of August 12, 1949 which at all material times enjoined the United States of America, as the occupying power, 'to the fullest extent of the means available to it' to ensure that the food and medical supplies of the population is adequate and in particular to bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.

With a situation where surgeons were operating on patients anaesthised with headache pills[52] and the World Health Organization reporting a shortage of equipment to deal with burns, shrapnel wounds and spinal injuries,[53] no further deterioration was required before the resources of Iraq could be declared inad-

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[49] Stone, J., Legal Controls of International Conflicts, (Rule of Law Research Centre, North Carolina, 1959) p. 697.

[50] Cohal, M., *Red Cross Suspends Delivery of Aid after Attacks*, THE INDEPENDENT, 10 April 2003; Elizabeth, B., *Relief Agencies are Forced to Wait as Chaos Reigns*, NEW YORK TIMES , 10 April 2003.

[51] Owen, B., *Lack of Water Threatens Hospitals Swamped by Casualties*, GUARDIAN, 8th April 2003.

[52] Milmo, C., & Buncombe, A., Surgeons *Using Headache Pills Instead of Anaesthetic*, INDEPENDENT 9th April 2003.

[53] Owen, B., *Baghdad Hospitals Pushed to the Limit*, GUARDIAN 9th April 2003.

equate. The obligation to the occupying power was nothing short of an employment of every machinery at its disposal to top up the supplies.

Due to the inadequacy of supplies, the United States had the mandate under the relevant Geneva law to agree to relief schemes on behalf of the civilian population. The United States was under humanitarian duty to facilitate these schemes by all means at its disposal and in particular to permit the free passage of consignments of foodstuffs, medical supplies and clothing and to guarantee their protection.[54] However, the permission of the passage of the consignments brought in by the relief agencies does not relieve the occupying power in question of its duties under Article 55 of the Fourth Geneva Convention.[55]

The foregoing can fairly support a conclusion that the attacks on the two vehicles carrying large Red Cross flags which were attempting to reach one of Baghdad's main hospitals that culminated in the death of Mr. Arslanian amounted to a failure by the occupying power to "guarantee protection" to the relief society.

In the same breath, a group of young men were reported to have been seen standing at the gates in Al-Kindi hospital in blue surgical gowns when, in actual fact, they were not doctors or medical orderlies. The young men were discovered to have been "volunteers" protecting the hospital from looters and thieves. Their argument was that the British and American forces would not protect them hence they had to protect themselves. [56]

The looting was not an isolated incident. In another sign of conditions in Iraq USAID was reported to have declared that it was not giving any more kits to the military just so that they could be looted. A World Health Organization stock of medical supplies for treating 10,000 people for three months was reportedly stolen soon after the American military unit left it at a hospital in a city on the way to Baghdad. [57]

A cursory glance at the events in Baghdad and many other cities in Iraq could logically lead one to conclude that the power of running Iraq had been grabbed from Saddam Hussein and unceremoniously handed over to anarchist looters. This driving of civilians to despair, be it deliberate or conditional, and the absolute disappearance of protective confidence in the occupying power, cannot

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[54] Article 59 of the Forth Geneva Convention.
[55] Article 60 of the Forth Geneva Convention.
[56] Buncombe, A., *People of Baghdad Guard Hospitals From Looters*, INDEPENDENT12th April 2003.
[57] Jane, P., *supra* note 40.

have been the intent of the drafters of both the Hague Regulations and the Geneva Conventions.

In actual fact, the framers of the two sets of instruments conferred upon the occupying power some legislative powers for purposes of maintaining law and order. As far as the Hague Regulations are concerned, the occupying power shall "take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[58] The same principle was largely upheld by the framers of the Fourth Geneva Convention who provided that "the penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the occupying power in cases where they constitute a threat to its security or an obstacle to the application of the present convention.[59]

It is imperative to note that imposing the occupant's law to the occupied territory is apparently highly discouraged. The belligerent occupant is authorized to enact legislative measures only in so far as they restore public order and civil life, that is, are concerned with the common interest or the interest of the population.[60] Common logic dictates that the massive looting, wounding, maiming and killing that took control of the better part of Iraq in the wake of America's take over constituted a state of public disorder that would warrant urgent legislative efforts for purposes of protecting the general public.

Decrees in the manner of states of emergency, which would constitute "laws" within the meaning of Article 43 of the Hague Regulations, could have been issued in the city of Baghdad and other areas that were governed by anarchy if the occupying power was really interested in upholding the greater public interest.[61]

Wartime measure in fact has been upheld by judicial organs as amounting to "extraordinary" laws, decrees or ordinances which are valid. In the case of *Cillekens v. Dehass,*[62] an order of the German Governor General in Belgium terminating a moratorium previously established by the King of the Belgians for the duration was challenged by a plaintiff who filed a claim for a debt. The defendant invoked the moratorium maintaining the governor's cancellation order was illegal because it was contrary to Article 43 of the Hague Regulations.

