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The International Humanitarian Law Classification of Armed Conflicts in Iraq since 2003

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Introduction: Review of the Timeline of Events in Iraq

An armed conflict, within the meaning of international humanitarian law (IHL), began in Iraq when that country was invaded by military forces of the coalition composed primarily of the United States, the United Kingdom and Australia in March 2003. It continues to this day, notwithstanding a certain decline in intensity since the British withdrawal in July 2009 and the reorganization of US forces under a new security agreement with the Iraqi government in December of the same year. Over the course of its duration, the Iraq conflict has undergone three definite mutations in terms of its participants, mutations which have had the effect of altering its characterization under IHL. The four phases of the conflict have been as follows:

1. the initial invasion, which saw hostilities between the coalition forces and those of the Iraqi government of President Saddam Hussein (March to April 2003);

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2. the *debellatio* of Iraq and its belligerent occupation by the victors, represented by the Coalition Provisional Authority (CPA), confronted by an increasingly violent insurgency (April 2003 to June 2004);

3. the transformation of the coalition occupying forces, with broader international participation and a United Nations mandate, but still opposed by the insurgency, into the Multinational Force–Iraq (MNF-I) (June 2004 to December 2008); and

4. the continuing presence of US forces (all others having withdrawn) to help confront the insurgency, without a UN mandate but with a security agreement negotiated between the United States and the Iraqi government (since January 2009).

The question of the nature of the armed conflict in Iraq is not of merely academic interest, nor can it be dismissed as an exercise in sterile semantics of no practical importance to the troops on the ground. On the contrary, the determination of the nature of an armed conflict in the sense of IHL has a very real significance for the military forces engaged in the conflict, for it impacts directly such practical military activities as the status of the participants, their consequent classification and treatment after capture by an opposing party, the conduct of hostilities and the use of weaponry. Above all, it determines the international law framework and rules applicable to the situation.

IHL recognizes two basic types of armed conflict: international (IAC) and non-international (NIAC). Although, broadly speaking, many of the same principles of customary international law are now considered applicable in both types of conflict,[1] the fact remains that the detailed legal regulation of conduct in armed conflicts is still contained primarily in the various treaties that have accumulated over the last one hundred fifty years—principally the Hague Regulations of 1907, the Geneva Conventions of 1949 and their Additional Protocols of 1977. The scope of application of each of these instruments is precisely defined, but they were designed for conflicts that were comparatively clear in nature: one State against another State or a State against insurgents, that is, its own nationals in its own territory. A salient feature of the hostilities in Iraq from an Anglo-American perspective, after the CPA was wound down in June 2004 and the coalition occupying forces became a multinational force present with a mandate from the UN Security Council and the consent of the new Iraqi government, has been the fact of State forces being engaged in foreign territory against foreign non-State actors. This situation, not having been expressly envisaged in 1907, 1949 or 1977, is not covered as

such in the relevant treaties and its legal characterization remains a matter of some uncertainty.[2] The United States and the United Kingdom, the two principal MNF-I partners in Iraq, did not agree on the legal characterization of the conflict in that country: the United Kingdom considered it to be de facto non-international, while the United States, intellectually hobbled by the Bush administration's insistence on viewing the use of force through the prism of the so-called Global War on Terror,[3] vacillated between the two paradigms of armed conflict. They cannot both have been correct, at least not simultaneously. The controversy surrounding the classification of the armed conflict in Iraq after the belligerent occupation phase was over, and the tendency of governments to rely on their own assessments of such classification—which are usually determined on the basis of the government's own concerns, e.g., its unwillingness to contemplate questions surrounding the status of captured "terrorists" under IHL—rather than on the basis of objective legal considerations, is understandable but unfortunate: firstly from the perspective of the troops in theater, and secondly from the judicial perspective. As to the latter, a British asylum and immigration tribunal has stated (in a case concerning the existence of an armed conflict in Iraq for the purposes of determining whether an Iraqi refugee qualified for admission to the United Kingdom as an asylum seeker):

> [T]he reasons [the immigration judge at first instance] gave for finding that Iraq was not in a state of internal armed conflict were misconceived. It was wrong to view it as a matter settled by the (assumed) fact that the United Kingdom government has not accepted Iraq is in such a state. *It is a matter to be judicially determined by applying legal criteria to the factual situation in that country*.[4]

Therefore, this article considers the characterization of the armed conflict in Iraq under IHL in each of the four stages enumerated above. While the characterization of the conflict as an IAC in its early stages (invasion through occupation) was clear enough, after the end of occupation it could not have been an IAC on a plain reading of the scope of application provisions of the Geneva Conventions, but nor could it have been a NIAC by the same terms or by any application of logic. The British determination, however reticent in its expression, that it was a NIAC was a policy decision based on a mixture of expediency and a literalist interpretation of the Geneva Conventions, but its accuracy as a matter of legal doctrine—to say nothing of its desirability—is in this author's opinion highly questionable in light of the aims and objectives of the humanitarian treaties that form the kernel of the contemporary law of armed conflict (LOAC). Since the law applicable in situations of NIAC is minimalist, vague and general in nature by comparison with that applicable in IAC, and the humanitarian aims and objectives of the law indicate

that the greatest possible protection should be afforded to victims in armed conflicts, it is suggested that it would have been better to have treated the conflict in Iraq post-2004 as de facto international in nature; such an approach would also arguably have been better for the MNF-I soldiers on the ground, as it would simultaneously have provided them with greater explicit freedom of action and legal protection under the LOAC. As a preliminary to this discussion, however, it is necessary first to recall the typology of armed conflicts in international humanitarian law, for it is the law's scope of application—the determination of the existence of different types of conflict—that determines its substantive content.

Review of the Scope of Application of IHL

Armed Conflicts

The spectrum of conflict in international law is classically said to comprise several stages of increasing intensity, from the violent (but legally non-conflict) stage of riots, disturbances and tensions through to full-blown international armed conflict, but it would be helpful first to consider as a starting question: what is an armed conflict, generically, in international law? Strangely enough for such a detailed specialist area of the law, there is no answer to this question in the treaty texts that dominate the *lex lata*. Of the principal treaty instruments that comprise the majority of contemporary IHL, the Hague Regulations do not specify a notion of armed conflict in the modern sense, referring merely to their applicability to "war" and "belligerents [who] are parties to the Convention";[5] the Geneva Conventions and their Additional Protocols do specify the types of conflicts to which they apply, but without actually defining those types of conflict generically. The authoritative International Committee of the Red Cross (ICRC) *Commentary* to the Geneva Conventions attempted to cast the net as wide as possible, asserting that "[a]ny difference arising between two States and leading to the intervention of armed forces is an armed conflict,"[6] but this position is not supported by State practice[7] and, in any event, in its State-centric approach, is of relatively limited use for contemporary conflicts, the vast majority of which are not between States. The conflict in Iraq after the defeat of Saddam's regime in April 2003 is a case in point.

