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HUMAN RIGHTS WATCH BRIEFING PAPER:

INTERNATIONAL HUMANITARIAN LAW ISSUES IN A POTENTIAL WAR IN IRAQ

Introduction

A potential U.S.-led military action against Iraq would likely have profound humanitarian consequences for the Iraqi civilian population. Consistent with our established policy, Human Rights Watch takes no position on the legality or appropriateness of such a war. Yet we have concerns with regard to the manner in which it may be conducted. This briefing paper addresses some of the key issues that may arise under international humanitarian law (IHL), also known as the law of armed conflict, with respect to the duty of all warring parties to protect civilians and other non-combatants. These include the use of human shields, the use of weapons of mass destruction, concerns about urban combat, attacks on civilian morale, attacks on dual-use facilities, targeting decisions (target identification and proportionality), the use of certain conventional weapons, the duties of an occupying power, and transparency in the conduct of military operations.

The relevant framework consists of the Geneva Conventions of 1949, Protocol I thereto, and customary international humanitarian law relating to international armed conflict, as well as fundamental international human rights guarantees that pertain at all times, including during armed conflict. The United States and Iraq are parties to the 1949 Geneva Conventions. Although neither the United States nor Iraq is party to Protocol I, most potential allies of the United States are parties, and the United States recognizes many Protocol I provisions as expressive of rules of customary international law.¹

Section I: Human Shields and Hostages

The deliberate use of civilian shields and the taking of hostages are war crimes.

The use of civilians, including a state's own citizens, as human shields to protect military objectives from attack is a violation of international humanitarian law amounting to a war crime. The forcible use of civilians or other non-combatants as human shields also violates the prohibition on the taking of hostages.² Customary humanitarian law and Protocol I prohibit encouraging or making use of volunteers as human shields.³

¹ In 1987, then U.S. State Department Deputy Legal Advisor Michael Matheson gave a speech in which he enumerated many of the principles enshrined in the First Additional Protocol of 1977 to the Geneva Conventions of 1949 (Protocol I) that the U.S. considers customary international law. Among them are: limitations on the means and methods of warfare, especially those methods which cause superfluous injury or unnecessary suffering (art. 35); protection of the civilian population and individual citizens, as such, from being the object of acts or threats of violence, and from attacks that would clearly result in civilian casualties disproportionate from the expected military advantage (art. 51); protection of civilians from use as human shields (arts. 51 and 52); prohibition of the starvation of civilians as a method of warfare and allowing the delivery of impartial humanitarian aid necessary for the survival of the civilian population (arts. 54 and 70); taking into account military and humanitarian considerations in conducting military operations in order to minimize incidental death, injury and damage to civilians and civilian objects, and providing advance warning to civilians unless circumstances do not permit (arts. 57-60); respect and protection of civilian civil defense personnel (arts. 62-63). Michael J. Matheson Remarks on The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions. "The Sixth 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*. Volume 2, Number 2, Fall 1987, pp. 419-427.

² Geneva IV, art. 34.

³ Protocol I, art. 51(7) states: "The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations."

The Iraqi government has used human shields in the past. As early as 1991, The U.N. General Assembly condemned the alleged use of human shields by Iraq, saying:

[The General Assembly] expresses its deep concern about the numerous and detailed allegations of grave human rights violations by the Government of Iraq to which the Special Rapporteur has referred in his report, in particular...the use of persons as “human shields,” a most grave and blatant violation of Iraq’s obligations under international law.⁴

Fearing U.S. and British airstrikes in 1997, the Iraqi government explicitly stated that it was using Iraqi civilian “volunteers” in government palaces and other strategic locations.⁵ Given past abuses of the Iraqi government, one must regard the designation of a “volunteer” with considerable skepticism. President Saddam Hussein even expressed public gratitude for such deployments. The Iraqi News Agency reported:

Leader Saddam Hussein has thanked all of the sons of the great Iraqi people who headed for the people’s palaces, factories and other installations to be a strong shield against the unjust aggression threatening our struggling country....⁶

Like workers in munitions factories, civilians acting as human shields, whether voluntary or not, contribute indirectly to the war capability of a state. Their actions do not pose a direct risk to opposing forces. Because they are not directly engaged in hostilities against an adversary, they retain their civilian immunity from attack. They may not be targeted, although a military objective protected by human shields remains open to attack, subject to the attacking party’s obligations under IHL to weigh the potential harm to civilians against the direct and concrete military advantage of any given attack, and to refrain from attack if civilian harm would appear excessive.⁷

Iraq has taken hostages in the past in violation of the Geneva Conventions. During its invasion of Kuwait in August 1990, Iraq seized Westerners and offered to release them if the U.S. withdrew its military forces from the region. Subsequently it threatened to use these hostages as human shields. On December 6, 1990, Iraq announced the release all of the people it held as hostages.⁸ U.N. Security Council Resolution 687 of April 3, 1991 condemned Iraq for taking hostages.⁹ Human Rights Watch is not aware of the U.S. taking hostages in modern history. The taking of hostages is strictly prohibited and constitutes a war crime under international law.¹⁰ Commission of these acts as reprisal for an opponent’s breach of these prohibitions is likewise forbidden.¹¹

- No party to a conflict may encourage or use civilians or other non-combatants to shield military objectives.

⁴ U.N. General Assembly, “Situation of Human Rights in Iraq,” A/RES/46/134, December 17, 1991, <http://www.un.org/documents/ga/res/46/a46r134.htm>, (retrieved January 14, 2003).

