

**March 6, 1991**

**THE BOMBING OF IRAQI CITIES:  
MIDDLE EAST WATCH CONDEMNS BOMBING WITHOUT WARNING OF AIR  
RAID SHELTER IN BAGHDAD'S AL AMERIYYA DISTRICT ON FEBRUARY 13**

- ☐ Finds That Shelter Was Protected From Attack Unless Warning Was First Given to Civilians**
- ☐ Believes Allied Forces Should Provide Full Public Accounting of All Civilian Damage Caused by Bombing Campaign**

*Middle East Watch conducted its own field research in Jordan last month to gather information about civilian casualties and damage from the allied forces' aerial bombardment of Iraq and occupied Kuwait, as part of its continued monitoring of the crisis in the Persian Gulf since August 1990. The findings of the mission will be published in the near future.*

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*The purpose of this newsletter, the fourth released by Middle East Watch since January 17, is to provide information and analysis concerning compliance by the U.S. and coalition forces under its command with binding restraints on methods and means of combat as they apply to the conduct of air warfare. In particular, it focuses on compliance by these parties with those rules in Protocol I Additional to the Geneva Conventions of 1949 which the U.S. expressly recognizes as declaratory of existing customary law, and with other rules which should be respected in the expectation that they soon will become part of the customary law of armed conflict. Middle East Watch is concerned that the U.S. and its allies may not always have applied these rules in the conduct of aerial bombardment in Iraq.*

*As the war in the Gulf entered its second month, Iraqi cities came under increasing aerial attack. Middle East Watch believes that the U.S. military command must provide more detailed public justifications to substantiate its claim that the allied forces undertook every effort to spare the civilian population and minimize civilian casualties and damage, pursuant to the laws of war.*

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#### **SUMMARY OF FINDINGS:**

- \* Under international humanitarian law, specific rules give special protection to civilian defense shelters which -- absent their express rejection by the United States -- should be observed. The Ameriyva building was protected from attack until such time as a warning was given to the Iraqi civilian population and that warning went unheeded. Given the knowledge of the U.S. military that the building had been used at one time as a civilian shelter, the failure before the bombing of February 13 to provide a warning to those who sought shelter there must be condemned.**
- \* The U.S. military has not demonstrated that it acted in strict compliance with the standards set forth in international law, particularly the process used to carefully verify that the Ameriyva building was not being used by civilians. This burden is only made stronger by the U.S. military's assertion that since the war began Iraqi command-and-control facilities were decentralized and placed in civilian structures.**
- \* Legitimate military targets, even when shielded by civilians, are subject to direct attack. By using civilians and prisoners-of-war to shield military targets from attack, Iraq violated its obligations under the Third and Fourth Geneva Conventions. Iraq thus would bear the primary responsibility for civilian casualties that might result from legitimate attacks by coalition forces against shielded military objectives. However, the legitimacy of a military target does not provide unlimited license to attack it. Individual civilians and civilian objects located within or near the target still retain the benefits of the rule of proportionality as it applies to collateral civilian casualties and damage to civilian objects.**
- \* The allied forces should provide a full public accounting, in a systematic and timely fashion, of all civilian damage caused by the bombing campaign. This information will help cut through what has been called "the fog of war," and permit policymakers, humanitarian and human rights organizations to independently assess the allied forces' adherence to the rules of war.**

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## **The Legal Requirement**

At the outbreak of war in the Gulf, Middle East Watch urged all parties to the conflict to adhere to the principles of international humanitarian law, also known as the laws of war. Middle East Watch called on all parties to the conflict to pay particular attention to the need to protect civilian noncombatants on all sides by directing their attacks only against military targets, and by refraining from launching attacks against military targets if the collateral harm to civilians and civilian objects would be disproportionate to the military advantage expected to be gained.

This customary law principle is enshrined and elaborated on in various provisions of Additional Protocol I of 1977, which broadens and strengthens the protection of the civilian population against the effects of hostilities. Article 57 of the Protocol states: "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects." Article 57 also instructs each party to the conflict to "take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects."