It has thus been left to customary international law, through the mechanism of a judicial decision, to come up with a definition. In the *Tadic* case before the International Criminal Tribunal for the former Yugoslavia (ICTY), the defendant argued, *inter alia*, that there had been no armed conflict in Bosnia and Herzegovina at the time when he had committed the acts with which he was charged, and that therefore they could not have constituted criminal violations of IHL, because, absent an

armed conflict, that body of law was not applicable to the situation. The ICTY Appeals Chamber held that

> an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[8]

Despite its generic wording, the formula suggested in *Tadic*—which has since been reaffirmed in international[9] and national[10] jurisprudence and has come to be regarded as expressing customary international law—plainly refers to criteria specific to international ("between States") and non-international ("between governmental authorities and organized armed groups or between such groups within a State") armed conflicts. The emphasis of the formula is also on the territorial extent of the armed conflict; with the exception of the single term "*protracted* armed violence," there is no reference to other factors affecting the determination of the existence of a conflict, such as intensity, escalation, etc. However, the requirement of a degree of organization on the parts of the actors in a conflict—whether as States in international armed conflicts or "governmental authorities and organized armed groups" in non-international conflicts—is made clear, and this has been reaffirmed in subsequent case law as the "first element" of the *Tadic* test.[11] The "second element" of the test, which has been developed by subsequent jurisprudence,[12] relates to the intensity of the conflict and includes such indicia as the protracted nature of the fighting and seriousness or increase in armed clashes,[13] spread of clashes over the territory,[14] increase in the number of governmental forces deployed to deal with the violence[15] and the type of weaponry used by both parties to the conflict.[16] If a situation does not satisfy these customary law criteria for the existence of an armed conflict, then, however unpleasant it may be and notwithstanding the deployment of armed forces to assist in the maintenance of law and order, it will not qualify as an armed conflict under international law; instead, it will fall into the looser category of "banditry, criminal activity, riots, or sporadic outbreaks of violence and acts of terrorism,"[17] which are normally dealt with under national criminal law but to which the LOAC does not apply.

International Armed Conflicts

Once it is accepted that an armed conflict within the meaning of IHL is taking place, it is necessary to determine what type of armed conflict it is, so that the applicable rules of IHL can be identified. Classically the main type of armed conflict—indeed, the only type of armed conflict regulated by international law until 1949—was one which took place between two or more States: international armed conflict. This was never comprehensively defined by the LOAC prior to the adoption of the Geneva Conventions,[18] since (a) it was obvious to one and all when two States were at war with each other, a condition which usually—though not invariably—resulted from mutual declarations of war; and (b) in the absence of any other type of war regulated by international law, an international legal definition of international conflicts was never thought necessary. Even at the time of the adoption of the Geneva Conventions in 1949, it was still fondly believed that the main frame of reference for armed conflicts in the modern world would continue to be international conflicts; hence the Conventions' strong bias in favor of their detailed regulation.

The traditional certainty surrounding the scope and ambit of international armed conflicts is reflected in the fact that, to this day, the definition of such conflicts is essentially the scope of application provisions of the Geneva Conventions and their first Additional Protocol. Common Article 2 of the Geneva Conventions provides that they "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 war is not recognized by one of them." The scope of application of the Conventions under Common Article 2 expressly includes situations of belligerent occupation of territory, whether violently opposed or not, which is significant for the situation in Iraq during the period of the CPA in 2003–4. Since only States can be high contracting parties to the Geneva Conventions,[19] the interpretation of the scope of application is clear enough. Additional Protocol I of 1977, however, added to the definition of an international armed conflict by extending its scope to cover "armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."[20] Although this would seem to be a very substantial widening of the definition of international armed conflicts, it is additionally necessary for an authority representing a "people" engaged in a conflict of the kind referred to, to make a unilateral declaration undertaking to apply the Protocol and the Conventions in its struggle.[21] To date, no such unilateral declarations have been successfully registered, and certain States have entered reservations to the Protocol asserting their right not to accept any such declaration unless the State is satisfied that the authority genuinely represents the "people" concerned.[22] In relation to these provisions of Protocol I, the United Kingdom entered a statement on

ratification to the effect that "the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation."[23] Although made specifically in relation to Articles 1(4) and 96(3) of Protocol I, the point is of equal relevance to Article 1(2) of Protocol II.

In the event that an international armed conflict is taking place, States participating as belligerents in such a conflict will be bound by the entire corpus of customary international humanitarian law[24] (including the Hague Regulations of 1907) and the four Geneva Conventions of 1949, along with any specifically applicable treaties regulating the use of weaponry. States that are also parties to the 1977 Additional Protocol I will be bound by that instrument also; even certain States that have not accepted the Protocol as a whole accept that substantial parts of it reflect customary international law and apply its terms as such.[25]

Non-international Armed Conflicts

The other main type of conflict recognized in international law, at least since 1949, is that of non-international armed conflict. In that year, Common Article 3 of the Geneva Conventions introduced, for the first time, legal regulation of the protection of victims in "armed conflict[s] not of an international character occurring in the territory of one of the High Contracting Parties." Beyond the phrase "armed conflict not of an international character," the article does not explain its scope of application. The authoritative ICRC *Commentary* provides a list of "convenient criteria" to assist in the differentiation of an "armed conflict not of an international character" from "any act committed by force of arms [not amounting to armed conflict]—any form of anarchy, rebellion, or even plain banditry":

> (1) That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
>
> (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
>
> (3) (a) That the de jure Government has recognized the insurgents as belligerents; or
>
> (b) that it has claimed for itself the rights of a belligerent; or
>
> (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or

> (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
>
> (4) (a) That the insurgents have an organisation purporting to have the characteristics of a State.
>
> (b) That the insurgent civil authority exercises de facto authority over persons within a determinate territory.
>
> (c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.
>
> (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.[26]

These indicia are both non-exhaustive and non-mandatory, thereby supporting the ICRC's desire that Common Article 3 should be applied "as widely as possible."[27] Arguably the logical *ne plus ultra* of this approach was achieved in 2006, when a plurality of the US Supreme Court held that the "Global War on Terror" being prosecuted in various locations around the world by the Bush administration after the terrorist attacks of September 11, 2001 was an "armed conflict not of an international character" to which Common Article 3 applied because the conflict was not directed against any other State.[28] Minimalist and very general though its protections are, Common Article 3 has indeed come to be accepted, as the International Court of Justice (ICJ) stated in the 1980s, as "a minimum yardstick" of humanitarian protection in all armed conflicts, whatever their characterization.[29]

The very minimalism of Common Article 3 and its perceived ineffectiveness in protecting the victims of non-international armed conflicts led to the adoption of a second Additional Protocol in 1977, which is exclusively concerned with the regulation of such conflicts. At the opposite extreme from Common Article 3's all-encompassing scope of application, however, Protocol II was given a scope of application so restricted as to render it all but unworkable in practice. Article 1(1) of Protocol II states that the Protocol applies to

> all armed conflicts which are not covered by [the Geneva Conventions and Additional Protocol I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Article 1(2) goes on to specify that the Protocol does not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." In practice, this is the real fault line when considering the spectrum of conflict for the purposes of the scope of application of IHL: once a situation in a State escalates beyond "internal disturbances and tensions," it will be considered (absent the involvement of any other State) to be a non-international armed conflict. Whether it is such a conflict within the terms of Common Article 3 of the Geneva Conventions or Article 1(1) of Additional Protocol II will then be a question of degree depending on the facts on the ground.

