

VIOLATIONS OF THE LAWS OF ARMED CONFLICT IN IRAQ AND THE POSSIBILITIES FOR PUNISHING THE RESPONSIBLE

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Abstract

There are many signs that various kinds of violations of the laws of armed conflicts happened in the latest military intervention in Iraq in March-April 2003. These violations would amount to, if proven, various kinds of war crimes and crimes against humanity. It seems that both parties of the conflict could be held responsible for these violations to a varying degree. There are two main legal issues to be overviewed. One is to respond to possible and actual arguments devised to justify many acts of criminal nature. Second is to identify the legal means of trying and punishing those who could be held responsible for the crimes.

Securing the observation of the relevant rules of international law during and after a military conflict and punishment of those who are responsible for the violations are really important to re-establish peace and stability for the next generations. In the particular case of the recent Iraqi conflict, there are unfortunately many political and legal impediments to achieve an independent investigation and initiate the trial of the alleged responsible.

Key Words: The Iraqi Conflict; the Laws of Armed Conflicts; International Humanitarian Law; Crimes Against Humanity; War Crimes.

Introduction

Two military interventions in Iraq in a single decade led by the United States and its allies, called as the 'Coalition Forces'¹ are tried to be justified

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¹ Alongside the USA and the UK, only Australia and Poland contributed to the Coalition Forces in small number for the recent military intervention in Iraq in March 2003. But, about

on the basis of political reasons which are related to security considerations of our time. The specific reasons for the recent attack that was initiated on 19th March 2003 are also mainly related to security considerations. Eradication of the so called 'weapons of mass destruction' in Iraq, weakening or removing the existing 'terrorist threat' to the west, and overthrowing the Saddam's *Baath* regime which is held responsible for the above threats were the publicly expressed reasons.

Although it is not as well portrayed as the political aspect, there is indeed a legal aspect of these attacks, which regulates the initiation and conduct of a military engagement as well as aftermath of it. During the military clashes that lasted around three weeks, international community subjected the conduct of especially the Coalition Forces, to a legal scrutiny.² Undoubtedly, the legal issues that have gained more interest after the military conflict is the conduct of the Coalition Forces as the occupying powers in Iraq. Inevitably, the means of trying and punishing those responsible will constitute another important legal quest.

All these issues need to be addressed on the bases of the relevant rules of international law, in order to clarify the less-publicised legal aspect of the conflict. However, two issues are left outside the scope of the present study. One is whether the initiation of the war was illegal, which would, if proven, amount to crime against peace. This necessitates a lengthy discussion of the events and deserves to constitute a subject of a separate study. Second is the conduct of the Coalition Forces in Iraq after the war as the occupying power. This is a matter that involves the ongoing events rendering any study, premature at the moment.³

1. The Laws of Armed Conflicts

Before commenting on the above legal queries over the recent Iraqi conflict, it will be useful to give a brief account of the laws of armed conflicts. Termed as 'the international law of armed conflicts' or 'international humanitarian law',⁴ the rules regulating all the aspects of an armed conflict have been mainly devised by certain international conventions, the principals of which are the 1899 and 1907 La Hague Conventions, 1949 Geneva Conventions and their additional two Protocols

fourteen States including some European Union (EU) members such as Spain and Denmark supported this recent military operation.

² As soon as the conflict started, the Red Cross called on the parties to the conflict to respect for the rules of international humanitarian law in order to prevent the adverse effects of the war. 20.03.2003, Press Release, 03/18.

³ For the responsibilities of occupying forces, see H. McCoubrey and N. White, *International Law and Armed Conflict*, (Dartmouth, 1992), pp. 82-97.

⁴ For the issue of concept, see H. Pazarcı, *Uluslararası Hukuk Derstleri*, IV. Kitap (Ankara: Turhan, 2000), p. 127, 128.

of 1977.⁵ It should be emphasized that the rules included in these conventions have mostly been considered as reflecting the customary rules of the law of armed conflicts.⁶

The rules of international law of armed conflicts are divided into two main categories. The first category comprises the rules which regulate resorting to a war, which are also known as *jus ad bellum*. The second category is constituted by the rules which regulate the conduct during a war and accordingly termed as *jus in bello*.⁷

This latter category is also divided into two sub-categories.⁸ The first is the rules that are aimed at protecting certain categories of people such as civilians, prisoners of war and others who have been rendered 'non-combatant' (*hors de combat*) by injury, sickness or other similar reasons. The second category of rules regulate the means and ways of conducting war. Generally speaking, the violation of the first group of rules are regarded as crimes against humanity while that of the second group is called war crimes.