⁵ “Iraqis Volunteering as Human Shields,” *CNN Interactive*, November 14, 1997. <http://www.cnn.com/WORLD/9711/14/iraq.al.sahhaf.presser>, (retrieved January 14, 2003).

⁶ Text of Report by the Iraqi News Agency, November 20, 1997, printed by *BBC News*, November 20, 1997, <http://news.bbc.co.uk/1/hi/world.monitoring/33345.stm> (retrieved January 2, 2003).

⁷ Protocol I, art. 51(8) states in part: “Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians....”

⁸ “Chronology of the Kuwait Crisis,” Kuwait Information Office, http://www.kuwaitinfo.org/Gulf_War/chronology_of_kuwait_crisis.html, (retrieved February 4, 2003).

⁹ Anthony Cordesman, “The Iraq Crisis: Major UN Resolutions Affecting the Crisis,” http://www.csis.org/stratassessment/reports/iraq_unres.html#687, (retrieved February 4, 2003).

¹⁰ See Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (Fourth Geneva Convention), art. 147; Protocol I, art. 85(2); Rome Statute of the International Criminal Court of July 17, 1998 art. 8(2)(viii).

¹¹ See Geneva Convention relative to the Treatment of Prisoners of War, 27 July 1929, art. 2; Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949 (Third Geneva Convention), art. 13; Fourth Geneva Convention, art. 33; Protocol I, art. 20.

- If one party uses human shields, opposing forces must still assess whether the potential harm to civilians is excessive in relation to the anticipated military advantage before carrying out an attack.
- No party may take hostages, even in reprisal.

Section II: Weapons of Mass Destruction

No party to a conflict in Iraq would be legally justified in using any weapon of mass destruction under any circumstances.

Given that a stated rationale for a potential attack on Iraq is the desire to remove any threat from weapons of mass destruction (WMD),¹² there are two issues that are of particular concern. The first is a deliberate use of WMD by Iraqi forces against invading coalition forces or as an act of vengeance against Iraqi civilians. The Iraqi government might also use conventional weapons to commit mass atrocities against Iraqis. The second is the use of WMD by the United States in reprisal for an Iraqi use or against hardened Iraqi bunkers suspected of storing WMD or harboring Iraqi leadership. In either case, the use of weapons of mass destruction would be unjustified and illegal under international law. To deter such abuse, the U.N. Security Council and others should pledge to prosecute anyone who orders or uses WMD or engages in other atrocities.

Although Iraq has repeatedly claimed that it currently has no weapons of mass destruction, it has used chemical weapons in the past against both combatants and civilians. The Iraqi army repeatedly used chemical weapons against Iranian armed forces between 1983 and 1988.¹³ Furthermore, it used chemical weapons against Kurdish civilians at Halabja in 1988, killing up to 5,000 people, and on some forty documented occasions that year during the *Anfal* genocide against Iraqi Kurds.¹⁴ These previous uses of chemical weapons violated the 1925 Geneva Protocol that prohibited the use of chemical weapons.¹⁵ The United States is not known to have used chemical weapons in combat since 1918.¹⁶ Any use of chemical weapons by either party would violate not only the 1925 Geneva Protocol but also the 1993 Chemical Weapons Convention and customary international law.¹⁷

Similarly, any use of biological weapons by either party to the conflict would violate international law. The 1975 Biological Weapons Convention (BWC) prohibits the development, production, acquisition, and stockpiling of biological weapons. Both the United States and Iraq are parties to the BWC. In addition, the 1925 Geneva Protocol, the provisions of which are now regarded as customary international law and are binding on all states, explicitly bans “the use of bacteriological methods of

¹² President George W. Bush stated in November, “America’s goal, the world’s goal is more than the return of inspectors to Iraq. Our goal is to secure the peace through the comprehensive and verified disarmament of Iraq’s weapons of mass destruction. Voluntary [sic], or by force, that goal will be achieved.” Remarks by the President to Prague Atlantic Student Summit, Hilton Prague, Prague, Czech Republic, November 20, 2002, <http://www.whitehouse.gov/news/releases/2002/11/20021120-4.html> (retrieved January 14, 2003).

¹³ Center for Nonproliferation Studies, Monterey Institute of International Studies, “Chemical & Biological Weapons Resource Page: Chronology of State Use and Biological and Chemical Weapons Control,” <http://cns.miis.edu/research/cbw/pastuse.htm>, (retrieved January 14, 2003).

¹⁴ Human Rights Watch and Physicians for Human Rights, *Genocide in Iraq: The Anfal Campaign Against the Kurds*, (New York: Human Rights Watch, 1993), p. xiv.

¹⁵ Walter Krutzsch and Ralf Trapp, *A Commentary on the Chemical Weapons Convention* (Boston: Martinus Nijhoff Publishers, 1994), p.1. The formal name of the treaty is the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare.

¹⁶ See fn. 13.

