

Review article

## Applicability of the international humanitarian law to the fight against the Islamic State during the 2013-2017 conflict in Iraq

Krystian Mularczyk<sup>1\*</sup> , Karolina Saska<sup>2</sup> 

<sup>1</sup> District Chamber of Legal Advisors in Wrocław, Poland,  
e-mail: krystianmularczyk@wp.pl

<sup>2</sup> Faculty of Law, Administration and Economics, University of Wrocław, Poland,  
e-mail: saska.karolina98@gmail.com

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### ABSTRACT

The article addresses the applicability of international humanitarian law during the armed conflict in Iraq in 2013-2017 waged against the Islamic State. The paper answers how to classify this conflict against the background of the law of armed conflict. The argumentation for considering it as a non-international conflict with the Islamic State and the Iraqi government as parties is presented. The discussed failure to recognize the Islamic State's status as a state within the meaning of international law does not classify the armed conflict as international. The classification has not been changed by the United States and allied states' intervention, which, as one at the invitation of the Iraqi government, does not mean qualifying the conflict as international. The article also discusses the scope of the norms of international humanitarian law that apply to the conflict in question. It primarily concerns Article 3 that is common to the Geneva Conventions and customary law. Protocol II supplementing the provisions of the Geneva Conventions will not apply as Iraq is not a signatory to it.

### KEYWORDS

international humanitarian law, armed conflict, international law, non-international conflict

\* Corresponding author



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## Introduction

The subject of this article is the evaluation of the applicability of international humanitarian law to the fight against the Islamic State<sup>1</sup> during the 2013-2017 conflict in Iraq. The study provides an overview of the conflict, its specifics, and its classification. It discusses

<sup>1</sup> The literature uses various names to describe the Islamic State, including through the use of acronyms of English names such as ISIS (Islamic State of Iraq and al-Sham), IS (Islamic State) or ISIL (Islamic State of Iraq and the Levant), and acronyms of Arabic names DAIISH (Daesh), which is an abbreviation of the official name of the organisation from 2013-2014 Al-Dawla Al-Islamiya fi al-Iraq wa al-Sham. For the purposes of the article, the nomenclature commonly used in the Polish literature and media was adopted, i.e., the

the emergence of the Islamic State and attempts to present its status in international law. The classification of armed conflicts against the background of the law of armed conflicts is provided, which is of great importance for applying this law, particularly the scope of norms that are binding on the parties to such conflicts. The article focuses on the provisions of the Geneva Conventions and their two Additional Protocols, which occupy a central place in the application of international humanitarian law. The paper aims to answer whether it is possible to apply the norms of international humanitarian law to the fight against the Islamic State during that conflict and determine the consequences of its application or non-application.

The scope of the article covers actions against the Islamic State only within Iraq, during the civil war from 2013 to 2017. Consequently, the analysis presented does not address other aspects of the said conflict, mainly the military or political dimension and the possibility of applying the law of armed conflict to actions conducted against other parties to the Iraqi conflict, primarily against the Kurds.

The article consists of three parts, an introduction and a conclusion. The first presents an outline of the conflict in question, which is crucial to determine its nature against the background of the international humanitarian law of armed conflict. The second part shows the classification of armed conflicts, while the third part defines the status of its parties, the legal nature of the conflict in question, and the applicable law.

## **1. The outline of the 2013-2017 conflict in Iraq**

### **1.1. The genesis**

The beginning of the armed conflict in Iraq dates back to 2003 when the United States and allied countries launched an intervention to overthrow Saddam Hussein's government [1, p. 27]. The operation was completed a few months later, in the result of which a democratic government was established and the stabilization of the political system began.

The de facto measures taken to calm the situation in Iraq, primarily to stop terrorism, resulted in the release of social discontent [2, p. 46; 3, p. 177]. Decisions were adopted to exclude certain groups (especially the Baath Party members that constituted the former political elite) and had previously enjoyed a high status from being able to hold positions in the authorities or live a life at a similar level as before) [4, p. 49].

The changes introduced were met with resistance from the Sunnis [5, p. 19]. Consequently, soon after the overthrow of Saddam Hussein's rule, the first groups organizing themselves against the new government emerged, both from the Sunnis (e.g., *Jama'at at-Tawhid wal-Jihad* led by Abu Musab az-Zarkawi) and from the Shiites (e.g., the Mahdi Army led by Muqtada al-Sadr). Iraq is a country with Islam as the dominant religion (about 98% of adherents). The adherents are divided into two main factions – about 51% of Shia and 42% Sunni [6, p. 30]. The subsequent years saw the radicalization of a society dissatisfied with the changes introduced after the US gained power, the growing impoverishment of the country following Saddam Hussein's rule [2, p. 46; 7, p. 34-36], and the strengthening division between different religious and ethnic forces [5, p. 18-21]. Those factors provided the impetus for the development of Islamist-type movements [2, p. 47].

