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Humanitarian intervention,
a refugee reducing or increasing
action?
-a case study on Iraq

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Summary

My thesis is a case study on the intervention in Iraq 2003, which was intensely debated prior the intervention and the debate is not yet concluded. My purpose is to analyse whether the intervention may be seen as a humanitarian intervention according to the criterions stipulated by the ICISS's report on the "Responsibility to Protect" and other authors' views about what justify a humanitarian intervention. The humanitarian argument has become more important in the *ex post* intervention, to justify the intervention on humanitarian grounds with the aim to overthrow and prosecute Saddam Hussein.

According to the ICISS' criterions to justify a humanitarian intervention large scale loss of life or ethnic cleansing have to take place. The aim of the interveners has to be humanitarian and means employed have to abide by humanitarian law and human rights. Especially these three criterions I find not justifying the Iraqi intervention as humanitarian. I believe the aim of the Allies was of political character since the aim was to disarm Iraq and to overthrow Saddam Hussein. Even according to views of authors I present, a regime change may be an aim of a humanitarian intervention; in this case I find it not. The International Community also declared such an aim to be contrary to International Law. Also the fact that the Coalition during the intervention has violated human rights and gravely set aside the Geneva Conventions makes it difficult to see the intervention as humanitarian. Another criterion for justifying a humanitarian intervention is that action will do more good than inaction. In regard of the Iraqi intervention I find it questionable if the intervention has done more good than harm. A dictator was replaced by insurgency and a risk of civil war, triggered by the release of long time hostilities between ethnic groups which Saddam Hussein had kept in check. A civil war appears in addition to be imminent.

I therefore move on to look at whether the intervention could be justified as humanitarian for reasons of reducing the producing of refugees and promoting the repatriation of refugees as functional justifications.

As part of the analysis whether the intervention has reduced the producing of refugees I do an empirical study on Sweden. In addition I analyse whether according to the 1951 Convention Relating to the Status of Refugees and Stateless persons, actors of persecution still exist in Iraq based on among other things decisions from the Swedish MB and AAB. I also make a study on whether Iraqis still may or have fallen into the Swedish subsidiary protection categories enshrined in the Aliens Act chapter 3, section 3. As part of the analysis of whether the intervention has promoted the repatriation of refugees, I analyse whether the cessation clause in the 1951 Refugee Convention is applicable in regard of Iraqis and whether the policy of the Swedish authorities has changed towards Iraqis. My conclusions are that the intervention in Iraq neither is justifiable for reasons

of reducing the producing of refugees since I find that despite the fall of Saddam Hussein, who was the main reason for the earlier producing of refugees from Iraq, new actors of persecution have entered the arena, including the US forces, which means that Iraqis still may qualify for refugee status in case the persecution feared can be linked to a Convention ground. Also the categories of subsidiary protection support that the producing of refugees has not been reduced since Iraqis are still falling into those categories, especially the torture provision. The analysis of the cessation clause comes to the conclusion that Iraq is subject to a fundamental change but that the change is not yet durable and stable because of the ongoing violence and the insecure situation and therefore it is too early to apply cessation. Instead the intervention itself has triggered new displacement both outside and inside Iraq and hence neither reduced the producing of refugees nor promoted repatriation. In conclusion despite the fall of Saddam Hussein people may still have protection needs and may not be returned. Consequently, before revoking their refugee status it is important to assess anew the protection needs for reasons of not violating other protection grounds and the principle of *non-refoulement*. I further conclude that humanitarian interventions should not be justified solely for reasons of reducing the producing of refugees and promoting the repatriation. To keep its credibility a broad support from UN and the fulfilment of the criterions should be strived for, which also the intervention in Iraq is a lesson of.

I further conclude that no legal right to unauthorised humanitarian intervention exists yet despite examples of state practice, since such a right is not generally accepted as lawful. GA resolutions from earlier interventions clearly state unauthorised interventions to be unlawful. Statements from states and Kofi Annan declare the Iraqi intervention to be illegal and hence the intervention in Iraq may neither be justifiable on humanitarian grounds. The intervention was subsequently an unlawful unilaterally recourse to force.

Preface

My interest for human rights began already before I commenced studying law when I was engaged in work for an international organisation. When the time came to decide the alignment within law it was obvious to choose International Law including Public International Law and Human Rights. During the courses in Human Rights I found a particular interest in Refugee Law and I therefore wanted to deepen my knowledge within that field. That was why I decided to write my master thesis about refugees since I find it important to emphasise their situation.

I would like to thank UNHCR Regional Office for the Nordic and Baltic Countries in Stockholm, especially the protection unit for a very rewarding internship, which gave me inspiration in the writing of this thesis.

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Abbreviations

AAB	Swedish Aliens Appeals Board (<i>Utlänningsnämnden</i>)
AI	Amnesty International
CAT	1984 Convention Against Torture and other Inhuman, Cruel and Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of Discrimination Against Women
Convention	The 1951 Convention Relating to the Status of Refugees and Stateless persons
CPA	Coalition Provisional Authority
CRC	1989 Convention on the Right of the Child
ECRE	European Council on Refugees and Exiles
GA	UN General Assembly
HRC	Human Rights Commission
HRW	Human Rights Watch
ICISS	International Commission on Intervention and State Sovereignty
ICCPR	1966 International Covenant on Civil and Political Rights
ICESCR	1966 International Covenant on Economic, Social and Cultural Rights
IGC	Interim Governing Council
IFA	Internal Flight Alternative
IOM	International Organisation for Migration
MB	Swedish Migration Board (<i>Migrationsverket</i>)
MNF-I	Multi National Forces-Iraq
SC	UN Security Council
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
US	United States of America
VCLT	Vienna Convention on the Law of the Treaties
WMD	Weapons of Mass Destruction

1 Introduction

1.1 Subject and Purpose

The subject of my thesis is the intervention in Iraq 2003 and its effects on the protection of refugees. Ever since the end of the cold war the SC has proved itself more willing to interpret broadly the phrase “threat to the peace”. The effect has been that the phrase now also includes humanitarian crisis relating to internal strife. One of the first humanitarian crises to be addressed after the cold war was the Iraqi repression of its Kurdish population during the first Gulf war in 1990. The use of force was then employed for the defence of the safety zones for Kurdish refugees and was justified by the Coalition as intervening on behalf of the Kurdish refugees on humanitarian grounds. The humanitarian intervention concept was from then on starting to evolve. The next time, the humanitarian concept was explicitly part of the justification for an intervention, was NATO’s intervention in Kosovo 1999. Since then a report of ICISS has been produced named the “Responsibility to protect” which aimed to conclude the general debate in regard of humanitarian intervention. The ICISS report on the Responsibility to Protect offers two basic principles:

- A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.
- B. Where a population is suffering *serious harm*, as a result of war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.

Serious harm is interpreted as constituting large scale loss of life and ethnic cleansing for justifying an intervention. The report encompasses as well the responsibility to prevent by addressing the root causes to an internal conflict for instance before intervening militarily and to re-build a post intervention society. The report favours an endorsement of the SC of a military intervention for human protection purposes and as the practice of the SC shows from the last decade it is now willing to act under Chapter VII for reasons of gross human rights violations. But when speaking of humanitarian intervention it is often the humanitarian intervention, which has not been authorised by the SC, that comes into mind and it is such an intervention that is unclear whether it is accepted as lawful and what is justifying it.

The question of this thesis is whether it would be possible to justify a humanitarian intervention for reducing the producing of refugees and promoting a repatriation of refugees. The Kosovo intervention for instance has not had the effect of promoting the repatriation of refugees since still

today persons originating from Kosovo have protection needs especially minorities as Romas and Kosovo Serbs. The purpose of this thesis is hence to look into whether the Iraqi intervention at first may be considered as a humanitarian intervention and second whether the Iraqi intervention has reduced the producing of refugees and promoted repatriation and hence may be justified on those grounds. As part of the inquiring of whether the Iraqi intervention has had the effect of reducing the producing of refugees I will analyse whether Iraqis still risk being subject to persecution despite the fall of Saddam Hussein and in that case from whom? As part of the inquiry whether the Iraqi intervention has promoted repatriation of refugees I will analyse whether Iraq is subject to a fundamental change and as an empirical sample how Sweden has treated and acted in regard of Iraqi asylum-seekers since the intervention?

1.2 Method and Material

The method used is a combination of a descriptive and analytical method where I have been studying the legal instruments covering the issue as well as the doctrine and decisions of the Swedish Migration Board (MB) and Swedish Aliens Appeals Board (AAB). The interview method has also been used on a qualitative basis, that is, I have only interviewed three lawyers for instance not claiming that they are representing all lawyers in Sweden but instead with the purpose to be inspired by their personal views. The purpose of the interviews was to get a picture of the Swedish practice in regard of the Iraqi refugees and of refugees in general. I therefore performed interviews with both officials at the MB as well as lawyers frequently representing asylum-seekers. Further, I have included in the thesis a description of the EU Qualification Directive, which has not been implemented in Sweden yet and therefore gives the thesis a *de lege ferenda* perspective as well.

The material used in this thesis is doctrinal writings and international human rights instruments and then especially the Refugee Convention from 1951. The Refugee Convention from 1951 has been the starting point when analysing what effects the Iraqi war has had on the protection of refugees. Also the Swedish Aliens Act has been described and analysed whether applicable in regard of the Iraqi refugees. Other material I have used in my writing is the UN Charter, SC resolutions, domestic law and *travaux préparatoires*, EU Directives and information provided by international human rights organisations.

1.3 Delimitations

When studying how the protection of refugees has been affected by a war and in this case the 2003 Iraqi war, a comparative approach stretching over several countries is one option. To remain within the framework of a master thesis I decided to focus on Sweden. Because, in case the war would have

affected the grant of residence permits in Sweden, it certainly would have done so at least in the rest of Europe as well and which also will be seen in the end of the thesis when I still will give one example of another European country's changed policy towards the Iraqi refugees. The Swedish empirical sample is intended to illustrate whether the Iraqi intervention has reduced Iraqi refugees in and promoted repatriation of Iraqis from Sweden.

1.4 Terms and definitions

In this thesis intervention means forcible/military intervention since that is the kind of intervention that is most controversial. When I am speaking of Iraq being characterised as a humanitarian intervention it is an unauthorised humanitarian intervention I am considering. A refugee in this thesis will mean someone who has fled their country of origin and fulfils the criterions for refugee status but has not yet applied for asylum or a person that is granted refugee status. An application for asylum will in this thesis mean the application for refugee status as well as for being otherwise in need of protection since the Swedish authorities are obliged to apply the refugee definition in the first place and in case the person does not fulfil the definition to then move on to the subsidiary protection categories.

1.5 Outline

In chapter 2, I analyse whether the Iraqi intervention may be characterised as a humanitarian intervention according to those criterions stipulated by the ICISS' report as well as other authors' views. Further, in chapter 3 an analysis is conducted whether the intervention in Iraq has reduced the producing of refugees and promoted repatriation by the description of the 1951 Refugee Convention and the analysis whether Iraqis still risk being subject to persecution and by whom in that case. Chapter 3 also includes the description and the application of the Swedish Aliens Act's subsidiary protection categories on the Iraqi caseload, analysing whether Iraqi refugees may or have been falling into those categories since the intervention is conducted. Chapter 4 finalizes this thesis and sums up the conclusions that can be drawn from the previous chapters whether the Iraqi intervention may be seen as a humanitarian intervention and may be justified for reducing the producing of refugees and promoting the repatriation of refugees.

2 Humanitarian intervention

Humanitarian intervention is an intervention undertaken for the stated purpose of protecting or assisting people at risk. For a humanitarian intervention shall take place it demands according to the ICISS's report on the "Responsibility to Protect" that large-scale loss of life or large-scale ethnic cleansing have to take place for intervening military. A humanitarian intervention if endorsed by the SC might be hard to differ from an act of peace-enforcement under Chapter VII. A peace-enforcement act can be a humanitarian intervention if it has humanitarian ends as the main purpose of the action. A peace-enforcement is undertaken to restore the peace and security and the SC nowadays believes itself to have a wide discretion in determining the existence of any threat to the peace and also that it is empowered under Chapter VII of the UN Charter to authorize the use of force to end human rights abuses.¹

Then the problem of what justifies an intervention for humanitarian purpose arises. Anarchy as a justification for humanitarian intervention is an argument of Tésou. Tésou defines permissible humanitarian intervention as "the proportionate international use or threat of military force, undertaken principle by a liberal government or alliance, aimed at ending tyranny or anarchy, welcomed by the victims, and consistent with the doctrine of double effect".² Tésou argues that humanitarian intervention is morally justified in appropriate cases and that is because states and governments have the major purpose to protect and secure human rights. Governments and others in power who seriously violate those rights undermine the one reason that justifies their political power and should therefore not be protected under international law.³

Article 2(7) in the UN Charter does exclude UN "intervention in matters, which are essentially within the domestic jurisdiction of any state...". This clause rests on the principle of sovereignty. But Tésou argues that sovereignty serves human values, and "those who grossly assault them should not be allowed to shield themselves behind the principle of sovereignty". "Tyranny and anarchy cause the moral collapse of sovereignty".⁴ This is also what the ICISS's report concludes, that it is the responsibility of the state to protect its population and if the state is unable or unwilling to do so the responsibility lies on other states to intervene and protect. It is the same as the 1951 Convention Relating to the Status of

¹ Holzgrefe J.L., "The humanitarian intervention debate", *Humanitarian Intervention, Ethical, legal and Political Dilemmas*, Cambridge University Press, Cambridge, 2003, edited by Holzgrefe J.L and Keohane Robert O., p. 41.

² Tésou Fernando R., "The Liberal case for humanitarian intervention", *Humanitarian Intervention, Ethical, legal and Political Dilemmas*, Cambridge University Press, Cambridge, 2003, edited by Holzgrefe J.L and Keohane Robert O., p. 94.

³ Tésou, p 93.

⁴ Ibid.

Refugees⁵ recognises as being a reason for being granted refugee status, in case the state is unwilling or unable to protect a person from persecution for reasons of race, nationality, religion, political opinion or membership of a particular social group. The transboundary effect refugees have makes it difficult to draw the line between domestic and international matters, since what occurs within a state, that produces refugees, effects other states.

2.1 The criteria of Humanitarian interventions

If an intervention is humanitarian and has as its purpose humanitarian goals can be shown through four additional criteria according to Ramsbotham and Woodhouse (1996). The first criterion is that there has to be a humanitarian cause (widespread human suffering), second the means deployed must be compatible with the ends, and further, the interest of the actors and the outcome must be consistent with humanitarian principles. This definition is a purist definition of a humanitarian intervention.⁶

The Human Rights Watch (HRW) has a similar definition of humanitarian intervention that includes what a humanitarian intervention should aim for to accomplish. First, military action must be the last reasonable option to halt or prevent slaughter. Second, the intervention must be guided primarily by humanitarian purposes; humanitarianism should be the dominant reason for military action. The organisation does not expect purity of motive. Third, the means used to intervene must themselves respect international human rights and humanitarian law. Fourth, it must be reasonably likely that military action will do more good than harm. Fifth, HRW prefers endorsement of humanitarian interventions by the SC. In case no endorsement can be reached military action should only in extreme emergency cases be carried out. HRW further states that the consent of the relevant government is necessary for carrying out a humanitarian intervention.⁷ The ICISS also provides a set of criteria similar to those already mentioned.⁸ Chesterman however, believes that in case such a thing as a humanitarian intervention exists, most probably an intervention with that character would be based on other grounds as well.⁹

⁵ Convention Relating to the Status of Refugees and Stateless Persons, adopted on 28 July 1951 by the United Nations Conference Plenipotentiaries convened under General Assembly resolution 429 (V) of 14 December 1950. [Hereinafter the Convention]

⁶ Suhrke Astri and Klausmeyer Douglas, "Between Principles and Politics: Lessons from Iraq for Humanitarian Action", Vol.17 No. 3, *Journal of Refugee Studies*, 2004, pp.273-285 (281).

⁷ Roth Ken, "War in Iraq: Not a Humanitarian Intervention", Human Rights Watch Annual Report, 2004.

⁸ See Supplement B.

⁹ Chesterman Simon and Byers Michael, "Changing the rules about rules? Unilateral humanitarian intervention and the future of international law", *Humanitarian Intervention, Ethical, legal and Political Dilemmas*, Cambridge University Press, Cambridge, 2003, edited by Holzgrefe J.L and Keohane Robert O., p. 191.

The criteria to be considered before a humanitarian intervention are therefore the following: the justification, the consent from the state, accountability and credibility, the right intention and the endorsement by the UN.

2.1.1 Justification

Genocide and mass slaughter are generally considered to justify a humanitarian intervention but the atrocities must either be ongoing or imminent. No such thing as preventive military force for humanitarian purposes exists, then there must be clear evidence that large-scale slaughter is in preparation and about to begin unless it is militarily stopped. Neither is a military intervention justified for the prosecution of past crimes even genocide. Prosecution may begin without a military intervention and be accomplished through economic, public and diplomatic pressure.¹⁰

2.1.2 Consent

Many of the interventions characterised as humanitarian during the last decade were performed with the consent and the invitation of the targeted state.¹¹ However, Österdahl means that it is not an intervention if the consent of the government is acquired and the intervention is not performed against the will of the powers in the state where the intervention is carried out.¹² HRW's view is that a humanitarian intervention that occurs without the consent of the relevant government can only be justified if there is an ongoing or imminent genocide, or comparable mass slaughter or loss of life.¹³ Probably the consent depends on if it is the state itself that is killing en masse or in case the state is unable to control mass killings by rebel groups for instance. Why people often react when an intervention is conducted without the consent of the state is when the means are not appropriate to the ends, especially when the interventions on humanitarian grounds have taken the form of air actions like both in Iraq in 1991 and 1998 and in Kosovo in 1999.¹⁴

2.1.3 Right intention, credibility, accountability

Walzer believes that humanitarian interventions to stop mass killings and "ethnic cleansing" will aim at regime change since it is the regime's

¹⁰ Roth, "War in Iraq: Not a Humanitarian Intervention", 2004.

¹¹ As for example some of the African interventions in Liberia, the democratic Republic of Congo etc., were consented to under varying degrees of pressure, Ibid.

¹² Österdahl Inger, "Is intervention humanitarian?", *Protecting Human Rights and Democracy Abroad*, Elanders Gotab, Stockholm, 2002, edited by Österdahl Inger, p. 3.

¹³ Roth, "War in Iraq: Not a Humanitarian Intervention", 2004.

