



LAW campaign



An open letter from peace and human rights activists of South Asia For an Independent International War Crimes Tribunal on Iraq

On behalf of the peace and human rights community of South Asia we send you this open letter in the wake of the devastating war on Iraq by Coalition Forces led by the United States and the United Kingdom, who have allied for the purpose of waging war there. The reflections that follow in this letter are pertinent to our appeal, and are precipitated by 10 specific demands on all parties involved in the war in Iraq, which Amnesty International made on 18 March 2003. These demands are also reflections of the tensions between the humanitarian law, called the laws of war, and the human rights law they mirror. The 10 demands made by the Amnesty:

- Do not use weapons that kill and maim indiscriminately.
- Treat civilian detainees fairly and humanely.
- Treat combatants according to the Geneva Conventions.
- Prioritise the safety and needs of the Iraqi people.
- Refugees and the internally displaced must be protected and helped.
- Perpetrators of crimes under international law must be brought to justice.
- All parties should allow independent investigation of their conduct.
- Human rights monitors should be deployed throughout Iraq as soon as practicable.
- All parties must support the UN's humanitarian and human rights work.

These ten injunctions are more relevant than ever. In these injunctions we have the embodiments of the principles of proportionality, transparency, and accountability. Collectively they represent the norms of fairness, humanitarianism, human rights, and justice.

The military campaign of occupation of Iraq by the US-led coalition forces, the capturing of its oil wells, the decapitation of the Iraq's governing and defending capabilities, and the state of anarchy, arson and plunder that attends the fading of Iraqi regime, referred to as "liberation" by the Coalition Forces, mark the latest stage of the war on Iraq and its people that started in January 1991. We do not know when this war will end. Meanwhile, violations of human rights laws and humanitarian laws continue, with murders of tens and thousands of people, amounting to a continuing and undeclared genocide. The partnership of the two leading powers of the Allied or the Coalition Forces, the US and the UK, and their way of declaring and conducting war, has already created serious predicaments for and questions about the working of the United Nations, its functions and the future. At this juncture much will depend on how impartially, transparently and candidly the international human rights community is able to contend with these challenges when the conduct of the most powerful and ambitious nations that also assume the burden of civilising the world have come under scrutiny. The claim of fighting this war to liberate the Iraqi people from tyranny, restore to them their human rights, to safeguard the world from the threats of weapons of mass destruction, and to reinstate an international order of accountability has to be hence rigorously examined. The scrutiny of the conduct of the Allied Powers fighting the war, therefore, has to be against these claims. Even as we look up to Amnesty International for leadership in living up to these challenges, we wish to take up its 10 specific demands on all parties involved in the war, figure out their logic and understand what their implementation entails.

The first 6 demands derive from the international humanitarian law, with distinction and proportionality being the guiding principles, which aim to "restrain the destructive force of war, while recognising its inexorable necessities". Obviously, it will be difficult to give findings on whether or not and to what extent these principles of distinction and proportionality are being adhered to until the parties involved in the war (as Amnesty's demands 8 and 9 show) submit to independent investigation of their conduct and receive human rights monitors in the terrain of their operations. But we have prima facie evidence of the way in which these countries have been waging war, which can be drawn from their record in 1991. The evidence speaks of the violations of these guiding principles of distinction and proportionality.

Primary evidence of violations of the principles

The January-February 1991 war following the UN Security Council Resolution 678, which authorised "all necessary means" to obtain unconditional withdrawal of the Iraqi troops from the Kuwaiti soil. The story of the 1991 Gulf War is well known and does not require a repetition here. But we can recall the indiscriminate carnage towards the end of the war when the Iraqi forces were already withdrawing from Kuwait following Moscow's 24 February 1991 peace plan, which Iraq had accepted. On 26 February 1991, as the long Iraqi convoy was moving towards Basra along the Highway 80, the coalition forces launched a combined ground and air offensive and hit both the ends with heavy explosives. The slaughter continued for the next forty hours with petrol tankers and tanks exploding in cascades of red flame and figures of soldiers perishing in them like little ants. An estimated 25,000 to 30,000 Iraqis of 12 retreating divisions died. The air campaign alone had taken the toll of 32,000 deaths and the total Iraqi casualties added up to 62,000. The coalition forces reportedly dropped a total of 99,000 140,000 tons of explosives equivalent to five to seven of the nuclear bombs dropped on Hiroshima. We do not know what the calculation would show this time. The war in 1991 had also witnessed a near total destruction of Iraq's civilian infrastructure, including electric power stations, irrigation facilities, and water and sewage treatment plants. It was estimated that Iraq needed US \$ 22 billion to repair damage to the civilian infrastructure. Those responsible for the destruction of civilian infrastructure have not yet paid.