In this categorization, the first group of rules are mainly found in Geneva Conventions of 1949⁹ while the second group of rules are covered mainly by the Hague Conventions of 1899 and 1907. However, it is a matter of fact that this is not a strict separation as many rules of first category are also found in the Hague Conventions or *vice versa*. This is, in fact, inevitable as rules which are related to weaponry are certainly related to protection of civilians too.

There is no exhaustive list of crimes defining the violations of rules protecting certain categories of people. However, the Geneva Conventions

⁵ The official texts of these conventions are available at: ><http://www.yale.edu/lawweb/avalon/lawofwar/lawwar.htm>>

⁶ See, the General Assembly's Decision Confirming the Nuremberg Principles, UN Doc. A/RES/95/1; See also, T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford, 1993), p. 43; C.M. Bassiouni, *Crimes Against Humanity in International Criminal Law* (Dordrecht, 1992)

⁷ See H. McCoubrey, *International Humanitarian Law, the Regulation of Armed Conflicts* (Dartmouth Pub., 1990), p. 2; D. Tezcan, *Uluslar arası Ceza Hukuku Ders Notları*, (İzmir: Dokuz Eylül Üniversitesi, 1995); İ. Lütem, *Harp Suçları ve Devletlerarası Hukuk* (Ankara: 1951).

⁸ See H. Ball, *Prosecuting War Crimes and Genocide. The Twentieth-Century Experience* (The University Press Kansas, 1999), pp. 11-17.

⁹ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; -Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; -Convention (III) Relative to the Treatment of Prisoners of War; -Convention (IV) Relative to the Protection of Civilian Persons in Time of War.

and the statutes of international *ad hoc* criminal tribunals¹⁰ as well as the newly established International Criminal Tribunal (ICC) suggest that at least common article which regulates the grave breaches of the Geneva Conventions sets a minimum standard that has to be observed in the sense of customary law:

‘Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.’

As noted, this is not a conclusive list and international instruments provide many more similar acts that amount to international crimes.¹¹ But, it is necessary to note that genocide is also regarded as a special form of crimes against humanity although it is mentioned separately in many international instruments.¹²

The war crimes, on the other hand, implies that means and ways of defeating the enemy is not unlimited.¹³ More specifically, using weapons which cause unnecessary deaths or suffering to enemy,¹⁴ the conducts that damage trust between the sides involved,¹⁵ and targeting those who are not involved in the conflict or civilians and civilian places are all regarded as war crimes.¹⁶

¹⁰ These are the UN Criminal Tribunal for the Former Yugoslavia and the UN Criminal Tribunal for Rwanda.

¹¹ The most comprehensive list of these crimes is given by Article 7 of the Statute of the International Criminal Court (ICC).

¹² See the Statute of the UN Criminal Tribunal for Rwanda; Article 5 of the Statute of the ICC.

¹³ The Hague Convention on Laws and Customs of War on Land of 1907, Article 22; The Additional Protocol I of 1977 I, Article 35(1).

¹⁴ The Hague Convention on Laws and Customs of War on Land of 1907, Article 23(e); The Additional Protocol I of 1977 I, Article 35(2).

¹⁵ The Hague Convention on Laws and Customs of War on Land of 1907, Article 23(f), 29-31; The Additional Protocol I of 1977 I, Articles 37, 46.

¹⁶ The Hague Convention on Laws and Customs of War on Land of 1907, Article 23(c); 1949 Geneva Convention for the Protection of the Civilians, Articles 13-23; The Additional Protocol I of 1977 I, Articles 48-58. For instance, Article 3 of the Statute of the UN Tribunal for the Former Yugoslavia provides that ‘The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to

2. Crimes Against Humanity in Iraq

International community has witnessed various forms of violations of the laws of armed conflict during the recent military intervention in Iraq. The question here should not be whether any violations have really occurred in Iraq, but it should rather be the nature and extent of these violations.