If an armed conflict is deemed non-international in nature, the question remains as to what provisions of the LOAC would have to be applied in such a conflict apart from the basic rules in Common Article 3 and, if applicable, Additional Protocol II. In particular, these treaty law provisions applicable in NIAC are considerably less detailed and developed than those that are applicable in IAC and they focus overwhelmingly on the protection of victims, while saying nothing at all about the methods and means of warfare. It is true, however, that some of the other treaties that comprise the LOAC, including treaties regulating the use of specific weapons, have been extended to cover situations of NIAC[30] or, indeed, apply in all circumstances and therefore in all types of armed conflict.[31] In its seminal decision in *Tadic*, the ICTY Appeals Chamber confirmed the generalities of this trend in customary international law, stating that

> elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.[32]

Although the ICTY's comments in *Tadic* in respect to this trend were rather too general to clarify much of the *lex lata* with regard to the regulation of methods and means of warfare in NIAC,[33] the ICRC's study, *Customary International Humanitarian Law*, published in 2005, extends most of its 161 identified rules to NIAC;[34] however, its methodology and the evidence supporting its approach have not been free from criticism.[35]

"Other" Armed Conflicts

Although the essential dichotomy of international versus non-international armed conflicts remains securely in place as regards the basic typologies of armed conflict

explicitly recognized in international humanitarian law, it represents what might be termed a very classical approach to the nature of war. As the history of modern warfare reveals, the last two decades of the twentieth century and the first decade of the twenty-first century have seen the increasing prevalence of—if not exactly new *types* of conflict—new *methodologies* of conflict.[36] These may be referred to by a variety of terms indicating their unorthodox nature according to traditional military thinking: the most widely used such terms are "asymmetrical," "low-intensity," "hybrid" and "unconventional" conflicts. These notions, along with the concepts of counterinsurgency and stability operations, belong to the realms of military and strategic doctrine, not to that of international law. In the contemporary legal discourse their counterparts are the potentially confusing and ambiguous terms "internationalized" and "transnational" conflicts. Like all armed conflicts, these must be subject to the LOAC, but because the Geneva Conventions and Additional Protocols do not *prima facie* take account of them in their scope of application provisions, the question has arisen with increasing urgency: for the purposes of determining the applicability of IHL, what types of conflict are these under the law, and which provisions of the LOAC apply to them?[37] What comparatively little legal authority there is on point derives from either decided case law or scholarly commentary.

The concept of internationalized armed conflict first arose in the jurisprudence of the ICTY as a result of the 1992–95 Bosnian war, which was essentially a conflict internal to Bosnia and Herzegovina, but in which forces of the Federal Republic of Yugoslavia and the Republic of Croatia intervened. An internationalized conflict has been held to be one that is *prima facie* internal, but has been rendered international in nature if

1. it exceeds the boundaries of the State within which it was initially taking place;[38] or

2. another State intervenes directly in the conflict with its own forces, particularly if in doing so it occupies territory within the meaning of Article 42 of the Hague Regulations and Geneva Convention IV;[39] or

3. another State intervenes indirectly in the conflict by virtue of some of the participants in the internal conflict acting on behalf of that other State.[40]

The third of these possibilities has been the most problematic in practice, but current international jurisprudence confirms that the correct test for determining the internationalization of an internal conflict by the indirect intervention of a foreign

State is a test of "overall control" under the doctrine of State responsibility in general public international law, whereby

> it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organizing, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.[41]

Once it has been determined that a particular armed conflict has been internationalized, the entire range of the LOAC applicable in international armed conflicts comes into play because the status of the conflict effectively becomes just that: an internationalized internal armed conflict becomes neither less nor more than an international armed conflict. The entire corpus of the customary law of IAC, together with the Hague Regulations, Geneva Conventions, and any other treaties that the relevant State has ratified, will then govern the conduct of its armed forces.

The term "transnational conflict," as has been suggested by some commentators, "represents an evolution of the law, more properly characterized as *lex ferenda* than *lex lata*."[42] It has been used in the contemporary international security context to refer principally to the US conflict against Al-Qaeda since September 2001 as a conflict that technically satisfies the scope of application requirements of neither IAC nor NIAC but undeniably involves military combat operations and displays features of both types of conflict—namely, the extraterritorial location of the fighting coupled with the absence of a State-actor adversary. A concept of such conflicts as a new typology of armed conflict has been "in the air" since the displacement of the Taliban regime in Afghanistan in December 2001. The end of belligerent occupation in Iraq in June 2004 transformed both those conflicts—which continued unabated and, indeed, even intensified—from ones that had been clearly international in nature into something else.

The premise of the theory is that an armed conflict that is not IAC is governed, in default, by Common Article 3; but the latter is deficient inasmuch as it only provides for the general protection of victims, while saying nothing at all about the methods and means of warfare and the conduct of hostilities. In itself, this is not a new point: it has been made before, by the present author among others.[43] Corn and Jensen suggest that

> while the term "transnational" armed conflict . . . may be new, the substantive impact of this concept is . . . a very old paradigm—that armed forces carry norms of conduct with them during all combat operations. In other words, a State cannot invoke the authorities of armed conflict and not concurrently accept the obligations. Accordingly, the use of the term "transnational" is really just semantic; what . . . is significant is that armed conflict must be understood as triggering the normative framework of the LOAC. And that is a proposition that . . . is really as old as organized warfare itself.[44]

As such, the suggested concept of transnational armed conflicts is a functional one that finds no direct support in the letter of the law, but rather in its spirit. It proposes that once the "trigger" of armed conflict—any armed conflict—has been generated, in respect to conflicts that are neither clearly IAC nor NIAC, such as the conflict with Al-Qaeda,[45] then "fundamental principles" of the LOAC apply. Such principles may be derived from customary international law, as evidenced by State practice. For example, one oft-cited current military manual lists "military necessity, humanity, distinction, and proportionality."[46] Corn and Jensen refer to "targeting principles" as part of their suggested "fundamental principles of the LOAC,"[47] a suggestion which subsumes distinction and proportionality and is certainly supported by some State practice.[48] By logical extension most of the customary international humanitarian law rules identified by the ICRC would also be applicable in transnational armed conflicts since its study explicitly specifies in most cases that they apply in both international and non-international armed conflicts;[49] the proof of this, however, would have to be conclusively determined by future State practice.

