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# THE HUMAN COSTS OF THE IRAQ WAR AND U.S. INTERNATIONAL RESPONSIBILITY

by Carmen Draghici\*

## Abstract:

*This contribution assesses the legitimacy of the Second Gulf War under international law through the lens of its human costs, exploring aspects such as the purported humanitarian nature of the intervention, the consistency of the warfare means and tactics employed with humanitarian law, and the compliance of U.S. military forces with the duties of occupying powers towards the civilian population after the termination of active hostilities.*

The widely saluted announcement of the upcoming withdrawal of U.S. forces from Iraq, released by the new U.S. administration in January 2009,<sup>1</sup> prompts for reflection on the balance sheet of the Second Gulf War in terms of human costs and benefits. Thus, the purpose of this contribution is not to attempt an overall appraisal of the Iraq war from the viewpoint of international legality, but rather to delve into possible responsibility issues arising under international law from U.S. actions and decisions (dis)regarding the human costs of the war.<sup>2</sup> The analysis will focus on the human-costs factor in the decision of the U.S. administration to wage war, the choice of warfare means and tactics during the course of hostilities, and the conduct of the U.S. in its capacity as the occupying power. The aim is to determine which rules of international, humanitarian and/ or human rights law applied to each stage of the conflict, and whether the conduct of U.S. authorities was in breach of any relevant norm.

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<sup>1</sup> See e.g. CNN article *Obama to pull combat troops from Iraq by August 2010*, 27 February 2009 at <http://edition.cnn.com/2009/POLITICS/02/26/obama.troops/index.html>.

<sup>2</sup> While the analysis of wrongful acts in connection with the human costs of the Iraq war may be extended to the allied countries – indeed the UK has recently initiated its own “Iraq Inquiry” (see <http://www.iraqinquiry.org.uk/>) –, this contribution only explores the conduct of the U.S., as originator and main player in the conflict.

## I. *Jus ad Bellum* Concerns: Was the Iraq Intervention ‘Humanitarian’?

Scholarly literature offers little support to the doctrine of extra-legality of war, whose proponents assume that “law cannot say *when*, but only *how*, war is to be waged”.<sup>3</sup> While the incidence of military interventions may render anarchic realism appealing, only exceptionally is the use of force permitted under modern international law. Indeed the prohibition on the use of force is widely recognized as a conspicuous example of peremptory norm,<sup>4</sup> even though, as discussed below, the precise scope of this norm still leaves room for controversy. Thus, a first aspect to be considered when assessing responsibility in connection with the human costs of the intervention regards the *jus ad bellum* claims of the U.S. administration.<sup>5</sup> From this perspective, the U.S. rhetoric attempting to legitimize the Iraq war as humanitarian intervention appears unpersuasive.

Humanitarian intervention as an exception from the general prohibition on the use of force remains in itself highly divisive. It is true that the prohibition in Article 2 paragraph 4 of the UN Charter can be said to be qualified rather than absolute, insofar as it does not ban the use of force *tout court*, but only the “use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. Nonetheless, the compatibility of humanitarian intervention with this provision requires a difficult demonstration. As emphasized by the International Court of Justice in the *Corfu Channel Case*, “[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations”.<sup>6</sup> Admittedly, small-scale operations aimed at rescuing nationals abroad can be deemed compatible with the Charter, insofar as they do not impinge on the territorial integrity or political independence of the State concerned.<sup>7</sup> However, forceful law-enforcement measures on the territory of another State are in contrast with the principle of equal sovereignty; they consequently run contrary to Article 2 paragraph 4 *in fine*, a proviso designed to cover any use of force inconsistent with the purposes of the UN.<sup>8</sup> Their wrongfulness may be precluded, however, if the circumstances of the

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<sup>3</sup> See DINSTEIN, *War, Aggression and Self-Defence*, Cambridge (Cambridge University Press), 2005 (4<sup>th</sup> ed.), pp. 73-75, for an overview of, and arguments against, this doctrinal position.

<sup>4</sup> See e.g. DINSTEIN, *War...*, *cit.*, pp. 99-100, for references to evidence of general acceptance based on the work of the International Law Commission (hereinafter ILC) and the case-law of the International Court of Justice (hereinafter I.C.J.); see also GRAY, *International Law and the Use of Force*, Oxford (Oxford University Press), 2004 (2<sup>nd</sup> ed.), p. 29, for references to legal scholarship supporting this view. The ILC Commentaries on Art. 40 of the 2001 Draft articles on Responsibility of States for Internationally Wrongful Acts, pp. 112-113, also provide an authoritative analysis of peremptory norms.

<sup>5</sup> As the current contribution is concerned with the human costs of the intervention, it will only discuss the humanitarian rationale behind the U.S. decision to wage war; the other justifications – pre-emptive self-defence in respect of State sponsorship of terrorism, and implied authorization by the UN Security Council – will not be addressed here.

<sup>6</sup> *Corfu Channel Case (UK v Albania) (Merits)*, I.C.J. Reports 1949, p. 4, at p. 35.

<sup>7</sup> On the arguments designed to justify the compatibility of forceful intervention to rescue nationals abroad with Art. 2 para. 4 of the Charter see RONZITTI, *Rescuing nationals abroad through military coercion and intervention on grounds of humanity*, Dordrecht (Martinus Nijhoff), 1985, pp. 1-19.

<sup>8</sup> The wording “use of force [...] in any other manner inconsistent with the Purposes of the United Nations” may be said to extend the ban to forceful measures undertaken in violation of the

case amount to a situation of distress within the meaning of Article 24 of the 2001 ILC Draft Articles on State responsibility,<sup>9</sup> and thus the intervening State cannot reasonably be expected to seek consent before proceeding with the operation. In fact, the contexts in which the use of force has been relied on as an allegedly legitimate means to rescue nationals abroad – the Israeli rescue operation in Entebbe in 1976, the Egyptian raid on Larnaca in 1978, the U.S. attempt to free the U.S. hostages in Teheran by the incursion in Tabas in 1980, etc. – concerned particularly critical scenarios, possibly involving a situation of distress.<sup>10</sup> Naturally, a circumstance precluding wrongfulness can only be invoked if it is accepted that minor uses of force (as opposed to military aggression) are not prohibited by a peremptory norm; in fact, breaches of a peremptory norm cannot be justified by reference to an exception under the law of responsibility.<sup>11</sup> Also, if the measure taken in response to distress is not limited in scope (e.g. a mere extra-territorial police operation), it is “likely to create a comparable or greater peril”, and thus the exception based on distress is no longer available.<sup>12</sup>

Intervention on humanitarian grounds in favour of *non-nationals* is undoubtedly even more controversial. Unlike operations to rescue nationals abroad, based on an assumption that nationals are emanations or extensions of the State itself,<sup>13</sup> intervention for the benefit of non-nationals cannot be corroborated by self-defence justifications. Also, as Ronzitti points out, unlike rescuing operations on foreign territory, “humanitarian intervention has no unquestionable ‘historic titles’ supporting its legality”.<sup>14</sup> There are no significant precedents confirming that States considered themselves entitled to intervene *unilaterally* in case of widespread atrocities. Farer maintains that “there is not a single case in the entire post-war era where one state has intervened in another for the exclusive purpose of halting mass murder, much less any other gross violation of human rights”.<sup>15</sup> In fact, the Cold War individual interventions

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principle of equal sovereignty enshrined in Art. 2 para. 1 of the UN Charter: “The Organization is based on the principle of the sovereign equality of all its Members”. Sovereign equality is not listed under the Purposes in Art. 1, but is engaged by the opening sentence of Art. 2: “The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles”. The broad wording of Article 2 para. 4 of the UN Charter suggests that it needs to be construed purposively.

<sup>9</sup> See Art. 24 para. 1 of the ILC Draft Articles on State Responsibility: “The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author’s life or the lives of other persons entrusted to the author’s care”.

<sup>10</sup> On the incidents arising under the putative right to protect citizens abroad see RONZITTI, *Rescuing nationals abroad, cit.*, pp. 26-49. See also SCHACHTER, *The Right of States to Use Armed Force*, in Michigan Law Review, vol. 82, 1983/1984, pp. 1620-1646.

<sup>11</sup> See Art. 26 of the ILC Draft Articles on State Responsibility.

<sup>12</sup> See Art. 24 para. 2 of the ILC Draft Articles on State Responsibility: “Paragraph 1 does not apply if: [...] (b) The act in question is likely to create a comparable or greater peril”.

<sup>13</sup> See RONZITTI, *loc. cit.*

<sup>14</sup> *Ibid.*, p.108.

<sup>15</sup> See FARER, *An Inquiry into the Legitimacy of Humanitarian Intervention*, in FISLER DAMROSCH – SCHEFFER (Eds.), *Law and Force in the New International Order*, Boulder (Colorado), Oxford (Westview Press), 1991, pp. 185-201, at pp. 192-193. Farer cites the Indonesian campaign to suppress opposition in East Timor, and the massacre of Hutu people in Burundi, as examples of slaughters which may have given rise to intervention based on the above-mentioned doctrine, but in practice did not; he also refers to the widespread torturous practices used in the criminal judicial systems of Turkey and Mexico, which did not result in any claim to a right to intervention.

on putative humanitarian grounds – Indian intervention in Bangladesh in 1971 to help the people secure independence from Pakistan and to end repression; Vietnamese invasion of Cambodia in 1978 leading to the overthrow of Pol Pot; Tanzanian intervention in Uganda in 1979 resulting in the overthrowing of Idi Amin; U.S. intervention in Panama in 1989 – were also supported by additional justifications, such as self-defence claims.<sup>16</sup> This suggests that the intervening states were not confident to rely on a right to humanitarian intervention. Krisch persuasively argues: “[f]or a right to unilateral humanitarian intervention to emerge, [...] its positive assertion by the actors as well as its acceptance by other states would be necessary. This has not yet occurred [...]”.<sup>17</sup>

Significantly, in his Dissenting Opinion in the *Nicaragua Case*, Judge Schwebel emphasized: “In contemporary international law, the right of self-determination, freedom and independence of peoples is universally recognized; the right of peoples to struggle to achieve these ends is universally accepted; but what is *not* universally recognized and what is *not* universally accepted is any right of such peoples to foreign assistance or support which constitutes intervention. That is to say, [...] it is not lawful for a foreign State or movement to intervene in that struggle with force or to provide arms [...]”.<sup>18</sup> The case was primarily concerned with military *assistance* to subversion; the reasoning should apply *a fortiori* to military intervention amounting to a full-fledged war, as the one in Iraq. Further, if intervention is not admissible even in the presence of the ultimate form of oppression, which is a colonial regime denying a people’s right to self-determination, protected by a peremptory norm,<sup>19</sup> there can be no lawful intervention to depose a foreign government violating human rights.<sup>20</sup>

When purely internal humanitarian crises do require intervention, world public order can only be ensured with UN authorization, as nothing in the language of the Charter justifies unilateral coercive measures as *actio popularis*. As Dinstein argues suggestively, “[n]o individual State (or group of States) is authorized to act unilaterally, in the domain of human rights or in any other sphere, as if it were the policeman of the world”.<sup>21</sup> In fact, nowhere in the Charter is there any implied right to individual

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<sup>16</sup> See RONZITTI, *cit.*, pp. 95-106, 108-109; Farer, *cit.*, p. 194; KRISH, *Legality, Morality and the Dilemma of Humanitarian Intervention After Kosovo*, in EJIL, 2002, vol. 13(1), pp. 323-335, at pp. 325-326; GRAY, *cit.*, pp. 31-32; WEISS, *Military-Civilian Interactions. Humanitarian Crises and the Responsibility to Protect*, Lanham etc. (Rowman & Littlefield), 2005 (2<sup>nd</sup> ed.), pp. 181-187.