2.1. Civilians and Civilian Places

It is clear that the most prominent feature of the laws of armed conflict is to protect those who are not directly involved in the military conflict either being civilian or becoming non-combatant due to various reasons. Although the clashes have lasted for a relatively short period of time in Iraq, the most adversely affected people were civilians in general and elderly people, women and children in particular.¹⁷

Some of the civilian casualties have been caused by direct shootings from the coalition soldiers at check-points.¹⁸ For such kind of killings, the Pentagon kept issuing statements that the vehicles which carried civilians failed to stop despite repeated warnings.¹⁹ Another reason that caused civilian deaths or injuries was the weapons which missed their targets and hit civilians or civilian places.²⁰ The death toll which directly resulted from such bombings is not yet clear.

The fact that the Coalition Forces used guided missiles from distant points which frequently missed their targets and hit civilians and civilian places was another major source of civilian casualties especially in major cities like Baghdad and Basra. The Coalition Forces did in fact wantonly

institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.' For an evaluation on the statute of the Tribunal, see, C.M. Bassiouni and P. Manikas. *The Law of the International Tribunal for the Former Yugoslavia*. (Transnational Publishers, 1996).

¹⁷ The Red Cross and Amnesty International issued warnings at the very beginning of the conflicts that they were concerned over big loses among the civilian pollution. Amnesty International Press Release AI INDEX: MDE 14/064/2003-1 April 2003.

¹⁸ For example, on 31st March, during a gunfire at a vehicle, 7 civilians some of whom were women and children have been killed. Again on 31st March, an American helicopter fired on a pick-up killing 15 civilians. Ibid, AI INDEX: MDE 14/062/2003-1 April 2003.

¹⁹ Ibid, 'Europe and the Crisis in Iraq: Statement to the Parliamentary Assembly of the Council of Europe', 28 March 2003. AI INDEX: MDE 14/052/2003.

²⁰ American officials stated that a missile hit a bus by mistake in Rutba in western Iraq killing 5 Syrian civilians on 23rd March. Amnesty International Press Release, AI INDEX: MDE 14/071/2003-8 April 2003. On 28th March, a missile hit a market place in al Shu'la in Baghdad and killed 62 civilians. AI INDEX: MDE 14/071/2003-8 April 2003. It should be noted here that the two sides accused each other of firing this particular missile. It was alleged that there were indications that the missile was an American missile. Amnesty International Press Release, AI INDEX: MDE 14/071/2003-8 April 2003, AI INDEX: MDE 14/071/2003-8 April 2003.

targeted and bombed many civilian places and basic infrastructure such as water, electricity and telecommunication networks. This was another source of many civilian deaths or sufferings. During the conflicts, a habit of bombing infrastructure especially in Basra and Baghdad was a common practice.²¹ Moreover, some civilian places such as TV stations or press offices were also bombed by the Coalition Forces.²²

Use of weapons like cluster bombs by the Coalition forces was another reason for the death or injury of civilians.²³ There are now very recent allegations that American soldiers used napalm bombs that were used in Vietnam and caused enormous reactions in international community.

On the other hand, Iraqi Army reportedly attacked on its people in Basra and killed many. Such attacks by the Iraqi Army on its own people should not be seen as a surprise as there had, prior to the conflict, been ongoing confrontation between the Iraqi regime and people living in the southern cities such as Basra.

Although the incidents are so obvious in their criminal nature, there are many legal points that have to be discussed and clarified. As a general point, the conflicting powers would certainly defend themselves by depending on the concept of 'military necessities' which is obviously approved by relevant international conventions. In the preamble of the 1907 Fourth Hague Convention on the Laws and Customs of War on Land 'the provisions, the wording of which has been inspired by the desire to diminish the evils of war, *as far as military requirements permit*, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.'²⁴ As there are no specified principles indicating the 'military necessities' in the conventions, it will certainly depend on the circumstances of every incident to find out whether there was really a justifiable military necessity.

The first specific question as to the Iraq conflict is whether deaths or injuries occurred at check-points due to alleged necessity 'to prevent possible suicide attacks' are justifiable. Secondly, it should be clarified whether there are any military necessities that could justify bombing basic

²¹ Ibid, AI INDEX: MDE 14/056/2003-28 March 2003; AI INDEX: MDE 14/071/2003-8 April 2003.

²² Examples are the Iraqi State Television facilities, and the offices of El-Cezira and Katar television channels. Ibid, AI INDEX: MDE 14/056/2003-28 March 2003.

²³ It was reported that the al-Hilla Hospital was bombed on 1st April by a cluster bomb. See ibid, AI INDEX: MDE 14/076/2003-7 April 2003; AI INDEX: MDE 14/071/2003-8 April 2003.

