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**Tamás LATTMANN**[1]**:**

# Legal status and protection of people deprived of their freedom by U.S. forces in Iraq

*The tragedy of war is that it uses man's best to do man's worst.*
- Harry Emerson Fosdick

After the hostilities settled down in Iraq, on the 1st of May 2003, the president of the United States, George W. Bush, surrounded by sailors, declared on the flight deck of the aircraft carrier USS Abraham Lincoln that "major combat operations in Iraq have ended",[2] everybody knew that this is only a political statement, and that there is still a plenty of fighting to face for U.S. and coalition troops. On the anniversary of this speech, the democrats strongly criticised its optimistic tone, pointing out that since that time nearly six hundred U.S. soldiers fell, but the president tried to fend off the political attack by emphasising in his radio speech the results of the democratisation and securing of Iraq, mentioning – among other things – that "people are no longer disappearing into (…) torture chambers".[3]

The president has made this statement just one day after he expressed "his disgust", seeing the pictures taken in the Abu Ghraib prison near Baghdad, which was run by U.S. personnel.[4] The photos have shown the guards humiliating Iraqi prisoners, apparently striking a direct blow to the naive image of a just war carried out for the good of the Iraqi people. A few days later, defence secretary of state, Donald Rumsfeld had to offer his "deepest apology".[5] This was an obvious sign of the scandal – which had its premonitory signs a few months ago[6] – growing big enough to cause serious problems to the American government, trying to defend their moral credibility.

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[1] Tamás Lattmann is senior lecturer at the Dept. of Legal Sciences and Political Theory of the Miklós Zrínyi University of Defence (Budapest) and at the International Law Dept. of the Eötvös Loránd University (Budapest)
[2] The unedited transcript of the presidential speech can be found at:
http://www.cnn.com/2003/U.S./05/01/bush.transcript/index.html
[3] The full text of the radio speech can be read at:
http://www.whitehouse.gov/news/releases/2004/05/20040501.html
[4] details: http://www.cnn.com/2004/WORLD/meast/04/30/iraq.photos/index.html
[5] details: http://www.cnn.com/2004/ALLPOLITICS/05/07/politics.abuse.main/index.html
[6] The first news about alleged abuse of Iraq detainees and about the reaction of the military had already been broadcasted by the media much sooner, for an example, see:
http://www.cnn.com/2004/WORLD/meast/01/16/sprj.nirq.main/index.html

In this study I plan to give an overview about the possible legal qualification of the people that U.S. forces keep locked up in Iraqi prisons or other detention centres. Due to the lack of information, I am not to take position in the debate according to their possible responsibilities in various crimes, terrorist acts or whatever they are accused with, and also because I believe that this shall be the task of a capable, duly operating judicial body.

## I. Legal analysis of the current situation in Iraq

If we want to find the right legal consequences of an action, at first we have to know the legal framework in which the action is taken. In this case it means that we have to find the right legal qualification of the situation, which results in people getting deprived of their freedom.

The invasion of the United States of America against Iraq clearly resulted in an international armed conflict, which was not debated by anyone. Questions and serious doubts had been raised already before the conflict has started, but only about the legality of this war, not about its character.[7] The warring parties themselves, the UN Security Council[8], the International Committee of the Red Cross[9], all other states and actors in international politics immediately acted or reacted as they would in an international armed conflict.

The international character of the conflict was also reaffirmed in the fresh resolution, adopted by the Security Council at its 4987th meeting, on the 8th of June, 2004, under the number 1546 (2004), in which the Council stated that it is "looking forward to the end of the *occupation*" and that "by 30 June 2004, the *occupation* will end and the Coalition Provisional Authority will cease to exist".[10]

Characterising the conflict as an international one, means that the body of international law specially created for these situations is applicable. The law of war, or on its more popular, better known name, international humanitarian law sets up different rules and principles that must be followed on all stages and in all kinds of armed conflicts, whether international or internal. The difference is, that in an international armed conflict, the warring parties are bound by the whole complexity of international humanitarian law, while in an internal one this body of law suffers from certain limits set by a different historical attitude of the states, which results in much narrower possibility of the international rules to have effect, international

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[7] For different legal arguments, see the memorandum of Professor Ian Brownlie and Professor Christopher Greenwood to the Committee of Foreign Affairs, House of Commons, Parliament of the United Kingdom in October, 2002. Available online at:
http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmfaff/196/2102401.htm

[8] The resolution no. 1472 (2003), adopted by the Security Council at its 4732nd meeting, on 28 March 2003 reminded the parties – inter alia – to the applicability of the 4th Geneva Convention of 1949, which was later reaffirmed by the resolution no. 1483 (2003) adopted by the Security Council at its 4761st meeting, on 22 May 2003. See S/RES/1472 (2003) and S/RES/1483 (2003).

[9] The ICRC right at the beginning of the conflict issued a memorandum to the warring parties to remind them of their relevant obligations in an international armed conflict under international humanitarian law. For the full text of the memorandum, see: "Conflict in Iraq: Memorandum to the belligerents", In: International Review of the Red Cross No. 850, p. 423-428.