¹⁷ The United States is party to the 1993 Chemical Weapons Convention, although Iraq is not. Nevertheless, the use of chemical weapons is also considered prohibited under customary international law. See Theodore Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1991), pp. 68-69, fn. 188.

warfare.”¹⁸ The United States is not known to have used biological weapons in combat and said that it unilaterally dismantled its offensive biological weapons program in 1969.¹⁹ Although Iraq reportedly began to develop an offensive biological weapons capability in 1985,²⁰ it is not known to have used biological weapons in combat.²¹

Possible U.S. use of nuclear weapons, either offensively or in reprisal, would be illegal under international law. There has been public concern that the U.S. military is contemplating the use of nuclear weapons. U.S. Senator Edward Kennedy has condemned reported plans by the U.S. Defense Department to use nuclear weapons offensively as “bunker-busters” to attack WMD sites and hardened leadership bunkers in Iraq.²² There is also reason to fear that the United States would use nuclear weapons in reprisal for Iraqi use of chemical or biological weapons. The U.S. National Strategy to Combat Weapons of Mass Destruction, released in December 2002, explicitly reserves the right to respond to *any* use of WMD against the U.S. or its allies with the full range of U.S. military capabilities, including nuclear weapons.

A strong declaratory policy and effective military forces are essential elements of our contemporary deterrent posture, along with the full range of political tools to persuade potential adversaries not to seek or use WMD. The United States will continue to make clear that it reserves the right to respond with overwhelming force – including through resort to all of our options – to the use of WMD against the United States, our forces abroad, and friends and allies.²³

Under international law, the use of nuclear weapons is unlawful except possibly under exceptional circumstances. In its 1996 advisory opinion, the International Court of Justice, in an evenly split vote decided by the president’s casting vote, wrote that the threat or use of nuclear weapons would “generally be contrary” to international humanitarian law. The court decided that it did not have a sufficient basis for reaching a definitive conclusion as to whether it would be lawful in the “extreme circumstance of self-defense, in which the very survival of a State would be at stake.”²⁴

The United States is the only country ever to have used nuclear or atomic weapons in combat. At present, it has about 8,000 nuclear warheads deployed on ballistic missile submarines, strategic bombers, and land-based nuclear missiles.²⁵ It last used an atomic weapon on the Japanese city of Nagasaki on August 9, 1945, killing 75,000 people.²⁶

As of this writing, there is no known evidence that Iraq has the capability to deploy nuclear weapons. It has never used nuclear weapons in combat, nor has it ever tested a nuclear device. The United States has asserted that Iraq is seeking to develop a nuclear weapons capability and that it may be willing

¹⁸ International Committee of the Red Cross, “Official Statement: Review Conference of States Parties to the Biological Weapons Convention,” November 26, 1996, <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList512/EE798D7EEAC45E1AC1256B660060B381>, (retrieved January 2, 2003).

¹⁹ Center for Nonproliferation Studies, Chemical and Biological Weapons Resource Page.

²⁰ *Ibid.*

²¹ U.S. Department of Defense GulfLink Document Index.

http://www.globalsecurity.org/wmd/library/news/iraq/gulflink/cia/960531/62995_01.htm, (retrieved January 14, 2003).

²² Sen. Edward Kennedy, “Our Nuclear Talk Gravely Imperils Us,” *Los Angeles Times*, January 29, 2003, <http://www.latimes.com/news/printedition/opinion/la-oe-kennedy29jan29.story> (retrieved February 4, 2003). See also William M. Arkin, “The Nuclear Option in Iraq: The U.S. has lowered the bar for using the ultimate weapon,” *Los Angeles Times*, January 26, 2003, p. M1.

²³ “National Strategy to Combat Weapons of Mass Destruction,” U.S. Department of State International Information Programs, December 11, 2002, <http://usinfo.state.gov/topical/pol/terror/02121210.htm>, (retrieved February 4, 2002).

²⁴ International Court of Justice Advisory Opinion: Legality of the Threat or Use of Nuclear Weapons.” Paragraph 105 (2) (E).

²⁵ The Brookings Institution, “50 Facts about U.S. Nuclear Weapons,”

<http://www.brook.edu/FP/PROJECTS/NUCWCOST/50.HTM>, (retrieved January 14, 2003).

²⁶ Nagasaki Atomic Bomb Museum, http://www1.city.nagasaki.nagasaki.jp/abm/abm_e/qa/gm_e/g_qa_e.html, (retrieved January 14, 2003).

to disperse them and other weapons of mass destruction to terrorist organizations that may use them against the United States.²⁷ At the time of this writing, however, there has been no concrete evidence brought forward publicly to substantiate this claim. Therefore, it is unlikely that Iraq could conceivably threaten the very existence of the U.S. and thus justify the use of nuclear weapons. Human Rights Watch affirms that any use of nuclear weapons in other than “an extreme circumstance of self-defense” would be illegal. Such a precedent would also breach the worldwide taboo against the use of nuclear weapons that has evolved since Hiroshima and Nagasaki and might make their use by other states more likely. Human Rights Watch recommends:

- All parties must refrain from the use of any chemical, biological, or nuclear weapon of mass destruction under any circumstances.
- As a deterrent, the U.N. Security Council should pledge to prosecute anyone who uses or orders the use of weapons of mass destruction or engages in other atrocities.

Section III: Urban Warfare

In the event of urban warfare, defending forces must avoid locating military objectives near populated areas, and attacking forces must provide adequate warnings and escape routes to civilians.

Urban combat poses particularly compelling humanitarian challenges that are rooted in the proximity of combatants to civilians in an urban environment. Such fighting inherently increases the risk to civilians and could result in substantial civilian casualties. Both attacking and defending forces have legal obligations to protect the civilian population caught in the crossfire of an urban environment.