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Islamic State, which is in fact the Polish translation of the name of the organisation functioning since 2014, i.e., since the proclamation of the caliphate (in the original, in Arabic: Al-dawla al-Islamiyya).

The reorganization of power following the US intervention in 2003 exposed the divisions that existed in Iraqi society and gave rise to the loss of the former status enjoyed by Sunnis. As a result, the following years saw a series of assassinations and fighting between Sunnis and Shiites.

The Shiites and the Kurds won the 2005 elections. That was met with dissatisfaction by the Sunnis, who felt rejected [5, p. 19-20]. Soon after, some of them were forced to leave their places of residence due to persecution [8]. Moreover, it reinforced the growth of extremist groups whose members were primarily Sunni [1, p. 28]. In the following years, the conflict escalated [1, p. 29].

In 2008, an agreement was signed between the United States and Iraq. Its aim was the complete evacuation of US troops from Iraqi territory by 2011 [9]. After the withdrawal of US troops, Iraq remained a divided state and was gripped by civil unrest [10, p. 3]. Iraqi Prime Minister Nuri Al-Maliki's (2006-2014) efforts to tackle the chaos proved ineffective [5, p. 21-24; 11, p. 144;]. They were counterproductive since they contributed to the escalation of social discontent through a policy of discrimination against opposition groups [12, p. 160-161]. In 2011-2012, Sunni-affiliated groups boycotted the elections, accusing the then government of pursuing a policy of marginalizing Sunnis.

The difficult situation in Iraq was influenced by the civil war in nearby Syria, which caused the problem of controlling the borders of the two countries [1, p. 30], and the growing influence of terrorist groups, including the Islamic State (then the Islamic State in Iraq – ISI). The activities of the Islamic State on Iraqi territory were downplayed, and the actions directed against the growing influence of the organization were negligible [13, p. 82]. In 2012, the Islamic State launched a series of attacks in Iraq<sup>2</sup>. The same year also saw numerous widespread protests against the al-Maliki government, forcibly suppressed by the Iraqi authorities. The demonstrators received support from the Islamic State.

## 1.2. The origins of the Islamic State

The roots of the Islamic State are found in 1999 when Abu Musab az-Zarkawi founded the terrorist organization *Jama'at at-Tawhid wal-Jihad*<sup>3</sup>. After the US intervention in Iraq, he moved his activities there. In 2004, he collaborated with Osama bin Laden and transformed his organization into Al-Qaeda in Iraq (also called *Tanzim Ka'idat al-Jihad fi Bilad al-Rafidain* or Al-Qaeda in the Land of Two Rivers), which became one arm of Al-Qaeda. The az-Zarkawi faction was characterized by a high degree of independence [14, p. 2]. In 2006, it established the Mujahidin Shura Council (originally, in Arabic: *Majlis Shura al-Mujahedin*), bringing together several different extremist groups [15, p. 14]. In 2006, it created the Islamic State in Iraq (originally, in Arabic: *Al-Dawla fi al-Islamiya fi Iraq*; abbreviated: ISI), headed by Abu Omar al-Baghdadi. In the following years, the organization expanded its activities in Iraq, gaining more and more reach.

The development of extremist organizations on the territory of Iraq was made possible by several factors, mainly the prevailing chaos after the United States had taken control of the country, the failed attempts to stabilize the country, which produced effects opposite to those intended [7, p. 34-56], and the Iraqis' resentment towards the order established after the

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<sup>2</sup> The Operation Demolition of the Walls, which aimed to liberate prisoners, attack Nuri al-Maliki's government forces, and recruit new members is being discussed.

<sup>3</sup> The formation previously functioned without any name, only taking on an official name in 2004.

2003 intervention. Those factors provided the basis for extremist movements that gained support by presenting the United States as an invader from which they had to break free, and which would constitute a common enemy against that society would stand up for a just cause [16, p. 187].

Some of the former Iraqi security apparatus joined the numerous extremist groups that emerged at that time, hoping to regain power in that way [17, p. 56-57; 18, p. 81]. Those organizations also accepted fundamentalists from abroad into their ranks [5, p. 20-21]. One of these groups was the az-Zarkawi'z organization, whose structures were joined by the Baath Party members, formerly associated with Saddam Hussein [5, p. 30-31].

After the leader died in 2010, Abu Bakr al-Baghdadi took power and began expanding the ISI into Syria. Initially, the activities of the so-called Islamic State on the territory of Iraq and Syria focused primarily on carrying out assassinations, surprise attacks, but later they were directed towards expansion and maintaining the captured territory permanently [5, p. 35-36].

