

Iraq: war, law and humanitarian protection

With the threat of conflict in Iraq, humanitarian agencies face profound and complex challenges. Is war justified? Is it the business of humanitarian agencies to ask this question, or should they concern themselves only with the means by which war is pursued and the consequences for civilians? How might international humanitarian law, refugee law and other bodies of law apply to this situation? What difference does the law make, and what do aid agencies need to know about it? What are the roles, duties and responsibilities of the various international, state and non-state actors that are likely to be involved? Is neutral, impartial and independent humanitarian action possible when closely associated with political and military intervention?

To explore these issues, a public meeting entitled 'Iraq: war, law and humanitarian protection' was held at the Overseas Development Institute on 22 January 2003. This report presents an edited transcript of the proceedings of this event. It is in two parts: the first describes the key elements of presentations given by invited panellists; the second presents a selection of questions and answers from the floor. Under the rules of the debate, only panellists are identified; contributions from the floor are unattributed.

The panel comprised:

- Dr Chaloka Beyani, Senior Lecturer in Law, Department of Law and Centre for the Study of Human Rights, London School of Economics and Political Science.
- George Joffé, Visiting Professor in Geography at King's College London and Research Fellow at the Centre of International Studies, Cambridge University.
- Emanuela-Chiara Gillard, Legal Advisor, ICRC.

The debate was chaired by ODI Research Fellow James Darcy.

Presentations

1. The legal environment governing the use of force

The meeting opened with an overview by Chaloka Beyani of the law relating to the use of force as it applies to any potential conflict on Iraq. The presentation covered three main aspects of this question:

- the prohibition on the unilateral use of force;
- the right of self-defence; and
- the authority for collective action.

The unilateral use of force

The prohibition on the unilateral use of force dates back to 1928, and the signing of the Kellogg-Briand Pact. At this time, the international community was looking at establishing a system of international order, and exploring how international order might best be maintained. The first stage in that quest, encapsulated in Article 1 of the

agreement, was the renunciation by states of the use or resort to war as an instrument of national policy. This agreement, which rapidly became accepted within customary international law, found its way into the charter of the UN as Article 2.4.

According to this provision, in their international relations all member states shall refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN. Article 2.4 was meant to guarantee the security of smaller states unable to protect themselves against more powerful countries. The Article is a principle of customary international law in the sense that it is binding upon all; no derogation is permitted under any circumstances.

Within existing jurisprudence, Article 2.4 was first pleaded in 1947 in the Corfu Channel case, which concerned a dispute between the UK and Albania over the status of waters off the Albanian coast. Essentially, Albania regarded the channel as sovereign territory, while the UK regarded it as international waters. When the British launched an operation to clear mines from the area, two British destroyers were damaged and several lives lost. The UK argued that the operation was justified on humanitarian grounds, and demanded redress. Albania pleaded that its territorial sovereignty had been infringed, but the plea failed.

In the 1980s, when Nicaragua challenged US President Ronald Reagan's support of Contra rebels, the International Court of Justice (ICJ) ruled that sending armed forces across or into the territory of another state constituted a breach of Article 2.4. Other cases have also been brought, or are pending before the court. Yet despite the court's rulings, international lawyers still argue over Article 2.4. Some contend that it is absolute in its terms, while others believe that exceptions may be admitted if the action is not aimed at annexing a state, occupying its territory or removing a government. Article 2.4 becomes inoperative once the Security Council decides that action must be taken under Chapter 7 of the charter.

The right of self-defence

The right of self-defence is enshrined in Article 51 of the UN charter, which states that 'nothing in the Charter shall affect the inherent right of self-defence on the part of states'. There is a grey area here. The use of the word 'inherent' suggests that this is not a right granted by the charter, but a pre-existing right within international law. But pre-existing law is not clear on whether self-defence actually carried a pre-emptive element – that is, a threat to attack, rather than an attack itself, was sufficient to justify force. Following the establishment of the UN charter, it has been argued that, unless an armed attack has occurred, there is a risk that a responding state may itself be committing an act of aggression, or may be acting in a way that threatens international peace and security.

The authority for collective action

For the Security Council to sanction the use of force, there must be unanimity between its five permanent members that certain criteria have been met. There are essentially three grounds on which the Security Council may authorise the use of force:

- in the event that the Council determines that a threat to international peace and security exists;
- in the event of a breach of the peace; or
- in the event of an act of aggression against another state contrary to Article 2.4, or in a manner not authorised by international law and the UN.

In Kuwait, the Security Council determined that Iraq's invasion clearly met all three criteria. In Kosovo, the position was less clear, and arguments continue as to the legality of the NATO operation. Similarly, the 'war on terror' raises several complicated legal issues. The first is the question of whether the events of 11 September constitute an armed attack on the territory of the US. If so, this would trigger the right of individual self-defence. Given the scale of the attack and the degree of planning that went into it, as well as precedents set in the Nicaraguan case referred to above, it is plausible that 11 September can indeed be viewed as such. The second question relates to the proportionality of the measures taken in self-defence. Humanitarian agencies have their own issues to raise in terms of access to civilian populations, military necessity versus humanitarian action and access. Finally, the responding state must conduct itself properly and discharge its responsibilities under international law. As for the present position in Iraq, it is for the Security Council to determine whether Baghdad is in material breach of Resolution 1441.