<sup>17</sup> KRISCH, *cit.*, p. 326.

<sup>18</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*. (Merits), I.C.J. Reports 1986, p. 14, Dissenting Opinion, p. 351 (para. 180) (emphasis in original).

<sup>19</sup> See *East Timor (Portugal v Australia)*, Judgment, I.C.J. Reports 1995, p. 90, at p. 102 (para. 29); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, pp. 31-32 (paras. 52-53); *Western Sahara*, Advisory Opinion, I. C. J. Reports 1975, pp. 31-33 (paras. 54-59).

<sup>20</sup> Indeed there is scholarly support for the thesis that armed intervention by a State is not permitted under international law even when aimed at overthrowing a genocidal regime. See DINSTEIN, *War...*, *cit.*, p. 90: “notwithstanding fervent pleadings to the contrary, should Atlantica use force unilaterally in order to overthrow a despotic (even genocidal) regime in Patagonia, it would also run afoul of Article 2(4)”.

<sup>21</sup> DINSTEIN, *War...*, *cit.*, pp. 90-91.

humanitarian intervention analogous to the individual (as opposed to collective) self-defence in Article 51. Quite on the contrary, Article 1 paragraph 3 of the UN Charter sets out to “achieve international co-operation in solving international problems of [...] humanitarian character”. Article 5 (1) of the General Assembly resolution on the *Definition of Aggression*, providing that “No consideration of whatever nature, whether political, economic, military, or otherwise, may serve as a justification for aggression”,<sup>22</sup> also advocates against humanitarian intervention by individual States.<sup>23</sup> To be lawful, any such intervention must take place within the framework of the collective security system, insofar as only the Security Council “is legally competent to undertake or to authorize forcible ‘humanitarian intervention’”.<sup>24</sup>

It is worth recalling that individual humanitarian intervention also clashes with the principle of non-interference in the domestic affairs of other States, especially if undertaken in response to situations of chronic human rights violations, as opposed to humanitarian emergencies. The General Assembly *Declaration on Friendly Relations* categorically excludes any right of States to intervene “directly or indirectly”, *a fortiori* militarily, “for any reason whatsoever”.<sup>25</sup> It is therefore difficult to argue that the principle of non-intervention should allow for exceptions, and that, in extreme cases, coercion should be admitted in order to induce a State to put an end to abuses against its own citizens (e.g. genocide or widespread torture). Also, the practice of States in respect of humanitarian emergencies, referred to above, does not support any such proposition.

In more recent years, the legitimacy of humanitarian intervention has been reconsidered by reference to the so-called “responsibility to protect”. The International Commission on Intervention and State Sovereignty (ICISS), submitted in its 2001 report<sup>26</sup> (arguably *de lege ferenda*): “There is an international responsibility to protect populations at risk, and this Commission has argued that it extends to a responsibility to react by appropriate means if catastrophe is occurring, or seems imminent. In extreme cases, that responsibility to react includes military intervention within a state, to carry out that human protection”. The suggestion is that the responsibility to protect may

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<sup>22</sup> General Assembly Resolution on the *Definition of Aggression*, Res. 3314 (XXIX), 14 December 1974.

<sup>23</sup> See GRAY, *cit.*, p. 33. Ronzitti also suggests that the declarations issued by States at the time of the drafting of the Resolution on the Definition of Aggression confirmed the intention to deny an exception from the prohibition on the use of force based on humanitarian intervention. See RONZITTI, *cit.*, p. 110.

<sup>24</sup> DINSTEIN, *War...*, *cit.*, p. 91.

<sup>25</sup> See *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States*, General Assembly Res. 2625 (XXV), 24 October 1970: “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law”.

<sup>26</sup> The International Commission on Intervention and State Sovereignty (ICISS), an independent international body intended to support the work of the UN, had the mandate to study how to reconcile the international community’s responsibility to act in the face of massive violations of norms of humanity with the principle of respect for the sovereign rights of States. The ICISS completed its work during the 2000/01 Millennium Assembly year, and reported back to the UN Secretary-General and Member States in December 2001. The ICISS report *The Responsibility to Protect* is available at <http://www.iciss.ca/pdf/Commission-Report.pdf>. See also BELLAMY, *Responsibility to Protect. The Global Effort to End Mass Atrocities*, Cambridge (Polity), 2009, p. 51.

provide for an exception from the principle of non-intervention; however, humanitarian intervention, the most extreme form of reaction, can only be admitted in case of mass atrocities perpetrated by a State against its nationals, where there is imminent peril of humanitarian catastrophe. In preparation of the September 2005 UN Summit aimed at reviewing progress since the Millennium Declaration, Secretary General Kofi Annan's report *In Larger Freedom* on the implementation of the Millennium Goals also urged heads of State and government to "[e]mbrace the 'responsibility to protect' as a basis for collective action against genocide, ethnic cleansing and crimes against humanity".<sup>27</sup>

The 2005 World Summit Outcome document stated accordingly: "[W]e are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the UN Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity".<sup>28</sup> The cautious wording of the document confirms that the international *opinio iuris* confines humanitarian intervention (even when UN-authorized, let alone otherwise) to rather extreme circumstances. Most importantly, the responsibility to protect is connected with collective action through the Security Council. It has been argued that, as a result of the humanitarian interventions following the end of the Cold War (Kuwait, Somalia, Rwanda, Balkans, East Timor), the "sanctity of sovereignty has been downgraded".<sup>29</sup> This is not to say that abuse is warranted by entrusting public interests to the discretion of individual States. Collective humanitarian intervention, based on the prerogatives of the Security Council under the UN Charter,<sup>30</sup> cannot provide legal support for unilateral intervention under general international law. The ICISS also circumscribes the exercise of humanitarian intervention, subordinating the "responsibility to protect" to the principle of "just authority". Just authority for military intervention on humanitarian grounds may be provided by the support of the Security Council, in the form of delegated powers pursuant to Article 42, taken in conjunction with Article 43 (and Article 48) as modified by way of practice.

Thus, the Iraq intervention does not meet the two threshold criteria governing *when* and *who* may intervene: imminent humanitarian catastrophe and just authority. By contrast with Kosovo or the humanitarian emergencies considered by the Security Council to require collective action (Somalia, Haiti, Rwanda, etc.), the Iraq war was not a reaction to a situation of gross violations of human rights underway leading to imminent catastrophe. It is unquestionable that the Ba'ath regime led by Saddam Hussein perpetrated large-scale violations of human rights, in fact torture, prolonged

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<sup>27</sup> *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General, 21 March 2005, UN Doc. A/59/2005, p. 59 (para. 7 (b)).

<sup>28</sup> 2005 World Summit Outcome document adopted by the General Assembly on 15 September 2005, Doc. A/60/L.1, para. 139.

<sup>29</sup> WHITE, *The Ethics of Invasion: Jus ad Bellum and Iraq*, in COADY– O'KEEFE (Eds.), *Righteous Violence: The Ethics and Politics of Military Intervention*, Melbourne (Melbourne University Press), pp. 32-50, at p. 33.

<sup>30</sup> See CADIN, *I presupposti dell'azione del Consiglio di Sicurezza nell'articolo 39 della Carta delle Nazioni Unite*, Milano (Giuffrè), 2008, pp. 101–176, on Art. 39 determinations and gross human rights violations.

detention without trial, forced disappearances, and genocidal acts against the Kurdish minority are well-documented.<sup>31</sup> However, the enduring situation of human rights abuses in Iraq was unlikely to fall under the scope of an emergency. As White argues, the threat to Iraqi citizens under Saddam's regime was serious, but also long-established, while the doctrine of humanitarian intervention "had been conceived from the need to provide for a response to *sudden* emergencies like Rwanda, East Timor and Kosovo".<sup>32</sup> Intervention should be limited to pressing circumstances leaving no time for seeking and implementing alternative solutions (diplomatic action, non-military coercive measures). It is submitted here that the *Caroline* standard governing self-defence should all the more be applicable to humanitarian intervention, as no direct and vital interest of the intervening State is endangered. Given the imperative nature of the prohibition on the use of force, and the fundamental importance of the principle of sovereignty in international law, humanitarian intervention should indeed be narrowly construed. A pattern of long-established oppressive regime clearly does not comply with such stringent criteria.

As to the second threshold condition identified, it cannot be overstressed that support for humanitarian intervention was consistently expressed in the context of collective action to be undertaken by the international community, and certainly not as a tool placed at the discretion of individual States. Conversely, the invasion by the coalition forces in March 2003 had no support from the Security Council.<sup>33</sup> Alternatively, at least support from a regional organization would be required, as proof of sufficient agreement within the international community, and guarantee against the pursuit of private interests. NATO's operation in Kosovo in 1999 arguably reopened the debate on the acceptability of regional intervention in extreme cases, when the Security Council is paralysed by the veto of a permanent member.<sup>34</sup> Albeit not authorized by the Security Council as required by Article 53 of the Charter, NATO intervention constituted multilateral action carried out by a large regional organization, which conferred a minimum degree of legitimacy. By contrast, in the case of Iraq there was significant disagreement within NATO and the EU on the matter.<sup>35</sup> Thus, despite the participation of other States, the 2003 U.S. decision to wage war remained essentially unilateral, and departed from any model of international policing under UN auspices. As such, the intervention posed a threat to the international order, denying the sovereign equality of States, marginalizing the UN collective security system, and promoting the do-it-yourself resolution of international crises.

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<sup>31</sup> See eg. Human Rights Watch, World Report (2000); Amnesty International, Annual Report (2001); Report of the UN special rapporteur on Iraq, Andreas Mavrommatis, E/CN.4/2001/42, 16 January 2001.

<sup>32</sup> WHITE, *cit.*, p. 42 (emphasis added).

<sup>33</sup> See TOMUSCHAT, R (on the Application of Al-Jedda) v Secretary of State for Defence. *Human rights in a multi-level system of governance and the internment of suspected terrorists*, in Melbourne Journal of International Law, 2008, vol. 15, available at <http://www.austlii.edu.au/au/journals/MelbJIL/2008/15.html>.

<sup>34</sup> See GAZZINI, *The Rules on the Use of Force at the Beginning of the XXI Century*, in *Journal of Conflict & Security Law*, 2006, 11(3), pp. 319-342, at pp. 324-328.

<sup>35</sup> See WEISS, *cit.*, p. 179.