²⁴ Emphasis added. Article 3 of the Statute of the UN Tribunal for the Former Yugoslavia provides in paragraph (b) that 'wanton destruction of cities, towns or villages, or devastation not justified by military necessity' is a crime under the jurisdiction of the Tribunal.

infrastructure that eventually caused the loss of many civilian lives or injuries. Third question is whether unintended deaths or injuries caused by missiles that missed their targets are justifiable on the basis of legal rules. Whether certain kind of weapons like cluster bombs and napalm bombs are to be considered among the banned weapons constitute the final major legal quest.

As to the alleged necessity 'to prevent possible suicide attacks', a persuasive judgement should be depended on the particular conditions of every incident. The point to be dwelled upon should be whether there were sufficient evidence to prove a reasonable suspicion that an attack on the Coalition Forces was about to take place. It is certainly quite a similar case to establish a right to self defense in a criminal act. However, it flows from the reports that there could be other ways of stopping and searching civilian peoples without harming or killing them during the conflicts in Iraq. It should be re-emphasized that a more certain judgement will depend on more details of every incident in order to establish weather there was reasonable evidence of an imminent attack.

As to bombing basic infrastructure, this is related to tactics and weaponry of military engagements but closely related to the protection of civilians, Article 18 of the Geneva Convention IV of 1949 should be remembered here:

'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.'

Even if these civilian hospitals are used for the treatment of military personnel, there is no way that these hospitals could be bombed. Article 19 provides that

'The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded. The fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants which have not yet been handed to the proper service, shall not be considered to be acts harmful to the enemy.'

There is no evidence that the Coalition Forces considered the civilian hospitals as in Iraq harmful to them by their operations. Thus there were no military reason to inflict damage to the hospitals and caused many civilian deaths or injuries. Concerning the other infrastructure, it seems that they intentionally kept bombing basic infrastructure for water, electricity and

other vital instruments such as telecommunication networks in order to weaken the resistance of the Iraqi Army. However, the most suffered people were the civilians.

Bombing such mainly civilian infrastructure and some civilian places such as press offices, is clearly prohibited by the relevant rules. Article 25 of the Fourth Hague Convention of 1907 provides that 'The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.' Even if the cities are under bombardment, all such structures and buildings should be protected.²⁵

As to the unintended deaths or injuries that caused by missiles by missing their targets, and use of particular weapons such as cluster bombs and napalm bombs are similarly related to weaponry of engagement. These issues will be discussed below in the more appropriate section.²⁶

2.2. Non-Combatants (*hors de combat*)

Within the context of the recent military confrontation in Iraq, the most prominent issue as far as the conditions of non-combatants is concerned was treatment of the prisoners of war. The relevant reports that were prepared by both the Red Cross and Amnesty International during the clashes²⁷ do not mention any ill-treatment to the Iraqi prisoners.²⁸

The specific problem concerning the prisoners of war during the confrontation seemed to be the treatment of the prisoners by the Iraqi Army and officials. More specifically, whether showing the prisoners taken by Iraqi Army from the Coalition Forces on TV and forcing them to speak about their own country or army was appropriate or a violation of the relevant rules constituted a matter of legal discussion.

As has been noted, the prisoners and other non-combatant should be treated humanly and should not be subjected to any degrading or humiliating treatments.²⁹ Showing them on TV and forcing them to speak in a certain

²⁵ Article 27 of the Fourth Hague Convention of 1907.

²⁶ See *infra*, 2.3.

²⁷ Red Cross announced during the clashes that it was able to make regular visits to the camps where the Iraqi prisoners were kept by the Coalition Forces. For instance, it was announced after a visit to a camp in southern Iraq by the Red Cross on 5 April that there were around 4,500. But the Red Cross also announced that it was not allowed to visit the prisoners kept by the Iraqi Army. 06.04.2003, Red Cross News.

²⁸ However, a news on BBC World on 30 May 2003 indicated that a British soldier who served in the conflict took some pictures when the captive Iraqi soldiers were allegedly being tortured by the Coalition Forces. This could be, if proven, taken as an indication of various forms of ill-treatment of Iraqi captives.

²⁹ The most relevant convention as to this issue is the 1949 Geneva Convention III. Article 13 of the Convention provides that 'Measures of reprisal against prisoners of war are prohibited.'

way could well be regarded as humiliating or degrading³⁰ as these acts seemed to have been done to achieve this particular purpose.³¹ In this particular case, the American soldiers who were captured by the Iraqis seemed to have been forced to present themselves as 'guilty of attacking Iraq or Iraqi people'. As matter of fact, no prisoner of war can be forced to admit a certain crime or be held responsible for a certain crime without an appropriate trial.³² Undoubtedly, torturing or forcing the prisoners of war to give information about their own army is a clear violation of relevant legal rules.