Application of the Typology of Armed Conflicts to Iraq since 2003

The Initial Invasion Phase

The conflict in Iraq, in its first or main invasion phase, commenced with an unsuccessful attempt to "decapitate" the Ba'athist regime by killing President Saddam Hussein on March 19, 2003; waves of airstrikes by British and American aircraft then went in on March 20, followed by a ground invasion conducted by coalition forces contributed by the United States, the United Kingdom, Australia and Poland, subsequently supported also by Spain, Denmark and a number of other countries. Saddam's regime was effectively removed from power as US forces progressively penetrated Baghdad during the first week of April, leading to the city's complete occupation and the end of organized resistance by regular Iraqi government forces on April 9. Large-scale looting and communal violence then erupted, however, and fighting with irregular armed elements did not cease. On May 1, 2003, US President George W. Bush formally declared an end to major combat operations.[50]

The period from March 19 to April 30, 2003 "clearly constituted an international armed conflict between the coalition States and Iraq."[51] Shortly before the start of invasion, the ICRC sent a "Memorandum on the Rules of International Humanitarian Law to Be Respected by the States Involved in Military Hostilities" to the anticipated belligerents, in which it emphasized the need to respect the detailed provisions of the four Geneva Conventions.[52] Iraq, the United States, the United Kingdom and Australia were all at the material time party to the Geneva Conventions; the latter two States were also party to Additional Protocol I and therefore were equally bound by that instrument's provisions. Although the United States was not technically so bound, certain provisions of the Protocol which the United States believes reflect customary international law were applied by US forces as a matter of policy.[53] Finally, all belligerents were bound by the entire corpus of customary international humanitarian law, including notably the Hague Regulations of 1907 (to which Iraq, for example, was not a party).[54]

The Belligerent Occupation Phase

The technical details of the law of belligerent occupation are considered elsewhere in this volume,[55] but at the outset of this section the main point to note is that belligerent occupation of territory is considered to be effectively an extension of international armed conflict for the purposes of IHL because it is generally the territory of another State that is being occupied consequent upon an armed conflict with that other State. Occupation is governed specifically by 1949 Geneva Convention IV, relative to the protection of civilian persons, and by certain provisions of the Hague Regulations. Although there is some doctrinal controversy as to the precise moment during hostilities when an occupation legally begins,[56] the application of Geneva Convention IV ceases one year after the general close of military operations[57] (which in the case of Iraq would suggest an end date of April 30, 2004 if President Bush's announcement of the end of major combat operations[58] is to be taken at face value). The CPA was in fact established to represent the occupying powers' administration of Iraq on May 16, 2003,[59] ten days after President Bush had appointed Ambassador L. Paul Bremer III to head the Authority[60] and more than two weeks after the announcement of the end of major combat operations. A transfer of power from the CPA to a transitional Iraqi administration took place on June 28, 2004,[61] at which point the MNF-I had already been established and the law of belligerent occupation technically ceased to be formally applicable in Iraq.

After some initial reluctance to use the international law terminology of belligerent occupation,[62] the United States and United Kingdom recognized themselves as occupiers when they voted in favor of Security Council Resolution 1483 on May 22, 2003.[63] The Resolution refers to the United States and United Kingdom

as "occupying powers" in its preamble[64] and also refers expressly, in its substantive paragraph 5, to obligations relating to belligerent occupation arising under the Hague Regulations and Geneva Convention IV. Even had the United States and United Kingdom formally declined to recognize themselves as occupying powers, the Geneva Convention would have been applicable automatically as the United States, United Kingdom and Iraq are all high contracting parties and the Convention specifies its scope of application as extending to

> all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties . . . [and] . . . 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.[65]

The Hague Regulations contain no such statement concerning their scope of application, but Article 42 states that "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army." In his briefing to the Security Council on May 22, 2003 regarding the provision of humanitarian assistance in Iraq, Jakob Kellenberger, the President of the International Committee of the Red Cross, noted:

> As far as the legal framework is concerned, we are, in terms of humanitarian law . . . in a situation of occupation. The applicability of the relevant provisions of the Geneva Conventions, in particular the Fourth Geneva Convention, and of the Hague Regulation is accepted by the occupying Power [*sic*].[66]

However—at least as far as the United Kingdom is concerned—significant developments in the UK domestic courts following reported abuses of Iraqi civilians by British troops have resulted in a major expansion of human rights law. These courts have held that where British troops have physical custody of local civilians in certain circumstances during an occupation, the latter's rights are protected not only by the law of armed conflict but also by the UK Human Rights Act 1998 (implementing the 1950 European Convention on Human Rights and Fundamental Freedoms into domestic law in the United Kingdom).[67]

The Post-occupation Phase

The phase of operations in Iraq which followed the termination of the CPA occupation regime in June 2004, and which has persisted, with varying degrees of intensity, to the present time, is usually characterized simply as an "insurgency" in lay language; but in terms of the scope of application of the LOAC, it is by far the most difficult to pin down. The insurgent forces have comprised a mixture of renegade

Ba'athist supporters of the late Saddam regime, Iraqi nationalists, Sunni Islamists, Shi'a Islamists, diverse foreign fighters and alleged Al-Qaeda operatives, who between them constitute at least a dozen major organizations and probably several dozen discrete smaller groups. Many of these groups have fought against the coalition, while others have fought against each other for local control. The hostilities have been at varying stages of intensity, from set-piece urban operations like the battles of Fallujah and Najaf in 2004 to isolated individual shootings and bomb attacks on coalition troops. The coalition forces officially became the MNF-I in June 2004[68] when the UN Security Council passed Resolution 1546.[69] Eventually a total of thirty-seven States (excluding the United States, United Kingdom and Australia, the original members of the coalition at the time of the invasion) contributed military forces to the MNF-I under the Security Council mandate. All of these other States progressively withdrew their forces from Iraq until July 2009, when the United Kingdom and Australia also withdrew. The Security Council mandate expired in December 2008, leaving the remaining foreign forces present in Iraq with the permission of the Iraqi government but without an international mandate. US forces have since been re-designated United States Forces–Iraq, effective January 2010, and their presence in Iraq is now governed by the security agreement, under which their complete withdrawal from Iraqi territory is provisionally required by December 2011.[70]

It is easy enough to provide a factual description of counterinsurgency operations—which are evidently what coalition forces were engaged in from 2004 onward—but how do they fit into the typology of armed conflicts under IHL, and (crucially) what law is applicable in such military operations? In the specific case of Iraq, the complications arose from the following factors:

- the fact that the occupation was officially no longer in place but coalition troops remained in Iraq, undertaking military operations under Security Council authority and with the permission of a government those forces had themselves installed;
- the fact that coalition States had deployed forces to undertake military operations in a foreign State and against foreign nationals; and
- the fact that any armed conflict was no longer directed against any other State.

These salient features gave rise to the fundamental question of how to characterize the situation in Iraq, for IHL purposes, after the end of occupation in June 2004. Was it an international armed conflict, a non-international armed conflict or something else? The question would not have arisen but for the Iraq situation's

failure to fit neatly into any of the categories of armed conflict that are recognized in IHL:

- once the state of occupation officially ended, the detailed technical provisions of the law of belligerent occupation were no longer applicable;
- the situation did not constitute an international armed conflict on a plain reading of the Geneva Conventions, since (from the point of view of the MNF-I) it was not directed against any other State and, indeed, the MNF-I was present on the territory with host-State consent;
- neither of the 1977 Additional Protocols could have been formally applicable as neither Iraq nor the United States (as the main contributor to and leader of the MNF-I) was a party to either instrument—although they could have been applicable to British and Australian forces; and
- the situation logically could not have been said to be "not of an international character," since both semantically and logically there is nothing non-international about the use of troops to fight against foreign nationals abroad.