2. International humanitarian law and the regulation of conflict

The second presentation, by Emanuela-Chiara Gillard of the ICRC, examined international humanitarian law (IHL). IHL is the body of law that regulates armed conflict, be it international (between states) or non-international (between a state and an organised armed group, or between two or more such groups). IHL has two objectives. The first is to protect those who are not, or who are no longer, taking a direct part in hostilities. This obviously includes civilians, but it also applies to captured, wounded and sick combatants. The second objective is to regulate the permissible means and methods of warfare. IHL regulates the conduct of hostilities. It does not address the legality of the resort to the use of force. This is regulated by other norms of international law as presented above. IHL applies to all parties to a conflict without distinction and in all circumstances. This means that there is no reciprocity: one party's violation of IHL does not remove another's obligation to comply.

As a whole, IHL represents a balance between military necessity and humanity. Its main sources for international armed conflict are the four Geneva Conventions of 1949 and the first Additional Protocols of 1977. Of particular relevance to this discussion is the Third Convention of 1949, which deals with prisoners of war, and the Fourth, which deals with the protection of civilians in armed conflict, specifically situations of military occupation. The two additional protocols of 1977, deal respectively with international and non-international armed conflicts (The US, the UK and Iraq have all ratified the Geneva Conventions, while of these three only the UK has actually ratified the two additional protocols.) It is important to note that the first protocol expressly covers both the attacking party and the defending party. The rules are equally applicable to acts in attack and in defence. There are also a number of treaties restricting or prohibiting the use of particular weapons: the 1972 Biological Weapons Convention, the 1980 Convention on Certain Conventional Weapons and its four protocols, the 1993 Chemical Weapons Convention, and the 1997 Anti-Personnel

Mines Conventions. Alongside these instruments there is an important body of customary law, which is binding on all states and organised armed groups regardless of ratification.

The corner-stone of IHL is the principle of distinction. This requires parties to an armed conflict to distinguish at all times between civilians and combatants, and to direct hostilities only against combatants. Civilians must as far as possible be spared from the effects of hostilities. Attacks against civilians and civilian objects are prohibited, as are indiscriminate attacks; hostilities must only target military objectives. This immediately begs a number of questions.

First, who is a civilian? Defining this is done *a contrario*; in simple terms, a civilian is a person who is not a combatant. In an armed conflict between two states, a civilian is someone who is not a member of these states' armed forces. However, if a civilian takes an active part in hostilities, then that person loses IHL's protection against attack for the duration of his/her participation in hostilities. Civilians can be prosecuted for the mere act of participating in hostilities, whereas members of the armed forces obviously cannot. They can however be prosecuted for war crimes if they violate IHL. The presence of combatants among the civilian population does not deprive that population as a whole of its civilian character, and therefore of its protection from the effects of hostilities.

Second, what is a civilian object? Again, there is no positive definition: a civilian object is anything that is not a military objective. Additional Protocol 1 defines military objectives as 'those objectives which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation in the circumstances ruling at the time offers a definite military advantage'. In case of doubt, Additional Protocol 1 provides that 'objects normally dedicated to civilian purposes such as places of worship, dwellings, schools should be presumed not to be military objectives'. In addition, there are special rules prohibiting attacks on places of worship, cultural objects, hospitals and medical facilities. Determining whether a specific object is or is not a military objective must be done on a case-by-case basis.

Third, what constitutes an indiscriminate attack? Additional Protocol 1 gives some examples: attacks which are not directed at a specific objective, or which employ methods which cannot be limited to a specific objective; attacks where the weapons used are such that they cannot specifically target a military objective; and attacks which may be expected to cause incidental loss of civilian life, injury to civilians, and damage to civilian objects which is excessive in relation to the concrete and direct military advantage anticipated.

The concept of indiscriminate attack ties in closely with another key principle of IHL, namely proportionality. This requires parties to a conflict to cancel or suspend an attack on a lawful military target if it may be expected to cause incidental loss of civilian life, injury to civilians or damage to civilian property which would be excessive in relation to the concrete and direct military advantage anticipated. Determining whether an action falls foul of the proportionality principle is complex, particularly with regard to determining the scale of the concrete and direct military advantage. A particular action could be construed as creating a concrete military

advantage in a wide and distant manner, in the context of the conflict as a whole for example. For the ICRC, the advantage gained has to be proximate to the attack, and it has to be substantial. When planning an attack, everything must be done to ensure that the objectives of the attack are in fact military objectives. All feasible precautions must be taken in choosing the means and methods of attack to avoid or minimise incidental loss of civilian life, injury and damage, even after it has been determined that the target is a military objective. Parties to a conflict also have a duty, whenever possible, to warn of an attack which may affect the civilian population.