Those who have been rendered non-combatant by injury or sickness also seemed to have faced many difficulties in Iraqi conflict. This time the Coalition Forces could be held responsible. First of all, the medical treatment and care of the soldiers from either side should be assumed by both sides.³³ As the hospitals and many other vital infrastructures were damaged, the possibility of adequately treating them by the Iraqis should be limited. Thus, it could be said that the relevant rules of the Geneva Conventions are violated by depriving the sick and injured people the adequate medical treatment or necessary equipment. On the other hand, the reports suggest that the attempts by some international organizations to treat these people and provide medical support were not facilitated by the two sides.³⁴ This is an obvious violation of the Geneva Conventions too.³⁵

Article 14 provides moreover that 'Prisoners of war are entitled in all circumstances to respect for their persons and their honour.'

³⁰ Amnesty International announced that filming the prisoners of war could be useful to protect their rights but they were not used to degrade or humiliate them. 'Europe and the Crisis in Iraq, Statement to the Parliamentary Assembly of the Council of Europe', 28 March 2003. AI INDEX: MDE 14/052/2003.

³¹ Common Article 3 (c) of the Geneva Conventions provides in paragraph c that 'outrages upon personal dignity, in particular humiliating and degrading treatment' is prohibited.

³² Article 99 of the Geneva Convention III provides that 'No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused. No prisoner of war may be convicted without having had an opportunity to present his defense and the assistance of a qualified advocate or counsel.'

³³ The most relevant convention in this respect is the 1949 Geneva Convention I. Common Article 3 of the Geneva Conventions provides in paragraph 2 that 'The wounded and sick shall be collected and cared for.' Moreover, Article 15 of the same Convention provides: 'At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.'

³⁴ Amnesty International Statement, AI INDEX: MDE 14/060/2003-31 March 2003.

³⁵ See, Article 30 of the Geneva Convention IV.

3. Iraqi War and War Crimes

Considering that the weaponry and tactics to be used in an armed conflict is not unlimited and subjected to legal restraints, use of prohibited weapons and tactics would be serious violations of the relevant rules. The logic behind banning them is mainly to protect civilians, civilian places and other elements that are vital to human life. Moreover, preventing the warring people from unnecessary pain is another main objective of the rules regulating the weaponry and tactics.

As to the methods and tactics used during the Iraqi conflict, there are seriously questionable practices. The Iraqi Army seemed to have placed its compounds and defense weapons near or inside civilian areas.³⁶ The question here is whether such a tactic is to be considered as defending the city or contrary to the relevant legal rules. Considering that the Iraqi Army was defending, let's say, the city of Baghdad, there could be no justification that defenses could be placed near the vital civilian buildings or places such as hospitals. Article 27 of the Fourth Hague Convention of 1907 is quite clear that places where the sick and wounded are collected should not be used at the time for military purposes.

The Iraqi Army also seems to have used civilian appearance and disguised themselves among civilians in order to commit suicide bomb attacks.³⁷ No doubt, using such kind of tactics is grave breaches of the laws of armed conflict as it deprave the confidence between the two sides and eventually endanger the lives of civilians and other non-combatants.³⁸

Concerning the weaponry at the conflict, the Coalition Forces used missiles fired from distant places, known as guided missiles. They frequently missed their targets and hit civilians and civilian places. These could be said to have resulted with unintended civilian deaths or injuries. It should be observed that the problem is whether using such possibly mis-targeting missiles is a violations of the laws of armed conflict. Such weaponry has never been used so intensively until the latest decade. That is why there is no specific rule on the issue. However, even if there is no specific rule, there are strong legal analogies that use of such weapons which endanger the civilian lives greatly should be prohibited. The Preamble of the IV. Hague Convention of 1907 provides that

“Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that,... the inhabitants and the belligerents remain under the protection and the rule of the principles

³⁶ Amnesty International Press Release AI INDEX: MDE 14/056/2003-28 March 2003.

³⁷ Ibid, AI INDEX: MDE 14/064/2003-1 April 2003; AI INDEX: MDE 14/071/2003-8 April 2003.