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[58] Article 43 to the Hague Regulations. Emphasis is added.
[59] Article 64 to the 4th Geneva Convention. Emphasis is added.
[60] Meuvier, Die Voelkerrechtliche Stellung Der Vom Feind Besetzten Gebiete, (Tubingen, 1915) p. 23.
[61] Stone J. *supra* note 49, p. 698.
[62] Dutch Dist. Ct., Rotterdam, May 14, 1919.

The courts gave judgment for the plaintiff on the grounds that the limitations of Article 43 applied to ordinary laws but not to war measures and therefore the moratorium had been validly terminated.

Considering that a decree touching on matters that were more commercial than administrative was upheld as being valid, the US had no excuse for failing to give appropriate decrees that would alleviate the superfluous suffering that was visited upon the Iraqi civilians. The duty that is generated under Article 43 of the Hague Regulations to "restore and ensure as far as possible public order" is a positive duty and the conduct of the U.S to sit back as lives and property were destroyed and despoiled, fell short of the expectations of the international community.[63]

An implicit admission by the US that it had began on an unsuccessful note in terms of meeting its obligations as an occupying power found expression in the inability of the Lt. Gen. Jay Garner, the man designated by the US to run Iraq temporarily, to go beyond Umm Qasr on his first day in Iraq. His aides reportedly admitted that it was not safe for him to go further north to Basra, the second biggest city in Iraq.[64] This act of an officer of high rank fearing to venture into certain areas of the state of Iraq tends to send a bleak humanitarian picture of the situation of the civilians who had no alternative but to stay in the turmoil.

Protection of civilians, as already noted, is at the core of the Principle of Distinction in International Humanitarian law. An occupying power is duty bound to protect civilians within the occupied territory from outrages of whatever kind as far as possible. Indeed, Article 27 of the Fourth Geneva Convention entitles civilians in occupied territory to respect for their persons, their honor, their family rights, religious practices and convictions and manners and customs. Such persons, it is provided, are supposed to be protected against acts of violence or threats thereof and against insults and public curiosity. The reported shooting of people by the American forces at roadblocks in Saddam city in the Northeast of Baghdad leading to the influx of casualties at the Al-Khadasia hospital in the city flies in the face of the occupant's duty to respect the persons of the civilians and to treat them humanely.[65]

Children, objects of special protection within the entire corpus of the Geneva Law were spared either. In one of the reports from the post war Iraq, children

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[63] Mr. Kenneth Bacon, President of Refugees International said that the Bush administration had little choice but to instruct the military to create some kind of order; The ICRC was quoted as appealing to the British to impose a curfew in Basra as a way of halting looting; See generally Jane, P., *supra* note 40.
[64] Jane, P., *Ibid.*
[65] Buncombe, A., *supra* note 56.

were reported to be lining the highways from the southern part of Umm Qasr to Basra, begging westerners to slow their cars and share their water.[66] Rather than leave children to survive under these deplorable conditions, the occupying power was under a duty to facilitate the proper working of all institutions devoted to their care and education.[67]

The establishment of the Humanitarian Operations Center (H.O.C) by the US-led coalition in Kuwait that stirred discontent within the circles of relief agencies could not go unscrutinized.[68] It is not in dispute that the state of supplies of foodstuffs and medical facilities in Iraq was appalling. In such circumstances, without relieving its obligation, the US, as an occupying power, was under an obligation to agree to relief schemes on behalf of the Iraq population and to facilitate them by all means at its disposal.[69]

Bearing in mind that the US was a party to the conflict and its impartiality in the coordination of relief supplies could not pass without raising questions, it was not in order for it to run the center whose role was interpreted to be a dictation of which aid goes where under the guise of a "logistics facilitator".

The language of the Convention is such as to subject the consignments by the relief agencies to the search of a power granting free passage on their way to the occupied territory, regulation of times and routes and a reassurance by the protecting power that the consignments are intended to be used for the relief of the needy population and not for the benefit of the occupying power. For the occupying power to assume an unnecessary control over these consignments when in actual fact they are intended to remedy a deficiency resulting from a breach of obligation by the same occupying power, this definitely runs counter to the express intends of the drafters of the Geneva Convention.

## 5 RELIEF ACTIVITIES

### 5(i) The Work of Relief Agencies

It is a truism that the effects of an armed conflict are many, varied and unpredictable in occurrence. This calls upon all and sundry to summon their strengths and efforts to uphold the humanitarian side of the otherwise forlorn face of an armed conflict. During the Iraq conflict, American non-governmental organizations such as CARE, the International Rescue Committee, Mercy Corps and

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[66] Elizabeth, B., *supra* note 50.
[67] Article 50 of the Forth Geneva Convention.
[68] Nicolas, P., Relief *Workers Urge Closure of Coalition Aid Centre*, FINANCIAL TIMES 10th April 2003.
[69] Article 59 to the Forth Geneva Convention.