According to IHL, parties to a conflict can only use methods and means of warfare of a nature that do not cause superfluous injury or unnecessary suffering. They are also prohibited from using the presence of civilians to render points immune from military operations. Other rules relating to the protection of civilians prohibit the use of starvation as a method of warfare; the destruction of objects indispensable to the survival of the civilian population; and the forced displacement of civilians. There are also prohibitions on torture, ill-treatment and sexual violence, and fundamental judicial guarantees must be granted to people in situations of armed conflict.

A large part of the Fourth Geneva Convention regulates occupation, in particular the rights and protection to which the population of occupied territories is entitled. The responsibility for ensuring these rights lies with the power in whose control civilians find themselves. Thus, the occupying power has the principal duty for ensuring food and medical supplies for the civilian population; if these are insufficient in the occupied territory itself, the occupying power is obliged to bring supplies in. Where the occupying power is unable or unwilling to do this, the international community can step in: Article 70 of Additional Protocol 1 provides that 'if inadequately supplied with food, medical supplies, clothing and shelter materials, relief actions which are humanitarian and impartial in character and conducted without adverse distinction shall be undertaken subject to the agreement of the party concerned'. Related provisions require neighbouring states to allow consignments to pass through unimpeded.

The ICRC in Iraq

The ICRC has had a presence in Iraq and contact with the authorities for a number of years. Its activities are aimed at alleviating the suffering of civilians caused by the sanctions regime; it carries out health, water and sanitation programmes, visits prisoners of war and other detainees, re-establishes family links, disseminates international humanitarian law to members of the armed forces and undertakes important mine-awareness activities.

In terms of preparedness in the event of a conflict, there are pre-positioned stocks of food and other items and medical supplies in Baghdad, as well as food and other relief items in Iran. The Jordanian capital Amman is the logistical centre for ICRC's operations in Israel and the occupied and administered territories, so there is an important stock there. Preparations are also underway in Kuwait. In the event of conflict, the ICRC will carry out its traditional activities for the protection and assistance of persons affected by armed conflict: meeting protection needs, ensuring respect for IHL, visiting prisoners of war, registering them, re-establishing family links and assistance activities, such as ensuring water supplies, establishing centres for medical care, and providing food aid and materials for building shelters. National

Red Cross Societies play an important role in assisting the ICRC to carry out many of these activities.

For the ICRC, it is essential that there is no confusion between military and humanitarian operations. If the dividing-line between humanitarian and military action is blurred, the very concept of humanitarian action risks being undermined. As pointed out in the Geneva Conventions, it is essential that humanitarian operations be independent, impartial and neutral, to ensure access, to be allowed to remain on the ground to work. It has to be clear that ICRC is present to provide humanitarian assistance, that it is not involved with the conflict and that it is not involved with the politics.

3. The implications of conflict in Iraq

The third presentation, given by George Joffé, looked more closely at the possible international repercussions in the event of conflict with Iraq. How the conflict is conducted, and how long it takes, will have very significant implications for the ways in which states in the region react; the consequences in terms of refugees; the nature of the call on humanitarian assistance; and the final implications for the Middle East.

Conflict scenarios

Almost certainly, any war will involve a massive aerial bombardment, followed by an invasion aimed at capturing Baghdad and thereby eliminating Saddam Hussein's regime. The bombardment is likely to be much more intense than in 1991, when as the UN itself stated Iraq was bombed back to the Stone Age. This will aim to cripple the Iraqi armed forces' capacity to resist the land invasion that is bound to follow, and which should thus, in theory, be rapidly concluded. A rapid outcome will see relatively low allied casualties, but undoubtedly fairly heavy Iraqi losses. In 1991 overall losses were probably between 150,000 and 250,000 Iraqis, though according to organisations like Human Rights Watch the civilian toll was remarkably low, around 2,000 dead.

The second possibility is that the allies seek to minimise casualties to their forces by besieging Baghdad, instead of fighting to occupy it. Baghdad is spread out on what is essentially a desert around a river. Besieging it is going to be a very lengthy and difficult process, and would seem bound to dramatically increase the number of civilian casualties. Such a delayed outcome would also be bad news politically in the US and Europe.

The third alternative is that, as the moment of decision approaches or shortly after the bombardments begin, there is either an internal coup, in which Saddam and the core of his regime are removed from power, or he voluntarily abdicates. Saudi Arabia has proposed just such a plan. Although not likely, this would obviate the need for major military action. There would instead be an occupation and the level of losses would be far, far lower.

Whatever kind of war there is, there will be a series of possible outcomes. What kind of regime, what kind of system are we going to see in the wake of the hostilities? The most likely outcome will, unfortunately, be the continuation of the current system. In other words, any occupying force will revive the remnants of existing power and

administrative structures. While a willing partner for the allies, for Iraqis themselves there would not be very much difference with what went before, based on the Ba'ath party, the army and the security forces: the regime would be authoritarian, it would be brutal and it would be permanent.