Although the U.S. has not ratified and rejects much of the "new law" in Protocol I, it accepts most of the Protocol's detailed rules implementing civilian immunity as reaffirmations or clarifications of existing customary laws of war. Michael J. Matheson, Deputy Legal Adviser at the U.S. Department of State, said in a speech in January 1987:

**[T]he United States will consider itself legally bound by the rules contained in Protocol I only to the extent that they reflect customary international law, either now or as it may develop in the**

future....We recognize that certain provisions of Protocol I reflect customary international law or are positive new developments, which should in time become part of that law.<sup>1</sup>

Regarding provisions of the Protocol that protect the civilian population, Mr. Matheson said:

Here again, much of this part of the Protocol is useful and deserving of treatment as customary law, although certain provisions present serious problems and do not merit such treatment. We support the principle that the civilian population as such, as well as individual citizens, not be the object of acts or threats of violence the primary purpose of which is to spread terror among them, and that attacks not be carried out that would clearly result in collateral civilian casualties disproportionate to the expected military advantage. These fundamental principles can be found in article 51...<sup>2</sup>

### **The Bombing in Baghdad's al-Ameriyya District on February 13**

The bombing of the building – termed a civilian air raid shelter by Iraq, and a military command- and-control bunker by the U.S. – took place at approximately 4:30 am on February 13. It occurred in the course of what has been described as some of the most intense bombardment of Baghdad since the war began, in a 12-hour period on the evening of February 12 and the early morning of February 13. Dilip Ganguly of the Associated Press reported from Baghdad that "dozens of other targets" were hit in the city during the nighttime raids, including the Palace of Conferences, across the street from al-Rashid Hotel.<sup>3</sup>

The facility is located in the al-Ameriyya district of western Baghdad, in what journalists have described as a middle-class neighborhood -- a nursery school, a supermarket and a mosque are said to be located in the immediate vicinity. The structure was built as a civilian bomb shelter in 1984 and, according to the U.S. military, later reinforced with a concrete and steel roof ten feet thick. The building was attacked with two laser-guided bombs: the first reportedly hit the air vent of the facility, weakening the structure; the second tore through the roof and exploded inside. Iraqi officials put the death toll at 310, some 130 of whom were children.<sup>4</sup>

Pentagon officials said the building was "EMP" – electromagnetic pulse – hardened with special equipment, in order to protect communications in the event of nuclear attack.<sup>5</sup> U.S. claims that it was surrounded by chain link and

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<sup>1</sup>Speech delivered on January 22, 1987 at the 6th Annual American Red Cross - Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *The American University Journal of International Law and Policy*, Vol. 2, No. 2 (Fall 1987), at 420-421 (hereinafter Matheson).

<sup>2</sup>*Id.* at 426.

<sup>3</sup> *The Independent*, February 14, 1991.

<sup>4</sup>Dr. Fayek Amin Bakr, the director of the Baghdad Forensic Institute, released the figures on February 19, stating: "Approximately 130 were children and the rest were men and women in roughly equal numbers." Alfonso Rojo, "Bombs rock capital as allies deliver terrible warning," *The Guardian*, February 20, 1991.

<sup>5</sup>Jeffrey Smith, "Design Convinced U.S. Analysts Building Was a Bunker," *The Washington Post*, February 14, 1991; William J. Broad, "Baghdad is Heart of Iraq's Complex Military Communications Structure," *The New York Times*, February 15, 1991.

barbed wire fences were also used as a supporting argument. Peter Arnett of CNN reported that at the building's entrance was a sign: Department of Civilian Defense Public Shelter No. 25.<sup>6</sup> Television footage also showed a sign marked "Shelter" in Arabic and English.

Abdel Razzaq Hassan al-Janabi, who identified himself as a supervisor of the shelter, described how the building was used by civilians:

Each evening since the start of the war, local people would come along with their food, blankets, pillows and their things to the bunker. Nothing had ever fallen on Iai-Ameriyya, but people preferred to spend the night down there for safety's sake. Last night, there must have been at least 400 people inside....There are shelters like this in lots of parts of Baghdad. They have room for 2,000 people. We always thought they were the best civilian shelters in the city.<sup>7</sup>

Hassan Ali Hussein, a local resident whose 14-year-old son Ahmad was in the building, said:

The boy went to spend the night in the shelter. They'd linked up a television to the generator and used to show videos. Clint Eastwood, Bruce Lee. That sort of thing....We were sure nothing could have happened to him. It's a nuclear shelter with walls of cement three metres thick.<sup>8</sup>

Middle East Watch last month interviewed Fawzi Muhtasseb, whose entire immediate family -- his wife and five children, aged six to 15 years, four sons and a daughter -- was killed in the Ameriyya bombing.<sup>9</sup> Mr. Muhtasseb, a Jordanian of Palestinian origin, had lived in Kuwait for 16 years, where he owned a small retail textile business. He and his family relocated to Iraq on January 10 because his business was no longer profitable in Kuwait, and rented a house in the Ameriyya neighborhood. According to Mr. Muhtasseb, two or three days after the aerial bombardment of Baghdad began, he and his family began to spend the night in the Ameriyya shelter because the bombing was so intense.