[10] See S/RES/1546 (2004), adopted by the Security Council at its 4987th meeting, on 8 June 2004.

humanitarian law has much more detailed and more widely accepted rules applicable in case of an international armed conflict, than in an internal one.[11]

## II. Possible legal status of confined people

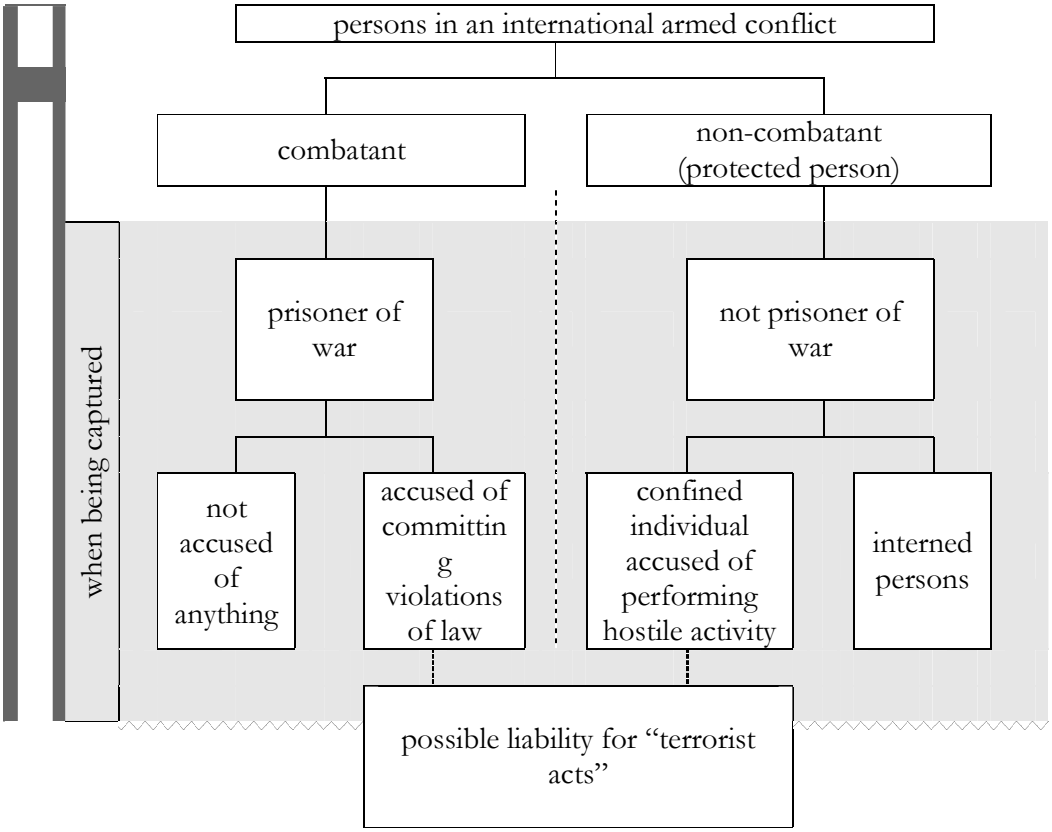
During an armed conflict, whether internal or international, people usually may get captured by one of the parties to the conflict, for either of the following reasons: for taking an active part in the hostilities, for performing any kind of hostile activity, meaning security risk, or sometimes even just for being at the wrong place at wrong time. International law does not employ strict limitations on different actors in armed conflicts, accepting the fact that this is the reality of all such clashes[12] – but on the other hand, it does not leave these people without any protection.

But the scope of the protection depends on the reason of the captivity. Obviously, the different reasons which can result in a person being captured and held locked up, are creating different kind of legal protection, even applying different areas of international law, or leaving the floor to internal legal tools, using international standards as background. The important fact is – as we will see later – that in any case, there are protective rules. For whatever reasons a person may get captured, whatever legal label we may stick on him, relevant protective legal provisions can be found and shall be applied.

In case of an international armed conflict, which we have in Iraq, the main difference between the legal consequences of different status of these people can be drawn according to the possibility of holding them responsible for the actions they had taken before getting captured. Based on this distinction, I set up two categories in this study (prisoners of war, and not prisoners of war), with appropriate sub–categories.

[11] States have always been more anxious to introduce international rules regulating their international conflicts with each other, while reluctant to do the same with internal ones, which are usually considered to be internal affairs, not needing international ruling. For a short overview of differences between the legal effects of an international and an internal armed conflict, see inter alia: "The Law of Non-international Armed Conflicts", In: How does Law Protect in War? Cases, documents and teaching materials on contemporary practice in international humanitarian law – by Marco Sassòli, Antoine A. Bouvier. 1999, ICRC. p. 201.

[12] International law gives the legal possibility to states to deprive people of their freedom in numerous cases, when – even one-sided – interest of the state demands it. See infra Section IV.2.2.




## II.1. Prisoners of war

Many times we can hear the term "prisoner of war" in connection with the persons in different detention places in Iraq. Are they really "prisoners of war"?
In an international armed conflict, an enemy *combatant* who falls into enemy hands, is entitled to the *prisoner of war* status, which means the widest possible legal protection going to people who had previously been performing hostile actions against the captor. This protection is derived from the old recognition of the fact, that conflicts between states are not the responsibility of the individual persons who get involved in it because of having the obligation to follow orders. According to Jean Jacques Rousseau, prominent figure of the French enlightment: "War (…) is a relation, not between man and man, but between State and State".[13] According to one of the most ancient, accepted principle of warfare, the principle of necessity, a captured combatant is not to be harmed, as he does not represent any military ability any more.