Save the Children were reported operating at least in the city of Umm Qasr, the town just over the border from Kuwait. They allegedly could not venture beyond Umm Qasr for security reasons. [70]

Other relief agencies reportedly operating in Iraq included Refugees International, World Food Program, Catholic Agency for Overseas Development (CAFOD), Christian Aid, Adventist Development, Japanese Agency Peace Winds, Charity Aid International, UNHCR, Muslim Aid, UNICEF and the International Committee of the Red Cross, to name but a few. [71]

The battery of NGOs that gravitated towards the Iraqi soil and the neighborhoods to offer material and moral assistance to those caught at the center of the long crisis irresistibly lent credence to the opinion that no study of NGOs can fail to note the importance of individuals with vision or dedication to an ideal, or dogged determination or all three, who identify an objective, who refuse to accept discouragement and who have charisma to inspire followers to continue the fight until the goal is achieved.[72]

Needless to say, the non-governmental and inter-governmental relief agencies did not take on the Iraqi cities as holiday destinations. The supply of 5,400 one-litre bags of drinking water to Karama and Munsarr hospitals, [73] the work by the ICRC team in Basra to restore electricity for pumps,[74] the reconnection of drinking water supplies in Basra,[75] the death of Mr. Arslanian, a Canadian logistics expert who had been part of the ICRC team delivering emergency supplies to hospitals and water treatment works,[76] all support the argument that these relief agencies were on a humanitarian mission in Iraq.

### 5(ii) Relief Agencies and the Need for Impartiality

It does not find accommodation within the mandate of relief agencies to foster hostilities. In the course of their operations, relief agencies are under an incessant call to be impartial. To foster this call and to emphasize the humanitarian nature of responses to conflicts, as distinct from the political nature of the

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[70] Jane, P., *supra* note 40.
[71] Nick, C., "*The Smart Donars Guide to Aid for Iraq*," GUARDIAN, 1st April 2003.
[72] Sanky, J., " Conclusions" in Peter Willets (ed.), The Influence of Non-Governmental Organizations in the U.N. System (Hurst and Company, London, 1996) pp. 270-276 at p. 274.
[73] Owen, B., *supra* note 53.
[74] Ewen, M., *Humanitarian Crisis in Besieged Basra – 100000 Children could be at Risk, Warns U.N Agency* GUARDIAN, 27th March 2003.
[75] Simon, P., *Aid Supplies Start Arriving in Iraq*, GUARDIAN, 27th March 2003.
[76] Cahal, M., *supra* note 50.

conflict itself, relief agencies, deliberately attempt to assist victims on both sides of the conflict.[77]

By their very nature, of all the players in an armed conflict, NGOs stand out as one category of players with a different motivation. This is based on the notion of the ideology, which they profess and which is predominantly or explicitly religious or humanitarian ideology and the individuals working with NGOs are often 'screened' for compliance with such an ideology.

The International Committee of the Red Cross stands out as an exemplar of an impartial humanitarian agency, which other relief agencies are implicitly called upon to ape.[78] In fact, in the statutes of the Red Cross Movement, impartially stand out as one of the seven principles governing the movement's operations.

### 5(iii) Mode of Operation of Relief Agencies

With the exception of the ICRC, which has a substantial Conventional mandate in armed conflict situations, most humanitarian relief organizations have historically relied on moral persuasion and negotiation with national and religious authorities to be allowed entrance into conflict situations.

Such relief agencies have tended to be pragmatic, attacking problems and hoping to eventually improve the conditions of the victims. Frequently, their work is dangerous, always difficult and more often than not small scale. They are less bureaucratic and their activities revolve around obtaining the relief and applying it to the real flesh-and-blood victim. The thirsty child who receives drinking water, the invalid elderly who receives medical attention, the wounded combatant who receives wound dressing and the famished civilian who receives a morsel at the end of the day are the actual concerns of these agencies and this is the humanitarianism that matters- humanitarianism in action.

### 5(iv) Protection of Relief Agencies

For all practical purposes and intents, members of relief agencies are civilians within the meaning of Article 50 of the First Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of international Armed Conflicts of June 1977, that is, they are not combatants.

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[77] Mohammed, A., " Responses of Non- governmental Organizations to Conflict Situations," in Thomas G. Weiss (ed.), Humanitarian Emergencies and Military Help in Africa (The Mac Millan Press Ltd., London, 1990) P. 98.

[78] See for instance Article 59 of the Forth Geneva Convention and Article 3 (2) Common to the Four Geneva Conventions, which describe the I.C.R.C as " an impartial humanitarian body."

They are therefore not supposed to be the objects of attack. Their work appears quite risky since it entails venturing into areas that all other mortals are yearning for a chance of a lifetime to get out.