He told Middle East Watch that he spent the first few nights at the shelter with his family, but that he and other men soon stopped going, in order to afford greater privacy to the women and children.<sup>10</sup> He would take his family to the building at about 5 pm and they would return at about 7 am the next day. Mr. Muhtasseb said that the building was a public shelter, with a sign outside describing it as a shelter and other signs in the neighborhood indicating directions to the building. He described it as having three stories: one above ground and two underground. The top floor contained the sleeping area, configured as one large hall without partitions. There were triple bunkbeds for children, enclosed areas for bathrooms, a kitchen and a television. Food and water were kept on the middle floor; food was not prepared at the building, and families would eat at home during the day. They would, however, bring sandwiches in case the children became hungry.

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<sup>6</sup>Robert D. McFadden, "Iraqis Assail U.S. As Rescue Goes On," *The New York Times*, February 15, 1991.

<sup>7</sup>Alfonso Rojo, "Bodies shrunk by heat of fire," *The Guardian*, February 14, 1991.

<sup>8</sup>*Id.*

<sup>9</sup>Interview in Amman, Jordan, February 23, 1991.

<sup>10</sup>It is uncomfortable for Moslem men and women to share, and sleep together in, close quarters with individuals who are not related to them by blood or marriage, particularly in a space where there are no partitions to separate families and to provide privacy.

The building's bottom level contained standby electrical generators and other building equipment. Mr. Muhtasseb insisted that although there were several technicians to manage the building and operate the generators, the building was only used for civilians and he never noticed any military use. He said that it looked like a simple large concrete building from the outside. From the street, he said he never saw camouflage paint on the building.

Mr. Muhtasseb said that on the night of February 12, he stayed at home and his wife and children went to the shelter. When they did not return home the next morning, he went to the shelter, knowing that the neighborhood had been bombed the night before. He said that he was never able to identify his family members because the bodies of the victims were charred beyond recognition.

Middle East Watch also interviewed a 22-year-old Egyptian retail worker, who was a resident of Iraq for three years and lived near the Ameriyya building.<sup>11</sup> He arrived at the building before the police cordoned it off and assisted in the rescue effort. He said that it took 15 minutes to open one of the doors, because of the heat and smoke. Once inside the building, he said he saw three-tiered beds that were melted from the high temperatures; he also said he saw three children completely burned and another whose back was burning. He told Middle East Watch that he knew of one Egyptian and two Iraqi families who were killed inside the building. The sole survivor was the father of the Egyptian family, who was not at the shelter on the night of February 12.

A Sudanese student of veterinary medicine at Baghdad University told Middle East Watch that he had lived in the Ameriyya neighborhood because it was close to his college, where he studied since 1986.<sup>12</sup> He said that he had never been inside the building, but that "everyone knew it was a shelter." He said the sign outside, marking it as a civilian shelter, was very old; the same sign was there during the Iran-Iraq war. The building was concrete and square-shaped, and looked like a very large hall. He told Middle East Watch that the wife and six children of one of his neighbors died in the bombing, and that visited the homes of neighbors in mourning.

It has been suggested that the bombing of the Ameriyya building may have been an attempt to strike against Iraqi government officials. Senior U.S. officials interviewed by *The Washington Post* said that the structure was a "leadership bunker," thought by intelligence experts to be one of some 20 similar facilities in Baghdad residential neighborhoods where senior Iraqi government officials lived, for use by them and their families during air raids.<sup>13</sup>

A U.S. official who had been stationed in Baghdad said: "We watched them build those things. Our understanding was that these were VIP shelters, built for government cadres and party people."<sup>14</sup> Senior military sources in Saudi Arabia also said that near al-Ameriyya was "a significant bunker in the series of bunker complexes that [Saddam Hussein] has. He moves frequently. He has a series of bunkers in the Baghdad suburbs."<sup>15</sup> Capt. David Herrington, deputy director of intelligence for the Joint Chiefs of Staff, said that "over a period of time, military

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<sup>11</sup>Interview at Ruwaishid Evacuee Center, Ruwaishid, Jordan, February 24, 1991.