All these imply that as against the traditional way of securing reparation by the victorious power from the vanquished, we need a process of reparation, which will take into account the costs of damages including the ongoing devastation and their impact on the quality of life. The issue of reparation is linked to human lives, human rights, indeed the basic right to live. International human rights law and international humanitarian law must agree on a computation of the overall damage and the need for securing reparation from the victorious party.

Traditionally, the distinction between combatants and non-combatants has been held important, and rightly so, not only for the accountability process but also to ensure that combatants receive the benefits of Geneva Conventions. Combatants are supposed to belong to clear military units, to clear structures of command with superiors and subordinates who wear recognisable identification and openly carry arms. The distinction between combatants and non-combatants allows the former to be accountable to the laws of war and to be liable for their actions. But today because of the way war has been conducted, and civilians simply because of their political allegiance, or membership of a political party, are being detained, tortured, and often murdered, often routing total resistance from non-civilians and civilians alike. The question is: How do we recover the meaning of this distinction and apply it in an accountability process when aerial bombing of terrifying power softens the enemy territory for the land war and occupation? And even if we can recover the meaning, how do we establish the degree of responsibility for obliterating this distinction?

In this context it is important to remember that the international human rights and humanitarian law must now address the so-called concerns about the Iraqi military tactics and their encouragement to suicide bombing, which place the civilians at greater risk. The issue of distinction between combatants and non-combatants has assumed obscure dimensions in the context of a war against such total aggression as it has been always so - when a resistance is being fought by a country on the basis of a patriotic call on the people combatants and civilians, all - to fight the invasion. Can "resistance" emanating from such a patriotic call, even if it manifests itself in such desperate and suicidal acts, as the British people would have taken recourse to if the Nazi German troops had crossed the English Channel in 1944, be judged illegal under the international humanitarian law? Do we condemn the American Revolution as perfidious because its harbingers had encouraged the participants to sneak up to the British military formations and shoot at them surreptitiously? It is time that we rethink the laws to bring them to conformity with current reality of colonial and neo-colonial wars of aggression and conquest.

It is now known that the coalition forces have been dropping cluster bombs from the air and also firing from the ground as artillery projectiles and rockets. The

US Infantry Divisions have been heavily using Multiple Launch Rocket Systems (MLRS) and Army Tactical Missile Systems (ATACMS), and 155mm artillery, known as M483A1 and M864 projectiles, which use only cluster munitions. The standard warhead for the MLRS is reported to contain 644 M77 individual sub-munitions, also known as dual-purpose grenades with a failure rate of 16 per cent. It is also reported that the standard volley of 12 MLRS rockets leave more than 1,200 unexploded grenades over an area of 12,000 240,000 meters. An ATACMS releases between 300 sub-munitions to 950 sub-munitions. M483A1 and M864 projectiles release 88 and 72 dual-purpose grenades and are reported to have a 14 per cent rate of failure. No one knows how many thousands of sub-munitions, or "duds" that explode on impact remain scattered and in which areas. The coalition forces say that the cluster bombs and munitions are not specifically banned under the 1997 Ottawa Mine Ban Treaty. That may be so, and that just shows the one-sidedness of the laws of war and their stagnant character. Poison gas is banned. Iraqi forces did not use it even in this war. But atomic weapons are not banned. Also, cluster bombs are not banned. Bunker-busters are not banned. Reporters of the Sydney Morning Herald and Melbourne Age claim that the coalition forces dropped 40,000 pounds of explosives and napalm bombs over Safwan Hill near Basra to beat the Iraqi resistance. The US authorities deny. They have also been using bunker buster bombs, 5,000-pound explosives, which are designed to penetrate up to 6 meters of concrete or 30 meters of earth before exploding. These bombs have been used also in the urban area of Baghdad. Former Nobel Peace Prize nominee Helen Caldicott says that the casing of bunker busters are made of uranium 238, depleted uranium, or DU. The coalition forces remain unapologetic