³⁸ See, the Additional Protocol I of 1977, Article 37. Tactics which are not causing civilian deaths or injury such as camouflage or fake operations are not prohibited.

of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”

As to the use of banned weapons in Iraq, contrary to the expectations or fears of the Coalition Forces, there is no sign that biological or chemical weapons were used by the Iraqis during the recent conflict in Iraq. Use of such weapons which do not distinguish between combatants and non-combatants or civilians, create unnecessary pains to human beings and devastate all the vital environmental elements would certainly be grave breaches of the laws of armed conflicts.³⁹

However, some reports indicate that the cluster bombs were used by the Coalition Forces.⁴⁰ Such a weapon which does not distinguish between combatants and civilians should be considered as among the banned weapons by their such a nature. Any weapon which ‘kill or wound treacherously individuals belonging to the hostile nation or army’ is prohibited.⁴¹ Some recent reports indicate that the Coalition Forces used napalm bombs that exert unnecessary pain to people as it burns down all the surrounding elements. Use of this weapon is a clear violation of the relevant rules. For the same reason of indiscriminatory nature and extensive in pain, use of anti-personnel mines by Iraqi forces and mine traps around Kerkuk⁴² are again serious violations of the relevant rules due to their similar results.

4. Punishing the Responsible: Legal Possibilities

As in almost all the military conflicts in the last century,⁴³ the fundamental question in the Iraqi conflict is the punishment of those responsible for the crimes committed during the conflicts. This matter seems to be a purely political one as it takes political will and appropriate political environment to achieve the trial of the responsible including those from the Coalition Forces side. That in fact justifies our choice of excluding in our examination the question whether the responsible for the crimes in the Iraqi conflict will ever be tried. What is important from our point of view here is the way in which they could be tried if they are ever decided to be tried.

³⁹ See, Article 23 of the Fourth Hague Convention of 1907.

⁴⁰ The Amnesty International openly stated that cluster bombs were used in Basra. Thirty-three civilians were said to have died and three hundred injured in a cluster-bomb attack on 1st April in al-Hilla. Amnesty International Press Release, AI INDEX: MDE 14/066/2003-2 April 2003. Amnesty International even condemned the British Government on 3rd April for using cluster bombs. Ibid, AI INDEX: MDE 14/068/2003-3 April 2003.

⁴¹ Article 23 of the Fourth Hague Convention of 1907.

⁴² Amnesty International’s Announcement, ‘Europe and the Crisis in Iraq Statement to the Parliamentary Assembly of the Council of Europe’, 28 March 2003. AI INDEX: MDE 14/052/2003.

⁴³ Y. Beigbeder, *Judging War Criminals, The Politics of International Justice*, (Macmillan, 1999), pp. 25-26.

4.1. American military courts

One of the suggested ways is the military criminal courts to be established by the United States and its allies in Iraq for the trial of the Iraqi war criminals. No mention of trial of possibly accused members of the Coalition Forces has yet been made. The Coalition Forces, as the occupying power in Iraq, have indeed such a legal right to do so.⁴⁴ Another similar suggestion is the military courts in the USA or the UK that could be empowered to try the allegedly responsible from both sides.

Legally speaking, trying the responsible for violations of international law before military courts does seem to have many legal and political drawbacks. First of all, it does not seem to be appropriate to try civilians in military courts. Some accused perpetrators could well be non-military persons such as public administrators or politicians.

Secondly and more importantly from the legal perspective, such a way will be contrary to a fundamental legal principle of 'natural judge', which necessitates that the court should be existing when the crime is perpetrated. Any military court to be established for the trial of accused for the above stated acts will not legally be appropriate. It should be noted that establishment of criminal tribunals by the UN Security Council for the Former Yugoslavia and Rwanda constitutes a different precedent as it is primarily related to the powers of the Security Council under the UN Charter.⁴⁵

Thirdly, the courts to be established by the Coalition Forces or an organ to be appointed by them will be seen as one-sided like the Nuremberg and Tokyo Tribunals were seen as "victors' justice".⁴⁶ The American courts or tribunals to be established by the USA will never be seen as a tool of delivering justice as far as the crimes in Iraq is concerned. They will certainly be seen as a tool of stiff punishment for the Iraqis and a tool of revealing the Americans from accusations. Moreover, Article 102 of the Geneva Convention III of 1949 urges the parties not to try the prisoners of war of the enemy in a court or procedure which are not also applicable to their own military personnel.

