

Lawyers Put Spotlight on UK Gulf Forces

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Britain could find itself in the new court's firing line.

Britain could find itself the first target of the International Criminal Court, ICC, if it invades Iraq this week.

London has already taken legal advice on the implications of any war.

America and Iraq are not members of the ICC, so US troops are immune from prosecution.

But the same is not true for the soldiers of Britain, Australia and Spain, all of whom are members of the court inaugurated earlier this month in The Hague.

At least one law firm in London has said that if Britain commits war crimes in the coming conflict, it will push for prosecutions. And human rights groups who have backed the ICC are likely to highlight evidence of any atrocities.

The headache for British government lawyers is that the list of possible violations is huge and untested.

Run your finger down the charges listed in the ICC statute and many possibilities for war crimes trials jump out.

The most serious count – genocide – is unlikely to be levelled at the British, as the declared aim of the war is to attack the regime, not the Iraqi people. But there seems plenty of scope within the other two key ICC charges – war crimes and crimes against humanity.

While civilians are unlikely to be targeted directly by British forces, many may be killed in crossfire.

Allied commanders reported in the Financial Times at the weekend that Iraqi forces will be targeted even if they are hiding in civilian areas.

They know Saddam Hussein is likely to repeat his tactics of the first Gulf War, when he parked tanks, and even jets, close to hospitals and apartment blocks.

Smart bombs will smash many of these targets while leaving nearby civilians unharmed, but not all smart bombs work – and the question nobody can yet answer is how much “collateral damage” will the ICC allow.

Such bombing may violate Article 8 of the ICC statute, which forbids “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians”. Likewise, it is forbidden to cause “superfluous” injury in fighting the war.

War crimes law also instructs armies to take care of civilians: those in British occupied areas must be looked after and not exposed to harm. In addition, prisoners of war must be well treated – deportation and torture are forbidden.

Charges could apply not just to British soldiers committing crimes – but also if they are ruled to have assisted others in committing them.

For instance, the British might be liable if they refuelled US planes, or provided intelligence, that led American forces to commit war crimes – even though the Americans themselves could not be prosecuted by the ICC.

And the ICC is likely to indict not just the soldiers carrying out a crime, but the commander who ordered it.

With the trial of former Yugoslav president Slobodan Milosevic, the UN tribunal has shown how an atrocity on a far away battlefield can end in the indictment of the supreme commander.

But there is uncertainty over the new court’s ability to prosecute – the newness of ICC law providing distinct problems. Quite simply, there is no case law.

For instance, prosecutors at the court acknowledge that some “collateral damage” is allowed in war – the question is, how much?

If bombs hit an army base and some civilians are hurt, this is likely to escape prosecution. But what if, to kill Saddam Hussein, an entire apartment block has to be destroyed?

Another test is that of recklessness: when a NATO jet blew up a rail bridge in Yugoslavia, killing civilian passengers, Hague prosecutors ruled this was permissible.

But the line between permissible mistake and reckless use of force is unclear.

In the Afghan war, US jets made a series of blunders, bombing several villages, a wedding party and a Canadian battle group, despite these targets being well away from any front line.

Would ICC prosecutors decide that such mistakes were permissible, or would they be so serious that they lead to war crimes charges? Right now, nobody knows.

The ICC has been set up to try only the most serious crimes. A prosecutor may decide that atrocities, if they are not part of a systematic pattern, do not warrant prosecution.

Finally, the ICC has yet to appoint a prosecutor. When it gets one, that official is likely to be very nervous of indicting someone from a leading power – the powers that, after all, pay the bills.

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Location: Iraqi Kurdistan
Iraq

Focus: International Criminal Tribunal for the former
Yugoslavia

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