supplies. All proceeds from such sales had to be placed in an UN-controlled bank account, to which Iraqi government had no access. Of the US \$ 4 billion of revenues over one year, 30 per cent had to go towards reparations for the Gulf War, 15 per cent towards humanitarian supplies for 3 million Kurds in northern Iraq, 5-10 per cent for the UN operations in Iraq and 5-10 per cent to repair and maintain oil pipelines, leaving just about US \$ 1.6 billion for Iraq's remaining population of 18 million, which meant less than \$ 7.50 per Iraqi per month. Then the value of Iraqi Dinar had sharply fallen after the Gulf War. Before the War, an Iraqi government employee who received a salary of 100 Dinars earned an equivalent of US \$ 310. This was a reasonable sum to maintain a normal life style. In early 2000, 100,000 Dinars were less than US \$ 60. A school teacher, who earned 3000 Dinars a month, took home less than US \$ 4, not enough for minimum food let alone medicine and other essentials. The oil for food program basically made Iraq pay for several clandestine operations of military nature under taken by the coalition forces in Iraq's North and the South, also the weapons inspection programmes. Even then the programme could not be implemented until mid-August 1996 because of repeated technical objections raised by the USA. We are sure, Madam Irene that you will remember the interview the then US Secretary of State Madeleine Albright gave to Lesley Stahl of CBS for its 60 Minutes Program on 12 May 1996. Stahl asked: More than 500,000 Iraqi children are already dead as a direct result of the UN sanction. Do you think the price is worth paying? The US Secretary of State replied: "It is a difficult question. But, yes, we think the price is worth it." The World Health Organisation's report released in the fall of 1997 disclosed that over 500,000 Iraqi children under five had died as a result of

★

"To initiate a war of aggression... is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."... The most reprehensible fact about the US decision to use force against Iraq outside the UN Charter is that it used the UN's disarmament program for 11 years effectively to make a country completely defenceless. ...The Lawyers Committee for Human Rights has called on the UN to appoint a Commission of Inquiry to pave the way to establishing an International Criminal Tribunal for Iraq, with appropriate mechanism for prosecuting those responsible for war crimes, crimes against humanity and genocide committed in Iraq.



about the extensive use of DU tipped anti-tank shells, which burn through tank armour, igniting the vehicle. After exploding, 70 per cent of the shell is said to vaporise into tiny particles and to get carried by the wind.

The widespread reports about using these weapons by the Allied forces, and/or the concern shown by them in using these weapons raise two questions of immediate concern to the international human rights community and the human rights law. First, there is the need for an immediate impartial inquiry, preferably instituted by the United Nations, into the reports, and fixing of accountability. Second, there is the immediate responsibility on the part of the human rights community to initiate such an investigation. The reports alluded in the preceding two paragraphs, certainly call for vigorous gathering of more reports and evidences so that the human rights community can build up prima facie case for investigation and trail for war crimes.