<sup>12</sup>Interview at Azraq Evacuee Center, Azraq, Jordan, February 26, 1991.

<sup>13</sup> R. Jeffrey Smith, *supra* note 5.

<sup>14</sup>Patrick J. Sloyan, "Was Hussein Target of Bunker Bombing?" *Newsday*, February 15, 1991.

<sup>15</sup>Christopher Bellamy et. al., "Shelter `a military target,'" *The Independent*, February 14, 1991.

vehicles...leadership vehicles...[and] a whole range of other equipment" were seen outside the building.<sup>16</sup> Military officials also said U.S. intelligence revealed that military trucks and limousines used by senior Iraqi leaders were seen entering and leaving the building in early February.<sup>17</sup>

There were several indications that the heavy bombing of Baghdad was intended to serve purposes other than those publicly articulated by Pentagon and White House spokesmen. A Pentagon official told *The Washington Post* that the bombing of Baghdad and other cities was "a way of letting the [Iraqi] leadership know that we care about them and want to bring the war home to them," in the hope that a coup might be staged against Saddam Hussein.<sup>18</sup> One experienced British journalist noted: "The bombing of ministries in Baghdad quite unrelated to the war effort seemed to many to ram home that message, which is in essence that there will be no Iraq left to govern and no means by which to govern it unless Saddam is removed."<sup>19</sup>

These views were reinforced by President Bush's remarks on February 15, in reply to the Iraqi Revolutionary Command Council (RCC) statement about the readiness of Iraq to deal with U.N. Security Council Resolution 660. In rejecting the RCC proposal, the President said: "There's another way for the bloodshed to stop, and that is for the Iraqi military and the Iraqi people to take matters into their own hands and force Saddam Hussein, the dictator, to step aside...."<sup>20</sup> These aims, however, cannot justify direct attacks on civilian objects or indiscriminate attacks against military targets.

### **The Official U.S. Position**

In a briefing on February 13 in Washington, D.C., Lt. Gen. Thomas Kelly of the Joint Chiefs of Staff laid out the U.S. position about the bombing of the building:

We knew this to be a military command-and-control facility and targeted it for that reason...We targeted it, we bombed it very accurately, we bombed a building that had barbed wire around it, not an indication of a bomb shelter. We bombed a building that had a camouflage roof painted on it for whatever reason, again, didn't look like a bomb shelter.<sup>21</sup>

However, U.S. military spokesman Brig. Gen. Richard Neal acknowledged, at a briefing in Riyadh the same day, that the U.S. knew that the shelter was originally built for civilians:

As to air raid shelters, my understanding is that [the Iraqis] do have air raid shelters. In fact, this was an air raid shelter in 1985, but then was upgraded. We had talked to folks that had worked in the

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<sup>16</sup> R. Jeffrey Smith, *supra*note 5.

<sup>17</sup> Michael R. Gordon, "U.S. Calls Target a Command Center," *The New York Times*, February 14, 1991.

<sup>18</sup> "Allies to Intensify Bombing To Prepare for Ground War," *The Washington Post*, February 8, 1991.

<sup>19</sup> Martin Woollacott, "Iraq's lost generation," *The Guardian*, February 15, 1991.

<sup>20</sup> *The New York Times*, February 16, 1991.

<sup>21</sup> *The New York Times*, February 14, 1991.

construction area that this one was upgraded to a hardened shelter used for command and control.<sup>22</sup>

Two reasons have been offered by U.S. military spokesmen to justify placement of the building on the bombing target list: the interception of military communications from the building, and aerial and satellite photographic intelligence that revealed the presence of military vehicles and personnel there. Gen. Neal, who noted that the building's roof was recently painted "with a camouflage patina," described the activity that was noticed there in recent weeks: "We are able to intercept an active communications mode. There [were] military folks in and around the facility on a routine and a continuous basis." He also explained why the shelter was not attacked earlier in the air war:

It became an active command-and-control bunker. We knew it was a military target, a military bunker during the work-up to the actual execution of the air campaign. But we haven't really seen any activity out of this bunker until the last two or three weeks...and so it was added to the target list as a result of this analysis and assessment by our J2 (military intelligence) folks.

Gen. Neal also said: "We have no explanation at this time really why there were civilians in this bunker." Nevertheless, he insisted that the facility was not attacked in error: "We don't feel we attacked the wrong bunker or that we made a mistake."