That of course may not occur. The American plan is for a dual administration, one military, one civilian, which would last for at least a year. During that year, an alternative system is to be developed and constructed. The idea that this can be done inside a year seems laughable, but then I don't make the decisions.

There is a third possible outcome, which is that the administration does not work, that the war proves to be much lengthier than anticipated, and that in the end the West, whoever may represent it, is not prepared to engage in controlling and rebuilding Iraq. (The costs of rebuilding are estimated at between \$120 billion and \$1.2 trillion.) Instead, Iraq breaks up, Iran grows concerned for the Shi'a majority (65% of the population) and the Kurds achieve some kind of autonomy, leaving an extremely angry, resentful, armed and dangerous Sunni rump that would begin to look for its own allies inside the region.

None of these outcomes appeals, except possibly a proper administration with the purpose of reconstructing Iraq, though there seems to be little evidence of the detailed planning necessary for that to be achieved. In all cases, it seems that the demand for humanitarian support is going to be massive. Iraq has been through 12 years of sanctions already, and we have some idea of the damage done to the Iraqi population and infrastructure. In the event of conflict, this will become much worse.

The regional reaction

None of the states in Iraq's immediate vicinity wants a war, either because they fear its outcome, or because the consequences for their own stability and survival could be severe. That said, some want it rather more than others. Some neighbours would be very happy to see the end of the Saddam regime, and may consider that to be a greater good than the question of continued stability in the region.

In the case of Turkey, the new government has made it clear that it wants nothing to do with the war at all. It doesn't want to offer a base for extended air operations outside of the Incirlik base, partly because Ankara does not believe that parliament will actually authorise this. The government is very unhappy about the idea of troops passing through its territory or being based on its territory. Of course, pressure and persuasion and large dollops of dollars can be very helpful in changing attitudes.

Turkey's position is complicated by its claim on the northern part of Iraq. This is a strong Turkish concern, and is backed up by Turkey's anxiety about the implications of Kurdish independence, not just for Turkey but also for Iran and, to a lesser extent, for Syria. Basically, none of the surrounding states wants to see the Kurds obtain independence; if it were clear that that was a possible outcome, the Turks would be among the first to intervene to prevent it.

There is a second Turkish concern, which is that Ankara would want to be in a position of dominance against Iran. Turkey is bound to take steps to guarantee its own position inside Iraq, whether by actual annexation, by creating a physical presence on

the ground or through influence. This would be designed to counter any attempt by Iran to achieve the same objective. Beyond that, Turkey has growing concerns about events in Central Asia and more generally about the implications of political Islam. As a result, much though they might not want to, the Turks cannot avoid being involved and taking a position.

The other major state is Iran. The Iranians have had a very bad two years. Before 11 September 2001 Iran was in a happy position, despite domestic problems. In many respects, it had become the most powerful state in the region. It provided transport and pipeline access directly from the Gulf to Central Asia and the Caucasus, as well as playing a political role. Tehran was, for example, engaged in arbitration in the Nagorno-Karabakh dispute. Iran saw itself with a real regional future. And then came Afghanistan. Now, Iran finds itself surrounded by the US and cut off from its Central Asian and Caucasian hinterland. It is also clear that the Bush administration is determined to pursue the same policy of dual containment as its predecessor, and has gratuitously included Iran in the so-called 'axis of evil'. That went down very badly in Tehran, where moderates were beginning to think that it might be possible to improve relations with the US. That was swept away, and the conservatives were able to establish that better relations are no longer acceptable. And that despite the fact that 65% of Tehran's population would like to see improved relations. The gentleman who carried out that survey now faces trial for political offences and for threats to national security.

The other irony is that, despite Iran's dislike for the American position, the underlying driver of Iranian policy in the Gulf is to see the end of the Saddam regime. Thus, Tehran is torn between a profound desire to encourage any attack on Iraq and a profound anxiety about the implications if it leaves the US not just to Iran's east and north, but to its west as well. So the Iranians find themselves in a very uncomfortable position.

Of the subsidiary players, Kuwait would clearly like to see an end to the Iraqi regime, and has every reason for doing so. But again it has anxieties about what that might mean. Its problems with Iraq will not disappear with Saddam; the main problem is the longstanding border dispute between the two countries. Although the UN has pronounced on this, the problem is not resolved. As far as the other Gulf states are concerned, there is of course an unparalleled benefit in seeing the end of the Saddam regime. There is also a disadvantage. If Iraq goes, Iran rises in importance, which would concern the Arab states in the Gulf, including Saudi Arabia, which would like to see itself as a dominant power inside the region.

The Gulf Cooperation Council was created in 1980 specifically to keep out two powers from the Gulf: Iraq and the US. Although it failed in the second, it would like to see the first maintained. However, a new regime in Baghdad may demand to be included, and this could have unpleasant implications for the Gulf states themselves. For reasons of national interest, the Gulf states will almost certainly accept American demands. Saudi Arabia is now preparing to accept that American troops should use its territory once again, providing the largest airbase in the Middle East for the use of the US air force, as well as a new command centre.