The claim to legitimacy of the Iraq intervention was further discredited by its ill-founded doctrinal basis. In fact, the reading of official U.S. statements conveys a posture akin to ideological rather than humanitarian intervention. The 2002 State of the Union Address identified Iraq as part of the axis of evil,<sup>36</sup> and, as a result, the U.S. administration overtly pursued a policy of régime change. Significantly, the operation that drove Saddam Hussein from power in April 2003 was called *Operation Iraqi Freedom*. In his Address to the Nation on Iraq of 17 March 2003, President Bush notably sent a message to Iraqi citizens: “We will tear down the apparatus of terror and we will help you to build a new Iraq that is prosperous and free. [...] The tyrant will soon be gone. The day of your liberation is near”.<sup>37</sup> The declarations of President Bush upon the capture of Saddam Hussein are also eloquent: “This afternoon I have a message for the Iraqi people. You will not have to fear the rule of Saddam Hussein ever again”; “The capture of this man was crucial to the rise of a free Iraq”.<sup>38</sup> Thus, the Bush administration justified the use of force against the oppressive regime of Saddam Hussein as aimed at forging a better régime for the people rather than ending an imminent catastrophe.<sup>39</sup>

Proponents of democratic intervention attempt to found the legality of the use of force on the purpose of furthering UN goals such as human rights.<sup>40</sup> Such a discourse may appear attractive, but intervention allegedly aiming at freeing a people from a tyrant appears unwarranted under international law. In this regard, the ICJ emphasized in the *Nicaragua Case* that “[h]owever the régime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State”.<sup>41</sup> It may be true, as Franck argues, that current international law has established a “democratic entitlement” for the citizens of the member States of the international community.<sup>42</sup> However, the coercive implementation of the democratic entitlement remains, at best, a matter for the international community collectively, especially as far as any forcible measures are concerned (as opposed to political pressure, public condemnation, or economic sanctions). The use of force by a State against the oppressive regime in another State (‘the lesser of two evils’) is at variance with many founding principles of

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<sup>36</sup> See the State of the Union address of President Bush of January 29, 2002, available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/01/print/20020129-11.html>.

<sup>37</sup> President Bush’s Address to the Nation on Iraq of 17 March 2003, available at <http://edition.cnn.com/2003/WORLD/meast/03/17/sprj.irq.bush.transcript/>.

<sup>38</sup> See the New York Times report at <http://www.nytimes.com/2003/12/15/world/capture-husseini-president-bush-s-cautious-demeanor-masks-white-house-elation.html>.

<sup>39</sup> See also MURPHY, *cit.*, p. 173: “attention was called to the welfare of the Iraqi people and the need to help them throw off a despotic and abusive ruler”.

<sup>40</sup> See GRAY, *cit.*, p. 50.

<sup>41</sup> *Nicaragua Case, cit.*, p. 133 (para. 263).

<sup>42</sup> See FRANCK, *Intervention against Illegitimate Regimes*, in FISLER DAMROSH – SCHEFFER (Eds.), *Law and Force ...*, *cit.*, pp. 159-176, at p. 166. The author refers to the right of every citizen “to take part in the conduct of public affairs, directly or through freely chosen representatives”, as guaranteed by Article 25 of the International Covenant on Civil and Political Rights, which he considers to have entered the process of becoming customary law.

international law in the post - UN Charter era. Even though it does not affect the territorial integrity of the State concerned, as *per* Article 2 (4) of the Charter, military intervention seeking to overthrow a regime on behalf of its victims does affect the political independence of that State, and contravenes the principles of sovereign equality and self-determination of peoples. Any individual attempt at mounting an expedition in the name of a controversial right to democracy would therefore remain at odds with the prohibition of the use of force in international relations. A right to ideological intervention not connected with a humanitarian emergency would also be an undesirable development, as it would readily provide pretexts for abuse.<sup>43</sup> The interventions of States during the Security Council meetings on the Iraqi situation in March 2003 show that there has been no evolution in the *opinion juris* in this respect. Numerous countries in fact emphasized the illegality of the régime change policy pursued by the U.S.<sup>44</sup>

Pro-democratic intervention must be kept distinct from the forcible intervention to restore democracy authorized by the Security Council under Chapter VII in the presence of additional circumstances constituting a threat to international peace and security (see the case of Haiti). As Gray emphasizes, that authorization was exceptional, and in fact the overthrow of democratic rule in most instances – Burma (1990), Algeria (1991), Nigeria (1993), Niger (1996), Pakistan (1999), Cote d’Ivoire (1999), Fiji (2000), Central African Republic (2003) – did not give rise to any authorization to use force or even sanctions.<sup>45</sup>

The application of the rules on international responsibility further supports this conclusion. It can certainly be accepted that gross violations of human rights are a matter of concern for the whole international community, and that the perpetrating government violates obligations protecting collective interests, i.e. *erga omnes* obligations. However, if that is the case, the other members of the international community can only respond with *lawful* measures in order to induce that State to put an end to the breaches;<sup>46</sup> peaceful countermeasures are not permitted, let alone countermeasures involving military action (hence, the violation of a peremptory norm).<sup>47</sup>

Whether there were any genuine humanitarian considerations behind it or not, the scale of the Iraq intervention, amounting to complete occupation and obliteration of the system of government, was clearly disproportionate with respect to the crisis prompting the intervention.<sup>48</sup> Even if it had been a warranted exercise of self-defence,

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<sup>43</sup> Frank underlines that the application of the principle of self-determination has proven susceptible of turning into a “license of self-promoting states to mount fishing expeditions for their own advantage” (*op. cit.*, p. 166). The affirmation of a principle of democratic intervention would entail similar application problems.

<sup>44</sup> See Security Council meetings of 19, 26 and 27 March 2003, Press releases SC/7696, SC/7705, SC/7707.

<sup>45</sup> See GRAY, *cit.*, pp. 51-52.

<sup>46</sup> See Art. 48 of the ILC Draft Articles on State Responsibility.

<sup>47</sup> Article 50 of the ILC Draft Articles on State Responsibility specifically prohibits the use of force as a countermeasure, even by the injured State (if there is any): “ 1. Countermeasures shall not affect: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;[...]”.

<sup>48</sup> See WHITE, *cit.*, p. 43: “If Saddam’s regime had been engaged in systematic mass murder of a large proportion of its population, as the Khmer Rouge did in Cambodia in the 1970’s, this kind of

based on more than misrepresentations of the weapons of mass destruction threat, still the legality of the Iraq invasion would have remained problematic. In fact, it is doubtful that régime change can ever be considered consistent with international law: insofar as even lawful forceful measures are subject to the principle of proportionality, they can never be equated with a licence for régime change. Quite on the contrary, as a matter of principle, under international law any armed intervention, regardless of its motivation, should, to the extent possible, allow the preservation of the political organization in place before invasion.<sup>49</sup> Since humanitarian intervention may be admissible only as last resort, to put an end to a catastrophe or to prevent a humanitarian disaster, it should be confined to this very limited purpose.<sup>50</sup>

Moreover, the humanitarian *jus ad bellum* claims of the Bush administration seem to have been at odds with the principle of good faith. The Report of the International Commission on Intervention and State Sovereignty on the responsibility to protect also includes a test of “right intention”, i.e. whether the motives are indeed humanitarian.<sup>51</sup> The allegation that the invasion sought to protect the human rights of the Iraqi population was introduced by U.S. officials as a parallel, subsequent, and secondary motivation. The war was initially justified as an exercise of the right to pre-emptive self-defence proclaimed by the Bush doctrine (as notoriously articulated in the National Security Strategy 2002), in the face of Iraq’s (undocumented) possession of weapons of mass destruction, coupled with alleged connections with Al-Qaeda, hence the risk that such weapons could be made available to terrorists. The first legal basis officially invoked by the U.S., when notifying the intervention to the Security Council on the day the hostilities commenced, was in fact Article 51 of the UN Charter. The U.S. additionally relied on an implicitly authorized enforcement of previous Security Council resolutions.<sup>52</sup> The humanitarian claims were rather adduced as a means to rationalize the recourse to war “only after the original rationale of the attack was substantially undermined by the failure to locate the alleged weapons of mass

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action might have been proportionate to the emergency, and therefore legitimate. But appalling as Saddam’s regime undoubtedly was, he did not pose an immediate threat to Iraq’s people on that scale”.

<sup>49</sup> Art. 43 of the Hague Regulations, discussed in further detail *infra*, requires occupying powers to preserve to the extent possible the law of the occupied territory, which should include to the very least the main institutional setting.

<sup>50</sup> A use of force going well beyond this objective is bound to be unlawful. As the UK representatives argued in defence of NATO operations, humanitarian intervention is understood as an exceptional use of force “directed exclusively to averting a humanitarian catastrophe, and [...] the minimum necessary for that purpose”. See Security Council meeting of 24 March 1999, Press release SC/6657.

<sup>51</sup> See ICISS, *Responsibility to Protect*, *cit.* note 22, pp. 35-36. See also the principle as articulated in the Synopsis on p. XII: “Right intention: The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned”.

<sup>52</sup> The U.S. sought implied authorization in Resolutions 678 (1990) and 687 (1991), and considered that Iraq had decided not to avail itself of its final opportunity under Resolution 1441 (2002); given Iraq’s breaches, the U.S. representative argued, the basis for the ceasefire in Resolution 687 (1991) had been removed, and the use of force was authorized under Resolution 678 (1990). On the controversial reliance on an implied Security Council authorization to secure the disarmament of Iraq see GRAY, *cit.*, pp. 270-281; LOWE, *cit.*, pp. 865-866.

destruction”.<sup>53</sup> The hesitation between different, and arguably far-fetched, motivations suggests that the humanitarian contention was spurious.<sup>54</sup>

Finally, in order to qualify as humanitarian, an intervention may not cause greater damage than the one it purports to avoid or to bring to an end. The classical *jus ad bellum* doctrine encompasses a “utilitarian” dimension; it predicates that “resort to armed force can only be justified in order to prevent worse outcomes”.<sup>55</sup> Similarly, the criteria defined by the International Commission on Intervention and State Sovereignty for lawful military intervention in defence of foreign civilian populations encompass “reasonable prospects”. The ICISS suggested, amongst the tests for righteous humanitarian intervention, the “balance of consequences”, i.e. whether military intervention would do more harm than good.<sup>56</sup>

From this viewpoint there was significant inconsistency between the declared humanitarian purpose of the intervention and the choice of means, i.e. full-scale war. As has been noted, “defenders of a right to intervene on humanitarian grounds have consistently laid claim to a higher morality than their opponents. Yet the history of humanitarian interventions is one of abuse, and the loss of blood incurred in its course draws into doubt this moral high ground.”<sup>57</sup> Iraq post-invasion is probably worse off, as the intervention predictably unleashed sectarian violence of a non-conventional type. Amnesty International stressed that “US and UK authorities were repeatedly warned before the conflict by Amnesty International and others that there was a grave risk of widespread disorder, humanitarian crisis and human rights abuses, including revenge attacks, once the Iraqi government’s authority was removed”.<sup>58</sup> Thus, several years after the “liberating” intervention, the country is characterized by political instability, lack of security and greater loss of human lives than under Saddam.<sup>59</sup>

Also, as discussed below, the operations were not planned in such a way as to ensure that, for the civilian population, the advantages obtained outweighed the losses (in terms of effective enjoyment of the right to life, integrity, security, family life, education etc.). It can be submitted, accordingly, that the U.S. did not exercise due diligence when calculating the costs and benefits of the war.<sup>60</sup> Together with the lack of

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<sup>53</sup> SULLYOK, *Is Intervention Humanitarian? Protecting Human Rights and Democracy Abroad*, in EJIL, 2004, vol. 15 (5), pp. 1058-1063, at p. 1061.