Civilians tend to bear the brunt of military operations in urban terrain. During U.S. military operations in Panama in 1989, for example, civilians died at a rate of six-to-one to Panamanian soldiers and thirteen-to-one to U.S. soldiers.²⁸ This was in urban fighting largely confined to a single city (Panama City, population density 440 people/square mile in 1989)²⁹ for less than a week. In a major Iraqi city like Baghdad (population density approx. 2,811 people/square mile)³⁰ this ratio could be much higher, especially if fighting is prolonged. Fighting in cities significantly endangers the civilian population in a manner that few other operational environments do. Among the dilemmas posed by urban combat are the difficulties of discriminating between combatants and civilians because of their proximity to one another and the narrow margin for error associated with the use of weapons in close-quarters combat.

²⁷ Deputy Secretary of Defense Paul Wolfowitz, DoD News Briefing (Interview with Southeast Asian Journalists), January 28, 2003, U.S. Department of State International Information Programs, <http://usinfo.state.gov/topical/pol/terror/03012807.htm>, (retrieved February 4, 2003).

²⁸ According to Physicians for Human Rights (PHR), at least 300 Panamanian civilians were killed as a direct result of military operations in Panama in 1989. Though the U.S. originally claimed that 314 Panamanian soldiers were killed, officials from the U.S. Southern Command eventually agreed that the more likely number of Panamanian soldiers killed was fifty. See PHR, *Operation “JUST CAUSE:” The Human Cost of Military Action in Panama*, (Boston: Physicians for Human Rights, 1991), p. 4. The official number of U.S. war dead as a result of hostile action during Operation JUST CAUSE is twenty-three. See “Worldwide U.S. Active Duty Military Deaths: Selected Military Operations,” <http://web1.whs.osd.mil/mmid/casualty/table13.htm> (retrieved January 14, 2003).

²⁹ *Columbia Encyclopedia, Sixth Edition*, s.v. “Panama,” <http://www.infoplease.com/ce6/world/A0837444.html> (retrieved January 14, 2003). This source cites the estimated population of Panama City in 1989 as 435,000. This was divided by the land area of Panama City (2,560.8 square kilometers/988.73 square miles) as cited in the official website of Panama City, <http://www.mundio.gob.pa/> (retrieved February 15, 2003) to determine the estimated population density of Panama City in 1989.

³⁰ *GlobalSecurity.org*, “Iraq – Major Cities,” <http://www.globalsecurity.org/military/world/iraq/city/htm> (retrieved January 14, 2003). This source cites the estimated population of Baghdad at 5.6 million in 2002. This was divided by the land area of Baghdad (5,159 square kilometers/1,991.95 square miles) as cited by the website of the Library of Congress Country Study: Iraq, http://lcweb2.loc.gov/frd/cs/iraq/iq_appen.html (retrieved February 15, 2003) to determine the estimated population density of Baghdad in 2002.

As previously noted, the Iraqi government must not place military equipment or personnel near concentrations of civilians and must remove civilians from the vicinity of military installations. There are reports that Iraq has in some cases deliberately located military objectives in the midst of civilian objects and encouraged civilians to act as human shields in the event of an attack. This is in violation of prohibitions in customary humanitarian law and Protocol I against placing military objectives in heavily populated areas without first moving the affected civilians to safer locations.³¹

To maximize the protection of civilians near any military target, the U.S. and allied forces should provide effective advance warning of an attack.³² Since December 12, 2002, the U.S. has been using EC-130E Commando Solo aircraft to communicate via radio transmissions with the Iraqi civilian population at large and with Iraqi military forces.³³ The U.S. and its allies should also consider measures that allow Iraqi civilians to voluntarily and safely leave urban areas where military objectives are targeted for attack, and all parties should be prepared to call on third parties to negotiate passage to non-military areas.³⁴ They must also be prepared to negotiate passage for medical personnel and equipment and religious personnel to and from besieged or encircled areas.³⁵ In anticipation of possible urban combat in Iraq, Human Rights Watch believes that the following precautions should be taken:

- The U.S. and allies should ensure that adequate warnings are given to the civilian population prior to a ground assault on any Iraqi city. Adequate warnings must have such temporal and geographic specificity as to allow civilians time to take advantage of them.
- The Iraqi government should endeavor to evacuate civilians from areas that may come under attack and must avoid locating military objectives in proximity to civilian populations. As noted, it must not use human shields to protect its military forces from attack.
- All parties should attempt to negotiate safe and voluntary passage of civilians out of urban areas that are subject to attack, and facilitate the passage of medical personnel and supplies in and out of besieged or cordoned areas.
- As military forces prepare for urban combat in Iraq, the avoidance of civilian casualties should be an integral part of their tactical training.

Section IV: Attacks on Civilian Morale

Armed attacks designed to undermine civilian morale are illegal.

There is no doubt that civilian morale makes a contribution to military effort, but that contribution is indirect and intangible, in contrast to the direct support that conventional military objects lend. Armed attacks directed at civilian morale are prohibited under international humanitarian law and are inimical to the purpose of protecting civilians.³⁶ During the Second World War, both the Axis and Allied powers conducted bombing campaigns for the purpose of instilling terror in the civilian population; the current prohibition on such practices is reflected in article 51 of Protocol I, adopted in 1977.

Actions such as denying the general population electricity, attacking economic supporters of a regime, or destroying national symbols can undermine civilian support for war, but parties to a conflict

³¹ See Protocol I, art. 58 (setting out duties that have the status of customary international law, see above fn. 1).

³² Protocol I, art. 57(2)(c) states that, "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."