In Jordan, there is profound ambivalence. Iraq is Jordan's major trade partner, and provides a large part of Jordan's oil for free, and the rest on concessional terms. On the other hand, Iraq along with Syria has always been a major threat to Jordanian stability; change in Iraq, particularly change acceptable to the US, would thus be very desirable. But Jordan is likely to bear the brunt, along with Iran, of the human consequences of any war.

Behind these calculations by governments is another reality that is usually ignored, and that is what people in the Middle East and in the Arab world actually think about what's going to happen. Make no mistake: they are intensely angry. For them, this is the culmination of 50 years of betrayal. For them, it is a demonstration of the dishonesty of Western policy, and marks a defeat of a kind that they will find very difficult to stomach. As an indication of the level of anger, in the last year the sale of American goods in the Gulf has dropped by 46% through an informal boycott now proclaimed in every Arab newspaper. This does not mean that people necessarily hate the US or the West generally; they have their own ambivalences about that. But it does mean that political decisions taken and attitudes adopted in Washington, London and Europe more generally are prompting considerable anger.

That leaves Israel, the driver of a larger part of this crisis. It is no secret that the Sharon government will be delighted if there is a war, and has been pushing for one for the last two years. It has openly said, though may not necessarily believe, that Iraq is its greatest danger (some in Israel may argue that the greatest threat is posed by Iran). The problem is that removing Iraq leaves Iran much larger, much more powerful and perhaps much nastier. Iran has large numbers of missiles and an incipient nuclear programme. The Israeli population is terrified of the environment in which it lives, and it is extremely difficult for Israelis to take an objective view of the country's situation, or to respond appropriately to it. This will impel Israel to demand further military action to alter realities there. The irony is that, in 1988 at the end of the Iran-Iraq War, some Israeli politicians in the Ministry of Foreign Affairs saw Iraq as the appropriate partner for Israel in guaranteeing regional security.

War's consequences for the Middle East

What potential consequences will confront the Middle East as a whole? To explain this, we need to look briefly at the causes of the crisis. There is a common assumption that we're going to war over oil and the United States' insatiable demand for imported supplies. This is not in fact the case. It is true that the US imports eleven million barrels of oil a day, about half its consumption. But just 23% of that comes from the Gulf. The majority comes from Africa, Latin America and Canada. There is of course domestic American production. If it wishes to source more oil, the US can do so easily from non-OPEC areas outside the Middle East, which is in fact what the Bush administration's plans actually are. Projections from the US Department of Energy for further consumption over the next 25 years make quite clear that the increase in oil demand can be met by areas other than the Middle East. The Middle East will supply oil to the Far East, and to some extent to Europe. One important consideration is of course the oil price; since the oil market is global and oil is a fungible commodity, events in any part of that market affect prices in all of the market, so there is a legitimate concern here. But price depends on stability, and stability is not a consequence of war. In that case, the US and Europe should be trying to achieve stability, not instability. If you believe that the states concerned are not going to be

stable, then you might have a very good reason to cause short-term instability for the sake of long-term stability, in other words, remodelling the states concerned. This of course is a second justification given particularly by the neo-conservatives in Washington like Paul Wolfowitz, who argues that making Iraq into a democratic state, presumably by bombing it into democracy, will like dominoes make the others fall into line. That theory has been heard before in slightly different circumstances. It wasn't true then and it's not true now. Remodelling the Middle East is not a realistic objective because this is not the Middle East's central problem. The real problem in the Middle East, the real, real, problem is the 50-year-long Arab–Israeli conflict. Until that is resolved, all these constructs have no meaning.

Terrorism is the cause preferred by the British Prime Minister. The argument is that rogue states will eventually give weapons of mass destruction to terrorist groups. Now, this is bizarre. There are no examples of this happening in the past, and the groups concerned particularly dislike secular regimes of the Iraqi kind. If they do get such weapons from Iraq, the first place they will direct them is Iraq. At a deeper level, all states, including those considered to be rogue states, actually want good relations with the West. They have learned since the end of the Cold War that there is actually no other way forward. Therefore it is not them who threaten us; we perceive them to do so but in reality the threat is reversed. The argument about terrorism therefore carries little weight.

What about the argument of a clear and present danger, that weapons of mass destruction really do exist? Up until December 1998 UNSCOM was effective at destroying weapons programmes in Iraq. It destroyed the nuclear programme, it got rid of 90% of the chemical weapons programme and it got rid of 40%, 50%, perhaps 60% of the bacteriological programme. There may be material left, but the materials themselves degenerate over time so it is difficult to say how useful they are. Even if the programmes existed, it is not clear quite how they could have been financed. Iraq has no means of delivery. There is absolutely no evidence at all that Iraq has created weapons that could deliver those products effectively anywhere. And why now? Why not two years ago, five years ago?