⁴⁴ See, Article 43 of the Hague Convention IV of 1907; Part III, section of the Geneva Convention III of 1949.

⁴⁵ For an evaluation of the issue, see, G. Alpkaya, *Eski Yugoslavya için Uluslararası Ceza Mahkemesi*, (Ankara: Turhan, 2002), pp. 41-45; T. Odman, 'Eski Yugoslavya ile İlgili Uluslararası Ceza Mahkemesinin Kuruluşu ve Yasal Dayanağı' *Anakara Üniversitesi Hukuk Fakültesi Dergisi*, Cilt: 45, Yıl: 2002, p. 136.

⁴⁶ R.H Minear, *Victor's Justice-The Tokyo War Crimes Trial*, (Princeton University Press, 1973).

All these suggest that any involvement of the Americans and its allies alone in the process of trying the possibly responsible for the crimes in the Iraqi conflict will not be a legally appropriate way.⁴⁷

4.2. Universal jurisdiction and domestic courts

Punishing the responsible for the violations of the law of armed conflicts is not in fact a matter which necessitates a special regulation or institution after every military conflict. The principle of universal jurisdiction over such crimes enables the criminal courts of any country to try them.

The war crimes in its general meaning, as early as in the period of immediately after the World War II, was argued to be subject to universal jurisdiction.⁴⁸ The Geneva Conventions of 1949 refers to universal jurisdiction over certain crimes within their scope. A provision common to all the Geneva Conventions provides that 'Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.'

The fact that a big majority of States ratified the 1949 Conventions⁴⁹ may well be regarded as an indication of State practice. It is always possible that, a rule of conventional law could become a rule of customary rule due to the developments in State practice, even if it does not codify a pre-existing customary rule.⁵⁰ It is possible to see many examples from the relevant State practice proving that universal jurisdiction is accepted and applied by States as a rule of customary law.⁵¹

Many war crime cases seized by national courts of some States after the World War II were explicitly or implicitly depended upon the basis of universal jurisdiction. In the years following the War, cases such as the *Klein and Others*, *Kesselring*, *Tesch and Others*, *the Justice*, *the Remmele*, *Belsen*,

⁴⁷ For a detailed examination, see, Amnesty International's Announcement 'Iraq, ensuring justice for human rights abuses' AI INDEX: MDE 14/085/2003-11 April 2003.

⁴⁸ R.K. Woetzel, *The Nuremberg Trials in International Law with a Postulate on the Eichmann Case*, (Stevens and Sons, 1962), p. 66.

⁴⁹ 191 States have so far signed the Conventions. 137 of them have ratified or acceded the Conventions.

⁵⁰ R.R. Baxter, 'Treaties and Custom', 129 *Recueil des Cours* (1970-I), pp. 73-74.

⁵¹ British criminal law essentially territorial in nature. Report of the War Crimes Inquiry reads: 'War crimes, or grave breaches of the 1949 Geneva Conventions, wherever in the world they are committed are already triable in the United Kingdom under the Geneva Conventions Act 1957, which was passed in order that the United Kingdom be able to ratify the Conventions.' War Crimes, Report of the War Crimes Inquiry, Cm 744, July 1989, 21.

and the *Eichmann* were grounded on the principle of universal jurisdiction alongside with some other bases for jurisdiction.⁵²

Most of the authors are of the opinion that grave breaches of the Geneva Conventions and other war crimes, including crimes against humanity and genocide, are subject to universal jurisdiction enabling any State or a properly established tribunal to assume jurisdiction over such violations.⁵³ Generally speaking, this assumption stems from the fact that such crimes are not purely domestic in nature since while the domestic crimes disturb only the order of the State concerned, war crimes, as the Prosecutor in the UN Criminal Tribunal for the Former Yugoslavia described, 'transcend the interest of any nation and are truly crimes of international nature'.⁵⁴ The opinion of the Trial Chamber and the Appeals Chamber of the Tribunal turned out to be the same.⁵⁵

As to the Iraqi conflict, a recent development supports the implication that those responsible for the crimes committed in Iraq can be tried by national courts of other States.

A concrete example is in fact happening at the moment. For the violations in Iraq, a Belgium lawyer Jan Fermon requested a local Belgium court to start proceeding against the Supreme Commander of the Coalition Forces in Iraq, General Tomy Franks. This could well be precedent to be followed by some other States.