In 2011, Syria saw numerous anti-government demonstrations bloodily suppressed by Bashar al-Assad's forces, which over time escalated into armed conflict. Numerous jihadist groups, including the Islamic State militants, joined the fight against the government. In 2013, the organization captured Ar-Rakka and continued the expansion. In effect, al-Baghdadi announced the creation of the Islamic State in Iraq and al-Sham (originally, in Arabic: *Al-Dawla Al-Islamiya fi al-Iraq wa al-Sham*; abbreviated: ISIS)<sup>4</sup>.

In the following years, the organization gained more and more influence and built up its administration in the captured territories. In 2014, it gained such a strong position that it decided to proclaim the creation of a caliphate to constitute its state and thus gave it a name to emphasize its political distinctiveness and independence, i.e., the Islamic State (originally, in Arabic: *Al-Dawla Al-Islamiya*).

### 1.3. The armed conflict in Iraq 2013-2017

In 2013, the Iraqi province of Al-Anbar witnessed numerous terrorist attacks carried out against the army subordinated to the government. Sunni groups dissatisfied with the situation in Iraq were already active in the province. Prime Minister Nuri al-Maliki made unsuccessful attempts to stabilize the situation [5, p. 23]. As a result, the Islamic State forces launched an attack on al-Falluja in late December 2013, which ended with the capture of the city. In January 2014, the organization attacked Ar-Ramadi under the pretext of protecting the Sunnis living in the area [18, p. 83; 19, p. 40]. This time the attack failed. In the following months, new fighters joined the Islamic State, which enabled the organization to expand its armed activities [5, p. 39].

In total, by early 2014, the Islamic State took control of numerous towns in Al-Anbar province, including Al-Falluja, Al-Karma, Al-Khalidiyya, Al-Hadisa, Al-Ka'im, and partly Ar-Ramadi and Abu Ghurajb, while fighting battles with Iraqi forces [20, p. 8]. In May, the Islamic State began operations in northern Iraq, launching attacks on the province of Salah ad-Din, and later also on Nineveh. Mosul, Iraq's second-largest city, was seized in June. The Islamic State continued its success in the northern provinces of Iraq, taking control of Tikrit, Bayji, Tall Afar, Al-Aludja, and other towns on the road to Syria [5, p. 40].

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<sup>4</sup> Also, the name Da'ish or Daesh, an acronym for the original name in Arabic, *Al-Dawla Al-Islamiya fi al-Iraq wa al-Sham* is widely used in various publications. In addition, the name Islamic State is used in Iraq and the Levant (ISIL).

With much of the state in control, the Iraqi government decides to request assistance from the United States and other allies in the July 25, 2014 letter to the UN Secretary-General [21]. On August 8, 2014, the United States undertook an air intervention against the Islamic State inside Iraq. The then President of the United States, Barack Obama, stated that the action was made expressly at the request of the Iraqi government to assist Iraqi forces in the fight against the Islamic State [22]. The airstrikes by the United States caused that the Kurds managed to take the Mosul Dam and other locations. In late August 2014, the town of Amerli was recaptured [5, p. 42]. In September 2014, the United States announced the formation of a coalition against the Islamic State.

Soon other countries such as Saudi Arabia, Australia, Bahrain, France, Jordan, Qatar, the United Kingdom, and the United Arab Emirates joined the intervention in Iraq [20, p. 8-9]. In the letter dated September 20, 2014, the Iraqi government, called on the United States to lead the actions conducted against the Islamic State [23]. In response to events in Iraq and Syria, on September 24, 2014, an emergency meeting of the UN Security Council adopted Resolution 2178 (2014), targeting terrorism and calling on states to initiate action and cooperate against it [24]. However, it proved to be insufficient and did not have a momentous effect [25, p. 330-333].

The United States, together with the aviation of allied countries, performed numerous airstrikes against Islamic State positions; however, despite that, its position remained strong in Iraq until the end of 2014 [5, p. 44]. In late 2014, Morocco joined the air operations. In early 2015, extended airstrikes were also carried out by Jordan. Soon, Iraqi troops assisted by allied countries took control of almost the entire province of Diyala. The city of Tikrit was also recaptured in March 2015. At the end of 2015, Iraqi forces captured Ar-Ramadi.