Responsibility of the occupying power

By any definition, Iraq is now an occupied territory, and by Geneva Conventions the occupying authority alone is in a position and has a duty to maintain order. In the past few days, we have been witnessing how Iraq has been allowed to slip into criminal anarchy and in this context it is important to remind the occupying authorities of the rules of conduct by which they would be judged. It is their duty to inform the inhabitants of the powers they exercise and the extent of their occupation. They must also take all measures to restore and ensure public order, public safety and public health. For that purpose, the occupying forces have to maintain the laws, which were in force before they arrived, and must not modify, suspend or replace them. The occupying forces must ensure that the property in a comprehensive sense that belongs to the occupied State is not disposed of or appropriated, that means of transportation as well as communication are not destroyed. That they act as provisional administrators in respect to real property, such as buildings, commercial and business establishments and natural resources, and that they do not seize or interfere with the institutions devoted to religion, charity, education, health, art and science. Such are the requirements under the Laws of War on Land, drafted in September 1864. Indeed, we must recall in this respect that, while the occupying forces took care to guard the office of the Petroleum Ministry, they allowed the Iraq's National Museum, considered to be a heritage of mankind containing artefacts and items of five thousand years' of human history, to be looted, ransacked, and destroyed.

The case for initiating independent human rights investigation by the human rights community into the war crimes becomes stronger when we critically examine of the role of those Security Council members of the UN who have been waging this war since 1991 and also the humanitarian and human rights work which the UN agencies have so far done and undone in Iraq. This is important in view of the Amnesty's call for trial of war crimes and support for UN humanitarian efforts in Iraq. Resolution 661 by the Security Council on 6 August 1990 placed a blanket ban on all imports and exports from Iraq except for "supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs." The exception had no meaning since Iraq did not have any hard currency income because of the ban on oil sales and the freezing of its foreign assets. Regular reports about the humanitarian disaster caused by these sanctions resulted in the Resolution 986, adopted in April 1995, which proposed a food-for-oil deal, which the Iraq accepted on 20 May 1996. Under the proposal, Iraq was permitted to sell US \$ 1 billion of oil over a 90-day renewable period in order to buy humanitarian

malnutrition and lack of medicine caused by the UN embargo. The Iraqi health ministry statistics showed much higher figures. In January 2000, seventy members of the US Congress addressed an open letter to President Clinton appealing him to do "What is Right - Lift the Economic Sanctions." The letter cited the UN estimates that over one million civilians, mostly children, had died due to sanctions. Clinton ignored the appeal. The US knew the facts and after carefully considering them, chose to kill millions of weakest Iraqis through the UN regime of sanctions.

Roll of the United Nations

The question therefore relates also around UN's culpability in violating human rights. Did the UN know the undeclared genocide and approve? Did the UN policy-making circles at least consider and debate the facts of the World Health Organisation's report? Did they deliberate over the issue of acceptable balancing between coercing a rogue state and harming its population? What were the legal principles that justified sanctions after their results became known? Can a Security Council Resolution be allowed to undermine the United Nations Charter? Article 24 of the Charter explicitly directs the Security Council "to act in accordance with the Purposes and Principles of the United Nations" when exercising its authority to maintain peace and security. The most fundamental purposes and principles for which the UN exists, as Article 1 of the Charter says, is to promote human rights, of which the right to life, considered by the UN Human Rights Committee to be the "supreme right from which no derogation is permitted even in time of public emergency" is pre-eminent. It is a universally accepted principle that human rights belong to individuals, and not on the dent of their association with a State. Also, human rights of individuals cannot be forfeited because their government has offended members of the Security Council. Many Iraqis, Arabs and other global citizens hold the UN's devastating regime of sanctions responsible for at least 500,000 deaths in Iraq and for violating the UN Charter's proclamation of "faith in fundamental human rights and in the dignity and worth of the human person". Even as the war was threatened by the Allied Powers, the United Nations Secretary General, Kofi Annan, ordered UN personnel engaged in disarmament mission and oil for food programme to withdraw from Iraq, citing reasons of their safety. At the same time, while Iraq still remained a UN member, its children, women, old men and women, infirm, disabled, were left completely unprotected. In the light of all these, will not the global human rights community ask the United Nations to account for its past involvements in Iraq and atone and apologise for its past failures before it returns to do humanitarian and human rights work in that country. And allow the United States and United Kingdom, two founding members of the United Nations, in a position of leadership for any role in Iraq.