<sup>54</sup> See KRITSIOTIS, *Arguments of Mass Confusion*, in EJIL, 2004, vol. 15(2), pp. 233-278, at p. 234: “From President Bush’s commitment to expanding the boundaries of pre-emptive self-defence in a terror-struck world to the utilization of an intriguing complement of Security Council resolutions stretching as far back as 1990, we became perplexed spectators to the sport of nurturing different arguments as possible candidates for the legal justification of Operation Iraqi Freedom”.

<sup>55</sup> WHITE, *cit.*, p. 34.

<sup>56</sup> See ICISS, *cit.*, pp. 32 ff.

<sup>57</sup> KRISCH, *cit.*, p. 324.

<sup>58</sup> See Amnesty International, *Iraq. Looting, Lawlessness and Humanitarian Consequences* (2003), available at <http://www.amnesty.org/en/library/asset/MDE14/085/2003/en/a4389c50-d703-11dd-b0cc-1f0860013475/mde140852003en.pdf>, p. 1.

<sup>59</sup> See, e.g., the disquieting revelations of the 2006 survey conducted by an American and Iraqi team of public health researchers, *The Human Cost of the War in Iraq. A Mortality Study, 2002-2006*, available at <http://web.mit.edu/cis/human-cost-war-101106.pdf>, which assessed deaths occurring during the period from January 1, 2002, through the time of survey in 2006: “Death rates were 5.5/1,000/year pre-invasion, and overall, 13.2/1,000/year for the 40 months post-invasion” (at p. 1).

<sup>60</sup> See WHITE, *cit.*, pp. 35-36.

credibility of the motivation for waging the war, the disregard of the foreseeable adverse impact on the population suggests that the intervention was hardly humanitarian in any meaningful way.

## **II. *Jus in Bello* Requirements: Was the Unlawful Intervention Lawfully Waged?**

The law of international armed conflict is “predicated on a subtle equilibrium between two diametrically opposed impulses: military necessity and humanitarian considerations”.<sup>61</sup> This proposition stands true irrespective of the causes, nature and purposes of the war; however, when the justification for the war was, at least in part, based on humanitarian grounds, an emphasis on military necessity at the expense of humanitarian considerations appears particularly critical. It may be useful to recall that, in the *Nicaragua Case*, the ICJ considered whether the goal of protecting human rights may provide a legal justification for the use of force, and concluded that a humanitarian objective is not compatible with undertakings such as the mining of ports, or the destruction of oil installations.<sup>62</sup> Also, in respect of NATO’s intervention in Kosovo, commentators argued that a bombing campaign cannot be considered a humanitarian action, as only a ground operation could have secured the minimum loss of incidental civilian life.<sup>63</sup> The same compelling ethical-legal considerations affect the Iraq campaign. It is submitted that military operations cannot constitute humanitarian intervention where the means used to constrain an oppressive and torturous regime to comply with human rights cause great damage to the civil population, and to the infrastructure on which they depend for their survival and welfare.

That said, international responsibility will arise in any event, regardless of the motivation relied on for the military operations, where the choice of warfare means results in grave casualties, and excesses unwarranted by actual war necessities occur. In effect, one of the core concepts of the laws of armed conflict, as enshrined in Article 22 of the Hague Regulations of 1899 and 1907,<sup>64</sup> and in Article 35 paragraph 1 of the 1977

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<sup>61</sup> DINSTEIN, *The Conduct of Hostilities Under the Law of International Armed Conflict*, Cambridge (Cambridge University Press), 2004, p. 16. See also GREEN, *The Contemporary Law of Armed Conflict*, Manchester (Manchester University Press), 2000 (2nd edition), p. 126: “Necessity concerns those activities, subject to any restrictions imposed by the law, such as the ban on the killing of prisoners, which are essential to achieve victory. The principle of humanity regulates the degree of permitted violence, forbidding action which is unnecessary or excessive for the achievement of victory, particularly with regard to the treatment of non-combatants. The principles of necessity and humanity are complementary, seeking to adjust the means essential to realise the purpose of the conflict with the minimisation of human suffering and physical destruction”.

<sup>62</sup> *Nicaragua (Merits)*, *cit.*, para. 268.

<sup>63</sup> See GRAY, *cit.*, p. 42, note 50.

<sup>64</sup> See Article 22 of Hague Convention IV respecting the Laws and Customs of War on Land of 18 October 1907 (identical to Article 22 of Hague Convention II of 29 July 1899): “The right of belligerents to adopt means of injuring the enemy is not unlimited”. The 1907 Hague Convention IV entered into force on 26 January 26 1910.

Additional Protocol I to the Geneva Conventions,<sup>65</sup> is that the right of belligerents to choose means and methods of warfare is not unlimited.

More specifically, the laws of war prohibit *inter alia* weapons that cause superfluous injury and suffering. This principle, first enshrined in the Preamble of the 1868 St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight,<sup>66</sup> was reaffirmed in Article 23 of the 1899 Hague Convention II.<sup>67</sup> The bar on the infliction of unnecessary suffering to combatants finds support in various sectoral international treaties banning specific types of weapons.<sup>68</sup> Additionally, the Martens clause, incorporated in the Preamble of the 1899 Hague Convention II and 1907 Hague Convention IV, as well as in Article 1 (2) of Additional Protocol I, establishes that, absent specific international agreements, combatants are entitled to protection by virtue of “principles of humanity” and “dictates of public conscience”.<sup>69</sup> The U.S. is a party to the 1907 Hague Convention IV, and though it is not a party to Additional Protocol I, many provisions of the latter – Part III and several chapters of Part IV (in particular Articles 35-60) dealing with the conduct of hostilities – reaffirm norms already established by the 1899 and 1907 Hague Conventions and customary international law.<sup>70</sup>

There is also judicial support in favour of the customary nature of the prohibition of superfluous suffering of combatants. In 1946 the Nuremberg International Military Tribunal stated with regard to the 1907 Hague Convention IV: “The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing International Law at the time of their adoption [...] but by 1939 these rules [...] were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war”.<sup>71</sup> In the *Corfu Channel Case*, the ICJ confirmed that “elementary considerations of humanity” prohibit the use of certain weapons.<sup>72</sup> More recent ICJ case law further confirms that some tactics and weapons are prohibited under customary humanitarian law.<sup>73</sup>

Another basic rule of military conflict is the principle of distinction between civilian and military objectives, based on the need to protect civilians during the

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<sup>65</sup> See Article 35 (1) of Additional Protocol I to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (8 June 1977): “In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”

<sup>66</sup> See DINSTEIN, *The Conduct of Hostilities*, *cit.*, p. 57-58.

<sup>67</sup> See Article 23 of 1899 Hague Convention II: “Besides the prohibitions provided by special Conventions, it is especially prohibited: [...] To employ arms, projectiles, or material of a nature to cause superfluous injury; [...]”. See also Article 35 para. 2 of Additional Protocol I: “It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”.

<sup>68</sup> On illegal weaponry see GREEN, *cit.*, pp. 125-128 and 133-144; DINSTEIN, *loc. ult. cit.*, pp. 61-73.

<sup>69</sup> See DINSTEIN, *loc. ult. cit.*, p. 56.

<sup>70</sup> See the overview of Protocol I by the International Committee of the Red Cross available at <http://www.icrc.org/ihl.nsf/INTRO/470?OpenDocument> to this effect.

<sup>71</sup> Reprinted in *American Journal of International Law*, Vol. 41, 1947, pp. 248-249, quoted by the International Committee of the Red Cross at <http://www.icrc.org/ihl.nsf/INTRO/195?OpenDocument>.

<sup>72</sup> *Corfu Channel Case (Merits)*, *I.C.J. Reports 1949*, p. 4, at p. 22.

<sup>73</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996*, p. 226, at p. 257.

hostilities by limiting the attacks to military targets.<sup>74</sup> In its 1996 Advisory Opinion on *Nuclear Weapons in Armed Conflict*, the I.C.J. authoritatively found that the principle of distinction amounts to an “intransgressible” norm of international customary law.<sup>75</sup> Article 48 of Additional Protocol I reaffirms this principle: “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 the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”. The principle of discrimination between lawful and unlawful targets has as a logical corollary the prohibition of weapons that are not apt to discriminate between the two categories. In *Nuclear Weapons in Armed Conflict*, the I.C.J. stressed that “States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets”.<sup>76</sup>

Against this background, the employment by the U.S. of weapons containing depleted uranium<sup>77</sup> amounted to a breach of both the rules on illegal weaponry and the principle of discrimination between civilian and military objectives. More specifically, Article 23 lett. (a) of the 1907 Hague Convention prohibits the use of poisons,<sup>78</sup> and the 1925 Geneva Protocol establishes the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare;<sup>79</sup> moreover, Protocol I to the 1980 Convention on Certain Conventional Weapons prohibits the use of non-detectable fragments.<sup>80</sup> Additionally, the employment of such weapons violates the principle of distinction, as depleted uranium particles cannot be contained to the battle field, nor disengaged when the war is over, and they cause medical catastrophes (cancer, birth defects, and genetic damage) long after the cessation of hostilities.<sup>81</sup>

Furthermore, such weapons seriously pollute the environment, whereas weapons that cause undue harm to the natural environment are prohibited by Article 35 (1) of Additional Protocol I,<sup>82</sup> and by the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, to which the U.S. is

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<sup>74</sup> On the principle of distinction and legitimate military objectives see DINSTEIN, *The Conduct of Hostilities...*, *cit.*, pp. 82-112.

<sup>75</sup> See *Advisory Opinion on Nuclear Weapons in Armed Conflict*, *loc. cit.*

<sup>76</sup> *Ibid.*

<sup>77</sup> See the 2006 report of Consumers for Peace on *War Crimes Committed by the United States in Iraq and Mechanisms for Accountability* (esp. pp. 6 and 20), available at [http://consumersforpeace.org/pdf/war\\_crimes\\_iraq\\_101006.pdf](http://consumersforpeace.org/pdf/war_crimes_iraq_101006.pdf).

<sup>78</sup> The provision actually resumes the earlier prohibition, contained in the analogous Article 23 of the 1899 Hague Convention II, “[t]o employ poison or poisoned arms”.

<sup>79</sup> The U.S. ratified the Geneva Protocol of 17 June 1925 on April 10, 1975.

<sup>80</sup> See Protocol on Non-Detectable Fragments (Protocol I) to the 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: “It is prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays”.

<sup>81</sup> See Consumers for Peace report, *cit.*, p. 20.

<sup>82</sup> See Article 35 (3) of Additional Protocol I: “It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”.

a party.<sup>83</sup> Also, there is evidence of growing international concern for the preservation of the environment in the event of armed conflict. One example is the inclusion of the use of warfare methods causing widespread and severe damage to the environment in the 1996 Draft Code of Crimes against the Peace and Security of Mankind.<sup>84</sup> Moreover, former Article 19 para. 3 lett. (d) of the 1996 ILC Draft articles on State Responsibility, which drew a distinction between international crimes and international delicts, enumerated amongst the examples of crimes “a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment”. For this reason, it may be argued that the prohibition expressed in Article 35 (1) of Additional Protocol I, while not binding on the U.S. as such, is nevertheless binding as an emerging customary rule.