In 2016, operations against the Islamic State began to bear fruit [26, p. 122]. In October, an operation was launched to retake Mosul, the capture of which was central to destroying the strength of the caliphate in Iraq [26, p. 122; 27, p. 11]. A joint operation between Iraqi troops supported by the United States and other countries and Shiite and Kurdish armed groups seized the eastern part of the city in January 2017. Furthermore, the Islamic State forces also began to lose control in other positions they held in Iraq, including Nineveh, Kirkuk, and Diyala provinces. The defeats of the Islamic State were accompanied by numerous attacks carried out by them in the lost territories. On July 10, 2017, Iraqi troops captured Mosul. In late August 2017, the last major city under Islamic State control, Tal Afar, was taken. Fighting continued until December to recapture the jihadist-held territories that remained under their control. On December 9, 2017, Iraqi Prime Minister Haider Al-Abadi announced the final victory over the Islamic State.

## **2. The division of armed conflict against the background of the international humanitarian law**

The international humanitarian law of armed conflict (*ius in bello*) regulates the rules of conduct of parties in international and non-international armed conflicts [28, p. 23-24]. As the International Committee of the Red Cross specifies, the norms of the international humanitarian law aim to protect persons and certain goods that may be affected by the conflict, as well as limit the unrestricted right of the parties to choose the methods and means of conducting hostilities for humanitarian reasons [29, p. XXVII; 30, p. 14]. The sources of the law of armed conflict are international agreements; the Hague Conventions adopted at the Second Hague Conference on October 18, 1907, the Geneva Conventions for the Protection

of Victims of War with subsequent protocols signed on August 12, 1949, in Geneva, and customary law are indicated as the fundamental ones [31, p. 149; 32, p. 27-35].

The application of the international humanitarian law of armed conflict depends on the identification of a certain factual situation that can qualify as an armed conflict [31, p. 149-150; 32, p. 45-46]. The definition of armed conflict today leaves some difficulties since it has not been formulated in international treaties so far [31, p. 150]. In the science of international law, it is defined as a manifestation of armed struggle between states (the use of force is characteristic) and parties not recognized as subjects of international law [32, p. 46; 33, p. 417]. An attempt to define the concept was made by the International Criminal Tribunal for the Crimes Committed in the Former Yugoslavia in *Prosecutor vs. Dusko Tadic*: “an armed conflict exists whenever there is a use of armed force or prolonged armed violence between states between governmental authorities and organized armed groups or between such groups on the territory of a single state” [34, para. 70].

When a state of facts is qualified as an armed conflict, the provisions of the Geneva Conventions of 1949 shall apply. A vital issue in the background of applying the international humanitarian law is the distinction of armed conflicts into international armed conflicts, i.e., ones fought between two or more states and those not of an international character. According to Article 2, the Conventions provisions shall apply in the event of a declaration of war or any other armed conflict between two or more High Contracting Parties, even if one of them did not recognize a state of war, and when all or part of the territory is occupied [35, Article 2]. Moreover, Article 3 provides that the Conventions applies in armed conflict, not of an international character, where a state is engaged in combat with an armed group in its territory [35, Art. 3]. Such conflict will not always fall under the Conventions and its protocols due to the classification of conflicts discussed later in the article [31, p. 150]. Difficulties under the applied law may also be posed by the distinction between an armed international conflict and an armed conflict without an international character.

Classification of an armed conflict as international or non-international has significant consequences at the level of law application [36, p. 294-295]. Indeed, certain norms of the international humanitarian law of armed conflict will find application only to an armed conflict of international character.

## **2.1. International armed conflicts**

According to Article 2, common to the Geneva Conventions, which applies to all four Geneva Conventions, an international armed conflict occurs when one state uses force against another state [32, p. 46]. Such an armed conflict is fought between states that have the status of subjects of international law. Moreover, the Geneva Conventions apply to a state being not a party to them if it accepts and applies its provisions, and where one of the states involved in the conflict is not a party to the Conventions, the states – parties remain bound by its provisions in their mutual relations [35, Art. 2. sentences 3 and 4].

The international humanitarian law applicability does not depend on an official declaration of war or the formal recognition of the other party to the conflict as a state, provided that it meets the criteria that enable that organism to be qualified as a state [32, p. 51; 37, p. 376]. Compliance with its norms of the law of armed conflict is the responsibility of each party to the conflict, regardless of whether only one of the parties initiated the armed conflict or violated a norm of the international humanitarian law [32, p. 51]. The entire international humanitarian law applies to international armed conflict [37, p. 376]. It includes all four Geneva

Conventions and the Additional Protocol to the Geneva Conventions of August 12, 1949, concerning the protection of victims of international armed conflicts, adopted in Geneva on June 8, 1977 (Protocol I) [38], supplementing the provisions of the Geneva Conventions, and several other provisions of the law of armed conflict found in international agreements and contained in customary law.

These conflicts do not pose major problems to the applicability of the law of armed conflicts since states were the original addressees of their norms and remain so today to a much greater extent than parties involved in armed conflicts not of an international character [39, p. 69].