Accepting the wartime fact, that the legitimate combatant causes damage and harm to the adverse party, the prisoner of war enjoys impunity for all harmful actions, which he had performed within the framework of the legally acceptable war conduct. Which means that he

[13] In: The Social Contract (1763).

can not be held responsible for lawful actions during combat, but in case of violating the law of armed conflicts or committing other punishable act, he also can be tried and punished even by the captor, but in this case the law of war itself sets up legal guarantees to avoid abuse of this legal possibility.[14] An other important rule is, that after at the cease of hostilities, the prisoner of war is entitled to leave captivity and return home[15] – as his capture is only justifiable because of the military necessity, which loses its reason after the conflict is settled.
For gaining the prisoner of war status, the person has to fulfil some criteria to be considered as a lawful combatant. Either the person must be a "member of the armed forces of a Party to the conflict" or a "member of militias or volunteer corps forming part of such armed forces". In case of not being a member of these forces, e.g. belonging to some kind of volunteer corps, organized resistance movements, there are some conditions to meet: has to be under responsible command, has to display a distinctive sign, has to carry the arms openly, and the conduct of the operations has to be "in accordance with the laws and customs of war".[16] Exceptionally there is the chance of becoming a lawful combatant without fulfilling the condition of being regularly organised if the "inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces", but in this case, the condition of carrying arms openly, and conducting operations with respect to legal rules of warfare still stands.[17]

In the present conflict these are the rules, which apply[18] and can be used to determine if a captured person is entitled to the status of prisoner of war.

### II. 2. Not prisoners of war

As we have seen in the previous section, prisoner of war status is reserved for all those, who lawfully engage in combat, and fall into the hands of the enemy. In the other category we find everybody else. According to the Geneva Convention relative to the Protection of Civilian Persons in Time of War (4th Geneva Convention of 1949), all persons who "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" are entitled to the status of protected persons.[19]

In our case, the U.S. troops invading Iraq, acting as an *occupying power* according to the 4th Geneva Convention of 1949, have the legal possibility to introduce security rules in their own

[14] The fundamental rules, which contain the basic principles and guarantees of this possibility, can be found in Chapter III. "Penal and Disciplinary Sanctions" of Section VI. "Relations Between Prisoners of War and the Authorities" of the Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
[15] For a detailed interpretation of this rule and the possible consequences, see infra Section IV.2.
[16] Art. 4.A. (1) and (2) of the Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
[17] Ibid., Art. 4.A. (6).
[18] It must be noted, that the 1977 Additional Protocol I to the Geneva Conventions of 1949 in its Article 44 sets up less strict rules according to the status of combatant, stipulating the opened carrying of arms before and during action, as the only necessary condition. In the present conflict, these and other rules of the Protocol are not always applicable per se (e.g. the United States and Iraq are not technically bound by the letters of it, because they have never ratified it. One of the reasons the United States denied ratification is the ambiguous nature of this definition of combatant.).
[19] Art. 4 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

interest, which the population living on the occupied territory has to comply with, and if a person gets "engaged in activities hostile to the security" of the occupying power, he may lose his protected status.[20] The reasoning behind this rule is, that even though every person has the right to fight for his country, this right is not unlimited – neither in time nor in place. The occupying power has serious responsibilities deriving from international humanitarian law (e.g. ensuring public order), which require necessary legal tools to be at disposal to achieve these.

All those who fail to comply with these rules, may be subject to criminal proceedings, which can be conducted by the occupying power itself.[21]

**"Unlawful combatants" and terrorists**

At the time of arrival of the first prisoners from the war against Afghanistan, the U.S. government started to use the term "unlawful combatants", who do not have rights under the Geneva Conventions of 1949.[22] Obviously this is the result of the government wanting to create a legal category, which is not protected by the relevant treaties, but this is far from being compatible with the present legal framework.

We could say that an "unlawful combatant" is a person who takes active part in hostilities, but fails to meet the criteria, which would turn him to be a lawful combatant, ensuring him a prisoner of war status when captured. A splendid example of this category is the mercenary, who is a person hired for combat while he is not a part of the armed forces of the given state, or the spy who operates in disguise and can be tried in case of capture. These persons do not qualify for the prisoner of war status, so they do not enjoy privileges under the 3rd Geneva Convention of 1949, but they are protected by the 4th Geneva Convention, which makes it possible to try them for their actions. This argument is supported by the ICTY in the Delalic case, where the tribunal stated that "if an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements are satisfied".[23]

In the present legal framework, this is the category where the people who are usually referred as *terrorists*, can be fitted, but it is very important to express that this labelling is strictly legal. The term "terrorist" is not really a strict legal term, neither is that the term "terrorism" or "terrorist acts". Different criminal acts can be qualified as terrorist acts, depending on different international treaties on this matter.[24] There is still no definition accepted by states, the

