

**Applicability of Geneva Conventions III (POWs) and IV (civilians) in Iraq after June 30, 2004, and Effect on US Powers and Duties Regarding Detentions**

- GC III allows the US to continue to hold POWs, and to detain any new POWs, until “the cessation of active hostilities” (Art. 118).
  - Active hostilities do not cease until military operations have ceased and there is no reasonable basis to believe that they are likely to resume.
  - Because this standard is factual, the legal changes contemplated for June 30 are not directly relevant.
  - GC III protects POWs, including any arrested after June 30, “until their final release and repatriation” (Art. 5).
  - A handover of an Iraqi POW after June 30 to the Iraqi Interim Government (“IIG”) for continued detention, even prior to the cessation of active hostilities, constitutes a release and repatriation rather than a transfer, and thus terminates the applicability of GC III to that person.
    - The customary rule is that a national of the power detaining him is not a POW. GC III recognizes this rule by distinguishing between the detaining power and the power on which a POW depends (*e.g.*, Arts. 21, 43, 111) and assuming that persons tried by a detaining power will not be its nationals (Arts. 87, 100).
    - But it would be good legal policy for the US to seek assurances that the IIG will humanely treat Iraqi POWs that the US releases to it, akin to the assurances that GC III requires for transfers of POWs between powers. (Art. 12 allows such transfers only after the transferring power “has satisfied itself of the willingness and ability” of the receiving power “to apply” GC III; Art. 6 prohibits agreements between powers that adversely affect POWs.)
    - To help publicly demonstrate that the release is not really a transfer, the US also might seek assurance from the IIG that the POWs handed over will be detained and tried by civilian rather than military authorities. (*Cf.* Art. 84: POWs usually to be tried “only by a military court.”)
  - GC III does not require any particular response to IIG demand for POWs before active hostilities cease.
  - US may transfer its POWs among US detention locations, including transferring out of Iraq (*see* Arts. 46-48). GC III does not impose any additional restrictions on such transfers simply b/c occupation has ended.
  - After cessation of active hostilities, US may continue to hold POWs “against whom criminal proceedings for an indictable offence are pending” (Art. 119), where the US either has commenced the proceedings or holds the POWs per an agreement with the power that has (*see* Art. 6).
  - After cessation of active hostilities, the US may decline to release and repatriate to Iraq individual POWs who have freely so requested for reasonable fear of unjust treatment (which does not include fear of a proper prosecution), notwithstanding the language of Art. 118 (imposing duty of release and repatriation) and Art. 7 (barring waiver of rights). But

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such persons should be released into a country other than Iraq, absent pending criminal proceedings per Art. 119.

- GC IV allows the US to continue to hold most previously detained “protected persons” (Art. 4) at least until “the close of hostilities” (Art. 133).
  - Although each case will be highly fact-dependent, at least the following are not “protected persons” in Iraq:
    - US citizens.
    - Nationals of states that have been US allies in the war against Iraq or are otherwise “co-belligerents,” which includes at least UK, Australia, Spain, Poland, Kuwait, and Qatar.
    - POWs, including prisoners who are members of militias, volunteer corps, or other organized resistance movements, so long as they otherwise meet the criteria for being lawful combatants.
    - Terrorist operatives engaged in transnational armed conflict against the US (e.g., operatives of Al Qaeda and affiliated groups) who are not citizens or permanent residents of Iraq.
  - The “close of hostilities” standard is at least as broad as “cessation of active hostilities.”
  - Because this standard is factual, the legal changes contemplated for June 30 are not directly relevant.
  - Protected persons detained before June 30 receive the protections of GC IV until their “release, repatriation or re-establishment” (Art. 6). But a handover of such Iraqi detainees to the IIG after June 30 would constitute a release and repatriation, by the same reasoning as for POWs.
  - There is a continuing duty to release any individual for whom “the reasons which necessitated his internment no longer exist” (Art. 132).
  - The ability of the US to transfer out of Iraq protected persons detained before June 30 would be subject to Art. 49.
  - After June 30, the US will have a duty to hand over to the IIG any detainees who “have been accused of offences or convicted by the courts in occupied territory” (Art. 77).
  
- After June 30, GC IV will no longer provide authority to arrest persons and detain them. (See Art. 78.)
  - But if hostilities are continuing, customary laws of war will permit arrest and detention of unlawful combatants: That is, non-POWs who “associate themselves with the military arm” of a group in armed conflict with the US. (*Quirin*, 317 U.S. at 37; see also *id.* at 30-38.)
  - Within Iraq, the scope of any additional arrest and detention power after occupation ends will be determined by the authorization of UN Sec. Council Res. 1511 to “take all necessary measures to contribute to the maintenance of security and stability in Iraq.” International law regarding security detentions in armed conflicts (such as GC IV, Art. 78, and GC

Protocol I, Art. 75<sup>1</sup>), might inform the interpretation of that authorization. (See State paper concerning scope of 1511.)

- An agreement with the IIG or a new UN Sec. Council Resolution could provide authority to arrest and detain additional to that of Res. 1511.
- After June 30, the exercise of the above powers in Iraq will depend on either the IIG's continuing consent to, or the UN's continued authorization of, military operations in Iraq. US actions in Iraq could not be inconsistent with the scope of that consent or authorization.
  - As of June 30, Iraqi consent to continuing US military operations in Iraq can reasonably be inferred from the following:
    - Depending on its details, CPA Order 17 as revised, which will be the *de facto* SOFA;
    - The Transition Administration Law ("TAL"), which the Iraqi Governing Council approved, particularly Arts. 26(C) (continuing CPA Orders in force) and 59(B) (including the Iraqi army within the US-headed multi-national force); and
    - Any letters issued by Iraqi representatives on or before June 30 welcoming the continued presence of the multi-national force.
  - The IIG might revoke Iraqi consent at any time.
  - UN Sec. Council Res. 1511 (particularly if reaffirmed by a new Res.), to the extent of its terms, could, as a *legal* matter, trump the wishes or actions of the IIG regarding continued military operations of US forces in Iraq.
  - But as long as active hostilities have not ceased, the US may continue to hold POWs outside of Iraq pursuant to GC III.

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<sup>1</sup> The US has not ratified Protocol I but has recognized Article 75 as setting forth fundamental guarantees that the US supports.