Trial of war criminals of the Iraqi conflict by national courts will not have legal problems and thus seems legally an appropriate way. However, chance for this way producing effective results is bleak as custody of the accused especially from the Coalition Forces side is really difficult to achieve. Even if the trial in custody is possible, there is a difficulty of applying the sentence if the convicted person is not under custody. Moreover, there is always a risk of political crises over the issue. In the case of the Belgium court, the reports in the news demonstrate that the USA is

⁵² For details, see, A.R. Carnegie, 'Jurisdiction over Violations of the Laws and Customs of War' 39 *BYIL* (1963), p. 418. In the *Rommel* Case, for instance, the defendant was tried by a US Military Government Court for war crimes allegedly committed against Russian and Czechoslovakian nationals although the USA did not even at that time enter in the War. For the details of the *Eichmann* Case, see, Fawcett, 'The *Eichmann* Case', 38 *BYIL* (1962), p. 202.

⁵³ T. Meron, *supra* note 5, p. 43; C.M. Bassiouni, *supra* note 5.

⁵⁴ The Prosecutor's Response to the Defense Motion in the *Tadic* Case Filled on 23 June 1995, 7 July 1995. Case No. IT-94-I-T.

⁵⁵ 'They are really the crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law, and transcending the interest of any one State....There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community.' The Trial Chamber, the Decision on the Defense Motions, Jurisdiction of the Tribunal, 10 August 1005, the *Tadic* Case, No. IT-94-I-T, par. 4.

applying an enormous pressure on Belgium to amend its domestic laws that could result with trial of the American officials or soldiers by the Belgium courts.

4.3. An *ad hoc* international criminal tribunal

Another possible way of trying the responsible for the crimes in Iraq could be the International Criminal Court (ICC). Despite the fact that the Court has officially been operational since June 2002 and about to have its judges selected, it is not fully operational for the Iraqi case. The Court's personal jurisdiction is twofold: one is nationality; the other is the place of the commission of the crimes covered by its Statute.⁵⁶

Both bases does not enable the trial of all the sides involved in the Iraqi conflict. The Great Britain, Australia, and Poland have ratified the Statute of the ICC but neither the USA nor Iraq is a party to it.

The ICC is not being legally operational, there are however other international ways, such as an *ad hoc* international criminal tribunals to be established specially for this purpose by the parties involved or by the United Nations. This seems to be the best suited way as it does not cause the consequences mentioned above, such as 'one-sided justice'. However, certain basic principles must be followed for a successful trial.

First of all, a commission of expert to be established by the United Nations should conduct investigation over the alleged violations and produce impartial and detailed reports. Secondly, all the necessary measures must be taken to ensure that the judicial body to be established be seen as impartial by the international community. In order to ensure this, this judicial body should be decided by a wide participation that must include the non-governmental organizations in Iraq or by the UN.

The conduct of trials should also be based on certain basic principles. Firstly, the jurisdiction of the court should cover all the violations of international humanitarian law. Secondly, nobody should be exempt from the jurisdiction of the court.⁵⁷ The benefit of these principles will be to safeguard the impartiality by securing all the alleged crimes and perpetrators adjudicated and punished.

Politically however, a word of caution must be noted. Considering that the USA and the UK are among the permanent members of the Security Council, the chance of establishing a tribunal by the Security Council to try

⁵⁶ See Article 4 (2) of the Statute of the ICC. See moreover, O. Nalcioğlu and A. Kaya, 'Uluslararası Ceza Divanı', *Silahlı Kuvvetler Dergisi*, Vol.: 372, 2002, p. 45.

⁵⁷ In the case of Tokyo Tribunal, the Emperor Hirohito and many other Japanese were immunized from the jurisdiction of the Tribunal. The main reason for this was to prevent any possible public uprising against the work of the Tribunal. For the Tribunal's legal correctness, this should be seen as a failing aspect.

the possible criminals from all the parties involved in the conflict seems theoretically weak.

Conclusion

The review has demonstrated that there happened various kinds of violations in the recent Iraqi conflict, as far as the laws of armed conflicts are concerned. It seems that both sides have been involved in these violations in various forms and degrees.

It should however be emphasized that there is a pressing need to establish an independent commission of experts to investigate all the alleged violations and establish detailed reports. The punishment of those who could be held responsible after an appropriate trial is also a significant task that could be appropriately done on the basis of universal jurisdiction or by an *ad hoc* international criminal tribunal. It certainly requires a political will and an appropriate political environment to be achieved.