³³ Kathleen T. Rheem, "American Broadcasts Reach Out to Iraqi Soldiers, Citizens," Armed Forces Information Service, December 18, 2002. http://www.defenselink.mil/news/Dec2002/n12172002_200212171.html, (retrieved January 13, 2003).

³⁴ Fourth Geneva Convention, art. 15.

³⁵ Fourth Geneva Convention, art. 17.

³⁶ Protocol I, art. 51(2) states: "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."

have a legal obligation to minimize the effects of combat on the civilian population.³⁷ Armed attacks that are principally designed to bring death, physical harm, or hardship to the civilian population *as a method of warfare* violate both the letter and spirit of the provisions for civilian protection under IHL. That said, there is no international law prohibition on affecting civilian morale or political will through non-violent means, such as propaganda, diplomacy and the like. Human Rights Watch recommends:

- No armed attacks should be designed primarily to undermine civilian morale.

Section V: Dual-Use Targets

Dual-use targets that are essential to the survival of the civilian population must not be attacked. Other dual-use targets should, insofar as possible, only be incapacitated, not destroyed.

Dual-use objects serve the needs of the civilian population and are also used by military forces. A dual-use object may presumptively be a legitimate military target because it contributes, in part, to concrete military aims, yet the harm to the civilian population in its destruction may still be disproportionate to the military advantage gained, rendering an attack impermissible.³⁸

In weighing potential targets, military planners must examine carefully how immediate the military advantage of destroying these facilities is, as well as the long-term cost to civilian welfare and economy, including environmental consequences.³⁹ This is particularly true in a modern, industrialized society such as Iraq in which the civilian population depends on dual-use infrastructure.

Fully 60 percent of the Iraqi population requires monthly food distributions from the central government. An armed conflict may disrupt distributions, cause food shortages, and exacerbate existing malnutrition among children.⁴⁰ Under customary humanitarian law and Protocol I, food, water, medical supplies, and other objects essential to the survival of the civilian population may never be attacked.⁴¹ When these resources are used directly or indirectly in support of the military, they still may not be attacked if such action would produce starvation or forced displacement of civilians.⁴²

Attacks on electrical generation facilities used by the civilian population would have a profound and long-term impact on the civilian population in Iraq. During the 1991 Persian Gulf War, for example, the failure of American war planners to accurately assess the cascading effects that attacks on electricity would have on the civilian population had profound humanitarian consequences. These attacks crippled basic civilian services, including hospital-based medical care, and shut down water-distribution, water-purification, and sewage-treatment plants. As a result, the most vulnerable members of the population, young children and adults requiring medical attention, suffered injury and death from the lack of potable water and poor medical treatment.⁴³ It was proven in Yugoslavia that attacks on electrical distribution facilities can achieve the necessary military effect of disrupting power supply without long-term incapacitation of electrical generation capability. Due to the severe consequences that followed destruction of electrical generation in Iraq, the U.S. attacked similar facilities in Kosovo in such a way as

³⁷ See article 48, Protocol I: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." See also article 51, section 1 of Protocol I: "The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations...."

³⁸ Protocol I, art. 51(5)(b).

³⁹ Protocol I, art. 55, *Protection of the natural environment*.

⁴⁰ See United Nations, "Likely Humanitarian Scenarios," December 10, 2002 para.11, available at <http://www.casi.org.uk/info/undocs/war021210.pdf>.

⁴¹ Protocol I, art. 54(2).

⁴² Protocol I, art. 54(3)(b) and 54(4).

⁴³ Human Rights Watch, *Needless Deaths in the Gulf War: Civilian Casualties During the Air Campaign and Violations of the Laws of War*, (New York: Human Rights Watch, 1991), pp. 180-185.

to cause only temporary incapacitation. In Afghanistan, coalition air forces attacked neither electrical generation nor and distribution systems. This trend should be continued. Electrical power production (i.e., generators) should not be targeted.

Among other dual-use objects that are likely to be considered as potential targets in Iraq are roads, bridges and airports. Transportation infrastructure that is essential to the delivery of humanitarian relief, or the movement of civilians to safer areas, should not be targeted unless the anticipated military advantage is likely to outweigh the profound effects on civilian survival. In Afghanistan, U.S. military forces did not destroy bridges or roads. The apparent trend since the Gulf War against destroying dual-use objects vital to the civilian population should be incorporated into military planning. One senior U.S. Defense Department advisor has noted, "The challenges in this air campaign [in a potential war with Iraq] will be to achieve certain military and psychological effects at the outset, but have as much of the infrastructure existing when it's over."⁴⁴ Human Rights Watch agrees with this premium on preserving infrastructure.

Even when food, water and medical supplies are dedicated solely to the sustenance of Iraqi armed forces, the destruction of these resources is likely to result only in the armed forces commandeering supplies from the surrounding civilian population, putting it at peril. Under these circumstances, it is doubtful that the direct and concrete military advantage accrued by attacks on military food stocks would outweigh the resultant harm to civilians.⁴⁵ Human Rights Watch recommends:

- Electrical generation facilities must not be destroyed.
- Humanitarian supplies essential to the civilian population must not be attacked.
- Transportation infrastructure should not be destroyed and, if attacked, should only be attacked in a manner that creates temporary incapacitation.

Section VI: Targeting Decisions -Intelligence and Identification

Every effort must be made to correctly identify a target before it is attacked.