[20] Ibid., Art. 5.
[21] For detailed rules, see infra Section IV.2.
[22] http://www.cnn.com/2002/WORLD/asiapcf/central/01/11/ret.detainee.transfer/index.html
[23] ICTY, Judgment, The Prosecutor v. Delalic et al., IT-96-21-T, 16 November 1998, para. 271.
[24] See the following treaties: 1. Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970. 2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971. 3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973. 4. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979. 5. Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980. 6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression

different types of "terrorist acts" resulted in different definitions. The thing that all of the treaties have in common is, that they qualify terrorist acts as crimes, and so there is an obligation of suppressing these crimes, trying or extraditing those who can be charged with them. The fact that the United States has declared war on "terrorism" changes neither the nature, nor the legal definition of terrorism as such. The persons who can be charged with committing terrorist acts, and for this reason held captive by U.S. forces are entitled to the protection of the 4th Geneva Convention of 1949, which means that although they can be tried, they still enjoy some protection. They are entitled to all the rights according to a fair trial, under the provisions of international humanitarian law and also under international human rights law and the domestic law of the captor power.

## III. Legal qualification of the acts committed in the Abu Ghraib prison

The government officials of the United States have always been very reluctant to use the term "torture", when talking about the events in the prison, they preferred the term "abuses". This may have more reasons, the most important seems to be to try to avoid the straight legal qualification of the acts committed. Following the breakout of the scandal, the result of the court martial of Spec. Jeremy Sivits, who was accused with three criminal charges (conspiracy to maltreat subordinates, or detainees; dereliction of duty for wilfully failing to protect detainees from abuse, cruelty and maltreatment; and maltreatment of detainees),[25] at first represented the case as separate acts of the guards.

So far, the situation seemed simple. But now it seems that these actions were not just a game of persons of clouded minds, but part of an interrogation policy, conducted by the United States. The Wall Street Journal has even disclosed a classified report on interrogation methods, which was prepared for Donald Rumsfeld. The government needed it, because commanders at Guantanamo Bay, Cuba, complained in late 2002 that with conventional methods they weren't getting enough information from prisoners.[26] The existence of this document caused disturbance not only in the political but also in the academic level, for example at the UCLA School of Law, university graduates protested by wearing red armbands against one of their professors, John Yoo participating in that work.[27] Later an other memo was published by the Washington Post, this time prepared by the Department of Justice on the same subject.[28] These documents shed different light on the events.

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of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988. 7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988. 8. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988. 9. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

[25] He plead guilty on all charges and was sentenced to one year of confinement, discharge for bad conduct, and demotion to the rank of private. See details at:
http://www.cnn.com/2004/LAW/05/19/court.martial.sivits/index.html

[26] Jess Bravin: „Pentagon Report Set Framework For Use of Torture", Monday, June 7, 2004,Wall Street Journal. The report can be found online at: http://online.wsj.com/public/resources/documents/military_0604.pdf

[27] For the full story, see: http://www.cnn.com/2004/LAW/06/08/hilden.torture/index.html

[28] Dana Priest: "Justice Dept. Memo Says Torture 'May Be Justified", Monday, June 14, 2004, Washington Post. The memo can be found online at:
http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf

Legally speaking, the terms "abuses" or "ill-treatment" include more activities committed against prisoners, even "torture" itself, so torture can always be considered as abuse or ill-treatment, but it does not work on the other direction. Ill-treatment cannot always be qualified as torture.

According to the letters of Article 1 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[29] which was ratified by the United States in 1994, the term "torture" means "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed". This means that there always has to be a special intent (the will to obtain information, etc.) of the abuse or ill-treatment of a person to establish torture.

The report mentioned above contained legal arguments on how to avoid the rules of this – and other relevant – conventions. As Kenneth Roth, executive director of Human Rights Watch put it: "The horrors of Abu Ghraib were not simply the acts of individual soldiers. Abu Ghraib resulted from decisions made by the Bush administration to cast the rules aside."[30] On 10th of June, at the press conference following the G8 Summit, president Bush had to face uncomfortable questions according to the torture, which he answered using only political phrases, like: "We're a nation of law. We adhere to laws. We have laws on the books."[31]
The disturbance of the president and the political leaders is not surprising, as it seems that they are in serious violation of the rules of the convention, as "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture" and personal impunity of the executive personnel seems to be – legally speaking – illusory, because orders from superiors "may not be invoked as a justification of torture".[32]

The United States argues that some methods of interrogation, like sleep deprivation (so-called "stress and duress" techniques) are not to be qualified as "torture". This argument is weakened by the fact that the Unites States Department of State had also declared it to be a form of torture in its Country Reports on Human Rights Practices of the year 2001, in the reports on Israel, Turkey, and Jordan.[33]

Summing up all the arguments above, the acts committed in the Abu Ghraib prison can be qualified as torture according to the letters of the Convention, both because of its nature and the existence of the special intent needed to separate torture from ill-treatment, although I

[29] United Nations, Treaty Series, vol. 1465, p. 85., available online at:
http://www.unhchr.ch/html/menu3/b/h_cat39.htm
[30] For more details, see: http://www.hrw.org/english/docs/2004/06/09/iraq8785.htm
[31] For the full text of the press conference, see:
http://www.whitehouse.gov/news/releases/2004/06/20040610-36.html
[32] Art. 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.
[33] For the full reports, see on the website of the Department of State:
Israel: http://www.state.gov/g/drl/rls/hrrpt/2001/nea/8262.htm
Jordan: http://www.state.gov/g/drl/rls/hrrpt/2001/nea/8266.htm
Turkey: http://www.state.gov/g/drl/rls/hrrpt/2001/eur/8358.htm

accept that the debate about this question still may have plenty of arguments to line up. Some of these arguments will be presented in section IV.1., where I will analyse the memos mentioned above together with the relevant sources of international human rights law.