### **Civilian Shelters Enjoy Special Protections under International Humanitarian Law**

Middle East Watch recognizes that civilian objects in general may lawfully lose their immunity from direct attack if they are used to make an effective contribution to enemy military action. However, Protocol I contains certain *specific* rules giving special protection to civilian defense shelters which, absent their express rejection by the U.S., should be observed by the U.S. since they are designed to strengthen the customary principle of civilian immunity. We believe that under these rules the Ameriyya building was protected from attack until such time as a warning was given to the Iraqi civilian population and that warning went unheeded.

Protocol I recommends that civil defense facilities be clearly marked with an internationally recognized symbol. Article 66 instructs parties to the conflict to "endeavour to adopt and implement methods and procedures which will make it possible to recognize civilian shelters as well as civil defence personnel, buildings and materiel on which the international distinctive sign of civil defence is displayed."<sup>23</sup> Middle East Watch is not aware that Iraqi civilian shelters have been marked with the international blue-and-orange symbol; regarding the Ameriyya building in particular, one U.S. official said that three black circles, resembling bomb holes, had been painted on its roof, to suggest that it already had been attacked.<sup>24</sup>

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<sup>22</sup> *The Guardian*, February 14, 1991.

<sup>23</sup>The international civil defense symbol is an equilateral blue triangle placed on an orange ground. Annex I of Protocol I recommends that the symbol "shall be as large as appropriate under the circumstances. The distinctive sign shall, whenever possible, be displayed on flat surfaces or on flags visible from as many directions and from as far away as possible...At night or when visibility is reduced, the sign may be lighted or illuminated; it may also be made of materials rendering it recognizable by technical means of detection." (Art. 15)

<sup>24</sup>William J. Broad, "Baghdad Is Heart of Iraq's Complex Military Communications Structure," *The New York Times*, February 15, 1991.

Iraq's failure to so identify civilian civil defense buildings in itself could not relieve the U.S. military of its obligation to take appropriate precautionary measures and give a warning prior to launching its attack. Such measures should have been taken in the circumstances of the Ameriyya case for at least two reasons: the U.S. military's knowledge of the building's prior use as a strictly civilian shelter, and the Iraqi's use of civilians to shield military targets.

Article 62 of Protocol I states in part: "Objects used for civil defence purposes may not be destroyed or diverted from their proper use except by the Party to which they belong." The protection afforded to civilian civil defense buildings, shelters and personnel terminates if "they commit or are used to commit, outside their proper tasks, acts harmful to the enemy."<sup>25</sup> However, in the event of the conversion of a civilian shelter to military purposes – which is the U.S. position regarding the al-Ameriyya building – Article 65 of Protocol I specifies that a warning must be given prior to the removal of such a facility from the category of a protected object:

Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

In the Ameriyya case, Middle East Watch deplores the fact that the U.S. military authorities have not publicly acknowledged that a warning was required, nor have they provided reasons why a warning was not given. In this context, it notes that U.S. Air Force Pamphlet 110-31 on the Conduct of Armed Conflict and Air Operations states, *inter alia*, the following regarding minimizing civilian casualties:

...Attacks are not prohibited against military objectives even though incidental injury or damage to civilians will occur, but such incidental injury to civilians or damage to civilian objects must not be excessive when compared to the concrete and direct military advantage anticipated. Careful balancing of interests is required between the potential military advantage and the degree of incidental injury or damage in order to preclude situations raising issues of indiscriminate attacks violating general civilian protections. An attack efficiently carried out in accordance with the principle of economy of force against a military airfield or other military installations would doubtless not raise the issue. On the other hand, attacks against objects used predominately by the civilian population in urban areas, even though they might also be military objectives, are likely to raise the issue.<sup>26</sup>

### No Demonstration That Precautions Were Taken Prior to Attack

In public statements, U.S. military officials have repeatedly emphasized the basis for their judgment that the Ameriyya building was used for military-related activity and therefore a legitimate military target. Gen. Kelly said on February 13: "We didn't know that the Iraqis had civilians in there." He posited the notion that U.S. reconnaissance did

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<sup>25</sup> Article 65. The presence of military personnel at civil defense facilities -- which the U.S. claims was the case at al-Ameriyya -- does not lift the immunity of such buildings from attack. Article 65 also states in part: "The following shall not be considered as acts harmful to the enemy: (a) that civil defence tasks are carried out under the direction or control of military authorities; (b) that civilian civil defence personnel co-operate with military personnel in the performance of civil defence tasks, or that some military personnel are attached to civilian civil defence organizations..."