The consequent difficulty would be the lack of any readily apparent legal framework within which the military operations of the MNF-I could be situated. As one highly respected commentator neatly put it more than two decades before the conflict in Iraq:

> A . . . relationship, between the insurgents and a foreign state that has been invited by the established government to help it overcome the rebellion, gives rise to great difficulties in determining what law is applicable. The traditional answer, which makes the situation subject to the rules of non-international armed conflict, clashes with *the undeniably international character of this type of relationship*.[71]

The "received opinion" concerning the nature of the conflict in Iraq after the end of the occupation phase has been that the conflict ceased to be international, and became non-international, in nature. This was the consistent and unambiguous position of the ICRC,[72] as noted by the UN High Commissioner for Refugees.[73] The British government for years after 2004 assiduously resisted making any public statement as to the classification of the conflict in Iraq; instead, it kept repeating the mantra that British forces were present in Iraq as part of MNF-I with the consent of the Iraqi government and under a mandate from the UN Security Council. This unsatisfactory obfuscation—it purported to answer a *jus in bello* question with a *jus ad bellum* rejoinder and placed undue emphasis on strictly political factors, as discussed below—ceased to be necessary when the British government conceded, in the course of litigation about an asylum applicant's entitlement to humanitarian

protection, that "Iraq as a whole is in a state of internal armed conflict for the purposes of IHL and [the government of Iraq] is one of the parties to the conflict."[74]

This position is broadly consistent with the approach adopted by a plurality of the US Supreme Court in *Hamdan v. Rumsfeld*,[75] in which it was suggested that the conflict between the United States and Al-Qaeda should be treated as an "armed conflict not of an international character" within the terms of Common Article 3 of the Geneva Conventions. It should be noted, however, that this finding was not an essential part of the decision (i.e., it was an *obiter dictum*), and was concerned with the relevance of IHL exclusively for the relatively narrow purpose of ascertaining the correct standard of treatment for detainees held in Guantánamo Bay and whether the military commissions created to try them were lawfully established. The interest of the scope of application question in Iraq, on the other hand, is not confined to the legality of a particular type of domestic tribunal established for the trial of criminal offenses. The view that the Iraqi conflict after the end of occupation became non-international in nature is based, legally, on a literalist reading of Common Article 2 of the Geneva Conventions and, strictly speaking, is technically correct on the law as far as the application of the Conventions is concerned. The main difficulty with the British government's approach, in fact, is that it gives undue prominence to aspects that are entirely political in nature, namely the fact of an "invitation" from the new Iraqi government at the end of the occupation phase and the executive mandate from the Security Council (of which the United States and the United Kingdom are conveniently permanent members). It also, in this author's submission, takes an unduly restrictive and minimalist approach to IHL, which is fundamentally inappropriate in light of the law's humanitarian aims and objectives.

As regards the former point, the authority of the Security Council is clearly open to abuse if certain permanent members who are the prime movers behind a decision then claim that such authority trumps all objections. The legal counterpart of this approach was given judicial expression in the United Kingdom by the House of Lords when, in a legal challenge to the detention without charge of a civilian by British forces in Iraq since October 2004, it was held that the Security Council's authority for the MNF-I to maintain law, order and security in Iraq by (*inter alia*) "internment where this is necessary for imperative reasons of security,"[76] trumped any inconsistent provisions of IHL or human rights law by virtue of Articles 25 and 103 of the UN Charter.[77] At the very least, such a position is politically self-serving, given that the United Kingdom (along with the United States) was the principal instigator of Resolution 1546. As to the "invitation," no allowance is made either for the fact that the government doing the inviting was installed by those same States (which is again a politically self-serving position) or for the linked fact that that

government may not have been truly empowered to issue such an invitation to foreign forces because it lacked either domestic or international legitimacy. For example, during the Hungarian, Czechoslovak and Afghan crises of 1956, 1968 and 1979, respectively, the Soviet Union in each case claimed to have been invited to intervene militarily; however, it was far from clear that the "governments" which had issued those invitations were legitimately installed in power and legally competent to issue them. Although the position of the interim Iraqi government in 2004 was different to some extent, in that it was installed with the imprimatur of the Security Council (albeit without a democratic mandate), does that necessarily make the coalition action any more legitimate than that of the USSR in the earlier instances? Arguably it does not, since the change of regime was effected as a result of a foreign armed intervention of dubious legality under international law, something as true in the case of Iraq as in the cases of Hungary, Czechoslovakia and Afghanistan. It was inevitable that the Iraqi government in 2004 would "consent" to the continuing presence and actions of the MNF-I on its territory, since it was in essence the MNF-I that put the government in place. In these circumstances, the issue of host-State consent is arguably meaningless.

The characterization of the situation in Iraq post-2004 as a non-international armed conflict is not inaccurate on a literalist interpretation of Common Article 2 of the Geneva Conventions, and is arguably supported by the US Supreme Court's decision in *Hamdan*. Neither Iraq nor the United States is a party to Additional Protocol II and the United Kingdom (which is a party to that instrument) has never conceded that the Iraqi insurgents satisfy its scope of application under Article 1(1), so the only clearly applicable IHL—if this characterization of the situation is accepted—would be Common Article 3 and customary international humanitarian law. Common Articles 2 and 3 are, of course, concerned exclusively with the scope of application of the Geneva Conventions—and there is more to IHL than just those Conventions. There is the large corpus of customary international humanitarian law, much of which is now believed to be of general applicability in all armed conflicts.[78] Which precise rules of that body of law would be applicable would depend on the extent to which the coalition States agree with the ICRC study's conclusions as to what are the rules.[79]

It should also be noted that the jurisprudence of the ICTY has extensively discussed the possibility of a non-international armed conflict becoming internationalized through the participation of another State in the (otherwise internal) hostilities.[80] In such cases, the normal range of IAC law becomes applicable to the conflict, as in any "normal" international armed conflict. Although *prima facie* this might be of direct relevance to the situation in Iraq, actually it is of somewhat limited utility, since the cases all concerned instances of intervention by foreign States

(principally the Republic of Croatia and the Federal Republic of Yugoslavia in the Bosnian conflict) on the side of the insurgents, rather than that of the government. In that situation, it is clear that the conflict effectively became one between "two or more of the High Contracting Parties" to the Geneva Conventions, within the terms of Common Article 2 thereof. In Iraq, on the other hand, the foreign States were fighting on the side of the government rather than that of the insurgents. Only if another State—Iran, for example—had openly intervened on the side of any insurgent groups in Iraq to the extent that it could be said to have overall control over them would the conflict vis-à-vis such groups have become internationalized within the terms of the ICTY jurisprudence.

There is a viable alternative approach to the characterization of the situation in Iraq post-occupation as non-international armed conflict, and that is to treat it—at least on a de facto basis—as *international* in nature. One rationale for this approach, made elsewhere in this volume,[81] is the argument that the conflict retains its original characterization throughout its duration, and that a government installed in Iraq as a result of the invasion cannot "magically" convert the conflict from an international to a non-international one by purporting to "invite" the coalition forces to be present in the territory which they had already invaded and occupied as a hostile act. It has further been asserted as a matter of doctrine that "a government established by the occupying power cannot in law give its agreement to the presence of the occupying troops in its territory and thereby transmute occupation by the armed forces of an outside state into the friendly presence of [the same] state."[82] Although this author is greatly in sympathy with these views, as far as the scope of application provisions of the Geneva Conventions are concerned, they appear to be contradicted by a plain reading of Common Article 2, as discussed above.