¹⁴ Gray Christine, "From Unity to Polarization: International Law and the Use of Force against Iraq", Vol.13 No. 1, *EJIL*, 2002, pp. 1-19 (11).

criminal behaviour that is the reason for intervening.¹⁵ While Suhrke and Klusmeyer argue that regime change is the last resort and the most drastic outcome of an intervention. An intervention aiming at regime change will probably face credibility problems as being humanitarian and not in the self-interest of the interveners.¹⁶ But Tésou favours an intervention aiming at defeating tyranny and even imposing democracy as an account to intervene.¹⁷ Imposing democracy in a country with different traditions of cultural and religious ideas of leadership and democracy is facing both credibility problems towards the international community and even more, according to my opinion, in the view of the country citizens. To persuade the population that the system the occupying power is enforcing will work in another kind of country than the western for example. An ending of tyranny can also easily lead to anarchy if the intervention is not so well planned and foreseeable. The question that should then be posed is if the criterion that the intervention shall do more good than harm is accomplished? But sometimes also what would be the alternative? In case of a regime change the responsibility to re-build comes into play and the importance of nation building with the prime objective to re-enforce the rule of law. HRW may see an overthrow of a dictator as a positive bi-product but not as a legal justification for intervening if not mass killing is proved to be planned by the dictator and is imminent.¹⁸ The ICISS argues that humanitarian missions should initially be limited to providing immediate and temporary protection to persons and groups at grave risk but leaves open the prospect for regime change. Warner criticizes this cautious position to be irresponsible on the grounds that an intervention carries an inherent obligation to institute post-interventions order that is better than the pre-intervention order.¹⁹

As the responsibility to address the root causes to an internal strife lies on the state it self, humanitarian interventions shall only treat symptoms of the crisis, not the underlying root causes, to be able to keep its credibility and accountability.²⁰ However, the Report on “the Power to Protect” emphasises a long term commitment if intervening militarily to stop mass killing, so as to prevent that the killings resume after that the intervening troops are withdrawn and that such a commitment should be focused on the addressing and correcting of the root causes of the conflict.²¹

¹⁵ An interview with Michael Walzer “The United Nations in the World-Just Wars and Just Societies (2003) referred to in Suhrke and Klausmeyer, p 281.

¹⁶ Suhrke and Klausmeyer, p. 281.

¹⁷ Tésou, p. 97.

¹⁸ Roth, “War in Iraq: Not a Humanitarian Intervention”, 2004.

¹⁹ Warner D., “The responsibility to protect an Irresponsible, Cynical engagement”, Vol. 32 No. 1, Millenium: *Journal of International Studies*, 2003, pp. 109-121.

²⁰ Shurke and Klusmeyer, p. 282.

²¹ Bernath Clifford H. and Gompert David C., “The power to protect- Using New Military Capabilities to Stop Mass Killings”, Refugee International, 2003, p. 31.

2.1.4 The need of endorsement by the UN

Humanitarian intervention as a concept is still internationally controversial.²² The opinions are divergent, whether a customary law has developed relating to a humanitarian intervention unauthorised by the SC or if it has not. The report from the ICISS tried to conclude the latest debate in regard of humanitarian intervention. An interesting part of the report's criterion for military intervention is the principle of right authority. According to the ICISS's report the authority of the SC shall primary be sought and the SC shall promptly deal with the request of authority so as to halter any delays when intervention is needed. Interestingly the report supports the SC to take into consideration what will be the alternative if the SC does not authorise an intervention, that is, the risk of unilateral action, which in the long run will undermine the credibility of the UN.²³ The question the report objects to answer is who is to decide to intervene and when and where.

A right to humanitarian intervention did not make its way into the UN Charter even though its text does "reaffirm faith in fundamental human rights",²⁴ it does not make provision for using force to implement that commitment. Has this been modified by practice though? First must a distinction between collective humanitarian intervention authorised by the SC and interventions by states or group of states acting at their own discretion be made. Although the Charter text does not specifically authorise the SC to apply Chapter VII's system of collective measures to prevent gross violations of human rights and humanitarian law, in practice it has done so occasionally for example by authorising members to use coercive measures to counter apartheid in South Africa. (Yugoslavia, Somalia, Kosovo and Haiti).²⁵ Opinions have also diverged not only whether there is a right or not to intervene but when to intervene. Many interventions have been delayed and then the inaction has been criticised. In some cases action has been taken too quick and been criticised for that. Either intervening too much or too little, it is a balance especially when the results and successes have been of a varying degree.

The question is whether a rule of customary law has been developed concerning a right of unilateral right to humanitarian intervention. A customary rule is a rule that derives from state practice together with *opinio juris*, a belief that the practice is required by law or at least relevant for its ongoing evolution. Chesterman and Byers argue that if an action shall be legal by support of the fact that a right of unilateral humanitarian

²² Chesterman believes humanitarian intervention to be an illegal exception to the prohibition of the use of force even with the endorsement by UN. Chesterman Simon, *Just War and Just peace?*, Oxford University Press, New York, 2001, p. 230.

²³ ICISS report "Responsibility to protect", p. XII, Chesterman, p. 232.

²⁴ UN Charter Preamble, para. 2, Article 1, para. 3.

²⁵ Franck Thomas M, *Recourse to force*, Cambridge University Press, Cambridge, 2002, p. 136.

intervention has been developed, it must have the status of *jus cogens* since the prohibition of use of force is of *jus cogens* character. According to article 53 of the VCLT it is only a peremptory norm (norm of *jus cogens* character) that can override another peremptory norm. And when looking at the state practice' inconsistency the last decade and the fact that the far most interventions have in some way been authorised by the SC, it is hard to conclude a coherence in the state practice that would lead to an emerged right of unilateral humanitarian intervention.²⁶ Even if state practice might support that a unilateral right to humanitarian intervention has evolved it is the widespread acceptance that it is lawful (*opinio juris*) that is more difficult to show. Holzgrefe explains the inconsistency in state practice by declaring the doctrine of unauthorised humanitarian intervention as permissive and not mandatory. But he also concludes that such a doctrine is not presently legal since the second part of a customary rule, *opinio juris*, is lacking supported by UN General Assembly (GA) resolutions, which reject such a right as for example the UN GA resolution passed in 1999 concerning NATO's intervention in Kosovo.²⁷ In regard of the Iraqi intervention no GA resolution has been passed condemning the intervention as unlawful but Kofi Annan has stated that the intervention was illegal and not in line with the UN Charter.²⁸ Further, in SC debates the majority of the SC members stated their opposition to a military intervention and after the intervention condemned it.

Téson argues that there is a right to intervene. It origins from a duty to assist victims of grievous injustice and that persons who are trapped in such situations deserve to be rescued. Sometimes the rescue cannot be accomplished in another way than by force.²⁹ This is his liberal argument from the political and moral philosophy, that sovereignty is dependent on justice and that we have a right to assist victims of injustice. That is why he argues, if a situation is morally abhorrent, that is situations that triggers humanitarian interventions are acts like crime against humanity, mass murder, serious war crimes, genocide, widespread torture and Hobbesian state of nature (war against all) and so on, then neither the inviolability of national borders or the prohibition against war should by themselves preclude humanitarian intervention.³⁰

On the contrary, Chesterman argues that there is no "right" of humanitarian intervention in either the UN Charter or in customary international law.

²⁶Chesterman and Byers, p. 183, as stated above many interventions determined to be humanitarian have had the consent of the state concerned or been authorised by the SC as East Timor. However, the Kosovo intervention was characterised by the UK as a humanitarian intervention but has been much criticised and cannot be said to be widely accepted as one.

²⁷Holzgrefe, p. 47-49, UN Doc. A/RES/54/172 (1999). Examples of state practice: Tanzania in Uganda (1979), the Coalition in Iraq (1991), Ecomog in Sierra Leone (since 1998), NATO in Kosovo (1999).

²⁸"Iraq war illegal, says Annan", 16 September 2004, available at http://news.bbc.co.uk/1/hi/world/middle_east/3661134.stm, accessed 12/05/05.

²⁹Téson, p. 97.

³⁰Ibid., p. 95.

Since when events characterized as humanitarian interventions have happened, the international responses have been very inconsistent, he therefore argues that there is no right and there have not been created an exception to the prohibition of the use of force.³¹

According to Holzgrefe it is at least widely accepted that the SC can authorise a humanitarian intervention and that that constitutes a lawful exception to the prohibition of the use of force of the UN Charter. What is more controversial is the unilateral recourse to force on humanitarian grounds. Holzgrefe affirms that the UN Charter apparently bans the unauthorised humanitarian intervention but concludes that it does not mean that states can do what they want with their own citizens since most states are signatories to international conventions which legally oblige them to respect human rights. This does not mean that if a state does not comply with its obligations other states are entitled to implement or enforce those obligations.³² As for example, the Genocide Convention from 1948 states that signatories undertake to prevent and to punish the crime of genocide.³³ But the only way for the contracting parties, as the convention text explains, to legally prevent acts of genocide is by calling upon the competent organs of the UN “to take such actions they consider appropriate”.³⁴ International conventions do seem to permit the enforcement mechanism of the SC but does not establish a right of unauthorised humanitarian interventions.³⁵ Multilateral human right treaties’ obligations may not be enforced by any external actor argues Donnelly.³⁶ Mertus goes even further and argues for humanitarian interventions to be grounded as means of enforcing these obligations on behalf of victims if the targeted state is party to any of the relevant human rights conventions, or if the human right can be said to be customary international law applicable to all states.³⁷

The recent intervention in Iraq demonstrates the unregulated exercise of Great Powers without prior authorisation of the SC and forms part of an act of state practice, which according to Chesterman is often regarded as counting more than statements as a sign of state practice,³⁸ but in regard of the Iraqi intervention the statements should overrule as being more consistent and as a sign of the intervention not being generally accepted as lawful (*opinio juris*) despite the lack of a GA resolution.

³¹ Chesterman, p. 226.

³² Holzgrefe, p. 43-44.

³³ Article 1 Convention on the Prevention and Punishment of the Crimes of Genocide, 1948. [Hereinafter Genocide Convention]

³⁴ Genocide Convention, Article 8.

³⁵ Holzgrefe, p. 44.

³⁶ Donnelly Jack, “Human rights, Humanitarian crisis and Humanitarian intervention”, Vol. 48, *International Journal*, 1993, pp. 607-640 (623) cited in Holzgrefe, p. 44.

³⁷ Mertus Julie, “The Legality of Humanitarian intervention: Lessons from Kosovo”, Vol. 41, *William and Mary Law review*, 2000, (1773) cited in Holzgrefe, p. 44.

³⁸ Chesterman and Byers, p. 189.

2.1.5 Costs, risks and self-interest

The moral dilemma is whose lives are most worth, to save people from genocide by intervening military, which might also cost innocent civilian lives or the ones intervening. To take the risk for other people or as NATO did in Kosovo sending the signal to intervene is not worth risking their own people, instead they bombed from planes far away from the actual scene. States are more willing to take greater risks if crucial interests are at stake. The crucial interest in a humanitarian intervention might be harder to see and leaders therefore are willing to take fewer risks to achieve them. One risk when intervening is when you have commenced a war it might be hard to find an end to it. The military actions will escalate and the interveners lose control over things, which as discussed before easily can lead to anarchy. As for example in Iraq 2003, the defeat of tyranny as Tesson puts it, was quickly achieved but instead anarchy developed and with that the occupying powers loss of control over the country. The cost of humanitarian interventions is if not internationally approved, the cost of the international legal order. Also the fact that interventions are expensive has had impact on whether action has been taken or not. There have been times when there has been a mandate and troops willing to go but not the resources for it. The Refugee International's objective with its report "Power to Protect" is hence to find means less costly and effective to make states more willing and in that manner provide them with the power to protect. Sometimes the will has not been that strong or even absent and therefore the interventions have been delayed (as for example East Timor and Bosnia) or not even taken (Rwanda).³⁹ Sometimes the willingness to intervene is too strong when a state has a self-interest for intervening that is not primary humanitarian. Sometimes you need states to see widespread and systematic human rights abuses as their concern too as part of their "national interest", to encourage them to prevent these abuses, to stop them and to seek justice for them. The problem with self-interest is hence twofold. However, the transboundary effects (the producing of refugees) these abuses and also internal conflicts cause may be seen as national interest since the International Community in any event ends up bearing the costs of aid and assistance as well as for hosting them. The US has proved to be the most willing state to intervene as well as the UK and Australia, contrary to Germany for instance seen as a non-interventionist. UK has sometimes had a long time colonial relationship with the states in need of intervention and therefore has had a national interest to intervene.⁴⁰

2.2 Iraq, a Humanitarian intervention?

HRW in their annual report of 2004 concludes that the Iraqi invasion cannot be said to be a humanitarian intervention for several reasons following the

³⁹ Bernath and Gompert, p.3.

⁴⁰ As for example the UK intervention in Sierra Leone in May 2000.

criteria stipulated in the above sections. First, there was no mass killing taking place or mass killing was not imminent or evidenced to be planned for in the future. Even if Saddam Hussein committed mass atrocities in the past, their conclusion is that that does not justify an overthrow for reasons of prevention of mass slaughter in the future. Current and imminent slaughter has to take place for intervening military and not as a mean to punish past abuses. Instead they favour prosecution or diplomatic and economic pressure to end the frequent use of torture and other human rights violations that did occur but did not rise to a sufficient level so as to justify an invasion. Therefore other options were possible and should have been tried long before to stop the then ongoing mass killing, which is criminal prosecution. An international indictment would have profoundly discredited even a dictatorial leader and would have undermined the support for Saddam Hussein at home and abroad if an indictment for genocide and crimes against humanity had been brought against him. This should have been done according to HRW after the condemnation in resolution 688 of the repression of the Iraqi civilian population in 1991.⁴¹

Humanitarian ends must also guide a humanitarian intervention. HRW does not insist on purity of motive but it should be the dominant motive since it affects numerous of decisions. In the pre-war period, the welfare of the Iraqi people was a substantive motive for the invasion in Iraq. The principal justification was the alleged possession of WMD and Iraq's alleged connection to terrorist networks. If the primary end of the invasion was to maximize humanitarian values in Iraq, the occupying powers would have been more prepared to handle the security issues arising after the overthrow of Saddam Hussein and would have foreseen the civil disorder that will follow such an overthrow. The occupying powers have instead failed to live up to their responsibility according to the Geneva Conventions to maintain public order and safety and protect the civilian population. The explicitly war objective to remove Saddam Hussein, which might be seen as part of the responsibility to protect and to address the root causes of the problem and abuses in the country, a humanitarian intervention shall only treat the symptoms of the crisis and for an overthrow to be possible mass killings have to be ongoing and imminent. Despite for example Téson's view that a humanitarian intervention may aim for a regime change, in this case the International Community found an action aiming at regime change to be contrary to International Law.⁴² Repressive regimes may be the ones promulgating abuses and responsible for mass killings but in the case of Saddam's regime as repressive, killing people in 2003 was not to a genocidal extent or planned for⁴³.

⁴¹ Roth, "War in Iraq: Not a Humanitarian Intervention", 2004, SC/RES 688 of 5 April 1991.

⁴² S/PV 4714 of 7 March 2003.

⁴³ Schmitt Michael, "The Legality of Operation Iraqi Freedom under International Law", Vol. 3 No. 2, *Journal of Military Ethics*, 2004, pp. 82-104 (101).

Compliance with Humanitarian Law should further be ensured to be a humanitarian intervention. Compliance is required in all conflicts. HRW believes that the Iraqi invasion largely met this requirement in the beginning of the war.⁴⁴ But the coalition forces have completely failed later on and have put civilian people at risk when not being precisely enough when attacking targets and sometimes even targeting civilians directly. Disregard for civilian life is incompatible with a genuinely humanitarian intervention. Tens of thousands civilians have been killed since the intervention. In addition the Geneva Conventions both about Civilians and Prisoners of War have not been complied with.⁴⁵

The Iraqi invasion had neither the approval of the SC and its legality is therefore questionable. HRW can imagine in extreme situations that an approval is not needed since the SC mechanism still is too imperfect to be the sole mechanism to legitimise a humanitarian intervention. Also the preparation for the post-war chaos would have been better if the SC would have approved the invasion since probably more troops had joined the US and UK forces. HRW concludes and so does Suhrke that the Iraqi invasion 2003 was not a humanitarian intervention. They fear and believe that this will have a bad impact for future humanitarian interventions. They believe that the Iraqi invasion has given the humanitarian intervention as a concept a bad name and that this will affect the public view of future interventions. If the defenders of the intervention keep justifying it as humanitarian when it was not, they risk undermining humanitarian interventions as an institution.

In case the intervention has made things better than worse is still too early to tell since insurgencies are still taking place and every day a new bomb is detonating. In the long run a removal of Saddam Hussein will be better for the country. Recently was a new government appointed where all the major ethnic and religious groups were represented, the Shiites, the Kurds, the Sunnis and a Christian. This is of course a sign in right direction but still the democratic process has a long way to go.

2.3 Conclusions

When looking further into the intervention in Iraq as a humanitarian intervention I find it hard to believe considering that it was not the prime aim of the Allies but the disarmament and terrorist hunting. According to the authors' view no mass killing was taking place or planned for. Killings have instead been the result of the intervention and the suffering of innocent civilians, which I do not find compatible with an intervention on humanitarian grounds. The criterion of the military action shall do more good than harm is therefore questionable even if Iraq got rid of a dictator. The intervention resulted in a civil strife. Violence and insecurity is now

⁴⁴ Roth, "War in Iraq: Not a Humanitarian Intervention", 2004.

⁴⁵ E.g. Abu Ghraib prison, see discussion in chapter 3.2.2.3.3.

prevailing. The Coalition has further instead of protecting human rights violated human rights of Iraqis and not abided by the Geneva Conventions. The rules of humanitarian law have instead been gravely broken, which will be seen in the next chapter. The fact that the Coalition failed to plan the post intervention society, which is part of the justification for humanitarian intervention according to the ICISS' report, indicates that the prime aim was not entirely humanitarian, instead at first the intervention resulted in lawlessness and chaos, the monopoly of arms was set aside and insurgency arose. I also find the intervention to be political as the aim to disarm reflects as well as the aim to overthrow Saddam Hussein. Neither of the two aims may be enforced by individual states without the prior authorisation of the SC. However, Tésou believes that a humanitarian intervention may aim for a regime change, but in this case I find it not. The aim of regime change was rather a concern of US national security than of the Iraqi people. In addition the International Community declared a regime change to be contrary to International Law. I subsequently do not find a unilateral right to humanitarian intervention exists despite existing state practice, since I do not believe such a right is generally accepted as lawful. Even without a GA resolution condemning the Iraqi intervention, it is clear to me that the International Community did not accept the Iraqi intervention as lawful as statements and condemnations from states and Kofi Annan show sign of.

Since I do not find that the criteria stipulated in this chapter for a humanitarian intervention are fulfilled, the question is whether the functional justification of humanitarian intervention to reduce the producing of refugees and promote the repatriation of refugees is fulfilled in regard of the intervention in Iraq?

3 The effects of the Iraqi war on refugee protection

3.1 International protection

The Convention is the prime instrument that stipulates protection for refugees. UNHCR is the UN organ which is put to supervise its observance.⁴⁶ The functions of the UNHCR comprise providing international protection to refugees who fall within the scope of the Statute and “to seek permanent solutions for the problem of refugees by assisting governments”...”to facilitate voluntary repatriation of such refugees, or their assimilation within new national communities”.⁴⁷ UNHCR is concerned specifically with 1) the prevention of the return of refugees to a country or territory in which their life or liberty may be endangered, 2) the determination of refugee status 3) the grant of asylum 4) the prevention of expulsion, 5) the issue of travel and identity documents, 6) the facilitation of voluntary repatriation, 7) the facilitation of family reunion, 8) the assurance of access to educational institutions, 9) the right to work, 10) the facilitation of naturalization. These concerns together with the principle of *non-refoulement* are of prime importance in the search for permanent solutions.⁴⁸

3.1.1 The Standard of treatment

The 1966 Covenants on Human Rights are indicative of standards. Article 2(1) of the Covenant of Civil and Political Rights (ICCPR) obliges states to respect and to ensure the rights declared to “all individuals within its territory and subject to its jurisdiction”. It is the state’s responsibility to ensure these rights to anyone within its territory. The article also embraces a broad principle of non-discrimination. The *non-derogable* rights enshrined in ICCPR are for example the right to life, the prohibition of torture or inhuman treatment, slavery, conviction or punishment under retroactive law and so on. Such rights allow no distinction between national or alien, whether the latter are an asylum-seeker, migrant, visitor or refugee.⁴⁹

International Refugee law instruments codify specific rights to refugees and the state parties are obliged to provide these rights. A full complement of human rights standards to refugees is provided in the Convention. For example freedom of movement is governed in Article 26 and 31. The

⁴⁶ UNHCR was established by the adoption of the Statute of UNHCR annexed to the resolution 428(V) by the General Assembly in 1950. [Hereinafter UNHCR Statute]

⁴⁷ UNHCR Statute, para. 1.