The U.S. forces also used incendiary weapons (as reluctantly admitted by U.S. officials in relation to a 2004 offensive against insurgents in the city of Falluja),<sup>85</sup> in particular white phosphorus,<sup>86</sup> expressly banned by the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) to the 1980 Convention on Certain Conventional Weapons. The United States, while a party to the Convention, has not ratified the incendiary weapons protocol; however, in the light of the particularly cruel effects of this type of weapons, their prohibition can be said to descend from the Hague and Geneva ban on weapons causing unnecessary suffering.<sup>87</sup>

Another cardinal principle of humanitarian law, directly connected with the prohibition of indiscriminate attacks, requires the parties to a conflict to use force proportionate to the objective of placing a military target *hors de combat*, and avoid large-scale casualties. Surely, incidental injury to civilians as a result of lawful attacks against military objectives is unavoidable in times of war; however, “legitimate collateral damage” is not boundless.<sup>88</sup> As Judge Higgins pointed out in a Dissenting Opinion in the *Nuclear Weapons* case, “even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain

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<sup>83</sup> The text of the 1977 Environmental Modification Convention was adopted by Resolution 31/72 of the UN General Assembly on 10 December 1976, and the Convention was opened for signature at Geneva on 18 May 1977. The Convention entered into force on October 5, 1978, and was ratified by the U.S. on January 17, 1980.

<sup>84</sup> See Article 20 of the ILC 1996 Draft Code of Crimes against the Peace and Security of Mankind: “Any of the following war crimes constitutes a crime against the peace and security of mankind when committed in a systematic manner or on a large scale: [...] g) In the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs”.

<sup>85</sup> See, e.g., BBC News 16 November 2005, *US Used White Phosphorus in Iraq* at <http://news.bbc.co.uk/2/hi/4440664.stm>; see also ‘The Independent’ article *The Fog of War: White Phosphorus, Fallujah and Some Burning Questions* at <http://www.independent.co.uk/news/world/americas/the-fog-of-war-white-phosphorus-fallujah-and-some-burning-questions-515345.html>.

<sup>86</sup> See Consumers for Peace report, *cit.*, p. 21.

<sup>87</sup> See *The Fog of War, cit.*: “White phosphorus is highly flammable and ignites on contact with oxygen. If the substance hits someone’s body, it will burn until deprived of oxygen. Globalsecurity.org, a defence website, says: ‘Phosphorus burns on the skin are deep and painful... These weapons are particularly nasty because white phosphorus continues to burn until it disappears... it could burn right down to the bone’.”

<sup>88</sup> See DINSTEIN, *The Conduct of Hostilities, cit.*, pp. 123-125 on collateral damage.

from the attack”.<sup>89</sup> Article 51 (5) (b) of Additional Protocol I specifically bans “attack[s] which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive* in relation to the concrete and direct military advantage anticipated” (emphasis added).<sup>90</sup> The classification of excessive attacks as war crimes in the Rome Statute of the International Criminal Court<sup>91</sup> is indicative of the general acknowledgement of the importance of proportionality.

In the light of these considerations, the use of cluster bombs under U.S. occupation mostly in urban areas in Iraq, dramatically increasing the number of civilian casualties,<sup>92</sup> appears inconsistent with international humanitarian law. The use of cluster bombs infringes the above-mentioned principles of discrimination, proportionality, and legitimate collateral damage, in that “they easily spread from legal to illegal military targets (they typically spread over an area of several football fields), and, because they have a poor detonation record, continue as unexploded ordinance (UXOs) for many years unless cleaned up”.<sup>93</sup>

Not only the weaponry, but also the military tactics need to be conceived in such a way as to observe the principles of distinction and proportionality. Since military operations may not result in undue civilian casualties, indiscriminating tactics or means of warfare are prohibited. The rules of engagement reportedly directed U.S. soldiers to attack insurgents even when they hid into private houses. As the *Christian Science Monitor* notes, “The rules of engagement instruct U.S. soldiers to bring withering force to bear on positions they’re attacked from, even when an insurgent ducks into a private house for cover”.<sup>94</sup> Other reports also reveal that the military tactics of U.S. forces in Iraq were not consistent with the principle of distinction, insofar as they were based on a blurred concept of enemy: “[N]umerous reports exist of various abuses against civilians arising from tactical decisions: in Haditha in November 2005 where 24 civilians were killed, allegedly by U.S. Marines; [...] These and numerous other incidences of gross abuses of Iraqis are regular occurrences, especially in a military environment that tends to judge all Iraqis as the enemy”.<sup>95</sup>

On the other hand, international norms governing the conduct of combat prohibit wanton destruction of property. In particular, the destruction of private or public property is prohibited under Article 53 of 1949 Geneva Convention IV, unless rendered

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<sup>89</sup> *Advisory Opinion on Nuclear weapons, cit.*, p. 587.

<sup>90</sup> On the meaning of “excessive” see DINSTEIN, *loc. ult. cit.*, pp. 120-121. This principle is also related to the rule on precautions. See in particular Article 57 (2) (a) (iii) of Protocol I: “With respect to attacks, the following precautions shall be taken: those who plan or decide upon an attack shall: [...] refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.

<sup>91</sup> See Article 8 (2) (b) (iv).

<sup>92</sup> See Consumers for Peace report, *cit.*

<sup>93</sup> *Ibid.*

<sup>94</sup> MURPHY, *In Tough Iraqi Conflict, Civilians Pay High Price*, in *Christian Science Monitor*, January 21, 2004, available at <http://www.csmonitor.com/2004/0121/p04s01-woiq.html>.

<sup>95</sup> Consumers for Peace report, *cit.*

“absolutely necessary” by military operations.<sup>96</sup> Further, Article 147 of Geneva Convention IV defines extensive and wanton destruction of property, not justified by military necessity, as a grave breach requiring criminal proceedings against the perpetrators. The U.S. attacks on Iraqi cities have involved a range of actions causing significant damage to cities and land. The findings of the Global Forum Policy in this respect are quite alarming: “The Coalition has used overwhelming military force to attack several Iraqi cities, on grounds that they were “insurgent strongholds.” These offensives, using heavy air and land bombardment, culminate in massive armored assaults. They have displaced hundreds of thousands of people, caused large civilian casualties and destroyed much of the urban areas.”<sup>97</sup> Several urban areas were thus subjected to aggressive sieges that lasted for weeks or months, and resulted in tens of thousands of buildings destroyed or severely damaged, as ‘precision’ air attacks cannot be realistically carried out on densely built cities.

One may be tempted to argue that, since insurgents used non-conventional tactics of combat, based on the deliberate intermingling with civilians, and the lack of distinctive uniforms, the protection provided by humanitarian law to civilians ceases to operate. Naturally, the Iraqi belligerents resorting to such tactics were in breach of the laws of war, which establish a clear prohibition on the use of human shields<sup>98</sup> and “perfidy”,<sup>99</sup> but humanitarian law is not based on the principle of reciprocity, and the duty of U.S. forces to protect civilian life to the maximum extent possible was not displaced by the unlawful conduct of the other party. Significantly, Article 51 (8) of Protocol I to the Geneva Conventions provides that “Any violation of these prohibitions [*inter alia*, the use of civilians to shield military objectives] shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57”. An argument pointing to the same conclusion is that civilians used as

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<sup>96</sup> See Article 53 of 1949 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War: “Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations”.

<sup>97</sup> See the report of Global Policy Forum on *War and Occupation in Iraq* available at <http://www.globalpolicy.org/component/content/article/168/37150.html>. The report refers to offensives against Falluja in April and November 2004, Najaf (April and August 2004), Tal Afar (September 2004 and September 2005), Samarra (October 2004, September 2005 and March 2006), al-Qaim (May and November 2005), Haditha (October 2005), Ramadi (October 2005 and June-July 2006) and Baqubah (January 2007).

<sup>98</sup> See Article 51 (7) of Additional Protocol I: “The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations”. See also Article 28 of Geneva Convention (IV): “The presence of a protected person may not be used to render certain points or areas immune from military operations”.

<sup>99</sup> See Article 37 (1) (c) of Additional Protocol I: “It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy: [...] the feigning of civilian, non-combatant status”.

human shields remain protected persons under the rules of humanitarian law insofar as they do not thereby become combatants, unless they voluntarily support the treacherous acts of the belligerents.<sup>100</sup>

The starvation of civilians as a military tactic is also prohibited. Attacks against food sources and water supplies are unlawful, and so is preventing the civilian population from being provided with food, water and medical care indispensable to its survival. Article 54 (1) of Additional Protocol I reads: “Starvation of civilians as a method of warfare is prohibited”. Pursuant to Article 54 (2) of the Protocol, it is “prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population such as food-stuffs, agricultural areas [...], crops, livestock, drinking water installations and supplies [...]”. While there is no general agreement on its customary value,<sup>101</sup> this provision contains a basic humanitarian guarantee; it may be submitted that the prohibition of starvation of civilians cannot be overlooked, if the principle of distinction in choosing the methods of warfare is to be fully observed. It has also been rightly emphasized that, since inhumane treatment of protected persons is prohibited, and indeed constitutes a grave breach of humanitarian law, a policy of starvation cannot be deemed lawful.<sup>102</sup>

The UN Special Rapporteur on the right to food, Jean Ziegler, cited violations of this rule in Tall Afar, Fallujah and other locations, where hunger and deprivation of water were used as a weapon of war, in response to the fact that the civilian population was being used as a shield by insurgents.<sup>103</sup> Many reports further document and condemn the practice of cutting off water, food, and electricity.<sup>104</sup>

Moreover, buildings dedicated to medical care may not be attacked. According to Geneva Convention IV, in particular Articles 18 (1),<sup>105</sup> 20 (1),<sup>106</sup> 21,<sup>107</sup> and 23 (1),<sup>108</sup>

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<sup>100</sup> They become, in the latter case only, unlawful combatants. See DINSTEIN, *The Conduct of Hostilities*, *cit.*, pp. 130-131.

<sup>101</sup> *Ibid.*, p. 132, and pp. 135-136.

<sup>102</sup> See GREEN, *cit.*, pp. 143-144.

<sup>103</sup> See Statement by Jean Ziegler, Special Rapporteur on the Right to Food, on the Occasion of World Food Day, 16 October 2005, on *Food and water used as weapons of war in Iraq*, available at <http://www.unhcr.ch/hurricane/hurricane.nsf/0/D53CB85688C438F9C125709D00262AEF?opendocument>, para. 14: “Given that insurgents frequently use civilian populations as human shields, the strategy of Coalition Forces for military assaults on cities have followed a pattern of firstly encircling the city under attack, secondly encouraging the civilian population to flee before the attack by cutting off their food and water supplies, in order to isolate insurgents within the encircled city”. See also para. 15: “Earlier reports from last year, in September and October 2004, including from the NGO, CASI, also reported that during military assaults on Tal Afar, Samarra and Fallujah water supplies were cut off to residents in the cities under attack by Coalition Forces, affecting up to 750,000 civilians”.