## IV. Relevant legal provisions protecting confined people

As it was mentioned above, everybody is under some legal protection against torture and other abuses, the difference depends on the legal status they acquire. In this section we will examine the exact provisions of different areas of law, which can be applied to the present situation.
In this study the main area of examination is international humanitarian law, therefore I give a detailed analysis about that area, but before that, here is a short overview about the provisions of international human rights law, which usually acts as a legal framework, with the rules of international humanitarian law as detailed, special provisions. This has special importance, as the United States has lined up legal arguments of the non-applicability of these documents.

### IV.1. International human rights law and U.S. domestic law

The first protective rule against torture can be found in Article 5 of Universal Declaration of Human Rights of 1948, the basic document of international human rights law, which has been adopted unanimously by the General Assembly of the United Nations. It states, "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".[34] Although this document does not have legal binding power as being a resolution of the General Assembly, most of its provisions – like this one – are widely accepted customary norms.

The UN General Assembly in 1984 in its resolution no. 43/173. (Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment) has enacted a complex set of rules about protection of people imprisoned, but it has no absolute legal binding power. However its principle no. 6 states that "no person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.".[35]

The International Covenant on Civil and Political Rights, which was adopted by the General Assembly and opened for signature in 1966, and was ratified by the United States on the 8th of June, 1992, is the first universal international, legally binding treaty covering a wide variety of human rights.[36] The Covenant has a binding power over the Unites States even in this situation as it stipulates that the member state shall undertake to respect and to ensure the rights recognized in it to all individuals "within its territory and subject to its jurisdiction".[37] As we have seen before, the United States has undisputed jurisdiction over people in Iraq, so the

[34] For the full text of the Declaration, see: http://www.un.org/Overview/rights.html
[35] A/RES/43/173 adopted by the General Assembly on its 76th plenary meeting, 9 December 1988
[36] United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407
[37] Art. 2 Para 1 of International Covenant on Civil and Political Rights, 1966.

letters of the Covenant must have binding power.[38] The Covenant prohibits "torture or (…) cruel, inhuman or degrading treatment or punishment",[39] and sets up the obligation of humane treatment and "respect for the inherent dignity of the human person" for persons deprived of their freedom.[40] According to the Covenant, in some cases (e.g. officially proclaimed public emergency, which threatens the life of the nation) there is the legal possibility of derogation from certain articles, but only if "such measures are not inconsistent with (…) other obligations under international law".[41] This may seem to be a chance of avoiding the protective rules mentioned above, but they do not work. The Covenant itself excludes the derogation from Article 7 (the one about the prohibition of torture), while Article 10 (the one about respect for dignity) cannot be derogated from, because doing so, the Unites States would also violate different provisions of the Geneva Conventions of 1949 and customary international law.[42]

The possible obstacle of application of the Covenant can be found in the reservation that the United States made when ratifying it. Among others, the United States expressed that it "considers itself bound by article 7 to the extent that `cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and-or Fourteenth Amendments to the Constitution of the United States".[43] This reservation raised objections from a few states (e.g. Denmark, Finland and Norway) arguing that interpretation of a non-derogable article of the Covenant by provisions of internal law is incompatible with the object and aim of the Covenant. However, none of those, who raised objections excluded the entry into force of the Covenant between itself and the United States.[44] However, in my opinion, even if we accept the reservations of the United States, the rules of the Covenant are still violated, as the treatment of prisoners in the Abu Ghraib prison (and other places) are also contrary to the rules and legal content of the amendments mentioned above.[45]

The special protection against torture and the exact definition of torture as an illegal act first appeared in resolutions of the UN General Assembly[46], binding legal power to this definition

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[38] It must be noted, that the memos mentioned above state „the United States has maintained consistently that the Covenant does not apply outside the United States or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during an international armed conflict". This statement is not supported neither by the text of the reservations nor the text of the Covenant itself.

[39] Art. 7 of International Covenant on Civil and Political Rights, 1966.

[40] Ibid., Art. 10

[41] Ibid., Art. 4 Para 1

[42] This is an example of legislation that is trying to fill the gaps. As long as the Covenant has not yet entered into force, the provisions of international humanitarian law were the only legally binding protective norms against torture at international level. When the Covenant entered into force, this protection has become dual: in peacetime, the Covenant, while in wartime (either in internal or international armed conflicts) the rules of international humanitarian law are applicable.

[43] To read more about U.S. policy on reservations and declarations on various human rights treaties, see: Thomas Buergenthal: „International Human Rights in a Nutshell", 1988 West Publishing Co.