This leaves one final argument, which I suspect is the one that's true: that there is a personal conviction held by significant groups in Washington and smaller groups here that Iraq is such a moral disgrace that there is a corrective imperative on the world to remove the regime from power. That is all very well, but in terms of politics and international politics not the best basis on which to work. How certain can you be that your motives are quite as pure as you think they are?

There is of course the possibility that Iraq will be reconstructed as a democratic state. There is the outside possibility that this will actually then be replicated elsewhere in the region. This is very unlikely. It is unlikely because the double standards that have characterised Western policy in the Middle East over at least the last 40 years will be maintained and intensified. In turn, popular anger is going to intensify. Not because Arabs reject the Western world but because they reject the moral standards applied to them. They will turn against their own regimes. The result will be increased instability and increased repression, because this is how these regimes have maintained themselves in power. The second response is that people look outside, and that anger is directed not just internally but externally too. For those who are weak there are very

few weapons available. One that is available – global terrorism – has been used with considerable effect in the last two years. Welcome to the Brave New World. It's going to be much fuller of terrorism than it was before.

4. Refugees: the legal regime and regional impacts

Beyani: The term 'displaced persons' includes refugees and internally displaced people. A refugee is a person who has a well-founded fear of persecution on specific grounds, such as religion, political opinion or membership of a particular group. As a result, they are unwilling to remain within their country of origin, and seek protection elsewhere. Internally-displaced people are compelled to leave their place of residence within a state, but do not cross an international boundary. Refugees are protected by the 1951 Refugee Convention. For internally-displaced people, protection resides in a mixture of human rights, international law and IHL, codified by the UN guidelines on internal displacement. Temporary protection for people fleeing violence and war, though not persecuted as such, came to the fore in the 1990s because of the conflict in the Former Yugoslavia; ad hoc temporary measures to protect such individuals are now included in the EU's Amsterdam Treaty.

The issue before us here is preparedness. If there is a war, individuals will flee, they will be displaced, they will seek asylum, they will seek protection, they will seek assistance. Of the neighbouring states, only Iran is prepared to take refugees from Iraq. The rest do not want any aspect of the conflict to spill over onto them, and do not want any antagonism between the fleeing populations and their own populations. The option so far as UNHCR and others are concerned is to have IDPs along the border. Let them cross the boundary of Iraq, but concentrate them along the border and provide assistance to them in those areas. That has never really worked. It failed in Afghanistan, and it failed in Rwanda, Burundi and elsewhere. A viable policy of protection was attempted with regard to Afghan refugees, but not so much with regard to IDPs.

If conflict broke out, the currently protected areas (the no-fly zones) will no longer be protected. Iraq will find it effective to send its troops there, and the Kurds and others will flee in large numbers. This is one of the reasons why humanitarian organisations should clearly lobby the allied forces or the UN for a clear, credible policy on the protection of refugees and displaced people.

Joffé: Whether there is a major refugee problem or not depends first of all on the nature of the war, and secondly on the nature of the settlement. If the war is prolonged, there is going to be a major refugee outflow, particularly from the Baghdad Basra Corridor where 60%–70% of the Iraqi population is located. This is the populated area running down from Baghdad along the Tigris to the Euphrates, and down to the Shatt el-Arab and the Gulf coast. Many will go to Iran, which is already home to three million Afghani refugees and therefore anticipates the new inflows with some anxiety. They will go across the river systems into Khuzestan, and across the mountains into Kurdistan. If the regime decides to distract allied attention by attacking Kurdistan, and that is quite possible, then the great immigrations of the Kurds in 1991 will occur again, and will go eastwards and northwards just as they did before. The Turks are already taking precautions to ensure that no refugees enter Turkey. Instead, they will create 13 refugee camps on Iraqi territory, which means the

Turkish army will have to intervene. This is going to be a major problem for humanitarian agencies.

There will be outflows to Jordan. Although Jordan is isolated from the populated areas of Iraq by a large amount of desert, the major road systems move west. Those outflows will not, as in the past, come as a flood but probably as a trickle, though they could still be substantial in number because of the large numbers of Iraqis who already live in Jordan. One of the problems for Iraqis is that they have absolutely no resources at all. They have been living on \$17 a month per family for year after year, and while some have done very well, for most virtually everything has gone.

It is certain that nobody is really going to go to the Gulf states. Kuwaiti border defences mean they cannot get in, and Saudi Arabia is itself desert, and separated from the populated areas of Iraq by desert.

Questions from the floor

This section presents an edited selection of key questions from the floor and the panel's responses. Questioners are not identified.

Question: What do the various documents say about the procedures to be followed in the case of a breach of Security Council Resolution 1441, and the penalties available to the world community, including in the International Criminal Court?

Response (Beyani): This is a fundamental question. The first point is that the Security Council has discretion to adopt whatever procedures it wishes. So far, the ICJ has always stopped short of saying 'we can't review the procedures and processes of the Security Council'. The closest it has come to this is over the Lockerbie incident, when it stated that it had jurisdiction to decide which state would try the accused.