<sup>104</sup> See Global Forum Policy, *cit.*, p. 20 ff: “The Coalition has repeatedly denied water to residents of cities under siege, including Falluja, Tal Afar and Samarra, affecting up to 750,000 civilians. [...] Along with water, the Coalition has cut off electricity (which may power pumps and local wells). They also have cut off food and medical supplies, creating a “state of siege” and imposing a humanitarian crisis on the entire remaining urban population. [...] The UN reported that in early July 2006, US forces imposed a “total blockade” of Rutba “for approximately four days” followed by subsequent blockades “intermittently.””

<sup>105</sup> See Article 18 (1) Geneva Convention IV: “Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict”.

<sup>106</sup> See Article 20 (1) Geneva Convention IV: “Persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for,

carrying out military operations against medical facilities, personnel or vehicles constitutes a serious violation of humanitarian law. The U.S. operations involved attacks on hospitals, health care centres and other protected medical facilities and equipment, bombing of ambulances, and prevention of humanitarian assistance (in Fallujah, Haditha, Al-Qaim, Tall Afar, and Ramadi); this has not only resulted in many casualties, but has also had as a consequence the complete breakdown of Iraq's medical infrastructure.<sup>109</sup> The UN Sub-Commission on the Promotion and Protection of Human Rights, in its Resolution 2005/2 on *Prohibition of Military Operations Directed Against Medical Facilities, Transport and Personnel Entitled to Protection During Armed Conflict* of 8 August 2005, expressed concern about such practices, and insisted on their fundamental incompatibility with the Geneva Conventions.<sup>110</sup>

Another principle of international humanitarian law provides that the belligerent parties must search and care for the wounded, and the dead must be identified as soon as possible and treated respectfully. In particular Article 16 of Geneva Convention IV requires military forces to search for, and aid, wounded civilians unless prevented by military considerations. UN investigators and NGOs have documented breaches of this obligation, and apparently in few circumstances can the U.S. abandonment of wounded civilians be supported by arguments of military necessity; equally documented is the denial of access of impartial humanitarian agencies, such as the International Red Cross and Red Crescent Society, to those in need. Also, the U.S. forces failed to adequately collect, identify and document the dead.<sup>111</sup>

The failure of U.S. forces to comply with the rules of war and humanitarian exigencies, by furthering military gain at the expense of human costs, amounts to a breach of its international obligations. It also sends the dangerous message that non-conventional conflicts justify lesser consideration for human life and dignity.

### **III. The Failure to Fulfil the Positive Duties of Occupying Powers**

In addition to embarking upon actions amounting to prohibited conduct, the U.S. arguably failed to fulfil its positive duties as an occupying power in Iraq. As recognized

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removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases shall be respected and protected”.

<sup>107</sup> See Article 21 Geneva Convention IV: “Convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying wounded and sick civilians, the infirm and maternity cases, shall be respected and protected in the same manner as the hospitals [...]”.

<sup>108</sup> See Article 23 (1) Geneva Convention IV: “Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases”.

<sup>109</sup> See Global Policy Forum report, *cit.*, Consumers for Peace report, *cit.* See also Dahr Jamail's survey *Iraqi Hospitals Ailing Under Occupation*, available at <http://www.brusselstribunal.org/pdf/HealthcareUnderOccupationDahrJamail.pdf>.

<sup>110</sup> See E/CN.4/Sub.2/RES/2005/2. The preamble of the document makes no specific reference to Iraq, but more vaguely to “current armed conflicts” (“Alarmed by direct and overt attacks on medical facilities, transport and personnel in a number of current armed conflicts”).

<sup>111</sup> See Consumers for Peace report, *cit.*, pp. 12, 26.

in Security Council Resolution 1483 (2003), between the cessation of hostilities on 1 May 2003 and the transfer of power to the Iraqi Interim Government on 28 June 2004, the U.S. had the specific responsibilities and obligations of occupying powers under international law, in particular those covered by the provisions of the Hague Regulations of 1907 (Articles 42-56) and Geneva Convention IV.

Occupying powers have an obligation to take all possible measures to restore and ensure public order and safety. Article 43 of the Regulations annexed to the 1907 Hague Convention IV<sup>112</sup> provides: “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country”.<sup>113</sup> This norm thus lays down a clear obligation for occupying powers (‘shall’) to protect the life and security of people living under their control. This is even more so when belligerent occupation is the result of total military defeat accompanied by the dissolution of the State structures, hence no administration the occupied State can resume after the cessation of hostilities. This duty was acknowledged specifically in connection with the Iraq occupation in the 2007 judgement of the UK House of Lords in the *Al-Jedda* case.<sup>114</sup> That said, the high number of deaths registered during occupation indicates that U.S. forces and their allies have failed to adequately protect the lives of Iraqi civilians.<sup>115</sup>

Another essential duty of an occupying power is to ensure the basic human needs of the civilian population, especially access to food, water, and health care. Articles 55 (1)<sup>116</sup> and 56 (1)<sup>117</sup> of Geneva Convention IV establish specific positive

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<sup>112</sup> The Hague Convention IV respecting the Laws and Customs of War on Land was adopted on October 18, 1907 and entered into force on January 26, 1910.

<sup>113</sup> The content of this provision corresponds to customary international law, as recognized by the International Military Tribunal at Nuremberg and the International Court of Justice. For further references see SASSÒLI, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, in *EJIL*, vol. 16 (4), 2005, pp. 661-694, at pp. 662-663.

<sup>114</sup> See the opinion of Lord Bingham of Cornhill in *R (on the application of Al -Jedda) v Secretary of State for Defence* [2007] UKHL 58, para. 32: “[D]uring the period when the UK was an occupying power (from the cessation of hostilities on 1 May 2003 to the transfer of power to the Iraqi Interim Government on 28 June 2004) it was obliged, in the area which it effectively occupied, to take necessary measures to protect the safety of the public and its own safety”. See also para. 8: “Major combat operations were declared to be complete on 1 May 2003, although hostilities did not end on that date in all parts of the country. As from that date the US and the UK became occupying powers, within the meaning of Section III of the Hague Regulations on the Laws and Customs of War on land (1907) and the Fourth Geneva Convention on the Protection of Civilian Persons in Time of War (1949) in the areas which they respectively occupied”.

<sup>115</sup> While the estimates vary greatly, numerous surveys (Opinion Research Business, The Lancet, Iraq Body Count etc.) confirm an astounding number of deaths. See, e.g., <http://www.reuters.com/article/idUSL3048857920080130>; <http://www.casualty-monitor.org/2007/12/iraqi-casualty-monitor.html>; <http://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2806%2969491-9/fulltext>; <http://www.iraqbodycount.org/analysis/reference/press-releases/12/>.

<sup>116</sup> See Article 55 (1) Geneva Convention IV: “To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate”.

<sup>117</sup> See Article 56 (1) Geneva Convention IV: “To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the

obligations in this respect. Nonetheless, the living conditions worsened drastically after the invasion: the lack of water, regular electricity supplies, health services and other infrastructure services has been widely reported. The failure of the occupation forces to establish law and order had as a result the looting and sabotage of oil, gas, and water pipelines, and electrical powers stations.<sup>118</sup> The precarious security environment prevented the Coalition Provisional Authority from reconstructing the country's infrastructure and providing basic services, but also made the operation of relief convoys of the World Food Programme virtually impossible.<sup>119</sup> The failure to secure essential services in the aftermath of the invasion had long-term effects. As emphasized in the UN humanitarian appeal for Iraq, "[t]he conflict and its aftermath resulted in the widespread breakdown of essential services, severely affecting the population, particularly the two thirds of Iraqis living in the urban areas".<sup>120</sup> The failure to repair and equip medical centres and to protect medical staff contributed to increased deaths among civilians; in 2004 UNICEF reported that due to the collapse of public services, the number of children affected by malnutrition had almost doubled (from 4% to 7.7%) since the beginning of the war.<sup>121</sup>

The destruction and plundering of the Iraqi National Museum in Baghdad in April 2003 is also attributable to the omissive conduct of the U.S. forces.<sup>122</sup> As Baghdad was occupied by American forces in early April 2003, the Pentagon's Office of Reconstruction and Humanitarian Assistance sent a memo to senior commanders at the Coalition Forces Land Component Command indicating the Baghdad Museum as no. 2 on a list of 16 priorities to protect, after the Iraqi central bank. It was not until 16 April that a military force arrived at the museum, 8 days after museum officials had actively requested it.<sup>123</sup> As Renfrew suggests, the negligence manifested by the U.S. forces amounts to a violation of the obligations of occupying powers in respect of protection of

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occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties".

<sup>118</sup> See also BBC News 30 June 2009 *Iraq Key facts and figures*, available at <http://news.bbc.co.uk/2/hi/7856618.stm>, on the standard of living of the population six years after invasion, with particular reference to food security, power shortages, and sanitation.

<sup>119</sup> See WEISS, *cit.*, p. 174.

<sup>120</sup> United Nations, *Humanitarian Appeal for Iraq, Revised Inter-agency Appeal 1 April – 31 December 2003*, 1, available at <http://www.reliefweb.int/appeals/2003/files/irq03flash2.pdf>.

<sup>121</sup> Office of the Iraq oil-for-food programme, fact sheet, available at [www.un.org/Depts/oip/background/fact-sheet.html](http://www.un.org/Depts/oip/background/fact-sheet.html).

<sup>122</sup> FOSTER, *Missing in Action: the Iraq Museum and the Human Past*, in ABRAMS – GUNGWU (Eds.), *Iraq War and Its Consequences. Thoughts of Nobel Peace Laureates and Eminent Scholars*, 2003, Singapore (World Scientific Publishing), pp. 295-317, at pp. 304-305, provides a detailed description of how the galleries were looted and vandalized: "At dawn on Thursday, April 2003, large crowds of people descended upon the Iraq Museum [...] and came and went freely until sunset the next day, and possibly for much of the next day as well. [...] For two days or more, the crowds rushed from the museum with boxes, push-carts, bicycles, wheelbarrows, and pockets full of loot. [...] Appeals by museum staff to the coalition command to protect the museum were unsuccessful. Five days later, the museum was still open to anyone who wished to walk around, and an American newspaper reporter who walked through the galleries stated that there was nothing left to be seen". While these events took place before the official starting date of non-belligerent occupation, Baghdad was under the effective control of U.S. forces at that time.

<sup>123</sup> See RENFREW, *Reflections on the Looting of the Iraqi National Museum in Baghdad*, in ABRAMS – GUNGWU (Eds.), *Iraq War...*, *cit.*, pp. 319-325, at p. 323.

cultural property.<sup>124</sup> The gravity of this omissive conduct is compounded by the fact that experts had anticipated the risks, and requested military protection for the museum: “this was a disaster which was foreseen and which could quite readily have been prevented”.<sup>125</sup> By contrast, as Foster notes ironically, the site no. 16 for which the Pentagon’s Office of Reconstruction had requested protection in its March 26 memo, the Iraq oil ministry, was fully protected.<sup>126</sup>

On the other hand, the occupying powers not only have obligations arising strictly under humanitarian international law; they are also bound by obligations stemming from international human rights norms. The simultaneous application of the two bodies of law was recently confirmed by the I.C.J. in *Congo v Uganda*: “The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda’s responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account”.<sup>127</sup> It appears clear from the wording of the judgement that the occupying power has a positive obligation to ensure respect for the fundamental human rights of the inhabitants of the occupied territory, including against detrimental action by non-State actors operating in the territory.

