

## **Human Rights Watch**

### **Q&A Legal Aspects of the Ongoing Fighting in Iraq**

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The fighting now occurring in Iraq between U.S. and other coalition forces and insurgent forces raises a number of issues of international humanitarian law (IHL), which is also known as the laws of war. Particularly relevant are rules on military occupation in the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949.

*What are the basic principles of international humanitarian law (IHL) underlying the military occupation of Iraq?*

*What law applies to the fighting between coalition forces and insurgents?*

*How does human rights law apply in Iraq?*

*What is the legal status of insurgent forces in Iraq?*

*Is there a special status for foreign fighters in Iraq?*

*What is the status of newly organized Iraqi soldiers and police?*

*What is the legal status of private security companies hired by the coalition or the Iraqi Governing Council?*

*When may coalition forces detain persons in Iraq?*

*Are captured insurgents entitled to prisoner of war (POW) status?*

*What are legitimate objects of attack during an armed conflict?*

*What does IHL say about attacks against civilians and hostage takings?*

*When are attacks affecting civilian areas permitted?*

*When do civilians become legitimate military targets and thus subject to attack?*

*Can forces lawfully besiege cities?*

### **Applicable Law**

*What are the basic principles of international humanitarian law (IHL) underlying the military occupation of Iraq?*

The United States, United Kingdom and other coalition members are considered occupying powers in Iraq. The Hague Regulations and the Fourth Geneva Convention impose numerous rights and obligations on occupying powers. They are obliged to restore and maintain, as far as possible, public order and safety. They must also respect the fundamental human rights of the territory's inhabitants, including refugees and other non-citizens.

*What law applies to the fighting between coalition forces and insurgents?*

IHL is applicable to situations of armed conflict without regard to the legal basis for the conflict. That is, it applies whether the armed conflict itself is legal or illegal under international law, and whether those fighting in it are regular armies or insurgent forces. While taking up arms violates domestic law, insurgency is not by itself a violation of

IHL. Rather, IHL concerns the legality of the *conduct* of hostilities by all parties. During situations of occupation, the rules on international armed conflicts apply.

Particularly relevant are standards on the means and methods of warfare and the treatment of captured combatants and other detainees. The means and methods of warfare includes: prohibitions on attacks against civilians and civilian objects; prohibitions on the use of force against military targets that is expected to cause harm (collateral damage) to civilians that is greater than the expected military benefit; and prohibitions on the use of weapons or means of warfare that cannot or do not discriminate between military targets and civilians.

*How does human rights law apply in Iraq?*

International human rights law, such as that found in the International Covenant on Civil and Political Rights (which Iraq, the United States and other coalition members have ratified) applies during wartime as well as peacetime. However, in certain instances, the more specific provisions of IHL apply instead of more general provisions of human rights law: for instance, the rules governing the detention of captured combatants will be found in IHL and will supercede in that case the more general rules on the detention of prisoners under human rights law. That said, in circumstances where the rules of armed conflict do not apply, such as police arrests of ordinary criminals suspects, human rights law must still be enforced. Some basic rights, such as the right to freedom of expression, can be more restricted during an occupation for reasons of security, but only as strictly necessary. Other rights, such as the prohibition on torture, always remain in full force.

### **Legal Status of Forces in Iraq**

*What is the legal status of insurgent forces in Iraq?*

The insurgent forces in Iraq are not part of the Iraqi armed forces, and so under IHL they are thus not entitled to the so-called combatant's privilege. The combatant's privilege permits soldiers to fire on enemy troops during an armed conflict without being prosecuted. That is, insurgents in Iraq have no lawful right to take part in armed conflict and may be legally prosecuted under domestic law for taking up arms and conducting armed attacks. They may also be prosecuted under a Coalition Provisional Authority order that prohibits the possession, transport, concealment, sale, and use of unauthorized firearms, and military weapons, by any individuals other than the coalition forces, Iraqi security police and personnel under the supervision of the coalition and private security companies licensed by the Ministry of the Interior. Insurgents, or any other armed force, who commit war crimes would be subject to prosecution under IHL. All the while, insurgents directly taking part in hostilities make themselves legitimate military targets and are thus subject to attack.

*Is there a special status for foreign fighters in Iraq?*

Any foreigners (non-Iraqis) taking part in insurgent activities in Iraq would generally be governed by the same laws that apply to Iraqis. If detained, they could be prosecuted for taking up arms. Such persons could also be legally returned to their home country unless there are substantial grounds for believing they will be subjected to torture, ill-treatment or persecution upon return.

*What is the status of newly organized Iraqi soldiers and police?*

Newly organized Iraqi soldiers are bound by the same rules that govern coalition forces in Iraq. They may lawfully take part in military operations, but they are also legitimate military targets. Unlike the newly organized soldiers, Iraqi police are considered civilians unless they take a direct part in the hostilities or have been specifically designated as part of the armed forces and meet the requirements for militia forces (responsible command, distinctive insignia, carrying arms openly, and respecting the laws of war). Making civilians the object of an attack is a war crime under IHL. In any case, if attacked, they may appropriately defend themselves.

