

Legal opinions on the events in Falluja in the light of the international legislation in force

Two differing legal opinions regarding the use of White Phosphorus are attached. Given the divergence of views, and the uncertainty about the extent of the effects, IPB calls for the establishment of an independent, international commission to determine the full facts and assess their legal significance.

1ST OPINION by Joachim Lau President of I.A.L.A.N.A. Italy (International Lawyers Against Nuclear Arms). and Filippo Tripanera, I.A.L.A.N.A. Italy member

The killing of troops and civilians in the city of Falluja on November 8-11, 2004 occurred in an indiscriminate way and against a specific population, falling under the provisions of Article 7 of the Rome Statute, for whose purposes “crimes against humanity” are "murder, extermination, or other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health when committed as part of a widespread or systematic attack directed against any civilian population."

We define an “*attack directed against any civilian population*” as a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack; “*extermination*” includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.

In the attack on the city of Falluja, on 8-11 November 2004, as pointed out by the RaiNews24 report, many war crimes can be identified – according to article 8 of the Rome Statute, in particular the employment of white phosphorus: even though it was employed as a “light-throwing substance”, its effects on the civilian population and on the insurgents fall under the protection of the article.

War crimes are:

- wilful killing;
- wilfully causing great suffering, or serious injury to body or health;
- extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

- attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- killing or wounding treacherously individuals belonging to the hostile nation or army;
- employing poison or poisoned weapons;
- employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition.

The United States of America have never signed the Statute but if we have a look at General Orders No. 100 – Instructions for the government of armies of the United States in the field, in force since 1863, during the U.S. War of Secession, we find out that it already envisaged the same prohibitions that have been enshrined and expanded in the Statute of the International Criminal Court.

White phosphorus, the chemical compound that is the object of this statement, just like many other chemicals that are or are going to be on the market and still don't have a precise name or coding, is neither prohibited in itself nor is expressly referred to in the "Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction" (Paris, 13 January 1993).

As a matter of fact, although it is not mentioned in the three "Tables of the chemicals" of the Convention, we must take into account that "for the purposes of this Convention" – as the Annex on chemicals states (B. Tables of chemicals, first paragraph) – these tables identify the chemicals that are object of the verification measures in accordance with the provisions in Annex on Implementation and Verification. According to Article II, Section (1a), "the Tables are not a definition of chemicals".

The same notion is highlighted in the first part of the Convention (Article II, Definition and criteria) where it says: "For the purpose of implementing this Convention, toxic chemicals which have been identified for the application of verification measures are listed in Schedules contained in the Annex on Chemicals".

Therefore, the point is not the nature of the weapon (incendiary, light throwing or biochemical weapons) but the **WAY IN WHICH THE CHEMICAL HAS BEEN USED**. We can't play with definitions and change the brand of a product to put it on the market for a while (as in the case of Napalm and MK77) until it is outlawed.

WARFARE HAS ALWAYS BEEN GIVEN RULES. However, these rules proceed at a slower pace than technology and this is the reason why lawmakers write comprehensive provisions instead of giving a list of prohibited chemicals (that can be too easily gone round) and prefer to focus on the effects they can produce and condemn everything that wilfully and systematically causes great and unnecessary suffering and serious injuries to human beings (people and animals) and jeopardize the environment.

The defense of this war strategy in the military campaign in Iraq based on the employment of white phosphorus can't be based on the "exclusivist" principle. On

the contrary, not all of the chemicals not expressly referred to in the tables can be employed with impunity in wartime because, as we have already seen, the tables are not a list of prohibited chemicals but, in line with the spirit of the Convention itself, “of the sole chemicals that are object of verification measures”.

We want to highlight once again that if a toxic chemical is not mentioned in the Convention, its employment is not automatically lawful. With regard to this, we recall that (Article II – Definition and criteria, Section (2)), “Toxic Chemical” means: "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere”.

References

- http://www.globalsecurity.org/military/library/policy/army/fm/6-30/f630_5.htm

White phosphorus uses by US army

4-16. SHELL WHITE PHOSPHORUS (WP) has four uses: incendiary, marking, obscuring, and screening. It can be used to destroy the enemy's equipment or to limit his vision. It is used against the following: Vehicles, Petroleum, oils and lubricants (POL) and ammunition storage areas, enemy observers. Also, shell WP can be used as an aid in target location and navigation. It can be fired with fuze time to obtain an airburst.