From this perspective, in addition to customary obligations in respect of human rights in occupied Iraq, the U.S., who is a party to the 1966 International Covenant on Civil and Political Rights as of 8 June 1992,<sup>128</sup> also had treaty-based obligations to secure the fundamental rights of any individual within its jurisdiction. The extra-territorial application of the Covenant in respect of foreign territories over which Member States exercise jurisdiction in their capacity as occupying powers was explicitly acknowledged by the Human Rights Committee. Despite the literal wording of Article 2 paragraph 1 of the Covenant,<sup>129</sup> the Committee held in its General Comment No. 31 of May 2004: “the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals [...] who may find themselves in the territory *or* subject to the jurisdiction of the State Party. This principle

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<sup>124</sup> See *ibid.*, p. 324: “The looting of archaeological sites to provide antiquities for unscrupulous collectors and museums is well known [...] Indeed to prevent the looting of archaeological sites in the open country during or following armed conflict can be no easy task. [...] But to allow seven days to elapse before the most obvious protective measures were undertaken, measures explicitly formulated in general Garner’s memorandum, seems a clear abnegation of the obligations of an occupying power”.

<sup>125</sup> *Ibid.*, p. 325.

<sup>126</sup> FOSTER, *cit.*, p. 304.

<sup>127</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, I.C.J. Reports 2005, para. 179. See also para. 180: The Court notes that Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation”.

<sup>128</sup> Conversely, the U.S. notoriously failed to ratify the 1969 American Convention on Human Rights.

<sup>129</sup> See Article 2 para. 2 ICCPR: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory *and* subject to its jurisdiction the rights recognized in the present Covenant [...]” (emphasis added). The wording would seem to exclude the disjunctive interpretation.

also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained” (*emphasis added*).<sup>130</sup>

Additionally, Article 1 of the Optional Protocol establishing the competence of the Human Rights Committee significantly omits the territorial reference: “A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications *from individuals subject to its jurisdiction* who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant” (*emphasis added*). It would not seem logical to bestow a procedural right under the Protocol upon individuals outside the territory of the State unless they enjoy a substantive right under the Covenant itself.<sup>131</sup> Also, it is difficult to argue why an instrument establishing a principle of non-discrimination<sup>132</sup> should promote different treatment for individuals subject to a State’s authority according to whether they find themselves within the territory of the State or on foreign territory effectively occupied by that same State. Since the rationale for limiting human rights obligations *ratione loci* is arguably to place the obligations on the State who has the actual power to enforce the rights, it seems untenable for States to embrace a strikingly different standard of human-rights protection within their borders and in occupied territories.

It should also be recalled that a similar view was taken by the ICJ in the *Israeli Wall Advisory Opinion*, where it concluded that the provisions of the ICCPR applied extraterritorially in the West Bank and Gaza, insofar as Israel exercised effective jurisdiction in those territories. The Court found that “the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”,<sup>133</sup> relying on the object and the purpose of the Covenant, on the practice of the Human Rights Committee, as well as on the preparatory works.<sup>134</sup>

The obligation to protect human rights in occupied territories is not affected by the existence of a conflict situation. As the I.C.J. stated in the *Nicaragua Case*, “the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency”.<sup>135</sup> This position was confirmed in *Congo v Uganda*, where the Court also dealt with the coincident

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<sup>130</sup> See also the *Al-Jedda* case, *cit.*, where the application of Art. 5 of the European Convention on Human Rights to UK actions in occupied Iraq was not disputed, but rather its qualification by a UN Security Council resolution under Chapter VII.

<sup>131</sup> One might argue that an individual must find himself/ herself in the territory of the State in order to qualify as a victim of a violation in the first place; however, if this article had been intended to contain an implicit cross-reference to Art. 2 para. 1 of the Covenant, there would have been no need to specify the jurisdiction condition either.

<sup>132</sup> Art. 2 para. 1 ICCPR establishes an obligation to respect fundamental rights “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

<sup>133</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 180, para. 111.

<sup>134</sup> *Ibid.*, para. 109.

<sup>135</sup> *Nicaragua, cit.*, p. 240, para. 25.

application of human rights law and humanitarian law.<sup>136</sup> It is submitted that, where occupation is associated with phenomena of violent insurgency, as in Iraq, the expected level of human rights protection should be the one provided for on the national territory during states of emergency.<sup>137</sup> The U.S. was thus expected to protect those rights of Iraqi citizens specifically excluded by the Covenant from any derogation:<sup>138</sup> the right not to be arbitrarily deprived of life, not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, protection from slavery, non-imprisonment for debt, non-retroactivity of criminal law, right to legal personality, freedom of thought, conscience and religion.

With particular reference to the protection of the right to life in Iraq during occupation, it may be argued that it is difficult to establish in all circumstances which standard of diligence applied, whether the one dictated by human rights law, or the one requested by humanitarian law, as *lex specialis*.<sup>139</sup> This is because responses to organized armed resistance may shift the operational context from law-enforcement police action to proper military operations (covered by humanitarian law rather than human rights law).<sup>140</sup> Only in the latter case is wilful killing permissible, and even so excessive civilian casualties are not warranted. In fact, an express provision of Additional Protocol I to the Geneva Conventions, corresponding to customary law,<sup>141</sup> places an obligation on the occupying forces to use all necessary precautions to avoid the loss of innocent civilian life.<sup>142</sup> In the former case, as with any police operations,

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<sup>136</sup> See *Congo v Uganda, cit.*, p. 178, para. 160: “[T]he Court considers that the protection offered by human rights conventions does not cease in case of armed conflict [...] As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law”.

<sup>137</sup> See Article 4, para. 1 ICCPR: “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”.

<sup>138</sup> See Article 4, para. 2 ICCPR: “No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision”.

<sup>139</sup> As the I.C.J. acknowledged in the *Nicaragua* case, a lower standard of diligence is expected where humanitarian law applies. See *Nicaragua, loc. ult. cit.*

<sup>140</sup> See SASSÒLI, *cit.*, pp. 665-666: “When lawful or unlawful organized armed resistance continues in an occupied territory, as was the case in Iraq, the distinction between the conduct of hostilities against those directly participating in such resistance on the one hand, and police operations destined to maintain law and order and directed at civilians involved in criminal activity on the other, is more difficult to establish. The response by US forces to an RPG attack upon one of their convoys in the midst of Baghdad may, for instance, be considered to be covered by the law on the conduct of hostilities, while their firing upon a car failing to stop at a checkpoint is covered by human rights law applicable to police operations”.

<sup>141</sup> See SASSÒLI, *cit.*, p. 666, note 23.

<sup>142</sup> Article 51 (5) (b) of the First Additional Protocol codifies a principle of proportionality aimed at prohibiting excessive incidental loss of innocent life: “Among others, the following types of attacks are to be considered as indiscriminate: [...] (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”. Further, Article 57 imposes precautions in attack: “1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects. 2. With respect to attacks, the following

even in exceptional circumstances such as terrorist emergencies, the use of armed fire cannot be deemed lawful except in extreme cases, such as self-defence or last resort in order to avoid imminent loss of innocent life.<sup>143</sup> However, since the active hostilities were officially considered terminated in May 2003, the prevailing standard for assessing U.S. conduct in respect of the right to life of civilians after that date should be that of *non-belligerent* occupation, hence the yardstick of international human rights law.

It is true that, even under human rights law, the right to life, though non-derogable under any human rights instrument, is not framed in absolute terms, and can be subject to restrictions. Indeed according to the wording of Article 6 of the UN Covenant, the prohibition only concerns *arbitrary* deprivation of life.<sup>144</sup> However, the Human Rights Committee emphasized in its General Comment No. 6 that “[i]t is a right which should not be interpreted narrowly”;<sup>145</sup> the Committee stresses that “States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces”, and that “the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities”.<sup>146</sup>

More specific limitations to the exercise of this right are explicitly present in the corresponding article of the 1950 European Convention on Human Rights, which lists as exemptions (i.e. non-arbitrary interference) the defence of third parties from unlawful violence, effecting lawful arrest, and lawful containment of an insurrection.<sup>147</sup> The case-law of the European Court of Human Rights concerning these exceptions may cast a light on the scope of the right to life in a situation of emergency threatening the life of the nation, which arguably goes beyond the context of the European Convention. Significantly, in the case *McCann and others v UK* of 27 September 1995,<sup>148</sup> concerning UK anti-terrorist operations in Gibraltar, the Court specified that the compliance of the measures taken by the authorities with the Convention depends on their being rigorously proportionate with respect to the defence of third parties from

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precautions shall be taken: [...] 3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects. [...]”

<sup>143</sup> This was undoubtedly the case when the challenge faced by the occupying forces was looting rather than violent insurgency.

<sup>144</sup> See Article 6 ICCPR: “1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court. [...]”

<sup>145</sup> Human Rights Committee, *General Comment No. 06: The right to life (art. 6)*, 30 April 1982, para. 1.

<sup>146</sup> *Ibid*, para. 3.

<sup>147</sup> See Article 2 para. 2 ECHR: “Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection”.

<sup>148</sup> See *McCann and others v UK*, Appl. No. 18984/91.

unlawful violence,<sup>149</sup> and on whether the operation was prepared and supervised in such a way as to minimize the use of lethal force.<sup>150</sup> The lack of precautions during military operations in Chechnya by the Russian authorities was similarly found to be incompatible with the European Convention in the *Issayeva, Yussupova and Bazayeva* judgement of 24 February 2005.<sup>151</sup>

Against this background, reports from international and authoritative NGOs such as Human Rights Watch and Amnesty International indicate that the U.S. forces did not fully comply with their obligations to protect civilian life deriving from either (or both) international humanitarian and human rights norms.<sup>152</sup> In particular, a 2003 Human Rights Watch report on the civilian casualties caused by U.S. forces in Baghdad during the first months after President Bush declared an end to hostilities concludes that “U.S. military with responsibility for security in Baghdad is not [...] doing enough to minimize harm to civilians as required by international law”, and that the “hostile environment for U.S. troops [...] does not absolve the military from its obligations to use force in a restrained, proportionate and discriminate manner, and only when strictly necessary”.<sup>153</sup> The report states that “[t]he individual cases of civilian deaths documented in this report reveal a pattern by U.S. forces of over-aggressive tactics, indiscriminate shooting in residential areas and a quick reliance on lethal force”.<sup>154</sup> Apparently, the training of U.S. soldiers, who were not prepared for a law-enforcement situation as opposed to the usual military context, is partly accountable for the use of excessive force against civilians.<sup>155</sup>

Other human rights violations were largely documented, including indiscriminate detention of civilians, often for extended periods and without a charge, and abuses to detainees at numerous detention centres, such as Abu Ghraib. The requirement to ensure the maintenance of order and safety encompasses respect for the judicial safeguards of persons prosecuted for violation of public order, or subject to

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<sup>149</sup> According to the Strasbourg court, proportionality must be assessed based on the nature of the aim pursued, the danger for the life or physical integrity of persons inherent in the situation, and the risk for the force employed to cause victims. See further *Kathleen Stewart v UK*, application no. 10044/82, Judgment of 10 July 1984; *Díaz Ruano v Spain*, application no. 16988/90, Judgment of 26 April 1994.

