International Legal Issues Surrounding The Mistreatment of Iraqi Detainees by American Forces

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In February, 2004, U.S. media outlets began reporting allegations regarding the mistreatment of Iraqi detainees by U.S. Coalition Forces (CF).(1) Earlier complaints had been raised by many Iraqis and various human rights organizations as well as the International Committee of the Red Cross (ICRC), which issued a report in February 2004 detailing the ICRC's concerns with the conditions of arrest and detention of Iraqis by Coalition Forces.(2) On January 19, 2004, Lt. General Ricardo Sanchez, the senior U.S. Commander in Iraq, requested U.S. Central Command to conduct an investigation, and on January 31, 2004, Major General Antonio M. Taguba was appointed to conduct an "informal investigation ... into the 800th MP Brigade's detention and internment operations," in particular as regards the Abu Ghraib prison in Baghdad. General Taguba's report was issued on February 26, 2004, but was not made publicly available until graphic photos depicting U.S. soldiers abusing Iraqi prisoners in various ways were aired by CBS on 60 Minutes II on Wednesday, April 28, 2004.

The Taguba report describes, in its own words, incidents of "sadistic, blatant, and wanton criminal abuses ... inflicted on several detainees ... [which were] systemic and illegal."(3) The report presents a catalog of offenses including, inter alia, physical abuse, videotaping and photographing naked male and female detainees, posing detainees in various sexually explicit positions for photographing, forcing detainees to remove their clothing and remain naked for several days at a time, a male MP guard having sex with a female detainee and using military working dogs, without muzzles, to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee."(4)

The Abu Ghraib prison scandal raises important questions of international law and practice, as well as policy questions beyond the scope of this Insight. This analysis confines itself to examining the international law applicable to the CF arrest and detention of Iraqi prisoners, as well as possible questions of individual and command responsibility for breaches, in general terms. It will not discuss the application of the Uniform Code of Military Justice to particular individuals, or other potentially applicable statutes, such as the [US] Torture Victim Protection Act,(5) the [US] War Crimes Act of 1996, as amended,(6) or the [US] Military Extraterritorial Jurisdiction Act.(7)

I. APPLICABLE LAW

Two distinct bodies of international law apply to the arrest and detention of Iraqis by Coalition Forces—international humanitarian law and international human rights law. Additionally, principles of State Responsibility and international criminal law may illuminate the possible legal exposure of the United States, as well as the potential personal criminal responsibility of those responsible for violations of the laws of war and international human rights law.
A. Issues Arising Under International Humanitarian Law

There is no dispute that U.S. and U.K. Coalition Forces in Iraq (CF) are subject to international humanitarian law. Nor do the occupying powers dispute this. Security Council Resolution 1483 called upon all States to observe their obligations under the Geneva Conventions of 1949 and the Hague Regulations of 1907, and the Taguba Report notes that all Enemy Prisoners of War (EPWs) and Civilian Internees should receive the "full protection of the Geneva Conventions, unless the denial of these protections is due to specifically articulated military necessity (e.g., no visitation to preclude the direction of insurgency operations)."

Both GC III (Relative to Prisoners of War) and GC IV (Relative to the Protection of Civilian Persons in Time of War) are applicable to the conflict, although different provisions of the Conventions may apply depending on the status of an individual detainee. These distinctions are not particularly important in this case because the abuses documented are illegal regardless of the status of the particular individuals involved. Prisoners of War must be humanely treated, and their families must be notified of their capture, and, in particular, outrages upon personal dignity, and humiliating and degrading treatment are prohibited. Civilians must be treated at all times "with humanity," and "in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and custom. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity." Their families must be notified of their capture, and, in particular, outrages upon personal dignity, and humiliating and degrading treatment are prohibited. Civilians must be treated at all times "with humanity," and "in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and custom. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity." In particular, "[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties," and murder, torture, corporal punishment and "any other measure of brutality whether applied by civilian or military agents" is prohibited.