## **2.2. Non-international armed conflicts**

Initially, international humanitarian law referred only to armed conflicts of an international character. Over time, due to the increasing number of internal conflicts, there has been a need to regulate these types of conflicts and ensure that the standards of international law, mainly human rights, are respected [40, p. 941-942]. Nowadays, local armed conflicts nature are becoming more frequent and seem to be slowly dominating those of an interstate nature [41, p. 19].

The Conventions in force before 1949 were only applicable to armed conflicts between states. Prior to adopting the Geneva Conventions, there were no norms that could apply to armed conflicts that were not of an international character. The view that such conflicts fell within the sphere of exclusive national jurisdiction was widely accepted since states considered internal conflicts as an internal matter of each state, to which the norms of international law could not apply as limiting the scope of sovereignty [39, p. 65]. Nonetheless, humanitarian needs necessitated the regulation of such conflicts. Those needs found expression in the Geneva Conventions adopted in 1949. Article 3 sets out the minimum standards of protection that parties are obliged to respect during armed conflicts not of an international character, in particular, the prohibition of attacks “on life and physical integrity, and in particular murder in all its forms, mutilation, cruel treatment, torture and torment”, as well as the prohibition of hostage-taking, attacks on personal dignity, and sentencing to death without trial [35, Art. 3(1)(a-d)]. The parties are also obliged to collect and treat the wounded and sick [35, Art. 3(2)]. Furthermore, the regulation of such conflicts is developed by the Additional Protocol to the Geneva Conventions of August 12, 1949, concerning the protection of victims of non-international armed conflicts, adopted in Geneva on June 8, 1977 (Protocol II) [42]. However, its application does not go as far as Article 3 of the Convention that sets certain limits, viz. it applies only to conflicts “which take place in the territory of a High Contracting Party between its armed forces and disunited armed forces or other organized armed groups under responsible command and control over part of its territory such that they can conduct continuous and consistent military operations and apply the present Protocol”, and it does not apply “to such internal tensions and disturbances as riots, isolated and sporadic acts of violence and other acts of a similar nature which are not regarded as armed conflicts” [42, Art. 1; 43, p. 104-105].

The definition of a non-international armed conflict is not specified in international law. In science, it is accepted that it is an armed conflict in which there is a confrontation on the territory of one state between government forces and an armed group or between armed groups using force [32, p. 210-211]. In such conflicts, at least one party does not have the nature of a party representing government forces [44, p. 75]. Each party is obliged to comply with the standards set out in Article 3 of the Geneva Convention.

According to the International Tribunal for the Crimes Committed in the Former Yugoslavia, two elements must be analyzed, i.e., the degree of intensity of the conflict and the degree of organization of the combatants involved, to qualify a given conflict as not having an international character and at the same time falling within the scope of Article 3 of the Geneva Convention [45, para. 562]. Both conditions should be met together. When analyzing the fulfillment of the condition of intensity, criteria such as duration of the conflict, its frequency, the means used, including the measure of violence, the armament, the size of the forces involved, the size of the territory controlled, the amount of damage, and the number of casualties should be primarily considered and analyzed concerning the specific conflict [44, p. 76-77; 46, para. 43]. When verifying the fulfillment of the second condition, attention should be paid to the level of organization of the armed group, with Article 3 of the Convention introducing more lenient criteria, i.e., “a certain command structure” will suffice [44, p. 77]. In contrast, for Protocol II, a certain degree of organization of the armed group or groups involved in the conflict and control of a certain territory is required [47, paras. 4464-4467]. The formula expressed in the case *Prosecutor v Tadić* [45, para. 562], has become widely used to qualify conflicts as non-international armed conflicts [48, p. 120-121].

If one of the two conditions is not met, the conflict in question cannot qualify as a non-international armed conflict within the meaning of the Geneva Conventions. Such a situation can at most be qualified as some internal tension or unrest. These are defined as “situations in which acts of violence have a relatively low degree of intensity such as riots, demonstrations, isolated and sporadic acts of violence, opposition to operations undertaken by government armed forces” [49, p. 47].

The Geneva Convention, in Article 3, requires that an armed conflict takes place in the territory of one of the High Contracting Parties [35, Article 3, sentence 1]. However, it does not mean depriving of the character of a non-international armed conflict, such as an armed conflict in the territory of more than one state. Instead, it specifies that the norms found in the Convention may only apply to an armed conflict ongoing on the territory of a state that is a party to the Geneva Conventions [44, p. 78].

In the absence of qualification as a non-international armed conflict simultaneously as an international armed conflict, only the internal law of the state on whose territory the conflict takes place shall apply to such a conflict.