It is also important to recall how the UN programme of inspecting Iraq's weaponry was used throughout the last decade in order to weaken Iraq, gather all available intelligence, so that at appropriate moment the US and the UK could begin war on Iraq and complete the mission of conquering Iraq that remained unaccomplished in 1991. There exists sufficient evidence to indicate that the United States used the UN's inspections regime to plant its intelligence agents and others involved in anti-Saddam coup attempts, and generally to further its policy of espionage and subversion of the regime. Already under Rolf Ekeus, the first head of the UNSCOM, the US placed Charles Duelfer, a US State Department official, who supervised the intelligence operations. On 2 March 1999, Barton

Gellman of Washington Post carried a long report about these operations, but withheld the names of key US intelligence agents operating under the cover of UNSCOM for security reasons. Rolf Ekeus, Chief of UNSCOM during 1991-97, told Swedish Radio in August 2002 that the US had planted its nationals, who were engaged more in trying to locate Saddam Hussein than attend to their duties as inspectors. They were also busy co-ordinating with the commanders of the elite Special Republic Guard for a planned anti-Saddam coup on 26 June 1996, which failed. Scott Ritter, a former Colonel of the US Marine Corps intelligence who joined the UNSCOM as a chief inspector at the very beginning, is known for his attitudes and actions. By his own admission, Ritter visited Israel to confer with Mossad and Israel's military intelligence agencies, mainly Aman, and shared his Iraqi intelligence with them. He also obtained from them the technology to tap Iraqi security networks on frequencies that could not be picked up by American U-2 spy planes, which it had been flying under the cover of 15 August 1991 Security Council Resolution 707. Yet, after five-and-a-half-year existence and 373 inspections involving 3,574 experts that cost \$ 120 million, taken out of Iraq's frozen assets abroad, the UNSCOM, as its October 1996 report disclosed, obtained no proof of "Iraqi wrongdoing." But the inspections continued not so much to recover WMD but to undermine the Iraqi sense of national dignity and sovereignty. In July 1997, Rolf Ekeus stepped down as UNSCOM's chief and Richard Butler, an Australian disarmament expert, took over. As is now public knowledge, Butler and the US National Security Adviser Samuel Berger worked closely. Barton Gellman of Washington Post published a report on 28 August 1998 referring to "a standard procedure" whereby Butler's senior staff briefed a liaison officer from the CIA. Butler became famous after withdrawing the inspectors from Iraq to help the Clinton administration launch the Operation Desert Thunder in January 1999. The US cited the Security Council Resolution 688 of April 1991 to rationalise its behaviour. But the resolution makes no reference to air exclusion zones. The resolution was not passed under Chapter VII of the Charter; hence it did not authorise the use of force. Exclusion zones were the pre-text of effectively partitioning Iraq by violating its integrity, when respecting the integrity of member countries remains one of the aims of the United Nations.

We all know what happened later with the UN inspection programme. Resolution 1284 of the Security Council, passed under Chapter VII of the Charter, replaced UNSCOM with UNMOVIC under Hans Blix. In September 2002, Iraq agreed to receive UNMOVIC, under Resolution 1284, after holding long discussions with Secretary General Kofi Annan. After several inspections, Hans Blix reported that there was "no clear-cut evidence" that Iraq possessed WMD. He reported satisfactory progress of inspections and asked for more time to complete the disarmament. Iraq did not expel them this time. The Security Council did not ask them to leave. The UK and the USA were free to send whatever information they possessed to Hans Blix and the International Atomic Energy Agency in Vienna. Instead, the White House released a twenty-page document on 12 September 2002, entitled A Decade of Deception and Defiance for publicity and propaganda. The document contained no hard information. Likewise, Tony Blair released a fifty-page document, Iraq's Weapons of Mass Destruction: Assessment of the British Government on 24 September. The document offered no evidence. The USA tried to obtain a new resolution from the UN authorising the use of force. Failing in this, the US-led coalition chose to act in defiance of the United Nations.

The question that we must address now goes therefore beyond the issue of monitoring how this war was conducted. Because, given the history of systematic violation by the allied powers of the UN Charter and the abuse of its programmes, the paramount concern has to be: Is not this war by itself the greatest violation of human rights?