Recent reports and past history indicate that the use of precision-guided aerial munitions (PGMs), or so-called "smart bombs," will play a significant role in a U.S.-led attack against Iraq.⁴⁶ As with other weapons, the precision technology of PGMs is only effective when it is used in conjunction with reliable intelligence. There may be other factors, such as human and technical error, that could cause a PGM to strike something other than its intended target. If either aircrews or targeteers misidentify a target, civilians can be killed or injured as a result. The mistaken NATO attack on refugee movements along the Djakovica-Decane Road in Yugoslavia on April 14, 1999 in which seventy-three civilians were killed is an example of misidentification.⁴⁷

Identification of mobile, or "emerging," targets has proven to be a particular challenge. During the air war in Yugoslavia, Human Rights Watch found that five of the ten worst incidents involving civilian deaths were air attacks on presumed Yugoslav military convoys or transportation routes that

⁴⁴ Gen. Ronald R. Fogelman, USAF (Ret.), former U.S. Air Force Chief of Staff and current member of the Defense Policy Board, as printed in "War Plan Calls for Precision Bombing Wave to Break Iraqi Army," *The New York Times*, February 2, 2003.

⁴⁵ The U.S. airstrike of October 16, 2001, on food warehouses operated by the International Committee of the Red Cross in Kabul with 1,000lb and 2,000lb guided bombs did not advance its military effort in Afghanistan, and did ensure that the supplies would never be delivered to civilians as they were intended. Even if the identity of the distributors of such aid is in doubt, as the U.S. asserted in this case, humanitarian supplies should not be targeted as a method of warfare.

⁴⁶ Eric Schmitt and Thom Shanker, "War Plan Calls for Precision Bombing Wave to Break Iraqi Army," *The New York Times*, February 2, 2003, p. A10.

⁴⁷ According to NATO statements in the days following the incident, NATO pilots believed that they were attack a column of Serb military vehicles. In fact, they released weapons onto civilian vehicles carrying refugees. Human Rights Watch, "Civilian Deaths in the NATO Air Campaign," p. 22.

turned out to include large numbers of civilians. In Afghanistan, for the first time the U.S. military systematically used special operations forces as ground spotters to determine the global-positioning system (GPS) coordinates for emerging targets to be attacked with satellite-guided Joint Direct Attack Munition (JDAM) bombs.⁴⁸ Nevertheless, initial analysis suggests that more civilian casualties during the U.S. war in Afghanistan were caused by attacks on emerging targets than on fixed targets.⁴⁹ The reasons for this are unclear. At the very least, it cautions that, regardless of the procedures used to identify and evaluate emerging targets for attack, they have not been sufficiently rigorous, to date, to avoid substantial harm to civilians. The standard of care should be higher. Human Rights Watch recommends:

- Targeteers and aircrews must positively identify and correctly evaluate the nature of a target before engaging with lethal force. If such positive identification is not possible, the target should not be attacked.
- Commanders should scrutinize the identification of emerging targets more closely than has been the case before authorizing an attack.

Section VII: Targeting Decisions - Discrimination and Proportionality

Only precision munitions should be used in populated areas. Cluster bombs must not be used in populated areas.

International humanitarian law prohibits attacks that strike military targets and civilians without distinction.⁵⁰ Although not all civilian deaths in war are attributable to violations of IHL, combatants must observe the principles of proportionality and discrimination in attacks. In deciding whether to use precision-guided weapons, states have a duty to take all feasible steps, including choosing the means of attack, that will minimize injury to civilians and civilian objects.⁵¹ With the proper intelligence, and assuming no technical failure or human error, PGMs can significantly enhance the ability of an attacker to discriminate between combatants and civilians. Therefore, a party to the conflict that has precision weapons at its disposal should favor their use over "dumb" bombs when planning an attack on a given military target located in or near populated areas. Other precautions may also mitigate civilian damage, such as choosing a time of attack when fewer civilians will be in the vicinity, or providing effective warnings. These measures must be evaluated and used in combination, if feasible, to produce the least harm to civilians consistent with achieving a military objective.

Conversely, cluster bombs are weapons that are very difficult to target discriminately. Even the cluster bombs employing the more accurate Wind Corrected Munitions Dispensers (WCMDs) now used by the U.S. military still have a wide footprint. Indeed, they are the only "dumb" bombs that the U.S. military has continued to use in populated areas. As such, cluster bombs should not be used in a conflict with Iraq, especially in or near populated areas. Human Rights Watch recommends:

- Only PGMs should be used in populated areas.
- Cluster bombs should not be used, especially in populated areas.

⁴⁸ The Global-Positioning System (GPS) is a constellation of 24 satellites orbiting the earth that allow user to pinpoint their position in three dimensions and in time. The Joint Direct Attack Munition (JDAM) is a GPS-guided 2,000lb air-delivered bomb that can strike a target with an accuracy of four to six meters even at night and in heavy cloud cover. Vernon Loeb, "Brilliant Bombs" *The Washington Post Magazine*, December 15, 2002, p. 25.

⁴⁹ "Understanding Collateral Damage," Project on the Means of Intervention, Carr Center for Human Rights Policy, Harvard University, 4-5 June, 2002, p. 7.

⁵⁰ Protocol I, art. 51(5)(b).

⁵¹ Protocol I, art. 57(2)(a)(ii).

Section VIII: Conventional Weapons

Landmines and Cluster Bombs must not be used.