### **3. Classification of the 2013-2017 armed conflict in Iraq**

#### **3.1. Remarks against the background of the status of the so-called Islamic State in international law**

The Islamic State is described as a “hybrid terrorist structure” that combines the features of a state and a terrorist organization or an armed group [50, p. 355]. Despite the name indicating it and its members’ ambitions, the Islamic State is not considered a state under international law.

The international law doctrine defines a state as a sovereign territorial or geopolitical organization [51, p. 335]. The doctrine distinguishes three elements that determine the possibility of qualifying an organism as a state, namely, the territory, the population living in this territory, and the authority of the nature of sovereign power [33, p. 132]. As indicated by W. Góralczyk and S. Sawicki, its establishment begins with the moment of “effective creation



of an independent, permanent, and stable power in a specific territory inhabited by the population in a manner consistent with the principles of international law” [33, p. 133].

The definition of a state is supplemented by the Convention on the Rights and Duties of States, adopted at the Seventh International Conference of American States in Montevideo in 1933. According to Article 1, “a state, as a person of international law, should possess the following attributes: (1) a permanent population; (2) a definite territory; (3) a government; and (4) the ability to maintain relations with other states” [52, Art. 1].

There is no doubt that the Islamic State meets certain conditions necessary to qualify as a state [53, p. 2], viz. the requirement to have a certain territory under its control, a population under its sovereignty and power structures, it should be particularly noted that the Islamic State built administrative structures in the captured territories, established institutions to manage sectors of the constructed caliphate, including ministries, institutions providing health and education services and courts [19, p. 45-49, 97-108; 54, p. 264].

According to the doctrine of international law, state power must be characterized by the attribute of sovereignty. Sovereignty determines the possibility of recognizing the international legal subjectivity of an organism aspiring to be a state [55, p. 160]. It is characterized as the independence of power from any other subject of international law [40, p. 173]. Internally, it means the ability to exercise real power full and exclusively over a specific territory and its population [56, p. 196]. The embodiment of sovereignty in the external dimension is acting independently in the international sphere [55, p. 161]. It is limited by respect for the sovereignty of other states [33, p. 134]. The Islamic State does not fulfill the ability to maintain relations with other states and external sovereignty [57, p. 144]. Moreover, account must be taken of the legality of its existence. The Islamic State was created in violation of the norms of international law. As Varus-Chaumette points out, “the absence of legality ab initio makes it impossible to grant the status of a subject of international law” [58, s. 84]. The acquisition of territory by the Islamic State, which was seized by force, should be considered illegal. According to the International Court of Justice, it is unlawful to acquire any territory using force [59, para. 87]. Furthermore, even if the other criteria for statehood are met, such a creation cannot be recognized as a state because “mere effectiveness cannot legalize the recognition of a state that has been illegally created” [60, p. 679; 61, p. 5]. It should be added that both states and the United Nations refused the organization’s recognition. It neither undertook international cooperation nor complied with the norms of international law [62, p. 235-236; 63, p. 42]. Thus, it is impossible to recognize it as a state in the sense of international law.

Not classifying a certain organism as a state gives rise to many consequences, mainly the problem of not being subject to certain norms binding only on states, and the related consequences in the absence or hindrance of the possibility of bringing such an organism to responsibility for actions contrary to the norms of international law, to which sometimes only states are subject.

### **3.2. The nature of the conflict**

The armed conflict in Iraq in 2013-2017 poses some classification problems as it is not a classic internal conflict [64, p. 642], due to the presence of other states’ interventions, as well as the question of determining the status of the Islamic State.

The attempt to qualify the armed conflict taking place in Iraq between 2013 and 2017 should begin with identifying the parties to the conflict, necessary to determine its nature. On the one hand, these were the Islamic State along with other related armed groups, primarily

groups composed of the Baath Party members, and, on the other hand, Iraq along with supporting Kurds and Shia units, integrated into the state security forces [65, p. 1-2]. As indicated above, the Islamic State, despite having some characteristics that may bring it closer to a state in the sense of international law, does not have such a status. Nor can this organization be considered an armed group that acts on behalf of another state, which would make it possible to consider the action of such a group as an actual state action [61, p. 5-6]. Armed action against such a group would then be classified as an international armed conflict [66, para. 541]. Therefore, due to the lack of armed action being conducted against one state against another, this conflict cannot be treated as an international armed conflict.

The intervention executed by the United States and other allied states does not change the character of this conflict into an international armed conflict [67, p. 831]. The legality of the actions carried out by the United States with other coalition partners leaves no doubt since it was an intervention with the nature of an intervention on demand [68, p. 166]. Such an intervention is generally accepted under international law, provided that the government requests assistance of the state concerned [68, p. 166; 69, p. 827]. The consent to the action expressed by governmental authorities excludes the illegality of such an act [69, p. 827]. In the present case, the Iraqi government itself requested assistance from other states [21; 23], which leaves no doubt about the legality of the activities carried out by the United States and other allied states. Moreover, none of the states questioned the legality of the actions conducted [70, p. 99]. However, according to the jurisprudence of the International Criminal Court, the mere intervention by invitation does not cause the conflict in which it occurred to be considered international [71, paras. 101-102].