⁴⁸ Goodwin-Gil, *The Refugee in International Law*, Oxford University press, Oxford, 2nd edition, 1996 p. 230-231.

⁴⁹ Goodwin-Gil, p.232.

facilitation of naturalization is provided in Article 34 and Article 5 stipulates that state parties are free to grant more favourable rights to refugees than provided for in the Convention, consequently the Convention rights provisions may be said to be minimum standards of treatment. Convention refugees are also entitled to be issued travel documents so that they may travel outside the country of refuge according to Article 28. The Convention is a quite extraordinary Bill of Rights for refugees.

Nevertheless it might occur that the international human rights instruments (for example ICCPR, the 1966 International Covenant on economic, Social and Cultural Rights (ICESR) and the 1984 Convention Against Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)) will guarantee even broader legal protection than the refugee instruments since the protection provisions of the international human rights instruments are equally to all persons without restrictions. It may also in the international human rights instruments be enshrined absolute rights, which are not absolute in the refugee instruments.⁵⁰ In Article 33 of the Convention, the prohibition of expulsion or return of refugees (*non-refoulement*) is provided and that Article is considered to be the cornerstone of international protection. The notion of *non-refoulement* is a principle of customary international law.⁵¹ It applies to refugees irrespective of their formal recognition and to asylum seekers. In the case of asylum-seekers, this applies up to the point that their status is finally determined in a fair procedure. Further, the principle of *non-refoulement* embodied in Article 33 encompasses any measure attributable to the state which could have the effect of returning an asylum seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she is at risk of persecution, including interception, rejection at the frontier or indirect refoulement.⁵² It has even been accepted that Article 33 applies to all refugees, whether or not they fit the prescribed definition of the Convention.⁵³ The prohibition of refoulement enshrined in Article 33 of the Convention is not absolute.⁵⁴ However, the CAT⁵⁵ provides in its Article 3(1) that: ‘no State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’. Article 3(1) of the CAT embraces broader protection than the Convention because it is an absolute right, no exceptions are acceptable and the right is non-derogable.

⁵⁰ Gorlick Brian, “Human Right and refugees: enhancing protection through international human rights law”, Working Paper No. 30, ISSN 1020-7473.

⁵¹ This was concluded at the Global Consultations on International Protection, Cambridge Roundtable 9–10 July 2001.

⁵² Summary Conclusions of the Global Consultations on International Protection, Cambridge Roundtable 9–10 July 2001.

⁵³ Howland Todd, ‘Refoulement of Refugees: the UNHCR’s lost opportunity to ground temporary refuge in human rights law’, Vol. 4, *U.C.Davis J.Int’l L & Pol’y*, 1998, pp. 73, 85.

⁵⁴ See Supplement A, the second paragraph in Article 33 stipulates that national security is an exception to the principle of refoulement.

⁵⁵ Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, UNTS Vol. 1465, p. 85. [Hereinafter CAT]

But the Article is restrictive in its application since it only applies in situations of torture.⁵⁶ But still state parties to the CAT have the obligation not to send back persons who would be in danger of being subject to torture.

Article 13 of ICCPR states that anyone, who is lawfully within the territory of a state, shall not be expelled from that state without due process. However, this rule does not have to be followed if national security is at stake. The article refers to aliens 'lawfully' within a state and not refugees specifically. But states bound by the CAT and also by the European Convention on Human Rights⁵⁷, which in its Article 3 prohibits torture or other cruel, inhuman or degrading treatment, and therefore provides similar protection for refugees as the CAT does, have the obligation not to subject people to torture. However, the ECHR differs in the way that the European Commission on Human Rights has used Article 3 in order to deal with the *non-refoulement* issue, which is not itself specifically mentioned in the ECHR.⁵⁸ Since according to the Commission in the *Soering* case, the obligation set forth in Article 3 of the CAT is also inherent in Article 3 of the ECHR, otherwise it would be contrary to the spirit and intent of the ECHR Article 3. Hence, a person's deportation or extradition may give rise to an issue under Article 3 of the ECHR where there are serious reasons to believe that the individual will be subjected, in the receiving state, to treatment contrary to Article 3.⁵⁹

A recent European Union instrument regarding asylum and refugees is the Council Directive (EU) 8043/04⁶⁰. The European Council there reaffirms the agreement of the special meeting in Tampere on 15 and 16 October 1999 on the establishment of a Common European Asylum System, based on the full and inclusive application of the 1951 Geneva Convention Relating to the Status of Refugees thus affirming the principle of *non-refoulement* and ensuring that nobody is sent back to persecution. The Qualification Directive's purpose is to lay down a common definition of the concept of "refugee" as contained in the Convention, and to provide a minimum standard of protection for those who fall outside that definition to complement the Convention in all member states. The Directive emphasises that the principle of *non-refoulement* should be evaluated regularly after that the EU Member states have implemented it.⁶¹ Hence, the Qualification

⁵⁶ Weissbrodt David and Hörtreiter Isabel, "The Principle of Non-Refoulement", Vol. 5 No. 1, *Buffalo Human Rights Law Review*, 1999, p.8.

⁵⁷ European Convention on Human Rights signed in Rom 4th of November 1950, ETS 5-1950. [Hereinafter ECHR].

⁵⁸ Weissbrodt and Hörtreiter, p 28. See e.g. Case of *Soering v. United Kingdom*, 14038/88, 07/07/1989, Series A no. 161.

⁵⁹ Case of *Soering v. United Kingdom*, 14038/88, 07/07/1989, Series A no. 161, para. 87-91.

⁶⁰ The Council Directive (EU) 8043/04 of 27 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted 2001/0270 (CNS). [Hereinafter Qualification Directive]

⁶¹ Qualification Directive, para. 36. Member states shall have implemented the Qualification Directive before 20 October 2006.

Directive divide protection into two categories, refugee protection based on the full and inclusive application of the Convention and subsidiary protection based on international human rights instruments.

Mc Adam describes, ‘complementary protection’ in legal terms to be “protection granted on the basis of an international protection need outside the 1951 Convention framework, triggered by the State’s obligation of *non-refoulement*”. It may be based on another human rights treaty, such as the CAT, or on more general principles, such as providing assistance to persons fleeing from generalized violence (through the expansion of the principle of *non-refoulement*). If complementary protection describes ‘the role of human rights law in broadening the categories of persons to whom international protection is owed beyond article 1A(2) of the Refugee Convention’, the EU concept of ‘subsidiary protection’ must be viewed as a regionally-specific example that is a political manifestation of the broader legal concept.⁶² The subsidiary protection was meant to stem from the EU members’ state practice in regard of complementary protection for a harmonised approach.

In EU generalised violence is not included in the Qualification Directive but in the Council Directive 2001/55⁶³ it is stipulated about minimum norms for temporary protection in case of *mass influx* for reasons of aggression or generalised violence. A Council decision is needed to decide whether a *mass influx* of people who are driven away from their country of origin because of an armed conflict or repeated outbreak of violence exists. People who cannot return on safe and durable conditions should be granted permission to stay on a temporary basis.

Sweden has ratified a number of International Conventions including those important for refugees as the 1951 Convention and its Protocol of 1967, ICCPR, ICESCR, CAT, Convention on the Elimination of All Forms of Racial Discrimination adopted 1965, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopted 1979 and the Convention on the Rights of the Child (CRC) adopted 1989. The ECHR is in addition incorporated in the Swedish Instrument of Government.⁶⁴ In regard of the principle of *non-refoulement*, Sweden has on several occasions been convicted for being in violation of the CAT, for rejecting an asylum-seeker to a country where he/she has risked being subject to torture, by the Committee Against Torture.⁶⁵ The Committee Against Torture in its

⁶² McAdam Jane, “Seeking refuge in Human Rights? Qualifying for subsidiary protection in the European Union”, 2004, p. 2 available at <http://www.forcedmigration.org/events/prague2004/mcadam-paper.pdf>, last accessed 27/05/2005

⁶³ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Official Journal of the European Communities L 212/12. [Hereinafter Temporary Protection Directive]

⁶⁴ Chapter 2, section 23, Instrument of Government

⁶⁵ Communication No 185/2001 : Sweden. 25/05/2002, CAT/C/28/D/185/2001. (Jurisprudence) CAT/C/25/D/149/1999, Communication No 41/1996 : Sweden. 08/05/96,

concluding observations⁶⁶ was in addition concerned about the fact that Swedish domestic law does not contain a definition of torture in keeping with Article 1 of the Convention. Neither torture nor cruel, inhuman and degrading treatment or punishment are identified as specific offences under Swedish domestic criminal law.

The Swedish Aliens Act⁶⁷ is the law regulating the grant of residence permits, the asylum procedure, the refugee status determination etc. In the Aliens Act the refugee definition of the Convention is almost identically included in chapter 3, section 2. However, the interpretation of it may differ from the general one as we will see further on. In chapter 3, section 3 of the Aliens Act, the subsidiary protection is stipulated and in chapter 2, family reunification and residence permits on humanitarian grounds are included. I will start to look at whether Iraqis still risk persecution today and by whom supported by the Convention and then whether Iraqis may or have been fallen into the subsidiary protection categories in the Swedish Aliens Act.

3.2 The 1951 Convention definition

The definition of a refugee contained in the 1951 Convention is widely accepted and reads as follows: ... Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁶⁸

The 1951 Convention's general purpose is to afford protection and fair treatment to those for whom neither is available in their country.

3.2.1 Well founded fear

The phrase "well-founded fear of being persecuted" is the key phrase of the definition and it reflects the main element of refugee character. The term "well-founded fear" contains both an objective as well as a subjective element. Since fear is subjective the determination therefore requires an evaluation of the applicant's statements rather than a judgment on the situation in his country of origin.⁶⁹ But as the term well-founded implicate

CAT/C/16/D/41/1996. (Jurisprudence). Communication No 43/1996 : Sweden. 15/11/96, CAT/C/17/D/43/1996. (Jurisprudence).

⁶⁶ Conclusions and recommendations of the Committee against Torture: Sweden. 06/06/2002, CAT/C/CR/28/6. (Concluding Observations/Comments).

⁶⁷ Aliens Act (Utlänningslagen) (1989:529).

⁶⁸ The Convention, para. 1A.

⁶⁹ UNHCR, "Handbook on Procedures and Criteria for Determining Refugee Status", 1979, Geneva, re-edited 1992, para. 37-38. [Hereinafter Handbook]

the fear must be supported by an objective situation and both must be taken into consideration. Hathaway emphasises the objective test rather than a subjective evaluation saying that well founded fear has nothing to do with the state of mind of the applicant for refugee status, except insofar that the testimony of the applicant can provide useful information about the situation in her home country.⁷⁰

3.2.2 Persecution

Persecution is not defined in the Convention. However, from Article 33 of the Convention it may be inferred that a threat to life or freedom on account of race, nationality, religion, political opinion or membership of a particular social group is always persecution.⁷¹ Other serious violations of human rights for the same reasons would also constitute persecution. According to Hathaway persecution may also be defined as the sustained and systematic violation of basic human rights demonstrative of a failure of state protection. A well-founded fear of persecution exists in case one would remain in the country and that would result in a form of serious harm, which the government cannot or will not prevent.⁷² Hathaway finds it important to examine two separate issues when determining if persecution exists. First the issue of whether the harm apprehended by the applicant amounts to persecution, that is, serious harm within the meaning of persecution. Secondly whether there has been a failure of state protection. In a Canadian case the Supreme Court found it possible to presume that persecution will be likely and that the fear is well-founded if there is an absence of state protection, in case the fear of the applicant has already been established.⁷³ UK case law in particular *Horvath*⁷⁴ demonstrates the lack of coherence in the definition of persecution in such a way that among the Lords there were divergent opinions in regard of the presumption of lack of state protection, the relation between serious harm and state protection as well as in regard of the need to separate the evaluation of the two issues of serious harm and state protection. The omission to include a definition on persecution in the Convention was according to Goodwin-Gill deliberate so as to permit a case-by-case determination of what given conduct constitutes an act of persecution.⁷⁵ States have therefore a wide margin of appreciation to interpret the fundamental term of persecution since no universal definition exists.

This margin of appreciation may cause problems as not being predictable for the asylum-seekers, how the state, in which they apply for asylum, will interpret the persecution they fear. The unpredictable outcome may not be in line with the rule of law, on the other hand an interpretation may also have a

⁷⁰ Hathaway James C., *The Law of Refugee Status*, Butterworths, Toronto, 1991, p. 74.

⁷¹ Handbook, para. 51.

⁷² Hathaway, p.105.

⁷³ *Canada Attorney general v. Ward* [1993] 2 SCR 689, 708.

⁷⁴ *Horvath v. SSHD* [2000] 3 WLR 379 (HL), cited in Crawley see note 140.

⁷⁵ Goodwin-Gil, p. 68.

more favourable outcome in case a particular state interprets persecution broader than another state.

3.2.2.1 Serious harm

The ordinary meaning of serious harm lies in the link between persecution and violation of fundamental human rights. The assessment of serious harm amounting to persecution must therefore have as its starting point and basis the international human rights standards recognised by all states. The International Community is committed to the assurance of basic human rights and therefore it is necessary to examine the human rights protected under International Law. Hathaway's definition of serious harm is grounded in human rights agreements internationally accepted as legitimate.⁷⁶

Whether restrictions of human rights amounts to persecution in the meaning of the Convention, according to Goodwin-Gill, an assessment of a complex of factors such as 1) the nature of the freedom threatened, 2) the nature and the severity of the restriction, and 3) the likelihood of the restriction eventuating in the individual case, has to be performed.⁷⁷ Regarding the nature of the freedom threatened, Hathaway has established a hierarchy of rights where for instance in the first category the freedom from slavery, protection against torture or cruel, degrading or inhuman treatment, right to life are included. In the second category freedom from arbitrary arrest and detention, equal protection of the law, fair criminal proceedings and so on are included.⁷⁸

Sexual violence and rape constitute acts of serious harm and do not differ from beatings, torture or other forms of physical violence that are commonly held to amount to persecution. Also gender related violence as for example female genital mutilation, forced abortion or violence within the family (honour related violence for instance) are acts that not in theory differ from other forms of ill-treatment and violence.⁷⁹ Acts of sexual violence in the context of armed conflicts are according to the four Geneva Conventions of 1949 and their Additional Protocols I and II grave breaches of humanitarian law.⁸⁰ Many times these sexual abuses go unreported since the social consequences if revealed may rise in themselves to the level of serious harm. For example if a woman is raped in custody, she might be afraid of the social stigma she would suffer, the rejection of her husband and

⁷⁶ The 1948 Universal Declaration of Human Rights, ICCPR, ICESCR.

⁷⁷ Goodwin-Gill, p. 68.

⁷⁸ Hathaway, pp. 104-105.

⁷⁹ Crawley Heaven, *Refugees and Gender: Law and process*, Jordans, U.K, 2001, pp. 42, 44.

⁸⁰ See for example Article 27 of Geneva Convention relative to the Protection of Civilian Persons in Time of War, Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949. [Hereinafter Geneva IV Convention]

close relatives, the deprivation of education or employment etc. in case she discloses the abuse.⁸¹

Other prejudicial acts and threats may also amount to persecution on a cumulative basis. In UNHCR's Handbook discrimination may amount to persecution on a cumulative basis taking into consideration also the objective circumstances in the country of origin, a cumulative analysis may then result in persecution.⁸²

3.2.2.1.1 Serious harm in Sweden

In the Swedish Aliens Act no definition on persecution is outlined. However, in the *travaux préparatoires* to the Swedish Aliens Act it is stipulated that it is the alien's life or freedom that shall be subject to persecution or else when the persecution is of severe nature. Every deprivation of liberty in the country of origin that an asylum-seeker has been subject to does not mean that persecution is at hand. A brief deprivation of liberty may only constitute persecution in case other circumstances support the persecution as for example assault or in case the deprivation is part of systematic harassments. Characteristic for such restrictive measures is that they are violating fundamental human rights. But not all violations of human rights, which are stipulated in International Conventions, have been considered to constitute persecution of severe nature as for example the procedural regulations in the ECHR. Minority rights' violations have as a rule not constituted ground for refugee status but in case the violations have involved serious violations of the personal liberty, ground for refugee status has been considered to be at hand. Today a combination of different kind of harassments and restricted measures may constitute ground for refugee status even though not each measure would do so.⁸³

3.2.2.1.2 Serious harm in the Qualification Directive

Article 15 of the Qualification Directive stipulates serious harm to consist of death penalty or execution, or torture or inhuman or degrading treatment or punishment in the country of origin, or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.⁸⁴ In addition, member states of the

⁸¹ Crawley, p 43.

⁸² Handbook para. 52.

⁸³ Government Bill (Proposition) 1996/97:25, p. 90, 98 and 154.

⁸⁴ The proposal was clearer in regard of what constitutes serious harm, as fundamental human rights violations and generalised violence. Brussels, 12.9.2001, COM (2001) 510 final, 2001/0207 (CNS), Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (presented by the Commission).[Hereinafter the Proposal to the Qualification Directive]

European Union may not return anyone to a state "where there is a serious risk that he or she would be subjected to the death penalty [...]"⁸⁵

This definition may be found a bit narrow in comparison to the doctrine that serious harm includes gross violations of human rights. But in Article 9 of the Qualification Directive acts amounting to persecution are listed and the Article stipulates that acts amount to persecution if they by their nature or repetition constitute severe violations of human rights and in particular the rights from which no derogation is possible according to the ECHR. Further, Article 9 enshrines acts of sexual violence to amount to acts of persecution as well as acts of gender-specific and child-specific nature. Acts of prosecution and punishment that is disproportionate or discriminatory may also amount to persecution. Accordingly, since the word in particular is included it infer that in case an act is deemed to be sufficiently serious by its nature or repetition, then a violation of a non-derogable right may be sufficient to amount to persecution. If violations of non-derogable human rights may sometimes amount to persecution, then they may certainly amount to subsidiary protection, since the latter is premised on the harm either not being sufficiently severe to constitute persecution, or as constituting persecution but without the requisite link to a Convention ground.⁸⁶ However, human rights violations as a form of persecution are not acceptable to all. Grahl-Madsen takes upon a restrictive view and believes that threats to life and liberty may amount to persecution but not for instance freedom of movement, opinion or religion.⁸⁷ This approach has some similarities with the Swedish one, compared to UK that has accepted the framework of Hathaway for the assessment of serious harm.⁸⁸

Comments:

Today human rights violations are the predominant reason for fleeing one's country of origin. The political reasons, as for example the plights of Chileans in the 70's, are no longer the predominant reason for asylum and according to my interviews with lawyers, it is seldom someone may stay on political grounds today. During the 90's gross human rights violations taking place within a country triggered displacement and also intervention on behalf of the suppressed populations by UN or coalition forces. As an EU member state, Sweden is obliged to implement the Qualification Directive of minimum standards but may also infer or retain more favourable standards for the refugee status determination. The fact that persecution may be gender related will be of significance to acknowledge in the Swedish Aliens Act since presently gender related persecution is not.