Antipersonnel Landmines. The prohibition on the use of means of attack that strike at military and civilian targets without distinction is fundamental to humanitarian law.⁵² By their nature, antipersonnel (AP) landmines are indiscriminate weapons. They cannot distinguish between combatants and non-combatants who inadvertently activate them. Every year, AP mines are estimated to cause between 15,000 and 20,000 new casualties, the vast majority civilians.⁵³ Landmines are a serious problem in Iraq from previous wars, especially in northern Iraq (Iraqi Kurdistan). The last time that the United States is known to have used AP mines in combat was during the 1991 Persian Gulf War.

Human Rights Watch believes that the use of AP landmines is prohibited by customary international law since they are inherently indiscriminate weapons.⁵⁴ In addition, the 1997 Mine Ban Treaty prohibits the use, production, transfer, and stockpiling of AP mines. Neither Iraq nor the U.S. is among the 131 states party to the Mine Ban Treaty. U.S. use of AP mines, however, would potentially place U.S. military allies who are party to the treaty at risk of violating the treaty's ban on assisting with any act prohibited under the treaty.

Cluster Bombs. In addition to the problem of their accuracy in targeting, airdropped cluster bombs have caused numerous civilian casualties and serious humanitarian and socio-economic problems after conflicts have ceased. The large numbers of bomblets that fail to explode as designed on initial impact threaten civilians long after attacks, just like antipersonnel mines. Both the United States and Iraq stockpile explosive submunitions.⁵⁵ In the Gulf War, the U.S. dropped about 61,000 cluster bombs containing some twenty million bomblets on Iraq and Kuwait. The U.S. dropped about 1,228 cluster bombs in Afghanistan between October 2001 and March 2002, leaving at least 12,400 explosive duds throughout the country.⁵⁶

Based on the targeting and humanitarian problems associated with cluster bombs, HRW recommends that the U.S. and others should not use cluster bombs until the initial failure rate has been dramatically reduced, certainly below the one percent threshold established as Department of Defense policy by Secretary of Defense William Cohen in January 1999.⁵⁷ In particular, cluster bombs must not be used, especially in or near populated areas. Human Rights Watch recommends:

- No party to the conflict should use, or facilitate the use of, antipersonnel landmines.
- No party to the conflict should use cluster bombs, especially in or near populated areas.

⁵² See, Protocol I, art. 51(4).

⁵³ International Campaign to Ban Landmines, *Executive Summary, Landmine Monitor Report 2002: Toward a Mine-Free World*, (Washington, DC: Human Rights Watch, 2002), p. 35.

⁵⁴ Human Rights Watch, "Memorandum to Delegates of the Fourth Annual Meeting of States Parties: Implementation of CCW Protocol II," December 11, 2002, <http://www.hrw.org/press/2002/12/ccwapii202.htm>, (retrieved February 4, 2003).

⁵⁵ Human Rights Watch, "Memorandum to CCW Delegates: A Global Overview of Explosive Submunitions," May 21, 2002, p. 7.

⁵⁶ Human Rights Watch, "Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan," *A Human Rights Watch Report*, vol. 14, no. 17, December 2002, pp. 1-2.

⁵⁷ Secretary of Defense William Cohen, Memorandum for the Secretaries of the Military Departments, Subject: DoD Policy on Submunition Reliability (U), January 10, 2001. The memo defines future submunitions as those reaching a production decision in fiscal year 2005 and beyond.

Section XIX: An Occupying Power's Duty to Provide Security

The United States and its allies must immediately provide security and humanitarian services for the civilians in any territory they come to control.

Given U.S. military capabilities, in the event of armed conflict, the U.S. and its allies are likely to quickly take effective control of considerable Iraqi territory. The displacement of Iraq's forces from any given territory may create a security vacuum, giving rise to the prospect of vengeance from groups suppressed by the government and opportunism by criminal elements.

An occupying power has a duty to restore and ensure public order and safety in the territory under its authority.⁵⁸ Under customary international law, this duty begins once a stable regime of occupation has been established, but under the Geneva Conventions, the duty attaches as soon as the occupying force has any relation with the civilians of that territory, that is, at the soonest possible moment -- a principle that finds reflection in U.S. military policy.⁵⁹ This duty requires the United States and its allies to use their own personnel to secure public order as they advance through the country and be prepared to mobilize and adequately train local military, and eventually police, personnel for such responsibilities. These forces must follow directly on those that displace existing authorities, to leave no intermediate period for reprisal and revenge.

Three areas are of particular concern. The first is the Shi'a heartland in cities such as Basra, Najaf and Karbala. There is already a history of executions by anti-Saddam forces during the 1991 uprising; Human Rights Watch fears that this killing could resume. The second area is the town of Kirkuk, where ethnic Kurds were systematically displaced by Sunni Arabs in a process of "Arabization" sponsored by the Iraqi government.⁶⁰ The return of Kurds to Kirkuk to reclaim their lost lands could yield violence. The patrol of vulnerable neighborhoods and villages, the proactive defense of vulnerable populations, and the immediate securing of prisons and jails where inmates may either suffer or inflict reprisals will be essential functions. Finally, If Turkish troops occupy areas of Iraq inhabited by ethnic Kurds, those troops must be particularly vigilant in protecting the Kurds from attacks by other groups. Furthermore, Turkish troops must ensure that they protect Iraqi Kurds as required by international law despite any perceptions of their support for ethnic Kurds living in Turkey.