In the case of Turkey's intervention in December 2015, some interpretative doubts will arise. During that period, a particular group of Turkish troops entered Iraq without its prior consent. The Turkish troops withdrew under Iraq's wishes, and their continued presence was condemned [67, p. 833]. That situation cannot be qualified as indicated above, i.e., as an invitation intervention, but as an act that violates Iraqi sovereignty. Given the lack of permission for Turkish troops to stay on Iraqi territory, that conflict between Turkey and Iraq could be qualified as an international armed conflict [67, p. 833]. Nevertheless, it remains without much relation to the interpretation of the armed conflict that is the subject of the article.

An armed conflict can be classified as non-international if it necessarily meets the criteria referred to above in *Prosecutor v Tadić* [45], i.e., the criterion of intensity and the criterion of organization. Their fulfillment allows classifying a conflict as not having international character, distinguishing it from unrest or internal tensions, which are not the subject of international humanitarian law regulation of armed conflicts.

In the case of the first criterion, i.e., the degree of intensity, it is indispensable to analyze the duration of the conducted armed actions. The factor should be interpreted with the entire period of the conducted armed actions and the involvement of forces taken into consideration [72, p. 248]. As A. Cullen points out, the level of intensity must be high enough to exclude isolated or sporadic acts of violence [48, p. 141]. When assessing intensity, factors such as the length of the conflict [73, para. 28], the seriousness of the armed clashes [73, para. 28], the spread of the clashes within the national territory [73, para. 29], the size of the destroyed property [73, para. 142], and the relocation of the local population [73, paras. 142, 167] are regarded. As for the 2013-2017 armed conflict in Iraq, there is no doubt that this criterion was met. This conflict was characterized by the intensity of the conducted armed actions aimed at seizing the entire territory of Iraq and creating a caliphate on the captured territories. The fighting spread over almost the entire territory of Iraq, with the Islamic State successively

expanding its operations into other provinces. In effect of the military action, property of enormous value was destroyed, including severe damage to cities, especially Mosul.

For the second criterion, i.e., the degree of organization of the participating armed groups, it is required that the armed group opposing the state meets a minimum degree of organization and discipline [74; 76, p. 31]. In assessing the degree of organization of an armed group, consideration is given to, among other things, the appointment of commanders [66, para. 96], the issuance of political statements [75, para. 101], the supply of weapons [75, para. 100], and the assignment of tasks to individuals [75, para. 46]. The element of the ability to carry out specific operations of a military nature is also indicated [77, p. 4]. Moreover, operational efficiency, viz. the ability to coordinate the army through the chain of command, is also a momentous criterion [48, p. 126; 76, p. 31]. There is no doubt that the Islamic State satisfies those requirements. During the armed conflict in Iraq, the group had a regular army of considerable size [78, p. 12], according to sources reaching up to 70 thousand fighters [63, p. 44]. The Islamic State had training camps, was able to carry out operations of a high degree of complexity, had an organized structure and good command, and was characterized by high discipline [63, p. 44-45; 78, p. 13]. It employed specific combat tactics [63, p. 46]. These features indicate the fulfillment of the criterion of organization.

When analyzing the above factors, it should be considered that the armed conflict in Iraq in 2013-2017 had the character of an armed conflict without international character. Consequently, Article 3, common to the Geneva Conventions and customary law norms relating to non-international conflicts, shall apply. As for the provisions of the Protocol Additional to the Geneva Conventions of August 12, 1949, concerning the protection of victims of non-international armed conflicts, adopted in Geneva on June 8, 1977 (Protocol II), they will not be applicable in the present case. According to Article 1 of Protocol II, which delimits the substantive scope of application of that instrument, it applies in the event of a conflict taking place "in the territory of a High Contracting Party, between its armed forces and disunited armed forces or other organized armed groups under the responsible command and exercising such control over part of its territory that they can conduct continuous and consistent military operations" [42, Art 1]. Iraq is not a party to Protocol II, which explicitly states that it applies when the conflict occurs in one of the territories of the signatory states. It is also irrelevant that the intervening states are parties to that act [67, p. 834]. Other provisions of the international humanitarian law of armed conflict applicable to armed conflicts of a non-international character expressed in international agreements to which Iraq is not a party, such as the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed in The Hague on May 14, 1954, will also not apply [79].