<sup>26</sup> Department of the Air Force, Judge Advocate General Activities, International Law -- The Conduct of Armed Conflict and Air Operations (AF Pamphlet 110-31) (19 November 1976) at Chapter 5, page 10 (hereinafter AF Pamphlet).

not observe civilians using the building because they moved inside under the cover of darkness: "We did see military people going in and out. Why didn't we see civilians going in and out? Maybe they didn't go in and out until after dark last night and we didn't have a picture of it...They could have gone in after dark last night when we weren't up there looking."<sup>27</sup>

According to accounts from Baghdad, civilians have in fact been using the building since the bombing of the city began. Even if they entered the building once darkness fell, what is left unexplained by U.S. military briefers is why aerial reconnaissance did not detect civilian movement from the building in the daylight of morning.

Gen. Kelly said on February 13 that "we did take all the precautions we could." He did not, however, spell out the specific nature of these precautions, in sharp contrast to the disclosure of information to support the contention that the building was used for military purposes. This is particularly important in view of three factors: the acknowledgement by the U.S. military that the building originally served as a civilian shelter, the contention that it only recently "became" an active command-and-control bunker, and Iraq's repeated use of civilians to shield military targets.

The identification of an object as serving a military purpose is a necessary, but not sufficient, condition prior to making a decision to attack it. First, in the case of any uncertainty that a civilian object is being used for military purposes, there is a presumption of civilian use in favor of such objects. Article 52 of Protocol I establishes this principle:

In the case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

The accompanying official Commentary of the International Committee of the Red Cross (ICRC) states:

The presumption established here constitutes an important step forward in the protection of the civilian population, for in many conflicts the belligerents have "shot first and asked questions later."<sup>28</sup>

Importantly, the U.S. Air Force also expressly accepts this presumption, and Air Force Pamphlet 110-31 states that "location as well as prior uses are important factors in determining whether objects are military objectives."<sup>29</sup>

The ICRC Commentary further describes the exacting nature of this presumption, which extends to front-line areas where armed forces are present:

Even in contact areas there is a presumption that civilian buildings located there are not used by the armed forces, and consequently it is prohibited to attack them unless it is certain that they

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<sup>27</sup> *The New York Times*, February 14, 1991.

<sup>28</sup> International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: 1987) at 637 (hereinafter ICRC commentary).

<sup>29</sup> AF Pamphlet, *supra*note 26, at Chapter 5, page 8.

accommodate enemy combatants or military objects. Strict compliance with the precautions laid down in Article 57 (*Precautions in attack*) will in most cases bring to light the doubt referred to in this provision or the certainty that it is a military objective.<sup>30</sup>

Article 57 of Protocol I codifies principles of pre-existing customary and conventional law concerning precautionary steps which an attacking party must take prior to launching an attack to avoid or minimize civilian casualties and damage to civilian objects. It states, in part, that those who plan or decide upon an attack must "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects". The ICRC Commentary on Article 57 notes that "the identification of the objective, particularly when it is located at a great distance, should be carried out with great care."

Further, the Commentary states that "in case of doubt, even if there is only slight doubt," those who plan or decide on an attack "must call for additional information and if need be give orders for further reconnaissance...The evaluation of the information obtained must include a serious check of its accuracy, particularly as there is nothing to prevent the enemy from setting up fake military objectives or camouflaging the true ones."<sup>31</sup>

As clarifications and reaffirmations of existing law, these precautionary measures are binding on the United States. The U.S. State Department clearly states in this regard:

We support the principle that all practicable precautions, taking into account military and humanitarian considerations, be taken in the conduct of military operations to minimize incidental death, injury, and damage to civilians and civilian objects, and that effective advance warning be given of attacks which may affect the civilian population, unless circumstances do not permit.<sup>32</sup>

In addition, Air Force Pamphlet 110-31 expressly adapts and incorporates the precautionary measures specified in Article 57 (2)(a) through (c) of Protocol I and notes pointedly that "precautionary measures are not a substitute for the general immunity of the civilian population, but an attempt to give effect to the immunity of civilians and the requirements of military necessity."<sup>33</sup>

Middle East Watch believes that the U.S. military has not demonstrated that it acted in strict compliance with the standards set forth in Article 57, particularly the process used to carefully verify that the building was not being used by civilians -- at the time when it was placed on the target list, and at the time when the bombing attack was planned and then executed. This burden is only made stronger by the U.S. military's assertion that since the war began Iraqi command-and-control facilities have been decentralized and placed in civilian structures.