Should the United States and its allies occupy Iraqi territory, they will have powers to enact penal legislation to ensure public order and protect their own security,⁶¹ or to assign residence or intern persons should that be "absolutely necessary" to protect the security of the occupying forces.⁶² In the former case, the occupier must be prepared to provide all guarantees of a fair trial, including the right to counsel of the defendant's choice.⁶³ In the latter, it must allow appeal to courts or administrative boards of any decision

⁵⁸ This is a principle of customary international law and a treaty obligation; see Hague Convention (IV) of 1907 respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land art. 43 [hereinafter Hague Regulations], and Fourth Geneva Convention, art. 27 ("Protected persons....shall be protected especially against all acts of violence or threats thereof").

⁵⁹ Cf. Hague Regulations, arts. 42, 43 and Fourth Geneva Convention, art. 6 and ICRC Commentary on the Fourth Geneva Convention, p. 60 ("There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets."). The U.S. Army Field Manual also calls for applying the protections that relate to occupation "as far as possible in areas through which troops are passing and even on the battlefield." Field Manual, 27-10, p. 138, para. 352.

⁶⁰ Human Rights Watch, "Endless Torment: The 1991 Uprising in Iraq and its Aftermath," *A Human Rights Watch Report*, June 1992, <http://www.hrw.org/reports/1992/Iraq926.htm>, (retrieved February 4, 2003).

⁶¹ Fourth Geneva Convention, art. 64.

⁶² Ibid, arts. 42 & 43.

⁶³ Ibid, arts. 71-73.

regarding internment or assigned residence.⁶⁴ These institutions must be established at the earliest possible moment, to avoid the prospect of arbitrary and indefinite detention of persons by the occupying forces. Indeed, the threat of prosecution is one of the most effective ways of deterring atrocities.

- The United States and its allies must be prepared to provide security to the civilian population at such point as they may be in effective control of Iraqi territory.
- The United States and its allies, should they occupy Iraqi territory, must be prepared to establish at the earliest possible moment the appropriate judicial and administrative structures that can guarantee the rights of fair trial and appeal of interim-authority decisions relating to detention, relocation and internment.
- The United States and its allies, should they occupy Iraqi territory, should publicly commit to prosecuting anyone responsible for serious human rights abuses.

Section X: Transparency and Assessment of Civilian Loss as a Consequence of Military Action

Journalists and human rights monitors should be given maximum access to assess the effect of war on civilians.

A degree of transparency of military operations is essential for demonstrating and enabling public understanding of compliance with humanitarian law. Journalists and human rights monitors should be allowed the greatest degree of access possible to military commanders, military information, and the battlefield, consistent with the security of military operations. The admission of foreign correspondents by Iraq and the preparations by the U.S. Defense Department to allow journalists to accompany military units are positive steps. All parties must be prepared to respect the protection of war correspondents under international law, in particular their status as civilians and their entitlement to the status of prisoners of war.⁶⁵

Another facet of transparency is the willingness of military forces to take steps at the earliest possible moment to facilitate internal and external investigation of alleged war crimes and serious violations of humanitarian law. Human Rights Watch believes that in addition to internal investigations and courts martial, it would be useful for the sake of transparency and public credibility for all parties to consider enabling commissions of inquiry into wartime violations that are comprised entirely or partly of experts outside the military establishment of the warring parties. One such panel that is already available is the International Fact-Finding Commission established under Protocol I to the Geneva Conventions, although *ad hoc* commissions may also be effective or acceptable to the parties, given that neither Iraq nor the United States is a party to Protocol I.

Finally, there has been surprisingly little post-attack evaluation by states of the effects of particular weapons and tactics on civilians, although increasingly efforts are made to predict civilian loss in advance. The United States, in particular, has adopted advanced computer modeling and formulas to estimate potential civilian casualties of weapons and target choices. Yet without careful analysis of the actual results of military actions and the various factors that contributed to particular decisions, it will be difficult to avoid or improve on errors in human judgment, intelligence, or strategic analysis that result in unnecessary civilian death and damage. Human Rights Watch maintains that all parties to a conflict have a duty to collect such data and perform such analyses to clarify the actual extent of civilian loss and the actual advantage and value of military targets so as to provide a baseline for future decisions with the aim of minimizing the impact of war on civilians.

With regard to improving transparency and accountability under the laws of war, Human Rights Watch recommends:

⁶⁴ *Ibid.*, art. 43.

⁶⁵ See Third Geneva Convention, art. 4(A)(4) and Protocol I, art. 79.

- All parties should facilitate access to military information, personnel and battlegrounds by journalists and international monitors;
- All parties should respect the legal status of journalists as civilians and prisoners of war;
- All parties should act swiftly to facilitate internal and external investigation of alleged war crimes and serious violations of international humanitarian law.

Conclusion

Many aspects of a potential war in Iraq pose grave risks for the civilian population, among them the prospect of extensive urban combat, the possible use of human shields and weapons of mass destruction, and the dependence of Iraqis on humanitarian assistance for food and medical supplies. It is imperative that all parties to a potential conflict take steps prior to the start of hostilities to improve civilian protections. Such steps must include separating and distinguishing military objectives from civilian populations, abjuring the use of weapons of mass destruction and other indiscriminate or inhumane weapons, and making immediate preparations to secure public order and assistance necessary to the survival of the civilian population in occupied areas. HRW urges all parties to such a conflict to respect international humanitarian law and, in so doing, spare unnecessary harm to civilians and other non-combatants who may find themselves caught in the crossfire.