[44] Status of reservations/declarations/objections can be found online at the website of the Office of the High Commissioner for Human Rights, at:
http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm

[45] For an overview of the U.S. Constitution and its amendments, see:
http://www.law.cornell.edu/constitution/constitution.table.html#amendments

[46] See: Declaration on torture adopted on 9 December 1975 by the United Nations General Assembly (Resolution 3452 (XXX), available online at: http://www.unhchr.ch/html/menu3/b/h_comp38.htm

was later given by the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, mentioned above in the section III. of this study. The United States has made the same reservation as to the International Covenant on Civil and Political Rights, attracting similar objections. In connection with Article 1, some of these reservations narrowed the definition of torture,[47] but still some of the acts committed in the Abu Ghraib prison can be qualified as torture, and are also contrary to the domestic law of the United States – which is perfectly proven by the fact that Spec. Jeremy Sivits was found guilty on different criminal charges by the U.S. court martial.

There has been embarrassing news about the United States transferring different captured people to different countries, where they were subject to torture during interrogations conducted by agents of his allied states, which are not party to the Convention against torture.[48] This violates the rules of the Convention prohibiting to "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",[49] and the rules which require that all states party to the Convention shall make efforts to establish their jurisdiction over offences related to torture.[50]

About the Convention, the Unites States has lined up more arguments to exclude its applicability, or to set up possible defence against charges of torture. The memo of the Department of Defense draws the difference between the definitions of torture as embodied by the Convention and as by the understanding of the United States. The latter sets up more detailed descriptions than the Convention does, and so gives the term a narrower meeting. Arguing the ambiguous definition of torture in the Convention, the US imposed the same kind of reservation as we could see with the Covenant, which set up the rules of different amendments of the American Constitution. This means that the protection provided by the Convention shall be interpreted according the American domestic law.
Analysing provisions of domestic law, prohibiting torture, the United States Code § 2340 defines torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control".[51] The Code qualifies torture as an offence, which is punishable by imprisonment or even death penalty, if the torture results in death.[52] These rules are applicable even in U.S. operations outside the territory of the state. In the light of these rules, the legal arguments of the government's legal experts have focused on the possible exemption of U.S. personnel chargeable with this offence. In their opinion, there are more ways to achieve this. First of all, the text of the Code requires a "specific intent" to commit the crime, which means that an express purpose of committing the crime is necessary. Without the specific intent to cause pain

[47] Status of reservations/declarations/objections can be found online at the website of the Office of the High Commissioner for Human Rights, at:
http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm
[48] This, and the missing of a few captured people has quickly raised the attention of the public and non-governmental organisations. See for example: http://www.iht.com/articles/518088.html
[49] Art. 3 Para 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.
[50] Ibid., Art. 5
[51] To search the U.S. Code, see: http://uscode.house.gov/usc.htm
[52] 18 U.S.C. § 2340A

or suffering, nobody can be charged with committing torture, and as the interrogating personnel's intent is not "specific" – they do not specifically want to cause pain or suffering – they do not commit the offence of torture. Furthermore, the provisions also stipulate that the "severe mental pain or suffering" caused by torture means prolonged mental harm, which is caused by or resulting from various acts[53], but the experts found that none of these is capable of qualifying different interrogation techniques. The memorandum of the Department of Justice added that only the most extreme acts shall be qualified as "torture".

The report also deals with the question of the president's Commander-in-Chief authority, which – according to the authors of the report – can exempt the individual charged with torture under § 2340 of the U.S. Code. The president has constitutional power to protect the security of the United States, which means that he can issue any orders to this end, and that any effort, even by the Congress, to regulate the interrogation of the people referred to as "unlawful combatants" would be a violation of the Constitution. The report itself states that the president should issue a directive or other writing with legal power, which would be capable of exempting his subordinates. According to the Uniform Code of Military Justice, it is a punishable act to wilfully disobey a lawful order,[54] but to decide if an order is lawful or not, is not always easy. An act performed pursuant to a lawful order is always justified but the act committed pursuant to an unlawful order can be excused only if the subordinate knows that the command is unlawful or if a "person of ordinary sense and understanding" would know that it is unlawful.[55] This means that in all cases, where the interrogations are not conducted obviously unlawfully, the interrogators can be exempted.

### IV.2. Protection provided by international humanitarian law

International humanitarian law tries to set up protective rules to all possible actors of an armed conflict. Protection of prisoners of war is provided by the 3rd Geneva Convention of 1949, while civilians, or all those who do not fall into the status of a prisoner of war, are protected by the 4th Geneva Convention of 1949. Beside the strict letters of these conventions, other sources of international law are also applicable, most importantly the fundamental principles of international humanitarian law, or international customary law. General prohibition of violence to life and person, mutilation, cruel treatment and torture, outrages upon personal dignity,

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[53] 18 U.S.C. § 2340: (2) „severe mental pain or suffering" means the prolonged mental harm caused by or resulting from (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality

[54] UCMJ § 890. Art. 90. (2) "(Any person, who…) willfully disobeys a lawful command of his superior commissioned officer; shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct."
For full text of the UCMJ, see: http://www.jag.navy.mil/documents/UCMJ.pdf

[55] The Manual Courts-Martial R.C.M. 916(d) „Obedience to orders. It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful."
For full text of the Manual, see: http://www.jag.navy.mil/documents/mcm2000.pdf

humiliating and degrading treatment[56] can be found in the common article 3 of the four Geneva Conventions of 1949, which is applicable even in an internal armed conflict, and accepted as binding customary law under all circumstances, as it sets up minimum standards which are also basic rules of international human rights law.[57]