3.2.2.2 State protection

⁸⁵ Article 19(2) of the Charter of Fundamental Rights of the European Union.

⁸⁶ McAdam, p.7.

⁸⁷ Grahl-Madsen Atle, *The Status of Refugees in International Law*, Vol 1, A. W. Sijthoff's Uitgeversmaatschappij N.V 1966.

⁸⁸ *R v IAT ex parte Jonah* [1985] Imm AR 7 (QBD) referred to in Crawley, p.41.

Fear of persecution and a lack of state protection are clearly interrelated elements as is shown in Article 1(A) in the Convention. The persecuted clearly do not enjoy the protection of their country of origin and evidence of lack of state protection may lead to a presumption of the likelihood of persecution and to the well-foundedness of any fear.⁸⁹ Failure of state protection under international refugee law shall not be confused by state responsibility. The Refugee Convention does not hold states responsible but aims to ensure that effective protection is available.⁹⁰

A failure of state protection exists in the following situations:

- 1) if “serious harm” has been inflicted by the authorities or by associated organisations, groups or individuals;
- 2) if “serious harm” has been committed by others and the authorities are unwilling to give effective protection, because they support the actions of the private persons concerned, or because they tolerate them or because they have other priorities;
- 3) if “serious harm” has been committed by others, and the authorities are unable to give effective protection⁹¹

State protection hence involves an evaluation of the ability and willingness of the state to protect the claimant from the harm feared. A state may, for instance, have lost effective control over its territory and thus not be able to protect. The state’s willingness may also show in the laws and mechanisms available for the claimant to obtain protection from the state. But, unless the laws are given effect in practice, they may not be of themselves indicative of the availability of protection.⁹² The claimant should be able to effectively avail himself of the state protection and in case he is not and/or the state is not willing or unable to provide such protection for him, the state fails in its responsibility to protect.

3.2.2.3 Actors of persecution

3.2.2.3.1 State agents

A state agent is someone who acts on behalf of the state and whose acts may be said to be attributable to the state for example acts and policies of governments, the police etc. It might be hard to decide about acts attributable to the state, especially in cases where an official usually acts on behalf of the state but may act as a private individual as well. In these cases the notion of state responsibility may be a helping tool to determine the actor of persecution.⁹³ The state is responsible for acts of its servants that

⁸⁹ *Canada Attorney General v. Ward* [1993] 2 SCR 689, 708.

⁹⁰ Crawley, p. 48.

⁹¹ Crawley, p. 49.

⁹² UNHCR Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (HCR/GIP/03/04) 23 July 2003.

⁹³ Goodwin-Gil, p. 73.

are imputable or attributable to the state.⁹⁴ Imputability assimilates the actions or omissions of state officials to the state itself and is rendering the state liable for damage resulting to the property or person of an alien.⁹⁵ As a state has a due diligence responsibility, and in case a state cannot control or is unwilling or unable to satisfy this responsibility it may be a basis for a fear of persecution.⁹⁶ A state must show that it has acted in good faith and without negligence then the general principle is of non-liability for the actions of e.g. rioters and rebels who are causing loss or damages.⁹⁷ The due diligence responsibility occurs in case the state has a duty to prevent that a given event occurs.⁹⁸

The Qualification Directive takes this due diligence responsibility into account in case the state has taken “reasonable steps to prevent the persecution or suffering of serious harm *inter alia* by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection”, then protection should be considered to be provided. However, the assessment to be made is whether the applicant’s fear of persecution continues to be well-founded, regardless of the steps taken to prevent persecution or serious harm.⁹⁹

The persecution from the state authorities may e.g. also take the form of persecutory laws, as being discriminative or having disproportionately penalties for non-compliance with the law.¹⁰⁰

3.2.2.3.2 Non-state agents

The *travaux préparatoires* to the Convention do not mention particularly that the actor of persecution has to be the state, neither does the Convention itself. Therefore actors of persecution might as well be private individuals as family members, different kind of groups e.g. death squads, religious groups, clan groups etc.¹⁰¹ As long as the state authorities do not exercise due care to protect its population against private individuals, the state may still be responsible for the non-protection. UNHCR has long maintained that the Convention does not restrict persecution to acts by state agents. Rather, persecutory acts committed by non-state agents against whom the state is

⁹⁴ Articles 5-11 of the Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001). [Hereinafter ILC Draft on State Responsibility]

⁹⁵ Shaw Malcolm N, *International Law*, 4th edition, Cambridge University Press, Cambridge, 1997, p. 548.

⁹⁶ Goodwin-Gil, p. 73.

⁹⁷ Shaw, p. 551.

⁹⁸ Article 14 of the ILC Draft on State Responsibility.

⁹⁹ UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted (OJ L 304/12 of 30.9.2004), p. 18.

¹⁰⁰ Crawley, p. 51.

¹⁰¹ Goodwin-Gill, p. 71-72.

unwilling or unable to offer effective protection, similarly give rise to refugee status under the Convention, provided, of course, the other criteria of the refugee definition are met.¹⁰² The jurisprudence in regard of non-state agents is inconsistent since not all states parties to the Convention recognise persecution by non-state agents.¹⁰³ In cases when the persecutor not is directly related to the government, one should consider whether the government was unwilling or unable to protect the applicant. It has then to be established the following:

- 1) whether the applicant sought and was denied protection by the government
- 2) whether governing institutions and/or government agents were aware of the harm to the applicant and did nothing to protect her or were unable to,
- 3) whether the applicant has reasons to believe that it was or would be futile to seek protection of the government (e.g. if the government has denied protection to similarly situated persons, or if the government has systematically failed to apply existing laws)¹⁰⁴

In regard of non-state actors, the Internal Flight Alternative (IFA) often comes into play. In an assessment of IFA the motivation of the persecutor, the ability of the persecutor to pursue the claimant in the proposed area, and the protection available to the claimant in that area from state authorities is included. Evidence of the state's inability or unwillingness to protect the claimant in the original persecution area will be relevant. It can be presumed that if the state is unable or unwilling to protect the individual in one part of the country, it may also not be able or willing to extend protection in other areas. This may apply in particular to cases of gender-related persecution.¹⁰⁵

3.2.2.3.2.1 The Qualification Directive

According to Article 6 of Qualification Directive, actors of persecution may be a) the state; b) parties or organisations controlling the state or a substantial part of the territory of the state; c) non-state actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm.

The key element of the Qualification Directive is the firm rule guaranteeing the recognition of refugee status irrespective of the source or agent of persecution, hence including persecution emanating from non-state

¹⁰² UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004, p. 17.

¹⁰³ Crawley, p 54. For example France and Germany have not recognised persecution by non-state agents.

¹⁰⁴ Crawley, p. 53.

¹⁰⁵ UNHCR Guidelines on International Protection: "Internal Flight or Relocation Alternative".

actors.¹⁰⁶ In this respect the Qualification Directive has clarified the state practice and the practice which shall be prevailing. As I stated above the jurisprudence in regard of acknowledging non-state actors has been inconsistent in Europe.

3.2.2.3.2.2 Sweden

The MB's case law is restrictive in regard of considering persecution from non-state agents.¹⁰⁷ Especially to recognise that persecution is also at hand, despite that the state has not sanctioned the acts of the non-state actors, if the state is not able to protect its inhabitants from actors of persecution and prevent these acts from occurring. The lawyers hence find it more difficult to prove the failure of state protection than the serious harm.¹⁰⁸ In the Swedish Aliens Act chapter 3, section 2 it is stated that persecution does not have to arise from the state authorities but also from individuals. The present wording of the Aliens Act regarding non-state actors has been in force since 1997.¹⁰⁹ It was then introduced regardless from whom the persecution aroused from; international protection should be able to apply. Before the change of wording in the Swedish Aliens Act, the Swedish authorities had had a long practice of only granting refugee status to those fearing persecution from the state or persecution with the consent of the state. Therefore for example persons fleeing from civil wars, where no longer any power of state existed, were not considered as Convention refugees.¹¹⁰

Comments:

Today persecution arising from non-state actors is becoming the most common feature. Before, as stated above, many fled because of political reasons, often because they had another opinion than that of the state rulers in their country of origin. But today other reasons are taking overhand, human rights violations for instance, which is such a harm that the state should protect from. Despite that the present legislation leave room to grant residence permits on grounds emanating from persecution from non-state agents, the lawyers still find the legislation's application and interpretation unpredictable in regard of persecution by non-state agents. The implementation of the Qualification Directive may therefore have significance in emphasising that persecution may arise from non-state agents.

¹⁰⁶ UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 p. 17.

¹⁰⁷ Interviews with the lawyers Eva Ståhl, Olle Hancock, Elisabeth Engstrand, 19 April 2005.

¹⁰⁸ Ibid.

¹⁰⁹ Act (1996:1379) about changes in the Aliens Act (1989:529) (Lag (1996:1379) om ändring i utlänningslagen (1989:529)), in force 01/01/1997.

¹¹⁰ Government Bill (Proposition) 1996/97:25, p. 90.

3.2.2.3.3 Possible Actors of persecution in Iraq (not exhaustive)

In relation to Iraq, the state no longer is an actor of persecution according to the MB. The earlier case law of the MB stipulated the Saddam regime as a persecutor since the actions of that government towards its population was unpredictable and it was known that the government was systematically violating the human rights.¹¹¹ The MB will much emphasise the fall of Saddam. But today other actors have entered the arena and the question is if those actors cannot be said to be actors of persecution as well?

Before hand over of power

US forces (Occupant-State agents):

The US forces may in theory be said to be an actor of persecution since according to the 1907 Hague Convention¹¹² and the fourth Geneva Convention, the US forces as an occupying power has the responsibility to ensure public order and safety and to protect the civilian population on the occupied territory. These conventions are legally binding for the US as a signatory and according to the Geneva IV Convention it shall apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.¹¹³ The SC has also in subsequent resolutions to the intervention recognised the applicability of the Geneva Conventions and requested the parties concerned to strictly abide by their obligations under International Law, in particular the Geneva Conventions and the Hague Regulations.¹¹⁴ As an occupying power the state that enters the territory of another state may be said to take upon the responsibility that a state has to protect its population and function as the government of the occupied territory. Persons protected by the Geneva IV Convention “are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or occupying power of which they are not nationals.”¹¹⁵ The occupying power has among other things the responsibility to protect civilians from acts of violence and threats thereof. In particular women are to be protected from being assaulted, raped etc.¹¹⁶ Contrary to the Coalition forces’ responsibility, civilians have been the ones who have been the most targeted group during this conflict and still are. Since the US-led invasion in March 2003 tens of thousands of civilians are reported to have been killed or injured in military operations or attacks by armed groups.¹¹⁷ Many civilians were in addition killed as a result of

¹¹¹ Migration Board decision of 23 March 2004.

¹¹² Hague Convention IV respecting the Rules and Customs of War on Land, signed 18 October 1907 at the Second Peace Conference at the Hague. [Hereinafter Hague IV Convention]

¹¹³ Geneva IV Convention, Article 2 and 27.

¹¹⁴ SC/RES 1472 and 1483

¹¹⁵ Geneva IV Convention Article 4.

¹¹⁶ Geneva IV Convention Article 27.

¹¹⁷ Amnesty International’s report: “Decades of suffering, Now women deserve better”, AI Index: MDE 14/001/2005, 22 February 2005, p. 1.

excessive use of force by Coalition forces.¹¹⁸ Further, the reports and pictures of the Coalition forces' degrading treatment of the prisoners of the Abu Ghraib prison in Baghdad have come to the world's attention.¹¹⁹ Prisoners of war (POW) are to be treated humanely at all times and the outrages upon personal dignity; in particular humiliating and degrading treatment are prohibited.¹²⁰ In January 2005 a sergeant named Charles Graner was convicted for his atrocities at the Abu Ghraib prison. This was one step towards accountability and hopefully not the last since these kinds of atrocities may be acts of individuals but in this case, as media reports and a HRW report stipulate, the acts were part of a larger pattern of abuses of Muslim detainees approved and encouraged from higher level and even endorsed by the Minister of Defence Donald Rumsfeld.¹²¹ As Hersh states "Bush unilaterally withdrew the war on terror from the international legal regime that sets the standards for treatment and interrogation of prisoners. Abu Ghraib was not the work of a few bad apples, but the direct consequence of the reliance of George Bush and Donald Rumsfeld on secret operations and the use of coercion...in fighting terrorism." He further concludes that "the resort to torture also flowed from the administration's fantasies of liberating Iraq and its failure to anticipate Iraqi resistance. Once this resistance began to claim American lives in the summer and autumn of 2003, the administration believed it had to let the dogs loose -- literally -- at the prison at Abu Ghraib. Torture and humiliation became the fallback response to the failure to plan for occupation".¹²² Since soldiers are state officials, the acts they commit are attributable to the state they are representing. The inhuman treatment and abuse of the Iraqi prisoners are grave breaches of the Geneva Conventions and therefore constituting war crimes. Many articles and reports of scholars illustrate the violations of the Geneva Conventions as a breakdown in command.¹²³ Human Rights organisations also reports about war crimes committed by the US-led forces as well as the widespread and frequent torture and ill-treatment.¹²⁴ Members

¹¹⁸ Amnesty International's Annual Report 2004, covering events January-December 2003.

¹¹⁹ Amnesty International Report 2004 Updates Selected events covering the period from January to April 2004, AI Index: POL 10/017/2004 (Public) 26 May 2004.

¹²⁰ Geneva III Convention, Articles 3 and 13. Since the intervention in Afghanistan the US has declared the ones they capture as "illegal combatants" so as to try and circumvent the Geneva Conventions.

¹²¹ Brody Reed, "Justice for Abu Ghraib", International Herald Tribune, 19 January 2005, available at <http://www.ihf.com/articles/2005/01/18/opinion/edbrody.html>, accessed 18/03/2005. HRW report: "Getting away with torture? Command responsibility for the US abuses of detainees", Vol. 17 No. 1(G), 24 April 2005.

¹²² Ignatieff Michael, "What Geneva Conventions?" Book review of *Chain of Command, The Road From 9/11 to Abu Ghraib* by Seymour M. Hersh., 17 October, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9D0CE6DF143BF934A25753C1A9629C8B63>.

¹²³ Thomas Lillian and Levin Steve, "Experts agree: Geneva rules broken", Pittsburgh Post-Gazette, 6 May 2004, available at <http://www.post-gazette.com/pg/04127/311907.stm>, accessed 28/4/2004.

¹²⁴ AI Annual Report 2004, Human Rights Watch World Report 2005.

of the US-led forces have also subjected women to sexual threats, and some women detained by US forces have been sexually abused, possibly raped.¹²⁵

It appears that the ones (civilians, women, POW) the occupying powers were to protect, the Coalition forces have not even been able to protect from themselves. The Coalition forces have failed to live up fully to their responsibilities under international humanitarian law as occupying powers. This includes their duty to restore and maintain public order and safety, and to provide food, medical care and relief assistance. In addition widespread looting of public and private buildings and a sharp rise in criminal activities has occurred across the country in the aftermath of the war. Further, many people faced grave dangers to their health owing to power cuts, shortages of clean water and lack of medical services.¹²⁶ In an international armed conflict combatants are to distinguish military targets from civilian. The targeting of civilian goals is prohibited.¹²⁷ Nevertheless civilians and civilian targets as for example the infrastructure, which has been so demolished by the Coalition Forces that it is creating insecurity in the country, are being targeted. The US claims civilians to be potential terrorists only to circumvent the Geneva Conventions and as part of their counter insurgency strategy the US forces are demolishing homes of suspected insurgents and imprisoning their relatives.¹²⁸

After the US President Bush declared the end of the major military combats, Paul Bremer was appointed as US Administrator for Iraq and Head of the Coalition Provisional Authority (CPA). In July 2003 the CPA appointed a 25-member Iraqi Governing Council (IGC) from the various religious and ethnic groups. The Council had some executive powers, but Paul Bremer retained power to overrule or veto its decisions. In early September 2003 the IGC appointed an Iraqi interim government, comprising 25 ministerial portfolios, including a Human Rights Ministry. In November 2003 the CPA signed an agreement with the IGC paving the way for a transfer of power to an Iraqi interim government by mid-2004.¹²⁹ Following the declared end of occupation by US-led coalition forces and the dissolution of the Coalition Provisional Authority (CPA) on June 28, 2004, the US-led coalition transferred sovereignty to the Interim Iraqi government. US-led forces have remained in Iraq under the authority of SC Resolution 1546, adopted on June 8, 2004, creating the Multi-National Force-Iraq (MNF-I).¹³⁰

¹²⁵ AI report: "Decades of suffering, Now women deserve better", AI Index: MDE 14/001/2005, 22 February 2005, p. 1.

¹²⁶ AI Annual Report 2004.

¹²⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted on 8 June 1977.

¹²⁸ U.S. Committee for Refugees World- Refugee Survey 2004-Iraq, May 2004.

¹²⁹ AI Annual Report 2004.

¹³⁰ Human Rights Watch World Report 2005.

The resolution gives the MNF-I “the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq,” working with the interim government.¹³¹

Until the hand-over of power in June 2004, the occupying powers had the political authority and therefore had the responsibility towards the civilian population. The CPA should be able to be considered as state-agents during the occupying period, that is, until the hand over of power in June 2004, since the CPA as an occupying power had the responsibility to protect, which is the state’s prime responsibility towards its population. Due to the occupying powers failure to live up to their protection responsibility against serious violations of human rights; torture, rape, discrimination by themselves and the below mentioned examples of actors of persecution, make CPA and the US forces themselves actors of persecution as state agents. The US could not subsequently provide effective national protection, was then unwilling or unable to protect, and this may make them in theory actors of persecution. Especially since war crimes have been committed, that if something would amount to persecution.

After the hand over of power

US forces (non-state agents):

For the time being, the conflict is no longer an international armed conflict between two governments. Now the two governments are co-operating to defeat the armed groups opposing the new government and the US invasion and presence. This kind of conflict resembles more like generalised violence with the MNF-I and the government on one side and internal armed groups on the other or a civil strife/internal conflict. Despite that the MNF-I no longer has the same responsibility for the Iraqi population as before, they are still obliged to adhere to the minimum standards of the Geneva Conventions covering internal conflicts and which stipulates that persons not taking part in the hostilities shall be treated humanely and not be subject to torture or violence.¹³² In case being a victim of persecution of US forces, the persons would not know when the US will leave and in case the crimes will be redressed since the Iraqi courts have no jurisdiction in regard of the Coalition forces. An order of CPA provides that the Coalition forces are subject to the jurisdiction of the sending state, that is, the Coalition forces are immune from any wrongful acts including human rights violations committed in Iraq as regards Iraqi jurisdiction.¹³³ According to AI no attempts have been made to start investigations or proceedings.¹³⁴

Despite that the MNF-I are to work with the new government, the Iraqi authorities may have difficulties to control the forces means to deter

¹³¹ SC/RES 1546 of 8 June 2004.

¹³² Common Article 3 of the Geneva Conventions.

¹³³ Economic and Social Council, Human Rights Commission, sixty-first session, Report of the United Nations High Commissioner for Human Rights and follow-up to the World Conference on Human Rights – The present situation of human rights in Iraq, E/CN.4/2005/4 9, 9 June 2004.