<sup>150</sup> In *Ergi v Turkey* (application no. 23818/94, Judgment of 28 July 1998), the European Court insisted on the need for State authorities to take “sufficient precautions” in order to spare the life of innocent third parties in preparing and conducting military operations.

<sup>151</sup> See *Khashiev and Akaieva v Russia* (applications nos. 57942/00 and 57945/00), *Issaieva, Yussupova and Bazaieva v Russia* (applications nos. 57947/00, 57948/00 and 57949/00), and *Issaieva v Russia* (application no. 57950/00).

<sup>152</sup> Amnesty International, *Iraq. Looting, Lawlessness and Humanitarian Consequences* (2003), *cit. note 65*; Human Rights Watch, *Hearts and Minds: Post-war Civilian Deaths in Baghdad Caused by US Forces* (2003), October 2003, Vol. 15, No. 9(E), available at <http://www.hrw.org/reports/2003/iraq1003/iraq1003.pdf>, at pp. 38–39 (RPG attack) and 34–38 (killing of persons at a checkpoint).

<sup>153</sup> Human Rights Watch, *Hearts and Minds, cit.*, p. 3.

<sup>154</sup> *Ibid.*, p. 4. The same report identifies three types of civilian deaths occurred in questionable circumstances: deaths that transpired during U.S. military raids on homes in search of arms or resistance fighters, deaths caused by disproportionate and indiscriminate responses of U.S. soldiers after they have come under attack at checkpoints or on the road, and killings at checkpoints when Iraqi civilians failed to stop in ambiguous circumstances (checkpoints not well marked, incomprehension due to language or gestures).

<sup>155</sup> SASSÒLI, *cit.*, p. 668.

internment on imperative security grounds, in accordance with Article 78 of Geneva Convention IV.<sup>156</sup> However, Sassòli argues that “[f]rom materials available today it seems that the occupying powers in Iraq created only belatedly a legal basis for administrative detention according to Convention IV, although they had recourse to widespread detention of civilians without trial from the start of the occupation”.<sup>157</sup> It should be recalled that, in addition to amounting to a violation of (non-derogable) human rights, torture or inhumane treatment, wilfully causing great suffering or serious injury, unlawful detention, and the denial of fair trial rights also constitute grave breaches of the Geneva Conventions, and therefore war crimes.<sup>158</sup>

#### IV. U.S. Status in Iraq After 2004: *Jus Post Bellum* Obligations?

After June 2004, U.S. responsibilities in Iraq in connection with the hardships suffered by the civilian population are less clear-cut. For the UN Security Council<sup>159</sup> and the U.S.-led coalition, the occupation ended on 30 June 2004, and the functions of government were handed over to a new national government. However, the ongoing hostilities against U.S. troops, and the questionable effective authority of the new government who accepted the end of the war, raise doubts as to whether the war could be deemed truly over in June 2004. Whereas war can be started by unilateral declaration, it cannot be necessarily terminated by unilateral declaration; rather, such a declaration has a valid effect only if the defeated State undergoes complete *debellatio*, or is willing to abide by the other party’s declaration.<sup>160</sup> How should the continuing presence of coalition forces in Iraq be then assessed, and what obligations lie upon them?

First of all, it is submitted that the norms governing military occupation remain applicable, in accordance with common article 2 of the 1949 Geneva Conventions,<sup>161</sup> as long as the U.S. has a military presence in Iraq and objective authority over that presence. In fact, the application of the Geneva Conventions is not confined to circumstances amounting to military conflict, and covers non-belligerent occupation.

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<sup>156</sup> See Article 78 of Geneva Convention IV: “If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment. 2. Decisions regarding such assigned residence or internment shall be made *according to a regular procedure to be prescribed by the Occupying Power* in accordance with the provisions of the present Convention. *This procedure shall include the right of appeal* for the parties concerned. *Appeals shall be decided with the least possible delay.* In the event of the decision being upheld, it shall be subject to *periodical review, if possible every six months, by a competent body* set up by the said Power. [...]” (emphasis added).

<sup>157</sup> SASSÒLI, *cit.*, p. 665.

<sup>158</sup> See Article 147 of Geneva Convention IV, Art. 147 Geneva Convention I, Art. 50 Geneva Convention III, Art. 130 Geneva Convention II.

<sup>159</sup> See SC Res. 1546 (2004), para. 2: “Looking forward to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq by 30 June 2004”.

<sup>160</sup> DINSTEIN, *War, aggression..., cit.*, pp. 49-50.

<sup>161</sup> See common art. 2 para. 2: “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”.

This is so regardless of the consent of the local government to the presence of foreign troops, for the relevant test is effectiveness of authority. The obligation to secure fundamental rights will necessarily fall on the State who has the effective power to do so, that is to say the State exercising authority over the territory, regardless of the capacity in which it does so.

However, at least between the end of June 2004<sup>162</sup> and 30 January 2005, when the first democratic elections took place in Iraq, the fact that the presence of U.S. troops occurred ‘at the invitation’ of the Interim Government (though recognized as sovereign by UN Security Council Res. 1546) does not modify their legal status, insofar as such an invitation does not have any meaningful legal effect. Consent obtained *after* an internationally wrongful act was perpetrated does not exclude the wrongfulness of the act; in particular, the consent to the presence of foreign troupes expressed by an entity established by the same forces after invasion has little value in legitimizing the foreign presence. It can be argued that the U.S. remained an occupying power until February 2005 to the same extent as before July 2004, even though belligerent occupation could be said to be over. The authorization of the continued presence by the Security Council in Res. 1546 does not appear to change this fact; not only because the allied military forces had not been placed there at the request of the UN,<sup>163</sup> but also because even a peace-enforcing operation authorized by the UN has the same obligations as an occupying power.<sup>164</sup>

Furthermore, Article 6 (3) of Geneva Convention IV stipulates that “In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, *to the extent that such Power exercises the functions of government in such territory*, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143” (*emphasis added*). Thus, the reference point for the termination of obligations under international humanitarian law is not the close of military operations, but rather the devolution of all functions of government to the local authorities. The maintenance of public order, through active police (or even military) operations, including opening fire and arresting and detaining suspects, is a paramount governmental function, and it is doubtful whether this function was entirely vested on the Iraqi authorities after February 2005, or indeed at the moment of writing. To put it differently, U.S. forces in Iraq need to abide by the law of occupation until the transfer of power to Iraqi authorities has been fully completed. The current political and security instability and the hesitations of President Obama vis-à-vis the timing of withdrawal leave room for suspecting that Iraqi authorities do not possess sufficient effective control yet.

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<sup>162</sup> On 28 June 2004, the American-led Coalition Provisional Authority which had administered Iraq since the end of major hostilities in May 2003, handed its power over to the Interim Government of Iraq and dissolved itself.

<sup>163</sup> In *Al-Jedda* the House of Lords rejected the British government’s argument (relying on the Strasbourg Court’s decision in *Behrami and Saramati* of 2 July 2007), that actions of its personnel in Iraq were attributable to the UN.

<sup>164</sup> See *Observance by United Nations Forces of International Humanitarian Law*, Secretary-General’s Bulletin, 6 August 1999, ST/SGB/1999/13.

The test for whether an armed presence constitutes an ‘occupying power’ has been recently considered by the ICJ in *Congo v Uganda*: “In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an “occupying Power” in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question”.<sup>165</sup> The Court refers to forces present “as a result of an intervention”, not to hostile forces, and the finding seems applicable to a large extent to the U.S. situation in Iraq.

Also, if a government is unable to maintain order on its own territory without the military involvement of another State, its true exclusive authority may be called into question, as acknowledged by the European Court of Human Rights in its 1996 *Loizidou* ruling. The Court found that the presence of many Turkish troops on the territory of the Turkish Republic of North Cyprus demonstrated that the latter was not the only authority in control of the territory; since Turkey was actually exercising control, it had concurrent responsibility for policies and actions adopted on the territory.<sup>166</sup> The continued presence of U.S. troops, and the reliance of the Iraqi government on their action, might be said to suggest that the U.S. shared the responsibility for maintenance of security and public order (including human rights) long after the official cessation of occupation in 2004. They possibly still do, until their withdrawal, or until U.S. troops are placed under the control of Iraqi authorities, and the decision as to their final and complete withdrawal lies with the Iraqi authorities themselves.

Thus, whether we qualify the post-2004 situation as peace or (international/internal) conflict, the U.S. obligation to enforce ICCPR rights in its capacity as an effective authority in the territory subsists. Even if the U.S. is merely acting as an allied of the Iraqi government, and assists it in addressing an internal conflict or a turbulent domestic situation, the U.S. forces share responsibility for breaches of humanitarian/human rights law in Iraq.

## **V. Concluding Remarks and Concerns for Accountability**

The Iraq war was marked by appalling human costs, both during active hostilities and non-belligerent occupation, including post-war reconstruction under a fragile government, depending upon the former invader’s protection. This was the consequence of an invasion which failed to consider the likely impact on the civilian population, and of the choice of illegal warfare means and tactics to defeat the Saddam regime, maintain the occupation, and put an end to the resistance. The intervention hardly had anything humanitarian in the way it was planned and carried out, and resulted in a great number of dead and injured civilians, the destruction of homes, cities

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<sup>165</sup> *Congo v Uganda*, *cit.*, para. 173.

<sup>166</sup> See *Loizidou v Turkey*, application no. 15318/89, Judgment of 18 December 1996.

and infrastructure, a climate of insecurity, and the deprivation of the population of assets necessary to satisfy the most basic needs.

The conduct of U.S. forces raises serious concerns under humanitarian and human rights law, arguably engaging the State's responsibility on the international plane. However, any claims before the I.C.J. are prevented by the U.S. withdrawal of the declaration recognizing compulsory jurisdiction after the *Nicaragua Case*. Any condemnation by the Security Council was and remains, naturally, unthinkable. Any action before the International Criminal Court for war crimes and crimes against humanity committed by U.S. personnel is also precluded, since both the U.S. and Iraq are third parties in respect of the Rome Statute. If Prosecutor Moreno-Ocampo had decided in 2006 to investigate the alleged UK abuses in Iraq, the ICC might have found, incidentally, that U.S. forces breached humanitarian law;<sup>167</sup> however, this was not the case. Thus, despite the consistent evidence of violations of international law by the U.S. forces, and notwithstanding the numerous reactions of condemnation, especially from the transnational civil society, the prospects for invoking and implementing U.S. responsibility in connection with the Iraq war remain problematic. These difficulties ultimately mirror a far deeper conundrum: how do you hold a hegemon accountable?

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<sup>167</sup> The ICC could have analysed the wrongful conduct of the belligerent allies as a whole, while separating the individual responsibilities of UK forces for the purposes of the ICC Statute.