The unconditional prohibition of torture was later reaffirmed by the letters of the first Additional Protocol of the Geneva Conventions, where it states that "torture of all kind, whether physical or mental (…) are and shall remain prohibited (…) whether committed by civilian or by military agents".[58]

### IV.2.1. Protection of prisoners of war

For prisoners of war, international humanitarian law sets up detailed, complex rules, embodied in the 3rd Geneva Convention of 1949, but not without historical antecedents. The first separate convention according to the protection of prisoners of war was created in 1929, when revising the Geneva Conventions of 1906, but the basic protective rules can be found even at the 1907 Hague Regulations, which are considered to be undoubtedly accepted customary norms[59]. Today there is also a wide international consensus about the customary legal power of the protective norms of the 3rd Geneva Convention of 1949, so its provisions shall be accepted as binding rules under all circumstances in the present conflict of the United States and Iraq.

The ICRC has the legal possibility to enter all detention places where prisoners of war are held to ensure that the conditions of captivity are adequate to the provisions of the Convention and that their rights are respected.[60] The memorandum of the ICRC already mentioned above especially emphasises the importance of the protection of prisoners of war.

If we consider the people caught in captivity to be prisoners of war, then the personnel of the United States has violated numerous articles of the Convention, which were created to ensure protection to these people.

First, the captor power has a general obligation of treating prisoners of war humanely, and to protect them "against acts of violence or intimidation and against insults".[61] This requirement was obviously not met in this occasion.

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[56] Art. 3 of the Geneva Conventions of 12 August 1949.
[57] The rules of common article 3 are later reaffirmed by the different documents and conventions of international human rights law, which are generally applicable in peacetime and in non-armed conflict situations. That means that if a state refuses to accept a domestic conflict to reach the level of an armed conflict, and so refuses to apply the relevant rules of international humanitarian law, there is still no gap in the legal protection of persons.
[58] Art. 75 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
[59] All texts of these Conventions and their commentaries can be found in the "International Humanitarian Law Database" at the website of the International Committee of the Red Cross at http://www.icrc.org/ihl
[60] Art. 126 of Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
[61] Ibid., Art. 13.

The detaining power is not free to choose the place of detention, as the Convention sets up some standards according to it. Prisoners of war "shall not be interned in penitentiaries", this provision may only be ignored, if "the interest of the prisoners" justifies it.[62] The Abu Ghraib Prison has been a well–known detention centre and prison of the Saddam–regime, so its use for detention of prisoners of war is hardly justifiable. Especially, because the aim of this prohibition is to spare the prisoner of war from the harmful psychological effects of being locked up in a place, where usually criminals are also being accommodated.[63] Prisoners of war must not to be transferred to penitentiary establishment even to undergo otherwise lawfully imposed disciplinary punishment.[64]

The United States expressed that the prisoners of war captured during the war (and those captured before, during the war in Afghanistan) represent valuable sources of information while also mean serious security risk, therefore they need to be held captured and also interrogated. Keeping prisoners of war locked up in a place is not contrary to international humanitarian law[65], but the time of captivity is not unlimited. The law stipulates that all people who are kept as prisoners of war by one of the warring parties shall be released "without delay after the cessation of active hostilities",[66] which means that the obligation to release these people is a question of facts, not legal or political considerations, and that there is no need for an armistice, a peace treaty or any other formal act of finishing the war. As the president of the United States himself has declared the end of "major combat operations", the legality of still keeping prisoners of war in captivity can be questioned, even if the White House clearly stated before the president's words does not mean the "legal end" of hostilities.[67]

Furthermore, the United States may qualify the prisoners of war as valuable sources of information, but international humanitarian law still strictly regulates the legal possibility of the interrogation of these people. There is no prohibition of interrogating, but the present legal framework is built on a concept that is not compatible with the U.S. expectations. Prisoners of war are usually in possession of military information of a belligerent party, which are useful to the adverse party to acquire. But on the other hand, the disclose of these information may constitute a criminal act by the prisoner, which may evoke his criminal liability when repatriated. International humanitarian law wants to protect prisoners of war from this menace, therefore prohibits to employ any method of gouging information by the captor. Among these protective norms, the most important are those, which prohibit "physical or mental torture" or "any other form of coercion".[68] If, for any reason, the prisoner wants to cooperate with the adverse party by his own will, taking the risk of breaking his obligation to secrecy, the disclosed information can be used.

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[62] Ibid., Art. 22.
[63] see the ICRC Commentary to the Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. Available at the website of the International Committee of the Red Cross at http://www.icrc.org/ihl
[64] Art. 97 of the Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
[65] Ibid., Art. 21.
[66] Ibid., Art. 118.
[67] See the statement of Ari Fleischer, White House Press Secretary, on 30th April, 2003.
Available online at: http://www.whitehouse.gov/news/releases/2003/04/20030430-10.html
[68] see Article 17 of the Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

Torture or cruel treatment is also forbidden to be employed as collective or individual punishment, corporal punishment, disciplinary punishment and in case of accusing a prisoner of war with committing criminal act, it is also prohibited to exert "moral or physical coercion (…) in order to induce him to admit himself guilty of the act of which he is accused".[69]

The Convention considers – among other acts – torture and inhumane treatment, or depriving the prisoners of war of the rights of fair and regular trial according to the Convention, to be grave breaches.[70] It must be noted that these acts have already been made internationally punishable under the statutes of the Tribunal for the Former Yugoslavia[71] and the International Criminal Court[72], which show the widely accepted importance of the protection against these acts, even though none of these documents is applicable in the present situation.