The main questions are inherent within Security Council Resolution 1441 itself. The resolution clearly states that Iraq is in material breach of existing resolutions, and all those resolutions warned consistently that there would be serious consequences. Second, the resolution clearly states that omissions or inaccuracies constitute a material breach of the existing resolution. The Security Council also states that the matter is due before the Security Council, and that it is for the Security Council to determine whether there is a material breach; in other words, states may make political statements about a material breach, but it is for the Security Council in the end to decide that this is so. To some extent, what constitutes a material breach is a principle of international law from the point of view of the law of treaties: a breach of any provision in an international agreement or instrument which prohibits the accomplishment of the purposes of that instrument. Whether the Security Council will be guided by a legal principle or by a political principle is another matter, but the Council would probably look at the evidence collected by the arms inspectors.

As for penalties, the International Criminal Court is an obvious avenue. It is possible that, if an armed conflict did take place and Saddam were disposed, he and a number of his generals and lieutenants might end up before the ICC. The presence of the ICC removes some of these issues from domestic jurisdiction. The Pinochet case is an

example of that, but this is speculation. Alternatively, if Saddam went into exile he might be granted immunity, but again that is speculative.

Response (Gillard): As regards breaches of IHL, the traditional mechanisms for the enforcement of public international law apply. Proceedings can be brought before the International Court of Justice, as has happened in a number of cases including the Kosovo bombing. The ICJ does not, however, have compulsory jurisdiction.

Common Article 1 of the Geneva Conventions requires all states to respect IHL, and also to ensure its respect. This is a softer form of enforcement, but it is relevant. States should condemn violations of IHL, something that is sometimes forgotten. It was definitely not the intention of the drafters of the Geneva Convention that this provision would be a basis for so-called humanitarian intervention. It is not a duty to ensure respect by intervening militarily, but rather to remind other states of their obligations.

One interesting aspect of IHL is that it recognises individual criminal responsibility for violations; this is not common for other branches of international law. So international tribunals have been established to deal with violations in certain countries, for example the Former Yugoslavia and Rwanda and, of course, the International Criminal Court, but there is also an obligation on states to prosecute persons within national courts. All states are under an obligation to search for and prosecute or extradite persons suspected of war crimes.

Question: Is the use of nuclear weapons prohibited under IHL?

Response (Gillard): No specific treaty prohibits the use of nuclear weapons. However, it is well-established that the rules and principles of IHL are applicable to nuclear weapons, in particular the principles of distinction, proportionality and the prohibition of unnecessary suffering and superfluous injury. In view of the application of these general principles, it is difficult to envisage a use of nuclear weapons that would not fall foul of the prohibitions in IHL.

Question: A million people in Iraq receive rations. Could you comment on the number of casualties that you think might result from attacks on the systems that are needed to keep the rations going?

Response (Joffé): The figures I gave were direct casualties as a result of military action, and not an estimate of what might happen in terms of indirect casualties. The UN estimates that between 500,000 and one million people may have died as a result of infrastructural damage over the last 12 years. In some parts of Baghdad, electricity is provided for about eight hours a day, but outside for as little as one or two hours a day. Rations are provided; in fact, the Iraqi government has provided double rations to build up reserves, but if there is a heavy and intensive bombing campaign distribution will be impeded or blocked. While the situation may not be too bad in major population centres, in the countryside it will be very bad indeed. These areas will be most affected, implying very high levels of indirect casualties.

New speaker: Conditions in Iraq have improved gradually and with increasing momentum in recent years. The deficit in terms of electricity is one-ninth, compared to one-half three years ago. Generators have been ordered and installed in almost all

water-pumping stations, and in all of the country's 580 clinics and 45 hospitals. So it would be possible in the short term to reactivate local electricity systems and generators for key institutions.

Overall, conditions are certainly poor, but people have saved up an average of about five weeks of food in addition to rations; people are preparing for a siege. The government in Baghdad has been locating shallow wells to provide water in case of siege. If a military administration wanted to provide essential humanitarian goods rapidly once the area is stabilised, that potential for humanitarian protection now exists in a way that it hasn't in recent years. Humanitarian organisations have to play an active role in seeing that international humanitarian law is applied.

Question: Could you comment on what objects are indispensable for the survival of the civilian population in a country which has been almost totally dependent on rations for 12 years?

Response (Gillard): The relevant legal provision speaks of foodstuffs, agricultural production, crops, livestock, drinking water installations and supplies and irrigation work. As for what limits there would be on the conduct of hostilities to ensure that the distribution of rations would not be terminated, this provision is not in fact relevant, because it is not a question of attacking these objects for the specific purpose of denying them to the civilian population. What we should be looking at instead is attacks on such things as roads, the transport infrastructure, the infrastructure that makes it possible to deliver these rations. The proportionality principle is the more relevant test: what is the expected military advantage? What is the loss of life and injury to civilians going to be as a result of these attacks?