Given the knowledge of the U.S. military that the Ameriyya building had been used previously as a civilian shelter, the failure before the bombing to provide a warning to any civilians who might have sought shelter there must be condemned.

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<sup>30</sup>ICRC Commentary, *supra*note 28, at 638.

<sup>31</sup>*Id.* at 680-681.

<sup>32</sup>Matheson, *supra*note 1, at 426-427.

<sup>33</sup>AF Pamphlet, *supra*note 26, at Chapter 5, page 10.

The U.S. military should publicly acknowledge if verification efforts were not undertaken, and should publicly report the steps that will be taken to avoid such omissions in the future. As a possible indication that additional precautions were taken by the U.S. in light of the tragedy at al-Ameriyya, Middle East Watch notes that a senior military source in Riyadh is reported to have said that command-and-control bunkers in Baghdad had been attacked since February 13, but also added: "We now know civilians are in certain bunkers in Baghdad."<sup>34</sup>

### **The "Co-Mingling" Issue: Civilians Must Not Be Used to Shield Military Targets, But the Rules of War Also Dictate That Attacks Against Such Targets Not Cause Disproportionate Injury or Damage to Civilians and Civilian Objects**

The U.S. commanders have claimed that the shelter was a legitimate military target because they believed it was being used as a military command center. Iraqi military command-and-control facilities have been targeted and attacked since the first days of the air war. Gen. Kelly said on February 13 that the Iraqis moved their command centers to alternate facilities as a result of the allied bombing campaign: "What you are seeing on TV today [the Ameriyya building] is one of those alternate command-and-control facilities that we knew was active."<sup>35</sup>

This implicit raises the issue of shielding, a violation of the rules of war. In order to give effect to the principle of civilian immunity, Article 28 of the Fourth Geneva Convention, ratified by all parties to the Gulf conflict, effectively enjoins the parties from using civilians "to render certain points or areas immune from military operations." This means that civilians may not be used to shield a defensive position, to hide military objectives, or to screen an attack. These principles are reaffirmed and codified in Article 58 of Protocol I. By using foreign civilians and prisoners-of-war to shield military targets from attack, Iraq violated its obligations under the Third and Fourth Geneva Conventions. Iraq thus would have borne the primary responsibility for civilian casualties that might have resulted from legitimate attacks by coalition forces against shielded military objectives.

Middle East Watch interviews with those who lived in and knew the neighborhood in which the shelter was located, and who had been inside the shelter, however, do not bear out the suggestion that the civilians in the shelter were used to shield military operations from attack. Residents who sent their children into the shelter believed this was strictly a civilian facility and that there were no military facilities present.

Gen. Schwarzkopf said on February 4 that the schools where command centers had been located would not be targeted by allied bombers. On February 13, after the shelter bombing, he again pointed out that Iraq had relocated military targets on, in and near civilian structures, affording the allied forces the right to attack these facilities:

[R]ight now they've dispersed their airplanes into residential areas, they've moved their headquarters into schools, they've moved their headquarters into hotel buildings, they've put guns and things like that on top of high-rise apartment building. *Under the Geneva Convention, that gives*

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<sup>34</sup>Christopher Bellamy, "Baghdad rocked by rain of destruction," *The Independent*, February 20, 1991.

<sup>35</sup> *The New York Times*, February 14, 1991.

*us a perfect right to go after those things if we want to do them. We haven't done it.<sup>36</sup>* (Middle East Watch emphasis)

Gen. Schwarzkopf is correct when he states that legitimate military targets, even when shielded by civilians, are subject to direct attack. He is incorrect when he suggests that the legitimacy of a target provides unlimited license to attack it. Individual civilians and civilian objects located within or near the target still retain the benefits of the rule of proportionality as it applies to collateral civilian casualties and damage to civilian objects. Article 51(4) and (5)(b) of Protocol I characterize and prohibit as "indiscriminate" an attack that

may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof which would be excessive in relation to the concrete and direct military advantage anticipated.

Similarly, Article 57 (2)(a)(iii) and (b), as a codification of pre-existing laws, directly binds Gen. Schwarzkopf and his subordinates to refrain from launching, or to cancel, such a disproportionate or indiscriminate attack. Middle East Watch believes that Gen. Schwarzkopf in his February 13 comment erred in his interpretation of the principles of customary law.