Article 59 to the Fourth Geneva Convention of 1949 enjoins state parties to guarantee the protection of agencies venturing into occupied territory. During the Iraqi conflict, the death of Mr. Arslanian of the ICRC as American forces were busy pulling down Saddam Hussein's statues was a slap in the face of humanitarian law. Indeed it is hoped that the international community shall one day think of coming up with a convention specific to the protection of relief agencies in times of armed conflicts.

## 6 THE MEDIA

Almost all the information on the war against Iraq relied on in this article was derived from articles in various reliable newspapers such as the Washington Post, Financial Times, Independent and Guardian. Indeed, for most of us, we rely heavily on not only the print media but also the electronic media for information on the events going on in various parts of the world. The war against Iraq was no exception and all forms of media kept us abreast with what was going on.

In any situation of armed conflict, as was the case in Iraq, issues of humanitarian law arise. There does not seem to be any specific provision of IHL that governs media activities in a situation of conflict. This sometimes gives rise to complications as where the media is deemed to have acted inappropriately there is not guideline on how to deal with the situation.

This problem was evident in the Iraq where the American government criticized the Arab Al-Jazeera Satellite Network and the Iraqi Television for showing video images of captured Americans. They claimed that this was contrary to the Geneva Conventions.[79] The media in the west can also not escape criticism as photographs of surrendering and captured Iraqi troops some in humiliating positions, were widely broadcasted.[80]

Those condemning such broadcasting by the media claim that it goes against Article 13 of the 3rd Geneva Convention, which stipulates that, all prisoners must be protected against such acts of violence or intimidation and against insults and public curiosity. Question arises as to whether shielding from publi

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[79] Fainaw, S., & Eggen, D., Prisoner *Images Are Tough Issue for Iraq and U.S.*, WASHINGTON POST 2 March 2003.

[80] Williams, F., *supra* note 33.

curiosity includes shielding from any kind of photography. One cannot ignore the important role that the media has played in letting the world know of the situation in Iraq. Indeed, how else would the world know of any violations of IHL being committed by the parties to a conflict? The only other body that would have information would be the ICRC, which has a policy of not publicizing any information within its knowledge.[81]

The media does act as a check against violations as parties who violate the laws of war will be condemned and may lose the support and goodwill of the other states. However, should there be a limit to how the media should go about their broadcasts? It has been opined that they should not, for example, show photographs of prisoners, while the prisoners are in humiliating positions as this would be contrary to Article 13, but how then will the world get to know the truth?

It is our humble opinion that the media should be left to do their job- and that is to keep us informed. Advocating for control of the media by their respective governments may prove to be counterproductive, as many governments may take advantage of their authority to stifle the media's independence. The media should on its part endeavor to give a balanced and fair representation of the facts. They should not be seen to be biased in their reporting. This was the bone of contention with the media that its critics had in the war against Iraq. The Iraqi television would only show photographs of the captured US prisoners while the western media would show photos of captured Iraqi troops.[82]

## 7 CONCLUSION

Clinging to the hope that the Iraq conflict of 2003 is the last scourge of war to befall the human society is a clear case of naïve optimism. The fact that another armed conflict, and perhaps of greater proportions, is bound to hit the globe is as sure as the fact that the human society is bound to exist at least a little longer. Humanitarian law does not by any means purport to turn war into a fashionable and basically humane activity, comparable more or less to a medieval jousting tournament. Rather and far more modestly, it aims to restrain belligerent parties from wanton cruelty and ruthlessness, and to provide essential protection to those most directly affected by war. [83]

An analysis of the First World War, the Second World War, the Vietnam War, Gulf War I and now the Gulf II among other situations seems to consistently

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[81] Confidentiality is one of the Seven Principles of the ICRC
[82] *Ibid.*
[83] Kalshoven, F., *Op Cit.* P. 1

and chronologically portray humanitarian law as a body of law that has only been honoured in breach. It is not prophetic to predict that when we encounter a similar situation that is undeserving of envy as found expression in the US-Iraq model of settling disputes, as we surely will, a sorry state of humanitarianism will once again rear its ugly head.

It is sometimes alleged that the laws governing war and not "law" in the sense of being susceptible to enforcement. It would seem that the only effective enforcement of humanitarian law is the common conviction of participants that adhering to the law rather than violating it advances their own self-interest. Legal scholars point out that this is the basic enforcement for all bodies of law, whether international or municipal; and the concept is that the interests of the participants are not only mutual but also reciprocal as well.[84] The writings of authors and rantings of orators in the manner of disseminating the knowledge and understanding of humanitarian law would seem to be an important first step towards the strengthening of the foundations and the adornment of the entablatures of an adequate respect and enforcement of this branch of learning.

[84] Mohammed, A., *Op Cit.* p. 98