¹³⁴ AI report: “Decades of suffering, Now women deserve better”, 22 February 2005.

terrorism and it therefore makes the MNF-I and the US forces non-state actors which the Iraqi sovereign is not able to control.

Comments:

To conclude such a theory about the US being an actor of persecution would be politically a delicate matter. Before at least the AAB in Sweden would take such a decision or considering to take such a decision, the AAB would most probably refer the question to the Swedish government for advice, which is usually done when a foreign policy issue is at hand, which may be sensitive or when the AAB need a guiding decision.¹³⁵ According to the MB no decisions have been made on the basis of US being the persecuting actor.¹³⁶ A war against terrorism is not a justification to disregard fundamental regulations as the Geneva Conventions. The relevance of these conventions has been questioned by the US and others in the latest developments of conflicts and also the international prohibition on torture, which is a *non-derogable* right, not even in case of public emergency. Nevertheless reports and statements by leading states insinuate that the prohibition is no longer as absolute and therefore these states do not hesitate to use it as a mean in the fight against terrorism. In my view the Geneva regulations and the prohibition against torture gets even more important to comply with, in order to be able to justify interventions or the war against terrorism.

Non-State agents both before and after the hand over of power

Islamic and Armed groups:

Islamic groups are targeting people, who try to help normalizing and reconstructing Iraq. Reportedly their targets are also women, who do not act in line with the Islamic rules and women political leaders and women's right activists. AI reports about killings and hostage takings.¹³⁷ HRW reports about a high level of "violent attacks on civilians by insurgents, including suicide bombings and the deliberate killing of Iraqi civilians working with US and other foreign forces".¹³⁸ Especially recruits for the new Iraqi Police Force have been frequently targeted.¹³⁹ The Police recruits' training is critical to improving security in Iraq and providing the US an exit strategy. Shiites who make up a majority in Iraq have also been targeted by these groups.¹⁴⁰ The Armed and Islamic groups' purpose might be to destabilize or try to force the MNF-I out of the country. But the fact remains that they are targeting certain groups, women and people who in different ways allegedly are supporting the new regime for instance police recruits.

The different groups, often Sunni Arabs still loyal to Saddam Hussein or the Al-Qaeda operative, Abu Musab al-Zarqawi, take upon responsibility for

¹³⁵ Chapter 7, section 11 Aliens Act.

¹³⁶ Interview Inger Lagerström, Information Desk, Migration Board Norrköping, 4 May 2005

¹³⁷ AI report: "Decades of suffering, Now women deserve better", 22 February 2005.

¹³⁸ Human Rights Watch World Report 2005.

¹³⁹ <http://www.muslimnews.co.uk/news/news.php?sub=1495>, accessed 19/04/2005.

¹⁴⁰ www.nytimes.com.

the acts of suicide bombings by announcing on internet websites. The first week in May 2005, 50 people were killed every day by suicide bombings carried out by these groups, many of those police recruits.¹⁴¹ Both the occupying powers before the hand over of power as well as the Iraqi sovereign after the hand over of power have proved unable to protect the targeted groups from these non-state actors.

Clan-groups:

Traditions are very well rooted in Iraq and the clan and tribal groups have taken over much of the power after the fall. It is the clans that rules villages and towns. UNHCR believes that people returning because of negative decision on their asylum application may face serious risks of rejection by the community resulting in physical insecurity and undue hardship if relocated in an area without the acceptance of the ruling clan or tribe. According to UNHCR's opinion no effective national protection currently exists in Iraq. These concerns are especially acute in the North and in rural areas.¹⁴² It is areas which the MB especially finds as an internal relocation alternative for rejected asylum-seekers. However, in a decision by the AAB a man was granted leave to remain on grounds of serious clan related violence, which could not be solved by mediation or by the protection of the local authorities.¹⁴³

Family members:

Honour related crimes by male relatives are being of continued concern in Iraq today. The AI's report demonstrates how gender discrimination in Iraqi laws contributes to the persistence of violence against women. Many women remain at risk of death or injury from male relatives if they are accused of behaviour held to have brought dishonour to the family. These so called "honour crimes" are in effect condoned in Iraqi legislation, which allows the courts to deliver moderate sentences on the perpetrators.¹⁴⁴

State-agent both before and after the hand over of power

Iraqi security forces:

The Iraqi national security forces were reorganised by the IGC in July 2004. New agencies were established under the authority of the Ministry of Interior but the Iraqi National intelligence Service (INIS) with the responsibility of intelligence gathering had already been set up under the authority of the CPA in April 2004.¹⁴⁵ The INIS is to report directly to the

¹⁴¹ www.nytimes.com

¹⁴² UNHCR Return Advisory Regarding Iraqi Asylum Seekers and Refugees, Geneva, September 2004, p.5.

¹⁴³ Aliens Appeals Board decision of 22 October 2004. Due to confidentiality I have only the date to use to differentiate between the cases from AAB and MB. The cases were sent to me by an official at the AAB and this decision is one of the policy decisions on Iraqis that the AAB took autumn 2004.

¹⁴⁴ AI press release: "Iraq: Iraqi women - the need for protective measures", AI Index: MDE 14/004/2005 (Public), 22 February 2005.

¹⁴⁵ Human Rights Watch World Report 2005.

head of government according to a CPA Order 69 and is the principal agency currently involved in the arrest, detention and interrogation of suspects. Although Article 12 of this order stipulates that the INIS “shall have no power to arrest or detain persons,” and limits its authority to intelligence gathering on “serious violation of Iraqi criminal law” including matters relating to internal state security, it has held lots of detainees in its custody without formal charges, having arrested them in the first place without judicial warrant.¹⁴⁶ In the report from HRW serious violations committed by the INIS since mid-2004 are highlighted. The violations have been committed principally against members of political parties deemed to constitute a threat to state security. The HRW’s investigations in Iraq found the systematic use of arbitrary arrest, prolonged pre-trial detention without judicial review, torture and ill-treatment of detainees, denial of access by families and lawyers to detainees and improper treatment of detained children.¹⁴⁷ The perpetrators have not yet been held accountable for the acts they have committed and as stated before, in case the victim of serious human rights violations did not have access to an effective legal system that prosecutes the perpetrators, it is then a factor that the state is not offering effective national protection and moreover, the security forces are in addition state agents. Consequently, there do exist actors of the state even though the state is not in general harassing and by policy violates human rights, still there exists a responsibility for the acts of its officials, especially now after the hand over of power last year and the elections in January this year, Iraq is starting to function as a state again and is accountable for its actions. Also other state agents as the Iraqi police and other agencies are reported to have mistreated and arbitrary arrested insurgents and militiamen. Since the conflict no longer is an international armed conflict but a civil strife insurgents picking up guns against the government may be arrested under Iraqi criminal law and are not treated as Prisoners of War (POW), who may not be prosecuted for taking up guns.¹⁴⁸ But nevertheless torture is never justifiable in the name of security, how difficult the INIS may have to uphold security and hold back the violence of the insurgents. In case the torture or arbitrary arrests may be linked to a Convention ground, for example political opinion (members of political opposition groups have been arrested) the serious violations of international human rights standards may amount to persecution and the actor would be the state.

State of Iraq

The overall problem after the hand over power is that the state authorities and government are re-building in Iraq and therefore the state’s major problem is that it is unable to ensure effective national protection. Maybe

¹⁴⁶ Human Rights Watch Report “The New Iraq? Torture and ill-treatment of detainees in Iraqi custody”, HRW Index No: E1701, January 25, 2005, p. 26.

¹⁴⁷ Human Rights Watch Press Release: “Iraq: Torture Continues at Hands of New Government Police Systematically Abusing Detainees”, January 25, 2005, p. 1.

¹⁴⁸ HRW Report “The New Iraq? Torture and ill-treatment of detainees in Iraqi custody”, 25 January 2005, p. 27.

not unwilling but unable and therefore state protection should not be considered to be available. The prevailing general insecurity, lawlessness and violence indicate the government's inability to protect and that they do not have effective control over its territory.¹⁴⁹ Also the likelihood to obtain legal redress for atrocities committed to one is to be taken into consideration in assessing the state protection. In many cases it seems unreasonable to obtain legal redress as redress for crimes committed by the US forces or by family members.¹⁵⁰ According to ECRE the rule of law is not yet in place in Iraq and despite the elections and the appointment of a new government applications of asylum should not be presumed to be manifestly unfounded only because Saddam's regime is gone. There are still people facing persecution and the applications may be well founded.¹⁵¹ Even though the government and the Coalition forces may be said to try to prevent persecution or violations, at least violence targeting civilians, by trying to defeat the resistance, there are still other aspects they are just not able to prevent and some that they have not emphasised to prevent, for example legislation discriminating women, the ineffectiveness of the legal system and so on. Since the Interim government still had some authority before the hand over of power, it is possible to regard the Iraqi state as a state-agent, who was able to persecute, also before the hand over of power.¹⁵²

3.2.3 Convention grounds

The five grounds that the Convention stipulates to be linked to the well-founded persecution are race, nationality, religion, membership in a particular social group and political opinion. Persecution on account of race is the most frequent reason to refugee movements in all parts of the world.¹⁵³ The nationality term in the Convention is normally interpreted to include origins and the membership of particular ethnic, religious, cultural and linguistic communities.¹⁵⁴ Persecution for reasons of nationality may also include persecution because of lack of nationality, that is, statelessness.¹⁵⁵ Often more than one of the Convention grounds may be of importance and may contribute cumulatively to a well-founded fear of persecution. This applies especially for many women claimants, who may face gender related persecution because of a Convention ground which is

¹⁴⁹ UNHCR Guidelines on International Protection: Internal Flight or Relocation Alternative, there it is stipulated that the loss of effective control may show unwillingness and inability to protect.

¹⁵⁰ US forces cannot be prosecuted in Iraq for wrongful acts, CPA Order No. 17.

¹⁵¹ ECRE Guidelines for the treatment of Iraqi asylum-seekers and refugees in Europe, April 2004, PP2/04/2004/Ext/AP.

¹⁵² ECRE's Questionnaire on the Treatment of Iraqi Refugees and Asylum-Seekers in Europe, April 2004, http://www.ecre.org/positions/Iraq_Quest_Apr04.xls. Switzerland applied a quasi state status on Iraq.

¹⁵³ Goodwin-Gill p. 43. One example is the genocide in Rwanda when the Hutus wanted to exterminate the Tutsis.

¹⁵⁴ Goodwin-Gill, p. 45, Article 27 ICCPR.

¹⁵⁵ Grahl-Madsen, p. 219.

attributed or imputed to them. In many societies a woman's political views, race, nationality, religion or social affiliations, for example, are often seen as aligned with relatives or associates or with those of her community.¹⁵⁶ The persecution feared could also be for one, or more of the Convention grounds, for example, a claim for refugee status based on transgression of social norms may be referable to political opinion, religion or membership of a particular social group.¹⁵⁷

Religion is as race a very common reason for persecution. As regards the Convention ground political opinion the Handbook states that persecution for reasons of political opinion implies that the applicant holds another opinion than that of the government and that the opinion has either been expressed or has come to the attention of the authorities. However, the holding of political opinions different from those of the government is not in itself a ground for claiming refugee status and an applicant must show that he has a fear of persecution for holding such opinions.¹⁵⁸ Membership of a particular social group is not defined in the Convention and states have recognised women, families, tribes, occupational groups, and homosexuals, as constituting a particular social group for the purposes of the Convention.¹⁵⁹ UNHCR has defined a particular social group as "a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights".¹⁶⁰

3.2.3.1.1 Who might still risk persecution?

Women:

According to the case law of the MB¹⁶¹, women in Iraq may still be exposed to persecution in their country of origin. Special attention shall therefore be paid to women allegedly fearing persecution. In particular, women who fear honour related violence, women who are targeted for working by Islamic groups and the women who were harassed and treated degrading, raped and so on by the occupying power.¹⁶² UNHCR's position paper from September 2004 confirms that groups at risk in Iraq today are for example those fleeing honour crimes and who will merit for refugee status despite the fall of the

¹⁵⁶ Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002, para. 22.

¹⁵⁷ Guidelines on International Protection: Gender-Related Persecution, para. 23.

¹⁵⁸ Handbook, para.80-83.

¹⁵⁹ UNHCR Guidelines on International Protection: Membership of a particular social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/02, 7 May 2002, para. 6-7.

¹⁶⁰ UNHCR Guidelines on International Protection: Membership of a particular social group, para. 11.

¹⁶¹ Aliens Appeals Board decision of 12 October 2004.

¹⁶² AI Press release: "Iraq: Iraqi women - the need for protective measures", 22 February 2005.

regime. The women and girls increasingly faced violent attacks, including kidnapping, rape and murder, as law and order broke down in the aftermath of the war. Many women became hence too afraid to leave their homes, and girls were kept away from school. Their freedom of movement was hence restricted. Women who were victims of violence in the street or in their homes had practically no hope of obtaining justice.¹⁶³ A number of Iraqi women have been taken hostage by armed groups, some of them in connection with political demands.¹⁶⁴ Due to the social stigma in reporting sexual violence, women's access to court is limited. In case the woman report a rape she risks being murdered by her male relatives since being raped brings shame on the family as well as fighting with her husband or having a relationship outside marriage. Under Islamic law, the punishment for a woman who commits adultery is death. Women face discriminatory laws and practices that deny them equal justice or protection from violence in the family and community.

The only positive guiding decision in 2004 in Sweden was for a woman from Baghdad based on her being threatened by her husband and family. In other cases people from Northern Iraq (Kurds and other minorities) are rejected. Even a Kurdish woman, with a similar domestic abuse claim as the woman from Baghdad, was rejected because Swedish authorities concluded that the authorities in Northern Iraq could provide adequate protection.¹⁶⁵

Past persecution and compelling reasons

Many Iraqis fleeing today could also be forced to leave because of past persecution and compelling reasons. Women in Iraq for example have suffered disproportionately through decades of government repression and armed conflict. Under the government of Saddam Hussein, women were subjected to gender-specific abuses, including rape and other forms of sexual violence, as political activists, relatives of activists or members of certain ethnic or religious groups.¹⁶⁶ Also Kurds and Shia Muslims were living under repression and discriminative conditions. The southern part of Iraq where most of the Shia Muslims were living was suppressed by Saddam's regime and was the part of Iraq most affected of the embargo period. The contributions did not arrive or very slow while the Kurdish parts were autonomic and the UN was present there to make sure that contributions arrived properly.¹⁶⁷ Today Shia Muslims are in the governmental position after being during decades repressed by the Sunni minority. But nevertheless past persecution may make it impossible to stay on in Iraq today despite the fall of the Saddam regime.

Concluding remarks:

¹⁶³ AI Annual Report 2004.

¹⁶⁴ AI Press release: "Iraq: Iraqi women - the need for protective measures", 22 February 2005.

¹⁶⁵ ECRE's Questionnaire, April 2004.

¹⁶⁶ AI report: "Decades of suffering, Now women deserve better", 22 February 2005.

¹⁶⁷ Interview Nevine Mawati, Migration Board Skåne, 16 November 2004.

As seen before armed groups are targeting those who support or allegedly support the US forces and the new government. Persons who want to normalize Iraq and re-construct the country are normally exposed to a risk of persecution. That has also the MB established as well as in severe cases of clan related violence there might be a need of protection.¹⁶⁸ Some of the clan disputes occur as a consequence of the Arabization by the Baath Party in northern Iraq, where Kurds property and houses were taken over by the Arabs and the Kurds were forced to move away from the area.¹⁶⁹ Today disputes easily arise when Kurds return and reclaim their property. Christians, intellectuals, religious and ethnic minorities and persons targeted by various non-state agents for reasons linked to the five Convention grounds, may also still be subject to persecution.¹⁷⁰ Persecution for reasons of political opinion is also as demonstrated above relevant in regard of the Iraqi caseload both for past and present persecution, as being targeted on the basis of real or perceived political affiliation. In addition the detainees whose human rights have been abused by US forces may be able to invoke persecution for religious reasons, as being targeted for being Muslims and therefore imputed to be terrorists. Shiites as stated above have been targeted by Sunni militia groups for reason of dislike of the new order in Iraq. Apparently Shiites are now resorting to revenge killings and rumours about Shiite death squads are circulating which would mean that a new non-state actor has entered the arena and in case sectarian killings will increase a civil war would soon be imminent.¹⁷¹

Sweden has not recognised gender as a particular social group yet but has started the governmental procedure to adopt such an approach.¹⁷² The government's inquiry suggests that the authorities should be guided in their interpretation of the concept of "membership of a particular social group" by the UNHCR guidelines and by the Qualification Directive. It means that in Sweden's application of the Convention too, it should be possible to regard groups defined by gender or sexual orientation as examples of social groups falling within the scope of the protection to be extended to refugees.¹⁷³ The consequences for the Iraqi caseload, since women are still risking persecution, as the MB has acknowledged, is that they most certainly not will be recognised as Convention refugees for fear that is essentially gender-related. Since Sweden still has not recognised persecution to be gender related, instead the subsidiary protection or persons otherwise in need of protection comes into play.

¹⁶⁸ Aliens Appeals Board decision of 22 October 2004.

¹⁶⁹ ECRE Guidelines on the treatment of Iraqi refugees and asylum-seekers, April 2004.

¹⁷⁰ UNHCR Return Advisory Regarding Iraqi Asylum Seekers and Refugees, Geneva, September 2004, ECRE Guidelines on the treatment of Iraqi refugees and asylum-seekers, April 2004.

¹⁷¹ Tavernise Sabrina, "Many Iraqis See Sectarian Roots in New Killings", 27 May 2005, <http://www.nytimes.com/2005/05/27/international/middleeast/27sectarian.html?th&mc=th>, accessed 27/05/2005.

¹⁷² Governmental Report (SOU) 2004:31.

¹⁷³ Governmental Report (SOU) 2004:31, p 18.

In conclusion of this chapter the intervention in Iraq 2003 has hence not deterred the actors of persecution but instead added new ones and therefore Iraqis will continue to flee the country and qualify for refugee status. The intervention may therefore not be said to have reduced the producing of refugees. I will continue to look into whether the Iraqi intervention has reduced the producing of refugees by conducting an inquiry of whether Iraqis also may or have been falling into the Swedish subsidiary protection regime.

3.3 Subsidiary protection

3.3.1 The Qualification Directive

Subsidiary status is to be seen as a complement to the refugee protection regime and not a substitute. The recognition of refugee status should still be primarily sought. Subsidiary protection is to be granted only if an applicant does not meet the criteria for refugee status, or if the application for protection explicitly excludes the Convention as a source of protection. This stems from the rationale that the Convention is to be given a full and inclusive interpretation.¹⁷⁴ A person eligible for subsidiary status according to Article 2(e) of the Qualification Directive means “a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country” The standard of proof for subsidiary status differs from that of refugee status, because for subsidiary status “substantial grounds... for believing” is needed, that is, an objective test. While for refugee status both a subjective and an objective test are required in the demonstration of a well-founded fear.¹⁷⁵

3.3.2 Swedish Aliens Act chapter 3, section 3

3.3.2.1 Torture provision

In the first paragraph of the provision regulating the criteria for persons otherwise in need of protection, the torture stipulation is laid down and is already a combination of a) and c) of Article 15 of the Qualification

¹⁷⁴ McAdam, p.9.

¹⁷⁵ UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004, p. 10.