*What is the legal status of private security companies hired by the coalition or the Iraqi Governing Council?*

The status of private security agencies depends on the role they are playing in Iraq. Should they take a direct part in the hostilities, such as by joining offensive military operations alongside coalition personnel or independently, they may be treated as legitimate military targets subject to attack. Private security company personnel who are not directly involved in the hostilities, such as those guarding civilians or providing security to factories and oil fields, would not normally be considered to be military targets; attacks directed at such persons would violate international humanitarian law. The legal status of such persons could change as their roles change. It is not evident how such companies are being held accountable for violations of Iraqi or international law. A Coalition Provision Authority order permits them to possess and use firearms. Media accounts indicate that such companies are not otherwise subject to Iraqi law or military codes, but that their contracts with the U.S. make them accountable under the law of their home countries -- it is not clear how provisions could be legally enforced.

## **Detention of Combatants and Civilians**

*When may coalition forces detain persons in Iraq?*

An occupying power may detain a civilian in anticipation of a trial for war crimes, crimes against humanity or other criminal offenses. Such a person may be tried by local courts. An occupying power may set up "properly constituted, non-political military courts" with local or foreign judges to sit in the occupied country; such courts must respect international fair trial standards.

The Fourth Geneva Convention also permits an occupying power if necessary "for imperative reasons of security" to subject persons to assigned residence or to internment.

Such decisions to detain must be made by the occupying power according to a regular procedure that includes the right of appeal, which shall be decided with the least possible delay. A competent body of the occupying power shall review each detention at least every six months to ensure it is still necessary.

*Are captured insurgents entitled to prisoner of war (POW) status?*

Captured insurgents are not entitled to be prisoners of war (unless they are found to be members of the former Iraqi armed forces, such as was the case with Saddam Hussein). Such persons are entitled to humane treatment and other protections due under the Fourth Geneva Convention. The rights of such persons, such as not to be mistreated, are often the same as rights POWs enjoy. As noted, they may nonetheless be prosecuted for having taken up arms as well as for committing war crimes or crimes against humanity.

## **Means and Methods of Warfare**

*What are legitimate objects of attack during an armed conflict?*

Under IHL, attacks must be limited to military objectives, which include the opposing force's combatants, weapons, equipment and military infrastructure. For objects to be military objectives, their nature, location, purpose or use must make an effective contribution to military action and their destruction must offer a definite military advantage. Insurgent forces attacking such objectives are not in violation of IHL, but may be prosecuted for taking up arms.

*What does IHL say about attacks against civilians and hostage takings?*

Attacks directed against civilians and civilian objects (such as houses, mosques, etc.) are serious violations of IHL. However, civilian objects used for military purposes may become legitimate targets, as discussed below.

The taking or executing of hostages – that is, holding persons to deter an enemy attack or otherwise influence enemy actions – is prohibited. Attacks against civilians and hostage-takings are war crimes.

An occupying power is specifically prohibited from carrying out reprisals and collective penalties against persons or their property and from taking hostages. In general, no one can be punished for acts that he or she has not personally committed.

*When are attacks affecting civilian areas permitted?*

IHL permits attacks on military targets located in civilian areas, so long as the weapons used can discriminate between the military target and the civilian population, and the anticipated harm to civilians is not disproportionate to the expected definite military advantage gained from the attack.

*When do civilians become legitimate military targets and thus subject to attack?*

Civilians become valid military targets if they are taking a direct part in the hostilities. Thus armed insurgents taking part in a battle would be subject to attack, as would a civilian directing military forces and planning attacks. Civilians otherwise directly assisting fighters during a battle, such as supplying ammunition to combatants, would become valid military targets.

Civilians indirectly assisting an armed force, such as those providing meals or lodging to insurgents, would not be legitimate targets. However, if such persons are harmed incidentally to an attack on fighters, the attack would not be unlawful so long as the civilian loss is not disproportionate to the military advantage to the attacker.

Armed insurgents have a legal obligation not to place civilians at risk. A defender who uses civilians as “human shields” to protect military targets from attack is in violation of IHL whether the civilians acted voluntarily or not. However, should armed forces attack a military target being protected by “human shields” they must still ensure that the harm done to the civilians is not disproportionate to the military advantage gained.

*Can forces lawfully besiege cities?*

Military forces may surround cities and restrict who enters and leaves, as well as the flow of goods. However, it is a serious violation of IHL to deliberately deprive the civilian population of food, or otherwise unreasonably to prevent humanitarian assistance, including food and necessary medical supplies, from reaching a civilian population. The wounded and sick must be collected and cared for, and access be allowed to impartial humanitarian agencies.

Military forces must permit civilians to flee an ongoing or future battle zone for their safety. However, a military force, particularly an occupying power, is entitled to restrict the movement of persons for security reasons and detain those posing a military threat. Persons seeking to enter a town that is a battle zone may be prevented from doing so. However, such restrictions cannot be used to prevent the delivery of humanitarian assistance to the population.

Besieging forces cannot “deny quarter” to enemy soldiers; that is, to order or threaten that there be no survivors and refuse offers of surrender. To deny quarter is a war crime.