New speaker: Iraq depends on irrigation, and there is an extensive system of canals 5,000 years old. If those canals are disrupted, the land will salinate. If the land salinates, it ceases to be available for agricultural production. If the electricity system is destroyed then the ability to pump up water from the Tigris and the Euphrates for irrigation disappears. The long-term implications of a long war directed against the core elements of the Iraqi economy are serious for the generation of food inside Iraq. It will be worse this time not just because the electricity system is still badly damaged but because Turkey, by constructing the Ataturk dam, has reduced the level of water in the Tigris; without proper electrical supplies the capacity for irrigation of any kind almost disappears.

Question: Would an organisation that debated the rights and wrongs of war lose its neutrality, and as a consequence would a warring party be entitled to refuse that organisation access to the population?

Response: To what extent is it of concern to humanitarian actors whether the use of force is legitimate? For a human rights agency, or at least for Human Rights Watch, the policy is this: 'Human Rights Watch does not make judgements about the decision whether to go to war, about whether a war complies with international law against aggression. We care deeply about the humanitarian consequences of war but we avoid judgements on the legality of war itself for two reasons. Because they tend to compromise the neutrality needed to monitor most effectively how the war is waged; and because they often require political and security assessments that are beyond our expertise'.

Question: The occupying forces are likely to control access to the region. Is this recognised within international humanitarian law?

Response (Gillard): The concept of access is very important, and negotiating access is definitely a problem whatever Article 70 says about the obligation to grant it. Situations of occupation are effectively the same as any other situations of conflict. The party that has control over the population has the primary responsibility to respond to the needs of the people affected by armed conflict.

Question: What are the legal parameters around occupation: who decides when an occupation is legal or not, and what are temporal and geographic parameters – when does it actually end?

Response (Beyani): Where the legality of occupation is concerned, two matters are involved. One is obviously the prohibition on the use of force. That provision also prohibits the acquisition of territory through the use of force. Now, whatever the laws on conflict say with regard to regulating the conduct of hostilities, there is a special attention and status given whenever a party to the conflict occupies territory with a view to either annexing it or establishing its administrative apparatus, including laws and courts. This is separate from simply exercising control of that territory for military purposes. For example, the US controls large areas of Afghanistan, but this does not displace the government's administrative system and its laws, so technically this is not an occupation. But in acknowledged occupied territories – the West Bank and Gaza Strip – the occupying power has its own system of laws in operation and its own system of administration, which displaces the pre-existing system. So there is a threshold beyond which control becomes occupation.

Whatever its legality, the occupying power has certain responsibilities. It has to ensure that the needs of the inhabitants of a territory are met in terms of assistance, food, water, hygiene. The occupying power has a duty to cooperate with humanitarian agencies and others, or it may devolve this responsibility to the humanitarian agencies. This then becomes an ethical issue, and a matter of judgement on the part of humanitarian actors themselves.

Question: If the military and the humanitarian worlds need to be kept separate, how do we square that with the obligation of an occupying power to provide humanitarian goods to the people caught up in conflict? Is there an ethical dilemma here for humanitarian agencies?

New speaker: There has been a long debate on the interface between military and humanitarian organisations. In law, it is the relief, not the body delivering it, that needs to be impartial. There is no legal reason why military forces should not be involved in the provision of relief. We might want to dispute the use of the word 'humanitarian' when relief comes from the military, but providing such assistance can very often be a duty of the military, and certainly the duty of the state.

One of the problems within the humanitarian community is making the mistake of using bad law to support what are actually very strong, pragmatic arguments for this division of responsibilities between the military and humanitarian communities. There are key questions about competence and completeness, as seen with the air-dropping of those yellow packets in Afghanistan. But we need to be cautious about taking these arguments too far; the US military can learn and could probably buy the necessary expertise. In many ways the strongest argument is sustainability; the security of staff

depends on their independence, and this will determine whether agencies are able to operate in the long term.

As a community, it is important to preserve the very specific nature of impartial humanitarian assistance as an institution in its own right, and for the victims of conflict. But we do not need to claim exclusivity in the actual delivery of food in conflict situations.

Question from a representative from Public Interest Lawyers: I would like to inform you briefly about an initiative involving NGOs and academic lawyers here, in the US, Canada and elsewhere aimed at making international humanitarian law count if there is a war (although I want to emphasise that all of our efforts so far have been spent in trying to prevent there being a war.) We have warned Mr Blair, Mr Hoon and Mr Straw today that if there are breaches of the Geneva Conventions and other principles of international humanitarian law, we are going to do our best to make them accountable to The Hague. We intend to do this by setting up a panel of international lawyers which will sit in London and hear evidence collected by NGOs and human rights organisations about whether there have been violations. If they find there are breaches, the panel will report with the evidence to the prosecutor in The Hague, who has powers under Article 15 of the Rome Statute to start an investigation on his own initiative. We intend to do this to make the government realise that if they breach international humanitarian law, e.g. specifically if they do what they did in 1991, they will find themselves being held accountable. At least there will be an investigation.