Directive. According to chapter 3, section 3, paragraph 1 of the Aliens Act, a person should be considered to be in need of protection in case he/she has a well-founded fear of being punished by death or being exposed to torture or other inhuman or degrading treatment or punishment. The torture provision comes into play when the torture amounting to persecution cannot be linked to any of the Convention grounds, race, religion, nationality, membership of a particular social group or political opinion. Chapter 8, section 1 of the Aliens Act stipulates the prohibition of executing a deportation to a country where there are reasonable grounds for the person to be subject to torture. The torture provision is founded on Article 3 of the ECHR and the CAT though not a complete definition as enshrined in the conventions. The prohibition to deport in case the person is risking to be subject to torture is without exception and therefore a person who are granted residence permit on this ground is provided with a stronger protection than the other categories of persons otherwise in need of protection and even the refugee status.¹⁷⁶ In chapter 3, section 4, of the Aliens Act, a person, who would fall into the refugee definition or a person otherwise in need of protection according to the gender clause, can be refused residence permit in case of national security concerns.

In regard of the Iraqi caseload 94 persons out of the total number of 346 Iraqis who were granted residence permits in 2004, were granted leave to remain on grounds of a well-founded fear of being subject to torture or being punished by death. 69 of these were women, probably women fearing honour killings. The torture provision is the predominant of the three categories of subsidiary status at least in respect of the Iraqi caseload. In a recent decision by the AAB in regard of an Iraqi woman and her daughter, who had claimed honour related violence, the AAB granted them residence permits by virtue of the torture provision.¹⁷⁷ In relation to gender related persecution both the torture and the gender provisions may be applicable therefore in the first place the torture provision should apply since it provides stronger protection.

3.3.2.2 War category

Paragraph 2 of chapter 3, section 3 of the Aliens Act stipulates that a person is in need of protection in case he/she is not able to return to his/her country of origin because of an international or internal armed conflict or because of an environmental disaster. According to the *travaux préparatoires* of the amendments of the Aliens Act, in which the category of persons otherwise in need of protection for reasons of armed conflict was added, persons fleeing war or civil war were considered to often be in great need of

¹⁷⁶ “Persecution because of Gender-grounds for residence permit-An analysis of its legal regulation and its application” (Förföljelse på grund av kön- grunder för uppehållstillstånd) UD2000/742MAP.

¹⁷⁷ Aliens Appeals Board decision of 12 October 2004.

protection or in any case in need of temporary protection. An asylum-seeker may fall within this category when an *armed conflict* is very *intense* in the region where he/she comes from and it is *unthinkable* to send the asylum-seeker back. At the same time it is not practically possible to send the asylum-seeker to another part of their country of origin. This definition of armed conflict is very vague in my view but the government, when proposing this amendment, remarked that the amendment was a codification of a very clear and firm practice. The previous practice resulted in persons fleeing armed conflicts were granted residence permits on political and humanitarian grounds, which did not entitle them any protection but only a possibility to be granted permission to stay.¹⁷⁸

In the Geneva IV Convention, an armed conflict includes declared war or any other armed conflict which may arise between two or more of the High Contracting Parties to the Geneva Conventions, even if the state of war is not recognized by one of them.¹⁷⁹ In the *Tadic* case, the court concluded that an armed conflict exists whenever there is a resort to armed force between states.¹⁸⁰

It appears that for this category of persons, the IFA becomes an important part of the assessment in regard of the refugee status determination. In relation to the Iraqi caseload the MB started in January 2000 to consider the northern part of Iraq, the autonomous Kurdish province, to be an internal flight alternative, as did then UNHCR. Still today after the war broke out MB, after Sweden and Norway have performed a Commission of Inquiry trip to the Northern part of Iraq in September 2003, considers the situation in northern Iraq to be better than in the rest of the country as well as not constituting protection needs, that is, returns are possible.¹⁸¹ However, UNHCR's position today is that the situation in Mosul and Kirkuk is still being very tense and a number of security incidents including explosions, attacks on police stations and pipelines, assassinations or assassination attempts of political figures have occurred in both cities. UNHCR also affirms that returns to any part of Iraq under current conditions could prove unsustainable and lead to renewed displacement.¹⁸² The MB is nevertheless rejecting Iraqis from both the Northern and the Southern part.¹⁸³

3.3.2.2.1 Is the war category applicable on the Iraqi case load?

Even though the US President Bush terminated the war two years ago, 1 of May 2003, the situation in Iraq is still warlike. News about attacks on civilians and soldiers and car bombs reach us every day.¹⁸⁴ Nevertheless the

¹⁷⁸ Government Bill (Proposition) 1996/97:25, p. 99-100, 102.

¹⁷⁹ Geneva IV Convention, Article 2.

¹⁸⁰ *Prosecutor v. Tadic*, IT-94-1-AR 72, October 1995.

¹⁸¹ Migration Board decision of 23 March 2004.

¹⁸² UNHCR Return Advisory Regarding Iraqi Asylum Seekers and Refugees, 2004, p. 3.

¹⁸³ Lönneus Olle and Magnusson Erik, "Flyktingtalen ska ner med hårdare kontroll", *Sydvenska Dagbladet*, 8 May 2005.

¹⁸⁴ www.nytimes.com

MB in Sweden does not consider the armed attacks in Iraq to constitute an armed conflict in the sense of chapter 3, section 3, paragraph 2 of the Aliens Act.¹⁸⁵ In 2004 one person got a permanent residence permit because of protection needs for reasons of armed conflict.¹⁸⁶ It is interesting to notice that the MB does not consider the clause of armed conflict to constitute a particular ground for protection in regard of Iraq refugees. But would it not be possible to apply the clause of armed conflict in relation to Iraq?

Armed conflict The intervention in Iraq began as an armed conflict in the sense of the Geneva Conventions between Iraq and the US. People fleeing outside Iraq then should therefore be able to be considered as fleeing from an international armed conflict since it then was an armed conflict between two governments and the Geneva Conventions as well as the Hague Regulation applied. Even after the end of the occupation, the hostilities continued. Today the situation is more similar to an internal conflict but the war category according to the Aliens Act shall apply on civil wars as well.

Intensity The first months before the declaration of the end of the major hostilities, the conflict consisted of major military attacks but despite the declaration, attacks have been most frequent since then. Last year intense attacks were lounded against Falluja and in Baghdad and areas around Baghdad, suicide bombings and violence are common features.¹⁸⁷ The unpredictability of the attacks and suicide bombings excludes any IFA. The present situation may be said to constitute generalised violence, which is mostly concentrated in the areas close to Baghdad but not exclusively. In this respect the OAU gives a broader protection since generalised violence is included as constituting a ground for refugee status.¹⁸⁸ The Swedish protection provisions do not yet enshrine generalised violence as being a ground for refugee status or subsidiary protection and neither does the Qualification Directive. EU member states seem to have difficulties in harmonizing provisions about generalised violence because in the proposal to the Qualification Directive generalised violence was included as an act of serious harm but not in the final version.¹⁸⁹ The Qualification Directive then stipulates about indiscriminate violence in armed conflicts.¹⁹⁰

In ECRE's recommendation to Article 15, the organisation concludes that indiscriminate violence in armed conflicts may apply to "situations where civilians, not necessarily targeted during armed conflict, are caught in the crossfire" and that "Article 15 (c) reflects the nature of present-day wars

¹⁸⁵ Aliens Appeals Board's decision of 22 October 2004.

¹⁸⁶ http://www.migrationsverket.se/pdf/er/statistik/statistik_3_2004.pdf, accessed 29/03/2005.

¹⁸⁷ www.nytimes.com.

¹⁸⁸ OAU Convention governing the specific aspects of refugee problems in Africa, Article 1(2), adopted on 10 September by the Assembly of Heads of State and Government. CAB/LEG/24.3. It entered into force on 20 June 1974.

¹⁸⁹ Proposal for the Qualification Directive.

¹⁹⁰ Article 15 of the Qualification Directive.

where conflict does lead to indiscriminate violence.”¹⁹¹ The insecure and instable situation in Iraq indicates exactly indiscriminate violence, as well as the loss of many civilian lives for reasons of coming in the crossfire ever since the intervention. The unpredictability of where attacks will be launched and where suicide bombings will take place also indicate indiscriminate violence. The purpose of armed groups is to destabilize the authorities which have got the effect that the authorities are unable to protect the civilian population from these unpredictable violent attacks. This also since the armed groups are both targeting politicians (kidnappings and killings of politicians are common incidents) and certain groups as mentioned before (women, people allegedly supporting the US and the new government) but also completely randomly bombing at civilian targets.

In an assessment for this category, one also has to take into consideration what would they return to? The risk is that they would return to an as insecure and violent situation as they fled from and after the elections and the following victory of the Shia Muslims, voices have been raised that a civil war between the different ethnic groups is not improbable to occur in case the political structure not will satisfy all groups. The violence and the civil strife as concluded in the previous chapter are not then reducing the producing of refugees and especially not in case a civil war between the ethnic groups is to be expected.

It is remarkable that this category has not been applied more frequent in regard of the Iraqi case load since it was an international armed conflict, which was intense, and attacks and violence are still occurring today. It was and still is unthinkable to return Iraqis to their country of origin, which also is seen in the Swedish policy of not executing the deportations of any Iraqis after their decisions of rejection. It would have been possible for the European Council of Ministers to decide to give temporary protection to the Iraqis fleeing the aggression. In case the European Council of Ministers would have thought the Iraqis to constitute a mass influx and the processing of their applications to have had effects on the asylum procedures in the European countries. In addition the Qualification Directive also is intended to make it possible to grant subsidiary protection to someone who is coming from a mass influx situation, which arises from aggression, even if the European Council of Ministers has not taken any decision about the mass influx situation.¹⁹²

3.3.2.3 Gender clause

¹⁹¹ ECRE's Recommendations to the Asylum Working Party on the Commission's Proposal for a Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM (2001) 510 final, 13 September 2002, available at <http://www.ecre.org/statements/wpcomments.shtml>, accessed 23/04/2005.

¹⁹² Proposal for the Qualification Directive.

According to the Aliens Act, chapter 3, section 3 paragraph 3, a person that has a well-founded fear of persecution for reasons of her/his gender or homosexuality is entitled to protection. This means that even though a person does not fall into the refugee provision, the person still has to demonstrate a well founded fear for being otherwise in need of protection under this category but still not be entitled to the protection afforded as a refugee. Sweden is almost the only country in Europe to have a special clause for gender related claims except for France and England. However, the clause has been much discussed since it has not got the effect it was intended to have. Another critic the clause has been subject to is that the clause is in violation of the prohibition of discrimination in the CEDAW. In Article 1 of CEDAW, the prohibition of discrimination also enshrines discriminative *effects* of a legislation that appears to be gender neutral. Some critics have then expressed concern that there is a risk that women when the gender clause is applied have to satisfy with a lesser protection than they actually are entitled to according to the refugee status provision and the torture provision. The gender clause has hence had limited application since often more than one provision is applicable. The torture provision may be applicable in more cases since for instance if the woman fears honour related persecution, this often constitutes degrading treatment or a risk to be killed. According to the Government Report, statistics shows that women who have falling into the gender category have been a hand full per year.¹⁹³ The provision has therefore not got the effect and application that it was intended to. Instead most women who have gender related claims have been granted residence permits on humanitarian grounds and in some cases have falling into the torture provision. In case women have been granted residence permits on humanitarian grounds, they have not really got the protection they were entitled to.

In regard of the Iraqi caseload 6 persons were granted leave to remain based on the gender clause in 2004, of which 4 were women. The concerns of the protection are most probably women fearing gender related persecution, that they will not get refugee status but subsidiary protection, since Sweden does not regard persecution because of gender as a reason for refugee status. Neither is gender included in the concept of social group but as demonstrated before it is in progress.¹⁹⁴ This concern of protection is therefore most relevant in regard of the Iraqi refugees since even the AAB has stated that women in particular are still risking to be exposed to persecution in Iraq today.¹⁹⁵

3.3.2.4 Humanitarian clause

¹⁹³ "Persecution because of Gender-grounds for residence permit-An analysis of its legal regulation and its application" (Förföljelse på grund av kön- grunder för uppehållstillstånd) UD2000/742MAP.

¹⁹⁴ Government Report (SOU) 2004:31.

¹⁹⁵ Aliens Appeals Board decision of 21 October 2004.

Residence permits on humanitarian ground is the predominant reason of all for granting Iraqi refugees residence permits during 2004. The humanitarian ground is not a protection ground but a form of compassionate ground that makes it possible to grant residence permits since it would be unthinkable to send the person back to its country of origin. Some space do still exist however to apply the humanitarian ground for political-humanitarian reason but to a limited extent.¹⁹⁶ The question is why many Iraqis have been granted residence permits on this particular ground. Maybe the ones who have been granted residence permits on humanitarian grounds should have been able to fall into the category of armed conflict since before the armed conflict category existed, people fleeing from war and civil war were granted residence permits on political-humanitarian grounds. Perhaps, if only speculations, but the number of persons granted residence permits because of humanitarian grounds are of concern since these persons are not entitled to any protection and may have similar experiences as those afforded international protection. On the other hand it is well known that the threshold for humanitarian grounds is very high as well.

Another group that probably also has fallen into this category is the women. Because in case the gender specific fear or persecution is not fully proved, humanitarian reasons easily apply. Most women get residence permit on humanitarian grounds and on rare occasions or sometimes on basis of the torture provision but not so often or rarely based on the gender clause only.¹⁹⁷

Concluding Comments

When the MB started to take decisions on the Iraqi caseload the war was declared over. The US forces occupied the territory and an international armed conflict was not the case but violent attacks occurred and occur still today. Maybe it had an impact on the MB's unwillingness to apply the war category. However, when the refugees fled there was a conflict and it was probably the reason why they fled in the first place. In conclusion, according to the subsidiary protection clauses in Sweden Iraqis are still falling into these categories despite the fall of Saddam Hussein. The intervention has hence not reduced the producing of refugees especially since indiscriminate violence still is prevailing and it is unthinkable to return Iraqis under these circumstances.

3.4 The use of cessation

The Convention recognises that refugee status ends under certain clearly defined conditions. It is under article 1C in the Convention that states that the refugee status may cease either through the actions of the refugee such

¹⁹⁶ KARNOV/Karnov Band 1 - 3/24 Medborgarskaps- och utlänningslagstiftning/24.3 Utlänningslagstiftningen/Utlänningslag (1989:529)/2 kap. Närmare om visering, uppehållstillstånd och arbetstillstånd.

¹⁹⁷ Interviews with Elisabeth Engstrand, Olle Hancock and Eva Ståhl 19 April 2005.

as by re-establishment in his or her country of origin (1C(1-4)) or through fundamental changes in the objective circumstances in the country of origin upon which refugee status was based (1C(5-6)). The sub-paragraphs 5 and 6 are commonly referred to the “ceased circumstances” or “general cessation” clauses.¹⁹⁸ These “ceased” circumstances shall be interpreted restrictively.¹⁹⁹ The conditions within the country of origin must therefore have changed in such a profound and enduring manner that the return of refugees will not renew instability and reproduce flight and a need for refugee status. The concept of a fundamental change in the country of origin assumes to be a change that removes the basis of fear of persecution. Typical situations of fundamental changes in circumstances are when an end to hostilities has been reached or a complete political transformation of a country of origin.²⁰⁰ Minor or temporary changes of the circumstances that base the fear of the individual refugee and that do not result in greater changes are not enough for the application of the cessation clause. UNHCR’s Executive Committee has given some guidance to the assessment in their conclusion no. 69:

“In taking any decision on application of the cessation clauses based on “ceased circumstance”, States must carefully assess the fundamental character of the changes in the country of nationality or origin, including the general human rights situation, as well as the particular cause of fear of persecution, in order to make sure in an objective and verifiable way that the situation which justified the granting of refugee status has ceased to exist. ...An essential element in such assessment by States is the fundamental, stable and durable character of the changes, making use of appropriate information available in this respect, *inter alia*, from relevant specialized bodies, including particularly UNHCR”.²⁰¹

Fundamental-

The relevant inquiry is therefore if the fundamental change of substantial political and social significance has produced a stable power structure different from that under which the original well-founded fear of being persecuted was produced.²⁰² Large-scale voluntary repatriations may be an indicator of changes in circumstances occurring in the country of origin.²⁰³ However, refugees may also choose to return to their country of origin well before durable and fundamental changes have occurred.²⁰⁴ A return of former refugees may in addition be likely to generate renewed tension in the

¹⁹⁸ See Supplement A.

¹⁹⁹ Handbook para. 116.

²⁰⁰ Guidelines on international protection: Cessation of refugee status under Article 1C (5) and (6) of the 1951 Convention relating to the Status of Refugees, HCR/GIR/03/03, 10 February 2003, para. 6, Executive Committee Conclusion No. 79 (1996), para. 11.

²⁰¹ Executive Committee Conclusion No. 69 (XLIII) (1992).

²⁰² Explanatory Memorandum to the Qualification Directive, Article 13(1)(e).

²⁰³ Guidelines on international protection: Cessation of refugee status, para. 12.

²⁰⁴ Fitzpatrick J. and Bonoan R., “Cessation of Refugee Protection”, *Refugee Protection in International Law UNHCR’s Global Consultations on International Protection*, edited by Feller Erica, Türk Volker and Nicholson Francis, Cambridge University Press, Cambridge, 2003, p. 496.

country of origin and then that itself would be a signal of absence of effective, fundamental change. Because the change must also include effective and available protection by the country of origin, of which the refugee can re-avail him-self or herself.²⁰⁵

Enduring-

Positive developments in a country of origin must also be durable and stable. A situation which has changed, but which also continues to change or shows signs of volatility is not by definition stable, and cannot be described as durable.²⁰⁶ Before any decision on cessation is made time is required to allow these developments to consolidate. Especially when the developments are taken place in the context of violence, absence of human rights guarantees or ineffective governance in the country of origin, a longer waiting period will be necessary to confirm the durability of change. UNHCR has promoted a minimum waiting period of 12-18 months to elapse after the occurrence of profound changes before a decision on cessation is made.²⁰⁷

General human rights situation-

A regime change, an overthrow of a regime, is also a given example when a longer time is needed to evaluate the durability of the changes. In this respect it is especially necessary to evaluate and assess the general human rights situation.²⁰⁸ Factors, which are important in the assessment, are the level of democratic development in the country including the holding of free and fair elections, adherence to international human rights instrument, and access for independent national or international organisations freely to verify respect for human rights. Other indicators that prove significant improvements are the respect for the right to life and liberty and the prohibition of torture, independence of the judiciary, fair trials and access to courts, which presumes innocence, the upholding of basic rights and freedoms such as the right to freedom of expression, association, movement and religion and the rule of law generally.²⁰⁹

Exceptions-

Despite the fact that circumstances have generally changed in the country of origin there may always be the specific circumstances of individual cases whose personal risk of persecution has not ceased that may warrant continued international protection. Articles 1C(5) and (6) contain an exception to the application of cessation, allowing a refugee to invoke “compelling reasons arising out of previous persecution” for refusing to re-avail himself of the protection of the country of origin. Compelling reasons cover for example ex-camp or prison detainees, survivors or witnesses of

²⁰⁵ Guidelines on international protection: Cessation of refugee status, para. 15.

²⁰⁶ Standing Committee: Note on the Cessation Clauses, (EC/47/SC/CRP.30), para. 21, which refers to *Discussion Note on the Application of the ‘ceased circumstances’ cessation clause in the 1951 Convention* (EC/SCP/1992/CRP.1).

²⁰⁷ Fitzpatrick and Bonoan, p. 496-497.