On the other hand, the US Secretary of State in 2004 seemed at least implicitly to consider that coalition forces in Iraq after the occupation would continue to apply the law of international armed conflict when he wrote that "the forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, *including the Geneva Conventions*."[83] Why would the last phrase be expressed in the plural if it were not intended that the obligations of *IAC* law were to be applied, thereby arguably implying a presumption that the conflict in Iraq continued to be international in nature?

A less dogmatic and semantic approach is to be found in the reasoning of the Supreme Court of Israel in *Public Committee against Torture in Israel v. Government of Israel*,[84] where the Court held that the conflict between Israel and non-State actors in the Palestinian Territories should be treated as international in nature, partly because of their transnational nature as evidenced by the deployment of Israeli forces

outside the borders of the State of Israel, and partly because of the advanced military capabilities of many contemporary non-State armed organizations, which mean that the scale and intensity of the hostilities effectively rise to the level of an international armed conflict. The former proposition, in particular, has received some support in the literature since.[85]

Finally, a case—arguably the most powerful case—for the de facto internationalization of the conflict against Iraqi insurgents could also be made based on a teleological interpretation of IHL in light of its aims and purposes. In relation to international armed conflicts, the LOAC is much more detailed and developed, with a far higher degree of internationally recognized regulation of both the conduct of hostilities and the protection of victims, than in relation to non-international armed conflicts. To put it crudely, there is more law in relation to international armed conflicts; this implies not only more precise protection for "victims," but also a more regulated approach to the actions of soldiers on the ground, with greater consequent protections for them in the event of any accusations of wrongdoing. Writing a dozen years ago, one of America's most respected experts on IHL stated that "[i]n interpreting the law, our goal should be to avoid paralyzing the legal process as much as possible and, in the case of humanitarian conventions, to enable them to serve their protective goals."[86] In relation to the Soviet intervention in Afghanistan, the interest of the State in having the conflict considered as international in nature was summarized as follows:

> [T]he Soviet Union's interests would impel it to apply the whole of international humanitarian law to the conflict [in Afghanistan]. The Soviet Union would be especially concerned with having its troops benefit from the greatest possible measure of protection. The law on non-international armed conflicts does not provide any special status for the combatants, even when captured. Only the law that is applicable to international conflicts, specifically the Third Geneva Convention of 1949, protects the combatant and guarantees him favored status as a prisoner of war. Thus, the Soviet Union should seek to have international [armed conflict] law applied if the Soviet authorities are concerned with the fate of their soldiers who fall into the insurgent's [*sic*] hands. Considerations of this kind might tempt an intervening power to opt for the extensive protection of the rules governing international armed conflicts, even if this would require that power to abide by the same rules.[87]

The fundamental reason for the insistence on characterizing the conflict in Iraq post-occupation as non-international, of course, is the unwillingness of coalition States to put themselves in a position where they would have to apply the rules of Geneva Convention III to captured insurgents by according them the status of POWs. This is partly because of the long-held view that to accord such status would

confer on the insurgents a legitimacy to which they should not strictly speaking be entitled, and partly because of all the other technical provisions concerning POWs that would then also have to be applied, with certain negative implications for the coalition States.[88] There is also the undeniable fact that the notion of reciprocity in observing the law, relied upon by Gasser, simply does not obtain in Iraq: the insurgents have consistently shown no regard whatsoever for the observance of IHL rules in their fight against foreign forces. Indeed, the same author's statement of the insurgents' interest in having the conflict considered international clearly demonstrates a compelling reason for *not* considering it as such:

> The intervention of an outside state would provide [insurgents] with proof of the international nature of the struggle. The insurgents would argue that the intervention of foreign armed forces alongside government troops makes the conflict an international one. The insurgents would have an interest in capturing members of the [foreign] armed forces, calling them "prisoners of war," and demanding that the adversaries adhere to the same rules.[89]

The insurgents in Iraq would do no such thing. Moreover, their struggle would be to some extent "legitimated" in the eyes of the international community—at least in terms of the application of IHL—and that is precisely the effect the multinational forces (and, latterly, the US forces) in Iraq seek to avoid.

Conclusions

The classification of armed conflicts in Iraq during and after the second Gulf War in 2003 presents certain specific problems. The initial invasion phase, in March and April 2003, and the belligerent occupation phase, from May 2003 to June 2004, are uncontroversial in that they clearly constituted an international armed conflict under the scope of application provisions of the Geneva Conventions. The international law applicable in those phases consisted of the corpus of customary international humanitarian law, specifically including the Hague Regulations, plus the Geneva Conventions. As far as the United Kingdom and Australia—but not the United States and Iraq—were concerned, Additional Protocol I would have been applicable too. During the occupation phase, only certain specific provisions of the Hague Regulations, plus Geneva Convention IV, applied as the *lex specialis* of occupation. After the end of occupation in June 2004, the position became substantially less clear.

Although the United States refrained from conclusively classifying the conflict and the United Kingdom considered it to be non-international in nature because of the absence of a State adversary, decided case law and academic commentary are more

ambivalent. If the option of creating a "new" typology of armed conflicts, which might be known variously as "transnational" or "mixed" conflicts, is dismissed, we are left with the standard two possibilities: international or non-international armed conflict. While the latter is supported by the practice of certain coalition States—principally the United Kingdom—it is a policy determination based on expediency, rather than a legal classification based on a proper analysis of the facts and the law. As such it is undesirable. This author takes the view that the conflict would have been better treated as a de facto international armed conflict, notwithstanding its failure to comply strictly with the wording of Common Article 2 of the Geneva Conventions. This would not necessarily have required slavish adherence to every dot and comma of every article of the Conventions: coalition forces could have announced that they would treat captured insurgents as POWs, without actually according them such formal status. In light of the detainee abuse scandals at Abu Ghraib, Camp Breadbasket and other such places of ill repute, public adherence to the higher legal standards derived from the law of international armed conflict would have sent a powerful, and positive, message to the world about the coalition's values and behavior. The IAC law of targeting was applied in any event, so no change in practice would have been required there. The policy reasons for adopting this approach were at least as compelling, in this author's view, as the policy reasons against. Nevertheless, it is recognized that governments are often likely to take the easier option. Applying the law of non-international armed conflict—which in Iraq basically meant just Common Article 3 of the Geneva Conventions since neither the United States nor Iraq is a party to Additional Protocol II—means much less law to worry about, especially in relation to detainees.

However, the emergence of human rights law as a body of regulation applicable (at least for certain States) in certain post-conflict situations analogous to occupations means that the advocates of increased humanitarian protection and oversight of military forces' behavior may yet have the last laugh over those who would prefer unfettered executive discretion. As Gasser has written:

> [I]t would be wishful thinking to postulate the application of the whole body of international humanitarian law to the relations between the intervening power and the insurgents. Nevertheless, humanitarian policy demands that some agreement be made to give better protection for all actual and potential victims of the conflict. Among the top priorities must be achieving greater respect for the civilian population, treating captured combatants similarly to prisoners of war, and guaranteeing respect for the protective emblem.[90]

Notes

1. *See* Prosecutor v. Tadic, Case No. IT-94-1-AR72, Interlocutory Appeal on Jurisdiction, paras. 96–127 (Oct. 2, 1995); CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2 volumes: Vol. I, Rules; Vol. II, Practice (2 Parts)) (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

2. This has *a fortiori* been the case in relation to Afghanistan since the Taliban were ousted as the de facto government in December 2001. *See* David Turns, Jus ad Pacem in Bello? *Afghanistan, Stability Operations and the International Laws Relating to Armed Conflict*, *in* THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS 387 (Michael N. Schmitt ed., 2009) (Vol. 85, US Naval War College International Law Studies).