### **U.S. Military Authorities Should Respond to Credible Allegations of Attacks on Civilian Targets**

The controversy surrounding the bombing of the building in the Ameriyya district on February 13 has demonstrated that public attention can bring forth more detailed information from Pentagon officials about military operations that cause civilian casualties. In February, reports continued of the bombing of civilian cars, trucks and buses on highways in Iraq, including eyewitness testimony that Middle East Watch gathered in Jordan. Middle East Watch believes that these persistent allegations are credible. And it calls on the U.S. and allied military authorities to make available as soon as possible specific documentation from bomb damage assessment reports to rebut or substantiate these claims. As one Riyadh-based journalist wrote, these reports contain detailed information that is not made public:

Military authorities who spend their days and nights in the war room here concede they know much more about bomb damages than they are willing to discuss publicly. Field commanders have said in recent days that they are provided daily reports with extraordinarily detailed bomb damage assessments, according to pool reports.<sup>37</sup>

In his reply to the Middle East Watch letter of February 1, Gen. Kelly suggested a willingness of the U.S. military to make available "sufficient factual detail" to confirm or rebut allegations of violations of the rules of war. We look forward to receiving such data at an early date.

As more information about the conduct of the Gulf war becomes available, the toll of civilian deaths and injuries and the extent of damage to civilian objects in both Iraq and Kuwait will slowly become known. In the case of the allied forces' aerial bombardment of Iraq, it is inevitable, however, that controversies surrounding the

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<sup>36</sup>Dan Balz and Edward Cody, "Third of Force In Kuwait Said To Be Depleted," *The Washington Post*, February 15, 1991.

<sup>37</sup>Molly Moore, "Bombing Damage Hard to Assess," *The Washington Post*, February 7, 1991.

circumstances of civilian casualties will continue to arise.

In this regard, Middle East Watch notes the report from Iraq that 130 civilians were killed on February 14 when bombs from British aircraft struck an apartment building and a marketplace in Falluja, a town west of Baghdad.<sup>38</sup> On February 16, reporters were taken by the Iraqi authorities to the town to view the damage; the same day, U.S. and British military spokesmen denied that any aerial bombardment had occurred near Falluja two days earlier.

It was only later on February 16 that a senior allied commander confirmed that a precision bomb dropped from a British bomber had missed its target, a bridge in Falluja, and hit a marketplace instead.<sup>39</sup> Confusingly, at a briefing in Saudi Arabia on February 17, British military spokesman Group Capt. Niall Irving said that a bomb did miss its target in Falluja, but put the date of the incident as February 13, not February 14:

For one reason or another, I understand some of the bombs went short and one veered off towards the town. Whether it did any damage or not we're not certain at this stage, but we're taking it very seriously because of the allegations of civilian casualties.<sup>40</sup>

Middle East Watch urges that the British military authorities come forward at the earliest possible moment with a detailed assessment of the extent of damage caused to civilians and civilian objects during the course of the bombing in Falluja.

More generally, Middle East Watch believes that the allied forces should provide a full public accounting, in a systematic and timely fashion, of all civilian damage caused by the six-week bombing campaign, perhaps the heaviest ever launched. Photographic evidence made public by allied forces indicates that it is fully within their technical capabilities to provide such assessments. This information will help cut through what has been called "the fog of war," and permit policymakers, humanitarian and human rights organizations and others to independently assess the allied forces' adherence to the rules of war.

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<sup>38</sup> Eric Schmitt, "2 U.S. Jets Are Shot Down Over Kuwait," *The New York Times*, February 17, 1991.

<sup>39</sup> *Id.*

<sup>40</sup> *The New York Times*, February 18, 1991.

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**Middle East Watch was created in 1989 to monitor human rights practices in the Middle East and North Africa and to promote respect for internationally recognized standards. The chairman of Middle East Watch is Gary Sick, and the vice chairs are Lisa Anderson and Bruce Rabb. The executive director is Andrew Whitley and the research director is Eric Goldstein. Middle East Watch is a component of Human Rights Watch, a non-governmental organization which is also composed of Africa Watch, Americas Watch, Asia Watch, and Helsinki Watch. The chairman of Human Rights Watch is Robert L. Bernstein, the vice chairman is Adrian W. DeWind, the executive director is Aryeh Neier, the deputy director is Kenneth Roth, and the Washington director is Holly J. Burkhalter.**

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