²⁰⁸ Guidelines on international protection: Cessation of refugee status, para. 14.

²⁰⁹ Standing Committee: Note on the Cessation Clauses, (EC/47/SC/CRP.30), para. 23.

violence against family members, including sexual violence as well as severely traumatised persons. Such persons are presumed to have suffered grave persecution and cannot be expected to return.²¹⁰ Another group recognised by the Executive Committee to be afforded relief from cessation are “persons who cannot be expected to leave the country of asylum, due to a long stay in that country resulting in strong family, social and economic links there’.²¹¹ In some cases deportation of persons with close family ties in the state of refuge may violate human rights treaties, such as Article 8 of the ECHR. Also certain refugees eligible to cessation may be subject to involuntarily repatriation under human rights treaties and then states must provide them with some other form of leave to remain.²¹² Cessation does therefore not need to trigger automatic return instead the country of refuge may have to provide another lawful status to stay in the state of refuge.

3.4.1 Is Iraq subject to a fundamental change?

To be able to evaluate whether the situation in Iraq is under a fundamental change I will step by step follow the above mentioned parts of such an assessment; the fundamental character, the durability and stable-ness and the general human rights situation.

The fundamental character and the durability and stable-ness:

As mentioned before a fundamental change may be characterized by the complete political transformation of a country of origin. The fall of Saddam Hussein, who ruled Iraq since 1979, and his suppressive regime should be able to be considered as a complete political transformation. Saddam Hussein is in addition going to be prosecuted for his many atrocities during his presidency by a National Special Tribunal established by the IGC with Iraqi judges and the application of Iraqi laws and Public International law. The task of the Tribunal is to try senior members of the former regime for war crimes, crimes against humanity, genocide and designated offences under Iraqi law.²¹³ These proceedings will be of great importance for Iraq to deal with past abuses of human rights and to be able to move on, both for the Iraqi state but especially for the victims of the Saddam regime, that past atrocities and human rights violations are being punished. The most important is that the Iraqi people will find the Tribunal legitimate as a remedy for convicting their past leader. The victims of Saddam Hussein’s rule might see the prosecution as a form of satisfaction and a special Task fund on Compensation for the Victims of the Previous Regime has been

²¹⁰ Fitzpatrick and Bonoan, p. 519.

²¹¹ Executive Committee, Conclusion No. 69 (XLIII) (1992), para e.

²¹² Fitzpatrick and Bonoan, p. 519, Provisions that may prevent deportation are e.g. Article 3 CAT, Article 3 and 8 of ECHR, Article 7 and 17 of ICCPR etc.

²¹³ Economic and Social Council, Human Rights Commission, – “The present situation of human rights in Iraq”, ”, E/CN.4/2005/4 9, 9 June 2004. However some are critic to the legitimacy of the Tribunal’s statute and to Iraqi judges’ competence to deal with such a complex task.

established.²¹⁴ Many of Saddam Hussein's victims of human rights abuses are today refugees in other countries. To deal with past abuses will be of great significance for the fundamental change to last. In replacement of Saddam Hussein a democratic government has been appointed, where the before suppressed Shiite majority is going to rule after being elected by the Iraqi people. The almost complete government has only recently been appointed and has not therefore been able to start working properly. The process to appoint a new government has taken over three months and the delay was caused by disagreements between the political parties in the choice of ministers. Seven cabinet posts are earmarked for Sunnis as part of an effort to create a national unity government. But all Sunni posts are not filled yet because candidates proposed by the Sunnis have not been accepted by the Shiites and vice versa. The whole disagreement arises from the gap among Iraqis how to deal with their Baathist past. The Shiites will of purging positions in the new government or in the new armed forces from former high ranking Baathist members are falling in the hands of the insurgents that for stop fighting want some influence in the political development and administration.²¹⁵ The tyranny of Saddam Hussein was at first replaced with chaos (anarchy) and lawlessness prevailed since the US was not prepared for the Iraqi resistance after the defeat of Saddam or for the occupational responsibility to re-build the country after the "liberation". The resistance and insurgents have not given up yet today but continues to restrain the democratic progress. However, the realization of the elections indicates though a real beginning of re-construction and a political change of power and a possible future stability. But still a stable power structure is hence not yet in place.

Many Iraqis have returned and many still want to return. The MB's view is that returning Iraqis do not face any risks of being targeted upon return.²¹⁶ While UNHCR requests states not to send people back not even on a voluntarily basis since the organisation is not able to monitor the returns or provide the returnees with reintegration activities as UNHCR is not present in Iraq since the attack on the UN Headquarters in August 2003. Therefore UNHCR's ability to engage in any type of protection in regard of returnees is limited. It should furthermore be noted that the Ministry for Displacement and Migration is still in the process of building up its own operational capacity, and is currently in no position to offer any type of accommodation or other assistance to returning Iraqis.²¹⁷ The repatriation of Iraqis may result in further displacement and continued risk since the conflict is still ongoing. The spontaneous repatriation of Iraqis should therefore not presume that the fundamental change is stable and durable.

²¹⁴ Economic and Social Council, Human Rights Commission, "The present situation of human rights in Iraq", E/CN.4/2005/4 9, 9 June 2004.

²¹⁵ Weisman Steven R. and Burns John F., "Some Sunnis Hint at Peace Terms in Iraq, U.S. Says", 15 May, 2005, available at <http://query.nytimes.com/gst/abstract.html?res=F60F1FF935540C768DDDAC0894D404482&incamp=archive:search> last accessed 30/05/2005.

²¹⁶ Migration Board decision of 23 March 2004.

²¹⁷ UNHCR Return Advisory regarding Iraqi asylum-seekers and refugees, 2004.

The political transformation was the result of the US intervention in Iraq and the overthrow of Saddam Hussein. The changes therefore took place in the context of violence. As discussed in the second chapter an intervention with the intention to overthrow a regime is discussable if it can constitute a humanitarian intervention and as also concluded in the second chapter, the US intervention in Iraq was not primarily humanitarian. However, a military intervention whether legitimate or illegitimate has the power to create such a fundamental change of the causes of the well-founded fear that can result in the cessation of refugee status. Especially when a dictator regime has been the cause of flight. A regime change will have effects on the international protection afforded in a host country.

A dictator regime often characterized as a strong state may nevertheless be a sign of state failure where human rights catastrophes have taken place but where the monopoly of legitimate means of violence still belongs to the state. Therefore may also strong states produce refugees, which Iraq is a good example of. Iraq has spread its problem in the region, that is, produced refugees during along period of time. The fall of Saddam Hussein has demonstrated this since Iraqis have repatriated from neighbouring countries in large amounts, as from the Rafha Camp in Saudi-Arabia, from the Islamic Republic of Iran and Lebanon. From Iran over a 100 000 Iraqis have returned. UNHCR estimates that Iran has hosted over 202 000 Iraqi refugees, many who have lived in camps in western Iran for many years.²¹⁸ But the returnees come back to no homes, no water, and no work and might even go into further displacement, which is not to characterize a durable change since it may revitalize tension in the area. Many have returned but since the end of the war two years ago several hundred thousand Iraqis, according to unofficial estimates, have also left the country for Syria and Jordan.²¹⁹

Even though two years have elapsed since the intervention and the fall of Saddam Hussein, the developments may not be considered to have consolidated since the changes still are taken place and then in the context of violence. The unstable security situation indicates ineffective governance as stated before, the Iraqi government and the Coalition forces do not have effective control over the territory. The violence and bomb killings have in addition increased since the elections in January 2005, especially during the appointment of the new government as a sign of dislike of the democratic progress, which indicates disorder and non stability.

The General Human Rights situation

²¹⁸ <http://www.unhcr.ch/cgi-bin/texis/vtx/rsd/+EwwBmeszSbexGwwwwtFqnfGw3cFqo-uPPyER0MFmqDFqnlRTPdFqnN0bI3zmmwwwGFqmf2JBFq5uNlg2aNni5aIBdGon5/rsddocview.html>, accessed 25/04/2005.

²¹⁹ Teloeken Stefan, "Revocation procedures alarm Iraqi refugees in Germany", 4 May 2005, UNHCR News Stories available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/+mwwBme1Gd0eqGwwwwhFqnN0bItFqnDni5AFqnN0bIDzmnwww/opendoc.html>, last accessed 09/05/05.

An Interim constitution was promulgated by the CPA on March 8 2004, and will remain in effect until “the formation of an elected Iraqi government pursuant to a permanent constitution,” envisaged for the end of 2005 following general elections. With the transfer of sovereignty, the Law of Administration for the State of Iraq for the Transitional Period (TAL) came into effect. The TAL contains a bill of rights for Iraqi citizens, including the right to freedom of expression and association, religious beliefs, and freedom from discrimination on ethnic, religious or other grounds. The law also stipulates that all citizens are equal before the law, and enjoy freedom from arbitrary arrest and unlawful detention, unfair trials and torture. The CPA also reviewed the Iraqi legislation whether it was in line with international human rights standards and abolished the death penalty. However, the HRC emphasises, in a report on the human rights situation in Iraq, that a long term review of the Iraqi legal framework is needed since the laws have not been thoroughly reviewed since in the 1960’s and are not in line with international human rights standards.²²⁰ A new court has been established but the old Penal Code and the Code on Criminal Procedure from 1969 respective 1971 are still applied.²²¹ According to a Danish and British Fact Finding Mission the lack of central authority, has resulted in a confusion as to which laws should be applied (those during Saddam’s regime or those amended after the overthrow). The mentality, which stems from Saddam’s regime, is that the police and/or security tell the court what sentence to give.²²² Independency of the judiciary is hence lacking and the judiciary is therefore not functioning properly. Many crimes are consequently not reported to the police and disputes are often settled through tribal justice systems instead or personal vendettas.²²³

In regard of adherence to international human rights standards, Iraq has not signed the Convention for instance and has made several reservations to CEDAW. Iraq is part to ICCPR and ICESCR though with reservations, not surprisingly, but Iraq is not a part to CAT. As part to these international human rights instruments, Iraq has an obligation to ensure the rights enshrined in those instruments to its population and everyone under its jurisdiction. To the contrary the previous regime has for years institutionalised violations of human rights.²²⁴

As several reports by AI, HRW, UNHCR, ECRE and Governmental Reports as for example the Fact Finding Mission by Britain and Denmark show, the human rights situation in Iraq today is poor, which the absence of rule of law and basic physical infrastructure (as roads, schools, health facilities, lack of housing and employment) indicate. The right to life is constantly

²²⁰ Economic and Social Council, Human Rights Commission, “The present situation of human rights in Iraq”, E/CN.4/2005/4 9, 9 June 2004.

²²¹ Human Rights Watch World Report 2005.

²²² Joint British - Danish Fact Finding Mission to Baghdad and Amman, on conditions in Iraq, 1-8 September 2004, para. 3.34.

²²³ UNHCR Advisory regarding Iraqi asylum-seekers and refugees, 2004.

²²⁴ Economic and Social Council, Human Rights Commission, “The present situation of human rights in Iraq”, E/CN.4/2005/4 9, 9 June 2004.

under attack because of the uncontrolled and indiscriminate violence and the reported excessive use of lethal force by the US troops.²²⁵ Torture and degrading and inhuman treatment are reportedly common features both by the Coalition forces as well as the Iraqi Security forces.²²⁶ Accountability for these crimes is limited because of the lack of such structures. The US seems not to have learned from previous interventions the importance of rights monitoring and protection but has treated human rights and humanitarian law as matters of secondary value, which also makes it difficult to regard the Iraqi intervention as humanitarian.²²⁷ The Law enforcement has been a challenge for the Coalition forces, to gain authority, but also to provide Iraqi police troops with training in the post-war for their future task to cope with the Law enforcement and prevention of human rights abuses without the Coalition forces.²²⁸ The recruitment and training have gradually been taken more seriously and are now one of the main tasks. ECRE reports about the authorities' complete inability to guarantee the protection of human rights in Baghdad as car bombings, kidnappings, rapes and killings are sign of.²²⁹ Despite the high level of international presence in the capital, the ineffectiveness of the governance continues to lack. However, UN agencies since the attack on the UN Headquarters in Baghdad have had limited presence in Iraq. The security situation has also made many non-Iraqi NGO's to pull out their staff. So international organisations may not be said to have free and unlimited access to observe the human rights situation in the country, instead humanitarian agencies are at risk of being attacked.²³⁰

Elections were carried out the 30 January 2005 and were reasonable free and fair considering the circumstances. Despite the armed groups', fractions of Al-Qaida for example, attempt to interrupt the election by attacking voters and election workers, the participation rate was 58% of the 14 million Iraqis that had the right to vote. Many countries around the world took an active interest in the Iraqi election since many Iraqis live in exile. 280 000 Iraqis in exile were registered to vote. In Sweden 30 000 Iraqis voted. The Sunni Arabs participation rate was very low for reasons of boycott and fear of being attacked in case they voted. Also many internally displaced persons had trouble to register and participate in the elections.²³¹ The way towards a democratic rule in Iraq has only begun and the institutions legitimacy will be of great importance for the achievement of democracy. To be able to achieve peace and legitimacy of the new state institutions the Sunni

²²⁵ Stork Joe and Abrahams Fred, "Sideline: Human Rights in Post War Iraq", Human Rights Watch, 2003, p 3, AI Annual Report 2004.

²²⁶ HRW World Report 2005, AI Annual Report 2004.

²²⁷ Stork and Abrahams, pp. 2-3.

²²⁸ Stork and Abrahams, p.1.

²²⁹ ECRE's Guidelines for the treatment of Iraqi asylum-seekers and refugees in Europe, 2004, p. 3.

²³⁰ UNHCR Country of Origin information-Iraq, August 2004, p. 3.

²³¹ Mooney Erin and Jarrah Balkees, "Iraq's displaced voters", 25 January 2005, available at

<http://query.nytimes.com/gst/abstract.html?res=F1081FFA345C0C768EDDA80894D404482&incamp=archive:search>, accessed 30/03/2005.

participations to a proportional extent is crucial. The purge of Sunnis too much may have the opposite effect and result in continuing insurgency. A political settlement is therefore depending on the settlement of the Sunni participation.²³²

Comments:

Free and fair elections are one factor that is not predominant when all other aspects of the general human rights situation are lacking. However, it is a good sign of a will to enforce future stability but more time is needed. The conflict has also created internal displacement, which will be more discussed later on and also displacement of foreign refugees, Iranians and Palestinians. Many Iranian Kurds are stuck in camps at the borders between Iraq and Jordan, Jordan not letting them in in the country. As demonstrated there are indicators that Iraq is subject to a fundamental change, especially the removal of Saddam Hussein, which has resulted in a complete political transformation. Elections have been carried out for the first time and in a reasonably fair and free manner having regard to the situation at that time. The elections in addition resulted in that the Shiite majority finally got some influence in the politics and is the ruling party nowadays.

But in conclusion the change is not yet durable and stable as the insecure and violent situation indicates. Those who fled Saddam's regime might be subject to cessation but many of them may also still have protection needs since the old regime to some extent exercise control and power. The persons fleeing the old Baathist regime may therefore still today, despite the fall of Saddam Hussein, have reasons to stay away from their country of origin. Especially since Baathist members still are present in Iraq and as shown in the opposition to the new order and the able-ness to pose resistance to the US, are exercising powers to a certain extent. The cessation clause may also not be applicable on all Iraqi refugees paying regard to their long stay in their host country, since the rule of Saddam has produced refugees during a long period of time. Returnees may also as demonstrated not be ensured any effective protection and might also be exposed to dangers. It is therefore premature to revoke Iraqi refugees their status and that is also the opinion of UNHCR. Notwithstanding that revocation is premature, Germany has recently declared that the German authorities will apply cessation on Iraqi refugees.²³³ This support that Iraq is subject to a fundamental change but since no deportations from Germany are conducted the application of revocation has not yet promoted repatriation. In addition as demonstrated in this chapter and in chapter 3.2.2.3.3 despite the fall of Saddam Hussein, who was the main reason for the producing of refugees from Iraq, which is now shown in the repatriation of Iraqis from neighbouring countries, the intervention itself has triggered new displacement and in addition new actors of persecution have entered the arena. Iraqis may hence still be in

²³² Weisman and Burns, "Some Sunnis Hint at Peace Terms in Iraq", U.S. Says, 15 May, 2005.

²³³ Teloeken Stefan, "Revocation procedures alarm Iraqi refugees in Germany", UNHCR News Stories, 4 May 2005.

need of protection even if the cessation clause may be applicable to them. They may be unfortunate and still be at risk of persecution upon return for other reasons today than their original one. Consequently, the application of the cessation clause may hence not have such significance on the repatriation of Iraqi refugees.

3.4.2 Effects of the Iraqi war in Sweden

In Sweden 60000-70000 Iraqis live legally. In the Aliens Act it is stipulated about cessation of refugee status but if you have a permanent residence permit based on refugee status it may not be withdrawn on basis of ceased circumstances in Sweden.²³⁴ However, the MB has during 2004 taking several policy decisions, which states that the general situation in Iraq no longer constitutes a reason for asylum. Instead case-by-case judgments are performed.²³⁵ The MB believes that the regime no longer is a persecutor and that there are parts in Iraq where persons may return to, that is, internal flight alternatives exist, as the former Saddam ruled parts, the central and south parts.²³⁶ The MB started from 24 February 2004 to take decisions in regard of Iraqi asylum-seekers after a period of suspension. 5400 applications were then waiting to be processed.²³⁷ Sweden was one of the first European countries to recommencing the review of status of Iraqi asylum-seekers and to consider returning them.²³⁸ The period of suspension was needed because the situation in Iraq was not foreseeable and the information about the conditions lacked. When the MB recommenced the decision-making, many of the Iraqi asylum-seekers were rejected since the MB's general opinion after the war was that there was no longer a protection need identified for any part of Iraq.²³⁹ But since several organisations including UNHCR, ECRE and AI were and still are against forced returns because of the insecure situation and also according to the principle of *non-refoulement*, no one should at the moment be forcibly returned to Iraq. Therefore the MB is taking decisions they cannot execute. An employee of the MB emphasised that the policy of the MB is to not take any decisions they are not able to execute because the consequence would then be that the asylum-seekers are living illegally in Sweden without any rights since the decision about rejection has got legal force but is not executable.²⁴⁰ The practice the MB now is performing is therefore contradictory. The MB is not fully following its own decisions nor the recommendations from UNHCR.²⁴¹ The rejected Iraqi asylum-seekers are

²³⁴ Interview with Nevine Mawati, Migrationsverket Skåne, 16 November 2004, chapter 3, section 5 para. 5 and section 6, Aliens Act. The declaration of refugee status may be withdrawn but not the residence permit.

²³⁵ Lönneus and Magnusson, *Sydsvenska Dagbladet*, 8 May 2005.

²³⁶ Interview with Nevine Mawati, Migrationsverket Skåne, 16 November 2004.

²³⁷ ECRE's Questionnaire, April 2004.

²³⁸ ECRE Guidelines on Treatment of Iraqi Asylum-seekers and refugees, 2004, p.1

²³⁹ ECRE's Questionnaire, April 2004.

²⁴⁰ Interview with Nevine Mawati, Migration Board Skåne, 16 November 2004.