Peace, democracy, development and human rights in the region cannot be brought into being on this basis of hypocrisy, double standards and political loyalty to neo-colonialist designs and aggressions that we are witnessing today. They are in a clear violation of the UN Charter and the Customary International Law. The principle of renunciation of the use or threat of force is clearly affirmed by Article 2(4) of the UN Charter, which requires all member states to give up "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN". The words of Robert Jackson, a US Supreme Court Justice who served as the Chief American prosecutor at the Nuremberg trials, spoken to indict Germany 5 decades ago are appropriate for the war against Iraq initiated by the US led coalition forces. Jackson said: "To initiate a war of aggression... is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." The most reprehensible fact about the US decision to use force against Iraq outside the UN Charter is that it used the UN's disarmament program for 11 years effectively to make a country completely defenceless.

In all likelihood, the USA will insist on trying Iraqi war prisoners and criminals under the American law and dispense "victors' justice". Nothing can be more damaging for the principles of international jurisdiction of human rights. As we know, Washington opposed the ICC on the ground that Americans could get implicated in politically sensitive prosecutions. We have noted that the Lawyers Committee for Human Rights has called on the UN to appoint a Commission of Inquiry to pave the way to establishing an International Criminal Tribunal for Iraq, with appropriate mechanism for prosecuting those responsible for war crimes, crimes against humanity and genocide committed in Iraq. But we do not know if this will include trial for the crimes committed by the United States and other Allied Powers. Robert Jackson, the US chief prosecutor at the Nuremberg War Crimes Tribunal, had said: "If certain acts of violations of treaties are crimes, they are crimes whether the United States does them or whether Germany does them. We are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us."

Need for an Independent War Crimes Tribunal

Given the culpability of some of the permanent and other leading members of the United Nations, and its overall failure, given the fact that the division of the world into colonial powers and the again-to-be colonised countries again appearing, the international human rights community must now take immediate, primary, and appropriate steps towards establishing an international war crimes tribunal of the kind Bertrand Russell in association with Jean-Paul Sartre and Leon Matarasso instituted in 1960s with the objective to keep the movement for accountability and end of impunity alive in the sphere of popular consciousness.

It is in this direction, that we address this open letter to you with the hope that Amnesty will take the lead. If it does not, it will sadly and very unfortunately fail the entire human rights community. We urge you more because we belong to the once-colonised region of the world, which has in its memory alive the colonial plunders, loots, and colonial wars of aggression and annexation. We also constantly note how many of the well-known human rights organisations based in the West, particularly in the United States, all in the name of human rights have supported wars of intervention, wars to impose democracy, and the accompanying loss of lives, reminding us of the past two centuries when the colonial powers annexed one country after another in the name of protecting "Christian subjects", or introducing democracy and rule of law.

The need for help from all

This then is our appeal. This is an open appeal to you in fact to all human rights activists, to take appropriate and founding steps towards investigation of the crime of imposing war on Iraq, conduct and build up a primary or a first information report, so that the international human rights community can institute a specific public trials for war crimes in Iraq and on Iraq.

This is slightly edited version of an open appeal addressed to Secretary General, Amnesty International, London. The appeal released on 17 April 2003 was endorsed by eleven peace and human rights activist of South Asia: Paula Banerjee (University of Calicut), Calcutta), Tapan K. Bose (South Asia Forum for Human Rights, Kathmandu), Meghna Guhathakurta (University of Dhaka, Dhaka), Ram Narayan Kumar (Committee for Informal and Initiative on Punjab, Chandigarh), Rita Manchanda (South Asia Forum for Human Rights, Kathmandu), Dinesh Mohan (Indian Institute of Technology, Delhi), Gautam Navlakha (Pakistan India Peoples' Forum for Peace and Democracy, Nepal), Subodh raj Pyakurel (INSEC, Kathmandu), Sushil Pyakurel (National Human Rights Commission, Nepal, Kathmandu), I.A. Rehman (Human Rights Commission of Pakistan), Ranabir Samaddar (South Asia Forum for Human Rights, Kathmandu).