One of the problems growing in the case of qualifying the conflict in question as an armed conflict without international character and at the same time establishing that the norms of the international humanitarian law of armed conflict are in force is their territorial scope of application. It concerns the question of applying the norms on the given territory of the belligerent states and other spaces where armed actions are taking place [39, p. 93]. The law of armed conflict will find application not only to the places where de facto armed actions are taking place but to the territory of the entire state, which is a party to the conflict, or in the case of conflicts without international character – to the entire territory under the control of a party [33, para. 70; 48, p. 140].

The international humanitarian law has a universal scope; wherever armed actions arise in the territory of the conflict, its norms will apply [39, p. 94-95]. A broad interpretation of the territorial scope of application of the law of armed conflict allows its norms to cover the

entire territory of Iraq. Consequently, the international humanitarian law shall be applicable to both the armed actions carried out against the Islamic State on the Iraqi territory and the airstrikes carried out by the United States and allied states against the positions of the Islamic State [67, p. 844-855].

## Conclusions

The article presents an attempt to classify the 2013-2017 armed conflict in Iraq between the Islamic State and the Iraqi government, taking various factors into account, primarily the nature of the conflict, the status of the parties, the applicable law, and the scope of application of the norms. An outline of the conflict necessary to understand the nature of the conflict is also discussed.

The armed conflict in Iraq from 2013 to 2017 is an example of an armed conflict without international character. When analyzing it, some interpretative difficulties will arise due to the participation of intervening third countries and the legal status of the Islamic State. However, these factors do not change its qualification. The norms of international humanitarian law will apply to the conflict in question. These are particularly Article 3 common to the Geneva Conventions and customary law. However, the provisions of Protocol II will not apply, as Iraq is not a party to it.

The classification of an armed conflict as non-international has significant consequences, as such conflicts are covered by a narrower scope of norms since the regulation covering them is not yet entirely developed. The appropriate classification of a given conflict is significant regarding the norms applicable to the parties during such a conflict and responsibility for war crimes committed during the conflict. Responsibility for war crimes in international armed conflicts is still broader than in non-international armed conflicts.

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## Conflict of interests

All authors declared no conflict of interests.

## Author contributions

All authors contributed to the interpretation of results and writing of the paper. All authors read and approved the final manuscript.

## Ethical statement

The research complies with all national and international ethical requirements.

## ORCID

Krystian Mularczyk  <https://orcid.org/0000-0002-7519-6816>

Karolina Saska  <https://orcid.org/0000-0003-4686-4843>

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## Biographical note

**Krystian Mularczyk** – Vice Dean of the District Chamber of Legal Advisors in Wrocław, legal advisor, graduate of the Faculty of Law, Administration and Economics of the University of Wrocław; author of over 40 scientific publications.

**Karolina Saska** – fourth year student of law at the Faculty of Law, Administration and Economics at the University of Wrocław.

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### Możliwość zastosowania międzynarodowego prawa humanitarnego konfliktów zbrojnych do walki z Państwem Islamskim podczas konfliktu w Iraku w latach 2013-2017

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#### STRESZCZENIE

Celem artykułu jest omówienie możliwości zastosowania międzynarodowego prawa humanitarnego konfliktów zbrojnych podczas konfliktu zbrojnego w Iraku w latach 2013-2017 toczącego przeciwko Państwu Islamskiemu. Artykuł odpowiada na pytanie



jak sklasyfikować ten konflikt na tle międzynarodowego prawa humanitarnego konfliktów zbrojnych. Przedstawiono argumentację za uznaniem go za konflikt niemający charakteru międzynarodowego, w którym stronami są Państwo Islamskie oraz rząd iracki. Na kwalifikację konfliktu zbrojnego jako międzynarodowy nie pozwala omówiony w artykule brak uznania posiadania przez Państwo Islamskie statusu państwa w rozumieniu prawa międzynarodowego. Klasyfikacji tej nie zmienia interwencja Stanów Zjednoczonych oraz państw sojusznicznych, która jako interwencja na zaproszenie rządu irackiego nie powoduje uznania konfliktu za międzynarodowy. Artykuł omawia również zakres norm międzynarodowego prawa humanitarnego konfliktów zbrojnych, które znajdują zastosowanie do przedmiotowego konfliktu. Są to w szczególności art. 3 wspólny dla Konwencji genewskich oraz prawo zwyczajowe. Protokół II uzupełniający postanowienia Konwencji genewskich nie będzie miał zastosowania z uwagi na to, iż Irak nie jest jego sygnatariuszem.

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**SŁOWA KLUCZOWE** międzynarodowe prawo humanitarne konfliktów zbrojnych, konflikt zbrojny, prawo międzynarodowe, konflikt niemający charakteru międzynarodowego

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