3. *See* David Turns, *The "War on Terror" through British and International Humanitarian Law Eyes: Comparative Perspectives on Selected Legal Issues*, 10 NEW YORK CITY LAW REVIEW 435 (2007).

4. KH (Article 15(c) Qualification Directive) Iraq CG [2008] UKAIT 00023, para. 11 (emphasis added) [hereinafter KH].

5. Convention No. IV Respecting the Laws and Customs of War on Land art. 2, Oct. 18, 1907, 36 Stat. 2227, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 69 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter Hague Convention No. IV].

6. COMMENTARY I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (Jean S. Pictet ed., 1960) [hereinafter ICRC Commentary].

7. *Cf.* UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT para. 3.3.1 (2004) [hereinafter UK Manual].

8. Tadic, *supra* note 1, para. 70.

9. *See, e.g.,* Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgment, paras. 56–57 (June 12, 2002); Prosecutor v. Slobodan Milosevic, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, paras. 15–17 (June 16, 2004).

10. *See, e.g.,* HH & others (Mogadishu: armed conflict: risk) Somalia CG [2008] UKAIT 00022, para. 257.

11. Milosevic, *supra* note 9, paras. 23–25.

12. For a useful summary of the case law, see Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, paras. 39–49 (Apr. 3, 2008).

13. Milosevic, *supra* note 9, para. 28.

14. *Id.*, para. 29.

15. *Id.*, para. 30.

16. *Id.*, para. 31.

17. UK Manual, *supra* note 7, para. 3.5.1.

18. *See* ICRC Commentary, *supra* note 6, at 28.

19. In 1989 Switzerland, as the depositary of the Geneva Conventions, declined to transmit to the high contracting parties a "letter of adherence" concerning the Conventions and Additional Protocols from the "State of Palestine" on the grounds of "uncertainty within the international community as to the existence or the non-existence" of such a State. S*ee* DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 362.

20. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 1(4), June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 422.

21. *Id.*, art. 96(3).

22. *E.g.*, the United Kingdom. S*ee* DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 510.

23. *Id.*

24. The ICRC has identified 161 rules of customary international humanitarian law, all of which are applicable in international armed conflicts. *See* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, vol. I.

25. *E.g.*, the United States. For detailed commentary on the US position, see Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLICY 419, 423–29. *See also* Ronald Reagan, Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions, 1 PUBLIC PAPERS 88, 91 (Jan. 29, 1987), *reprinted in* 26 INTERNATIONAL LEGAL MATERIALS 561 (1987); George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 19 (1991).

26. ICRC Commentary, *supra* note 6, at 49–50.

27. *Id.* at 49.

28. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

29. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, para. 218 (June 27).

30. *See, e.g.,* Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects amended art. 1, Oct. 10, 1980, 1342 U.N.T.S. 137, *reprinted in* 19 INTERNATIONAL LEGAL MATERIALS 1523 (1980).

31. *See, e.g.*, Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211.

32. Tadic, *supra* note 1, at 119.

33. *See* David Turns, *At the "Vanishing Point" of International Humanitarian Law: Methods and Means of Warfare in Non-international Armed Conflicts*, 45 GERMAN YEARBOOK OF INTERNATIONAL LAW 115 (2002).

34. *See* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, vol. I.

35. *See* PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Elizabeth Wilmshurst & Susan Breau eds., 2007).

36. *See* MARTIN VAN CREVELD, THE CHANGING FACE OF WAR: LESSONS OF COMBAT FROM THE MARNE TO IRAQ (2007).

37. Among the first conflicts to give rise to such legal questions was the Soviet intervention in Afghanistan (1979–89). *See* W. Michael Reisman & James Silk, *Which Law Applies to the Afghan Conflict?*, 82 AMERICAN JOURNAL OF INTERNATIONAL LAW (1988).

38. This point, which is mentioned but not elaborated upon in the jurisprudence, will probably depend more on the status of the parties to the conflict, rather than the territory in which the conflict takes place. Arguably it is of more relevance to the concept of a transnational than an internationalized armed conflict *stricto sensu*.

39. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, paras. 172–80 (Dec. 19).

40. Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Judgment (July 15, 1999), *reprinted in* 38 INTERNATIONAL LEGAL MATERIALS 1518 (1999).

41. *Id.*, para. 137 (original emphasis); confirmed in Prosecutor v. Dyilo, Doc. No. ICC-01/04-01/06, Decision on Confirmation of Charges, paras. 210–11 (Jan. 29, 2007).

42. Geoffrey Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISRAEL LAW REVIEW 46, 50 (2009).

43. *See* Turns, *supra* note 33.

44. Corn & Jensen, *supra* note 42.

45. While the plurality of the US Supreme Court in *Hamdan v. Rumsfeld, supra* note 28, characterized the "War on Terror" as an "armed conflict not of an international character" within the terms of Common Article 3, the Bush administration tended—where it said anything at all on point—to describe the struggle more in terms of international armed conflict. *See* Turns, *supra* note 3, at 468.

46. UK Manual, *supra* note 7, para. 2.1.

47. Corn & Jensen, *supra* note 42, at 60–67.

48. The United Kingdom applies the specific targeting rules contained in Additional Protocol I, which are clearly based on humanity, distinction and proportionality, to all armed conflicts, irrespective of their formal characterizations.

49. *See* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, vol. I.

50. Address to the Nation on Iraq from the *USS Abraham Lincoln*, 1 PUBLIC PAPERS 410 (May 1, 2003), full text *available at* WASHINGTONPOST.COM, May 1, 2003, http://www.washingtonpost.com/ac2/wp-dyn/A2627-2003May1 [hereinafter Bush Address].

51. Knut Dörmann & Laurent Colassis, *International Humanitarian Law in the Iraq Conflict*, 47 GERMAN YEARBOOK OF INTERNATIONAL LAW 293, 295 (2004).

52. International Committee of the Red Cross, *Conflict in Iraq: Memorandum to the Belligerents,* 85 INTERNATIONAL REVIEW OF THE RED CROSS 423 (2003), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5PXGBD/$File/irrc_850_memorandum.pdf.

53. On their application in the first Gulf War, see US Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O: The Role of the Law of War (1992), *reprinted in* 31 INTERNATIONAL LEGAL MATERIALS 615 (1992).

54. *See* Dörmann & Colassis, *supra* note 51, at 295–96.

55. *See* Eyal Benvenisti & Guy Keinan, *The Occupation of Iraq: A Reassessment*, which is Chapter XIII in this volume, at 263.