The legal possibility of transferring of prisoners of war to another state for "interrogations", as mentioned above in the previous section, is absolutely prohibited. Prisoners of war may only be transferred to an other state, if the 3rd Geneva Convention of 1949, which makes different kind of "interrogations" legally impossible, also binds the other state.[73]

### IV.2.2. Protection of those who are not prisoners of war

Due to the relevant provisions of international humanitarian law, it is not necessary to gain the status of prisoner of war to enjoy some kind of legal protection against abuses and especially against torture. Prisoners who do not fit into that category are still protected.

First, the above mentioned common Article 3 of the Geneva Conventions of 1949 can be applied with no regard to the status acquired by the detainees as the text makes no difference in the legality of participating in hostilities.

The general protective rule stipulates that protected persons are "entitled, in all circumstances, to respect for their persons, their honour" and "shall at all times be humanely treated" and protected against violence and insults.[74] The captor power has to bear the responsibility for violation of these rights "by its agents, irrespective of any individual responsibility which may be incurred".[75] The question of the term "agents" can be an interesting problem, the employment of private security contractors in Iraq by the Unites States has grew to a certain size that may rise questions about their legal status, whether they can be qualified as combatants or not.[76] My opinion is, that although this may be a question to debate, according to this specific rule it has no relevance, these persons shall be considered as legitimate

[69] Ibid., Art. 87, 89, 99.
[70] Ibid., Art. 130.
[71] Article 2 (a) of the Statute of the ICTY (S/RES/808 (1993))
[72] Article 7, Para 1 (f) and Para 2 (e) of the Rome Statute of the International Criminal Court. Available online at: http://www.un.org/law/icc/statute/romefra.htm
[73] Art. 12 of the Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
[74] Art. 27 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.
[75] Ibid., Art. 29.
[76] To read more, see inter alia: Anthony Dworkin: "Security Contractors in Iraq: Armed Guards or Private Soldiers?" Published by the Crimes of War Project at http://www.crimesofwar.org

representatives of the captor power, and so their actions are capable of founding state responsibility.

Special protective rules against any measures capable of causing physical suffering, including "torture, corporal punishments, mutilation" can also be found in the convention "whether applied by civilian or military agents".[77]

According to the rules of the 4th Geneva Convention relative to the Protection of Civilian Persons in Time of War, the persons who were arrested are to be "treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial". This is the rule that ensures legal protection even in the case of someone accused with "moving out" of the category of a protected person by acting as a spy or saboteur, or committing hostile acts against the occupying power.[78]

When trying to obtain information – in the present situation this seems to be the main goal of the actions in the Abu Ghraib prison – from protected persons, similarly to the protection of prisoners of war, there is a prohibition of exercising physical or moral coercion against them.[79]

If protected persons are interned or confined, special protective rules are applicable.[80] Internment of protected persons is only lawful if it is justified by security necessity,[81] and a competent authority shall revise the necessity of this captivity at least twice a year. The name of the captured persons shall be given to the protective power or its legal substitute, the International Committee of the Red Cross, and made sure that it can arrange its visits and interviews.[82] However, the ICRC reports that there are still detention centres where it was not let in.[83]

Protected persons, who commit offences against the occupying power, can be punished by the occupying power itself,[84] but international humanitarian law sets limitations on possible punishments.[85]
In connection with the transfer of protected persons, we find strict protective provisions, which do not make it legally possible to send captured people to different states for interrogations. The first rule is, that only a state party to the Convention may accept these people, which makes legally impossible to employ torture and abuse techniques to interrogate.[86] Anyway, forcible individual or mass transfers are per se prohibited, as well as deportations to different territories than the occupied territory. The only exceptions from this rule are the security of the population or imperative military reasons, and in any of these cases

[77] Art. 32 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.
[78] Ibid., Art. 5.
[79] Ibid., Art. 31.
[80] Ibid., Art. 79.
[81] Ibid., Art. 42.
[82] Ibid., Art. 43.
[83] For details, see: http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5YYH5X
[84] Art. 66 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.
[85] Ibid., Art. 68.
[86] Ibid., Art. 45.

the protecting power (ICRC) shall immediately be informed.[87] These rules surely have never been met according to people taken to secret detention places.
In general, acts like torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, or wilfully depriving a protected person of the rights of fair and regular trial, are qualified as grave breaches of the Convention.

## V. Conclusion

Summing up all the arguments, we can see that even in a case of an armed conflict, there is not any situation or any person that stays without legal protection. It is vital to understand, that the aim of these different protecting provisions is not to make decisions or to pass sentences about the individual responsibility of a person. These provisions shall be respected under all circumstances because of the universal moral value they represent. They do not protect "terrorists" – they protect people who may get accused of being "terrorists", and everybody else. This is a big difference. These rules protect everybody, also the U.S. soldiers or even government officials, if ever get caught. Playing with them may be dangerous for their health, too.

[87] Ibid., Art. 49.