²⁴¹ UNHCR has pointed out that Sweden is violating UNHCR's recommendations in regard of Iraqis, Lönneus and Magnusson, *Sydsvenska Dagbladet* 8 May 2005.

hence living illegally in Sweden today. The MB's contradictory approach has severe consequences for the affected persons. They are no longer asylum-seekers so they are not entitled to Swedish courses or any similar activities, no health care or school or work possibilities. Instead their work permits are withdrawn.²⁴² In case the rejected Iraqi asylum-seekers do not take part in their return to their country of origin, the MB may reduce their daily allowance. As long as they are registered at the reception centres they have residence and food. At the moment this treatment affects 1991 rejected Iraq asylum-seekers.²⁴³ The MB is not in their opinion bringing pressure upon the Iraqis to voluntarily repatriate but a withdrawn work permit would certainly be interpreted as such a pressure. The pressure would consist of the non-ability to earn one's living. Instead they are offered a place at the reception centres in the wait for deportation, which they do not know when it will be. A work would at least give the persons a feeling of independence and to be resorted to reception centres is a considerable restriction of movement compared to living in an apartment of your own.²⁴⁴ No forced returns to Iraq are hence being carried out only on a voluntarily basis and approximately 100-300 Iraqis have returned voluntarily. But how voluntarily is a return when the country of asylum is bringing pressure to the decision to return, even though the pressure is not performed by the police, who otherwise are the actor who forcibly deports rejected asylum-seekers.

The voluntarily returns are assisted by IOM²⁴⁵. This is apparently due more to logistical reasons than concern for human rights; the government cannot forcibly return people to Iraq since they would have to transit through Syria or Jordan. When Iraqi asylum-seekers receive a negative decision they are requested to return to Iraq via Syria or Jordan, with IOM assistance. Those who do not wish to return may remain in Sweden in asylum centres and continue to receive reduced benefits.²⁴⁶ Before processing was suspended in 2003, the MB started rejecting Kurds from Northern Iraq under the same arrangement, requesting them to return via Turkey with IOM assistance. Since the execution would be performed through another country, the returns had to be voluntarily and the MB could not bring pressure to bear by virtue of the applicant's obligation to cooperate to his/her execution.²⁴⁷ Although a couple of thousand Kurds were rejected, very few returned before the war. When the war started and the MB first suspended processing, they also decided to give full benefits to those Iraqis already

²⁴² A temporary work permit during the asylum-procedure is possible to grant in case the procedure is expected to take more than 4 months, Östman Klas, "Varför måste Yadgar sitta på bänken?", Svenska Dagbladet, 14 September 2004, also available at http://www.svd.se/dynamiskt/ledare/did_8127585.asp.

²⁴³ Interview with Inger Lagerström, Information Desk, Migration Board Norrköping, 4 May 2005.

²⁴⁴ Östman, Svenska Dagbladet, 14 September, 2004.

²⁴⁵ International Organisation for Migration.

²⁴⁶ ECRE's Questionnaire, April 2004.

²⁴⁷ Interview Nevine Mawati, Migration Board Skåne, 16 November 2004.

rejected but remaining in Sweden. When the processing recommenced, rejected asylum seekers once again received reduced benefits.²⁴⁸

Hence, the Swedish authorities can not forcibly return Iraqis because they have to rely on other countries in the repatriation so instead of forcing, the Swedish authorities are pressurizing the Iraqis to voluntarily return by limiting their human rights and possibilities to live in dignity in Sweden. In comparison in 1997 Germany forced Bosnian Roma Refugees to return by psychological pressure. The German authorities informed the concerned refugees that in case they did not return “of their own free will” they would be subject to deportation. Although the deportation measures implemented by the German authorities were explicitly only to assist them to leave "of their own free will", the manner of the implementation by the German authorities was strongly questionable.²⁴⁹ Today Germany is doing the same by revoking the Iraqis’ refugee status and pressurizing them in the same way as Sweden does with rejected Iraqi asylum-seekers, by restricting their freedom of movement, limiting social and basic rights and withdrawing work permits. A revocation of refugee status would also mean a risk of losing their jobs since they are no longer entitled to remain in the country of refuge.

Comments:

The result of the MB’s decision to suspend the decision making in regard of the Iraqi asylum-seekers has been a delay in the processing of Iraqis’ asylum applications. Many Iraqis therefore still wait for a decision from the MB after two years. The treatment of Iraqi asylum-seekers is hence harsh; especially for those Iraqis who have got a negative decision but are remaining in Sweden since no forcible deportations are carried out.

Instead they are living in a vacuum with no rights and nowhere to go except returning to Iraq, which most of them fear, that is not dignified. Human rights apply to refugees as well as demonstrated in 3.1.1.

3.4.3 Effects of the war in Iraq concerning refugees

The 2003 Iraqi intervention caused mostly more internally displaced persons. In the beginning of the war a repetition of the 1991 Gulf was feared when 2 million Iraqis fled Iraq. Even though the outbreak of war created displacement especially in the Middle East and also asylum-seekers in Europe, the greatest displacement was nevertheless that within Iraq itself.²⁵⁰

An estimated 1 million people remain displaced in Iraq and because of the insecurity new displacement continues to occur particularly in central and

²⁴⁸ ECRE’s Questionnaire, April 2004.

²⁴⁹ The Patrín Web Journal, “European Roma Rights Center Concerning the Forced Return of Bosnian Roma from Germany”, 5 May 1997, available at

<http://www.geocities.com/Paris/5121/errc-return.htm>. Some deportations were carried out through the wakening up of people in the middle of the night with no time to pack.

²⁵⁰ U.S. Committee for Refugees World, Refugee Survey 2004-Iraq, May 2004. Most of the 40000 Iraqis who applied for asylum during the year, applied in Europe.

southern Iraq.²⁵¹ An example is the approximately 250 000 people who were displaced from Falluja because of the violent attacks taken place there in late 2004. Today some of them have began to go back and to see what is left of their house. Only a couple of thousand decided to return to their home town, others decided to move away from Falluja permanently. Up to 100 000 Palestinians in Baghdad found themselves displaced anew when their Iraqi landlords evicted them outright, opposing the special privileges that Saddam Hussein had extended to Palestinians. It is an example of those long standing hostilities that had been kept in check by the regime but that were released after the fall of the government and a consequence of the power vacuum that followed the fall. Another such long-standing hostility is as mentioned before, the Kurds that were forcibly displaced during the Arabization campaigns, and who are now returning to their homes claiming their property back. Such claims can though take years in arbitration.²⁵² The property claims have instead resulted in the plight of Arabs, fleeing the homes they were installed in by the previous regime.²⁵³

²⁵¹ UNHCR, IOM and NRC Cluster meeting, Training on the UN Guiding Principles on Internal Displacement 7-9 September 2004 Amman, para.1.

²⁵² U.S. Committee for Refugees World, Refugee Survey 2004-Iraq, May 2004.

²⁵³ Economic and Social Council, Human Rights Commission, "The present situation of human rights in Iraq", E/CN.4/2005/4 9, 9 June 2004.

4 Concluding remarks

4.1 Was the Iraqi intervention humanitarian?

As part of my question whether Iraq could serve as an example of a humanitarian intervention solving the problem with refugees, I have analysed in my thesis whether the Iraqi intervention in the first place could be characterised as a humanitarian intervention and I will here expound on my views in this regard. Taking the criteria stipulated for humanitarian interventions by the ICISS's report on "Responsibility to Protect" into account, I have found that it is questionable if not hard to see the Iraqi intervention as humanitarian, for the following reasons.

Firstly no mass killings or human rights abuses to such an extent that an intervention was justifiable were taking place at the time of the intervention and according to HRW that in itself rule out the option to characterise the intervention as humanitarian. Secondly a humanitarian intervention shall be guided by humanitarian principles and humanitarian law shall be applied and pervade the whole intervention. This I find especially contradicting that the intervention could be determined as humanitarian since it is particularly the humanitarian law, the Geneva Conventions, which the Coalition has set gravely and deliberately aside. Instead of protecting the civilian population from violence the Coalition has subjected the civilian population to excessive violence and to attacks, which is prohibited. In addition POW have been treated degrading, inhuman and also been subject to torture by the Coalition. Accordingly, I cannot see that the Coalition has prioritised human rights protection when they themselves have violated human rights of the Iraqis by exposing them to torture, arbitrary arrests, pro-longed detentions etc. The non human rights priority also shows in the non preparedness for reconstruction and plans for post intervention society. Especially when regime change is an aim such plans are crucial. A regime change triggers nation-building which in itself is a long time commitment and has to be planned for before intervening to justify an intervention on humanitarian grounds. The rationale is that the interveners have to provide a better post intervention society and in the case of Iraq it is questionable. Before the intervention no mass killings were taking place, today killings and suffering of civilians are dominant factors. Despite the overthrow of a dictator who was unwilling and failed to protect his population, the intervention was still not justified since no large scale loss of life was taking place and an intervention may not be carried out for past abuses. The positive outcome of the intervention is the new government comprising all the major ethnic groups, but the consequence of the intervention has been the release of those long time hostilities between groups that Saddam Hussein kept in check, which has triggered insurgency and a risk for a civil war. The risk of civil war is only coming closer after sectarian killings are increasing especially between Sunnis and Shiites and peaceful solutions

seems out of the question instead they are resorting to violence. I therefore find it hard to see that the intervention has done more good than harm despite the removal of Saddam Hussein. The removal will in the long run probably lead to a better human rights situation in Iraq but not at the moment and not in the near future. I believe it will take some time before the Iraqi state is able to protect its population.

The prime aim of the intervention was not humanitarian; the humanitarian rationale was treated as of secondary value. Instead the disarmament was the prime aim, as the discussions in the SC prior the intervention demonstrate. I also believe that for the US it was a concern of national security in the combating of terrorism rather than a concern of the Iraqi people. The ICISS's report emphasises the need to separate the combating of terrorism and humanitarian interventions. The concept of humanitarian intervention has now instead been connected with a controversial intervention because of its justifications, its manner of execution (human rights violations) and its consequences (insurgency and civil war).

4.2 Did the Iraqi intervention reduce the producing of refugees?

From chapter 3 the conclusion can be drawn that the intervention has not reduced the producing of refugees instead the intervention has triggered new displacement both inside and outside Iraq, several hundred thousands refugees have fled to countries in the region and many have also sought asylum in Europe included Sweden. The intervention removed a dictator that had been the main reason for Iraqis' displacement outside Iraq during a long period of time but the removal only lead to that one threat vanished and others entered the arena, included the US forces themselves. The intervention hence did not deter actors of persecution, instead new ones emerged. Consequently, the intervention cannot be said to have reduced the producing of refugees or being a prioritised factor of the US since the US itself, as concluded, is an actor of persecution. The MB has not yet though considered the US to be able to constitute an actor of persecution but in my view I believe it is possible to do so, both as a state-agent as a occupant with the responsibility to protect the civilian population before the hand over of power and as a non-state agent after the hand over of power that the Iraqi sovereign is unable to protect from and control.

Further, the subsidiary protection enshrined in the Swedish Aliens Act also supports the fact that the intervention has not reduced the producing of refugees since Iraqis have fallen into these categories. What concerns the war category I believe that Iraqis may fall into that category. The Swedish authorities should apply it in case the person do not qualify for refugee status, which as concluded in chapter 3 Iraqis may still do for reasons of persecution by demonstrated actors linked to conventions grounds. The war provision applies both to international and internal *armed conflicts*. It is still

unthinkable to deport Iraqis to their country of origin. The fact is that the Swedish authorities are not forcibly returning anyone only voluntary repatriations are conducted. The violence has in addition been *intensified* since the election and the appointment of the new government and a civil war is reportedly to be expected. Hence, the intervention cannot be said to have reduced the producing of refugees since the US forces themselves may be seen as an actor of persecution contributing to the producing of refugees. Another actor of persecution, who also has entered the arena, is for example Islamic groups. Consequently, Iraqis still risk being subject to persecution as for example women fearing honour related persecution, person fearing clan related violence, people who want to help reconstructing Iraq and persons for reasons of political affiliation and religious reasons. Further, Iraqis are still being granted residence permits in Sweden, that is, are qualifying for refugee status and falling into the subsidiary protection provisions despite the MB's change of policy on the general protection need of Iraqis and restrictive approach towards Iraqi asylum-seekers.

4.3 Did the Iraqi intervention promote the repatriation of refugees?

The Coalition has neither facilitated the repatriation of refugees by still resorting to use of force. The conflict is no longer an international armed conflict but a civil strife which is still intense and unpredictable when to end. In case refugees would return at this stage it would probably result in further displacement as housing, water etc. are reportedly lacking. A return has in addition to be carried out without the monitoring of UNHCR since the organisation is not present in Iraq after the bombing of UN Headquarters. UNHCR is instead advising asylum countries not to forcibly return Iraqis because of the insecure and instable situation. The fact that the Coalition cannot provide the safety of international organisations and in this case UNHCR, support the conclusion that the Coalition is unable to facilitate the repatriation of refugees. Iraqis have in fact returned on a voluntarily basis from the neighbouring countries to Iraq but not from Europe and Sweden to any larger extent. Sweden is taking negative decisions but is not executing them because of the continuing violence that the Coalition and the Iraqi authorities are unable to control. European countries including Sweden are hence not deporting Iraqis despite negative decisions or revocation of their refugee status. According to Swedish authorities it is due to practical reasons because they cannot deport directly to Iraq. This is a sign of that the intervention has not promoted the repatriation of refugees when the refugees are not able to go back directly to Iraq. Further, the intervention has lead to Iraq being subject to a fundamental change, which in my view is not yet durable and stable since it is taking place in the context of violence. A fundamental change may have effect on the repatriation since the cessation clause might then be applicable. In regard of Iraq it would be contrary to the Convention to apply the cessation clause at this stage since the fundamental change characterised by

the political transformation, is not yet consolidated, stable or durable. It will probably take a couple of years more for the change to consolidate and that especially if a civil war is to come. As demonstrated in the above section Iraqis may still risk being subject to persecution despite their original fear of persecution, Saddam Hussein, is no longer posing a threat. There might have emerged actors of persecution, which would mean that they still are in need of protection. In addition their original fear may also still be accurate since members of the former government, Baathists, still are present in Iraq today and may still pose a threat to the ones who fled the Baathist rule despite the fall of Saddam Hussein and therefore their protection need continues. Host and asylum countries should pay attention to this otherwise there is a risk of violating other protection grounds and then especially the torture provision in chapter 3, section 3 Aliens Act and the principle of *non-refoulement*. So despite one's refugee status may be subject to revocation, protection need may still exist and a return may therefore be impossible on other protection grounds. This has to be considered by asylum countries in Europe. Germany for example wants to revoke the refugee status of Iraqis. Hence, a status should not be revoked before reflecting whether the person may risk persecution from other actors present in Iraq today otherwise it would impede the goal of durable solutions. The case law of the MB shows that even if the MB does not consider there to be a general protection need for Iraqis today, persons have been granted leave to remain and are therefore not returned because of the risk of persecution.

In sum, I find the intervention in Iraq to be a political intervention because of the aim to overthrow a dictator despite his past atrocities of war crimes and human rights violations. As my discussion in the second chapter demonstrates opinions are divergent whether an intervention aiming at regime change can be a humanitarian intervention. In the discussions preceding the Iraqi intervention states' declared an intervention aiming at regime change to be contrary to International Law and not a justification for an intervention without the prior authorisation of the SC. The intervention was hence not justified as a humanitarian intervention. It therefore constitutes an illegal unilateral recourse to force since a customary rule of a unilateral right to humanitarian intervention has not yet evolved. The intervention form part of another act of state practice but it does not exist an *opinio juris* that such a right is lawful, which the discussions prior the intervention in Iraq clearly demonstrates as well as the post intervention statements from states and from Kofi Annan. The regime change has in addition not resulted in reduce of refugees since the removal of the dictator has been replaced by other actors of persecution. I therefore conclude that the intervention in Iraq cannot serve as an example of humanitarian interventions as solving the refugee problem. Otherwise humanitarian interventions may have that effect since such interventions may halter the causes, which put people to flight, ethnic cleansing and human rights abuses for instance. I believe that a humanitarian intervention cannot be solely justified for reasons of reducing the producing of refugees and promoting repatriation but is worth striving for when intervening. I have found that for a humanitarian intervention to be credible the criterions stipulated by the

ICISS report should be fulfilled and especially an authorisation from UN should be strived for so as to guarantee a broad support and a better chance to succeed in the post intervention, which is also a lesson learned from the Iraqi intervention.

Supplement A

Article 1 C (5) and (6) of the 1951 Convention relating to the Status of Refugees and Stateless persons:

(5) He can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of origin;

(6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

Article 33. Prohibition of expulsion or return ("refoulement"):

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Supplement B

Article 9 of the Qualification Directive:

1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must:

(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under

Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

2. Acts of persecution as qualified in paragraph 1 can *inter alia* take the form of:

(a) acts of physical or mental violence, including acts of sexual violence;

(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

(c) prosecution or punishment, which is disproportionate or discriminatory;

(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);

(f) acts of a gender-specific or child-specific nature.

3. In accordance with Article 2 (c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1.

THE RESPONSIBILITY TO PROTECT:

CORE PRINCIPLES

(1) Basic Principles

A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.

B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.

(2) Foundations

The foundations of the responsibility to protect, as a guiding principle for the international community of states, lie in:

A. obligations inherent in the concept of sovereignty;

- B. the responsibility of the Security Council, under Article 24 of the UN Charter, for the maintenance of international peace and security;
- C. specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law;
- D. the developing practice of states, regional organizations and the Security Council itself.

(3) Elements

The responsibility to protect embraces three specific responsibilities:

- A. The responsibility to prevent: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.
- B. The responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.
- C. The responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.

(4) Priorities

- A. Prevention is the single most important dimension of the responsibility to protect: prevention options should always be exhausted before intervention is contemplated, and more commitment and resources must be devoted to it.
- B. The exercise of the responsibility to both prevent and react should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied.

The Responsibility to Protect: Principles for Military Intervention

(1) The Just Cause Threshold

Military intervention for human protection purposes is an exceptional and extraordinary measure. To be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind:

- A. large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- B. large scale 'ethnic cleansing', actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

(2) The Precautionary Principles

- A. Right intention: The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned.

B. Last resort: Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded.

C. Proportional means: The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective.

D. Reasonable prospects: There must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction.

(3) Right Authority

A. There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.

B. Security Council authorization should in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention should formally request such authorization, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under Article 99 of the UN Charter.

C. The Security Council should deal promptly with any request for authority to intervene where there are allegations of large scale loss of human life or ethnic cleansing. It should in this context seek adequate verification of facts or conditions on the ground that might support a military intervention.

D. The Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support.

E. If the Security Council rejects a proposal or fails to deal with it in a reasonable time, alternative options are:

I. consideration of the matter by the General Assembly in Emergency Special

Session under the “Uniting for Peace” procedure; and

II. action within area of jurisdiction by regional or sub-regional organizations

under Chapter VIII of the Charter, subject to their seeking subsequent authorization from the Security Council.

F. The Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation – and that the stature and credibility of the United Nations may suffer thereby.

(4) Operational Principles

A. Clear objectives; clear and unambiguous mandate at all times; and resources to match.

B. Common military approach among involved partners; unity of command; clear and unequivocal communications and chain of command.

C. Acceptance of limitations, incrementalism and gradualism in the application of force, the objective being protection of a population, not defeat of a state.

D. Rules of engagement which fit the operational concept; are precise; reflect the principle of proportionality; and involve total adherence to international humanitarian law.

E. Acceptance that force protection cannot become the principal objective.

F. Maximum possible coordination with humanitarian organisation.

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