56. That is, whether it can begin already during the invasion phase while advancing troops take physical possession of territory, or whether there is a hiatus until the formal inauguration of a stable occupation regime after the invasion phase has been completed. *See* Dörmann & Colassis, *supra* note 51, at 299–301. Although a strict interpretation of the wording of Article 42 of the Hague Regulations, annexed to Hague Convention No. IV, *supra* note 5 ("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."), would suggest that the latter interpretation may be technically correct, the present author agrees with Dörmann and Colassis that it cannot have been intended that there should be an intermediate period between invasion and occupation, when notionally no IHL at all would be technically applicable.

57. Convention Relative to the Protection of Civilian Persons in Time of War art. 6, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 301 [hereinafter Geneva Convention IV].

58. Bush Address, *supra* note 50.

59. CPA Order Number 1, De-Ba'athification of Iraqi Society and Government, CPA/ORD/16 May 2003/01 (May 16, 2003), *available at* http://www.cpa-iraq.org/regulations/ (then De-Ba'athification of Iraqi Society and Government hyperlink).

60. Remarks on the Appointment of L. Paul Bremer III as Presidential Envoy to Iraq and an Exchange with Reporters, 1 PUBLIC PAPERS 440 (May 6, 2003). Note that the terms "CPA,"

"occupation" and "Administrator" (the latter being Bremer's eventual title in Iraq) are not mentioned.

61. Provisions for the transfer of power from the CPA to the Iraqi interim government were made by CPA Order Number 100, Transition of Laws, Orders, Regulations, and Directives Issued by the Coalition Provisional Authority, CPA/ORD/28 June 2004/100 (June 28, 2004), *available at* http://www.cpa-iraq.org/regulations/ (then Transition of Laws, Orders, Regulations, and Directives Issued by the Coalition Provisional Authority hyperlink). The Order cited the advertised date of June 30, 2004 for the transfer of power; in fact, the CPA ceased to exist two days earlier, on the date that the Order itself was promulgated.

62. *See* Letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council, U.N. Doc. S/2003/538 (2003) [hereinafter US/UK Letter]. This neither mentions the term "occupation" or "occupying powers" nor makes any reference to the 1907 Hague Regulations, *supra* note 56, or 1949 Geneva Convention IV, *supra* note 57. Instead, it speaks only of ill-specified "obligations under international law" for the coalition and refers to the then–newly created Coalition Provisional Authority as an institution which would "exercise powers of government temporarily."

63. S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

64. Although the Security Council in *id.* noted the US/UK Letter, *supra* note 62, it recognized in the same paragraph of the preamble "the specific authorities, responsibilities, and obligations under applicable international law of [the United States and the United Kingdom] as occupying powers under unified command (the 'Authority')." The next paragraph further emphasized this identification of the United States and the United Kingdom by distinguishing them from "other States that are not occupying powers [that] are working now or in the future may work under the Authority."

65. Geneva Convention IV, *supra* note 57, art. 2. *See also* Paul Bowers, Iraq: Law of Occupation, Research Paper 03/51, House of Commons Library 11 (June 2, 2003) ("[a]s they took control of Iraqi territory the coalition entered the legal condition [*sic*] of being occupying powers"); Jordan Paust, *The U.S. as Occupying Power over Portions of Iraq and Relevant Responsibilities under the Laws of War*, ASIL Insights, Apr. 2003, http://www.asil.org/insights/insigh102.htm ("the duties of an occupying power are coextensive with its *de facto* control of territory").

66. U.N. SCOR, 58th Sess., 4762d mtg. at 11, U.N. Doc. S/PV.4762 (May 22, 2003).

67. R (Al-Skeini and others) v. Secretary of State for Defence [2008] 1 AC 153.

68. The multinational force that was to become known as MNF-I was first authorized by the Security Council on October 16, 2003. S.C. Res. 1511, U.N. Doc. S/RES/1511 (Oct. 16, 2003).

69. S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004).

70. Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq art. 24(1), U.S.-Iraq, Nov. 17, 2008, *available at* http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf.

71. Hans-Peter Gasser, *International Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 31 AMERICAN UNIVERSITY LAW REVIEW 911, 913 (1982) (emphasis added).

72. International Committee of the Red Cross, Iraq post June 28, 2004: Protecting persons deprived of freedom remains a priority, http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList322/89060107D77D7299C1256EE7005200E8.

73. United Nations High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers* 19 n.23 (2009).

74. KH, *supra* note 4, para. 75.

75. Hamdan v. Rumsfeld, *supra* note 28.

76. S.C. Res 1546, *supra* note 69, at 8 (text of letter from the Prime Minister of the Interim Government of Iraq Dr. Iyad Allawi to the President of the Council), 10 (text of letter from the United States Secretary of State Colin L. Powell to the President of the Council).

77. R (Al-Jedda) v. Secretary of State for Defence [2008] 1 AC 332. Article 25 of the Charter requires all member States of the UN to comply with legally binding resolutions of the Security Council passed under Chapter VII of the Charter (which Resolution 1546 was); Article 103 provides that legal obligations deriving from the Charter override all inconsistent legal obligations deriving from any other rule of public international law.

78. E.g., the United Kingdom applies the targeting rules from IAC (which are contained in Additional Protocol I), as customary international law, in all armed conflicts in which British forces are engaged, irrespective of their formal characterizations. So does the United States, despite not being a party to the Protocol. This is also true for both countries with respect to the "fundamental guarantees" of humane treatment contained in Article 75 of Protocol I.

79. The United Kingdom has not recorded a formal position on the ICRC study, although the matter will doubtless be addressed in the forthcoming second edition of the *Manual of the Law of Armed Conflict*. The provisional US response to the study is contained in Letter from John Bellinger III, Legal Advisor, U.S. Deptartment of State, and William J. Haynes, General Counsel, U.S. Department of Defense, to Dr. Jakob Kellenberger, President, International Committee of the Red Cross, Regarding Customary International Law Study, 46 INTERNATIONAL LEGAL MATERIALS 514 (2007).

80. For a summary of the relevant case law, see Christine Byron, *Armed Conflicts: International or Non-International?*, 6 JOURNAL OF CONFLICT & SECURITY LAW 63 (2001).

81. *See* Yoram Dinstein, *Concluding Observations: The Influence of the Conflict in Iraq on International Law*, which is Chapter XIX in this volume, at 479.

82. Gasser, *supra* note 71, at 920.

83. S.C. Res. 1546, *supra* note 69, at 11 (emphasis added).

84. Public Committee against Torture in Israel v. Government of Israel, HCJ 769/02, Judgment (Dec. 13, 2006), 46 INTERNATIONAL LEGAL MATERIALS 373 (2007), *available at* http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

85. *See, e.g.*, Andreas Paulus & Mindia Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict—A Tentative Conceptualization*, 91 INTERNATIONAL REVIEW OF THE RED CROSS 95, 112 (2009). See also the discussion of the 2006 conflict between Israel and Hezbollah in Lebanon in Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, *id.* at 69, 90–92.

86. Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 236, 239 (1998).

87. Gasser, *supra* note 71, at 914–15.

88. E.g., under Article 12 of Geneva Convention III, the continuing international legal responsibility of the detaining power for POWs transferred to another authority where the latter fails to respect the Convention; under Articles 118–19, release and repatriation of POWs "after the cessation of active hostilities." Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 244.

89. Gasser, *supra* note 71, at 915.

90. *Id*. at 917–18.

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Turns, David

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