According to available reports, it appears that most of the persons arrested and detained by Coalition Forces are civilians. In addition, the ICRC Report states that between 70 % and 90% of the persons deprived of their liberty in Iraq were arrested by mistake. If correct, this appears to be a violation of the obligations imposed on the occupying powers by the Third and Fourth Geneva Conventions to maintain the distinction between combatants and non-combatants, and to treat the civilian population with dignity and respect. According to the ICRC Report:

Arresting authorities entered houses usually after dark, breaking down doors, waking up residents roughly, yelling orders, forcing family members into one room under military guard while searching the rest of the house and further breaking doors, cabinets, and other property. They arrested suspects, tying their hands in the back with flexi-cuffs, hooding them, and taking them away. Sometimes they arrested all adult males present in a house, including elderly, handicapped or sick people. Treatment often included pushing people around, insulting, taking aim with rifles, punching and kicking and striking with rifles.

The Conventions do not prohibit the arrest and detention of Iraqis per se, but impose strict procedural and substantive requirements on the manner of arrest, treatment of detainees, and ultimate disposition of particular cases. This is also true of Army Regulation 190-8 which provides that although prisoners may be interrogated in combat zones, the use of physical or mental torture or any coercion to compel them to provide information is prohibited.
In addition to the specific allegations of abuse discussed above, other violations of U.S. Army Regulations and international humanitarian law at Abu Ghraib include the failure to properly register the names of detainees and internees on capture or internment cards, and to keep track of individual prisoners, a problem exacerbated by severe overcrowding at the prison and lack of training for U.S. military forces as well as Iraqi guards and civilian contractors. Finally, treatment during interrogation was apparently deeply problematic, including physical and psychological coercion, although, according to the ICRC Report, ill-treatment was not systematic except "with regard to persons arrested in connection with suspected security offenses or deemed to have an 'intelligence' value."(23) Methods used included hooding, handcuffing with flexi-cuffs, beatings and other forms of physical abuse, solitary confinement, threats (of ill-treatment, reprisals against family members, imminent execution or transfer to Guantanamo), denial of fresh air, being paraded naked, acts of humiliation such as being made to stand naked against the wall of the cell with arms raised or with women's underwear over the head–while being laughed at by guards, including female guards, and sometimes photographed in this position, and being subjected repeatedly over several days, sometimes naked, as well as exposure while hooded, to loud music or excessive heat. These are clear violations of the provisions of both the Third and Fourth Geneva Conventions, and certain abuses may also constitute torture.(25)

B. The Application of International Human Rights Law

Particularly given the mixed nature of the prison populations at Abu Ghraib and elsewhere, including civilians, Iraqi criminals, and prisoners of war, the application of both treaty-based and customary human rights law becomes important. The relevant instruments include the International Covenant on Civil and Political Rights, a treaty to which both Iraq and the United States are parties, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a treaty to which the United States is a party, and the Universal Declaration of Human Rights, a U.N. General Assembly resolution widely recognized as a statement of customary international law. In addition, the Rome Statute for the International Criminal Court, although not ratified by the United States or Iraq, has been recognized as an authoritative basis for the definition of Crimes Against Humanity, as reflected in the Statute of the Iraqi Special Tribunals.(26) Moreover, the United Nations has elaborated principles regarding the treatment of prisoners,(27) as well as a Declaration on the Protection of All Persons from Enforced Disappearance, 1992, which may be particularly applicable as regards "Ghost Detainees" and others who have been taken into custody without notification to their relatives, or without a record of their incarceration being made.(28)

International human rights law imposes stringent requirements regarding the treatment of detainees and prisoners, which are applicable at all times, including military occupation. These parallel, in many cases, the provisions of international humanitarian law. In particular, all persons deprived of their liberty "shall be treated with humanity and with respect for the inherent dignity of the human person."(29) Additionally, accused and convicted persons must be segregated from each other and subject to separate treatment, based on the presumption that those not yet convicted have, under international human rights law, the right to be presumed innocent. Thus, the Taguba report recommends the separation of the Iraqi criminal population in the prisons, from other detainees. Finally, the U.N. Standard Minimum Rules(30) and the United
Nations Human Rights Committee have generally emphasized the need for contact with the outside world, both as a basic right of the detainee, and as a potential check on abuse. As the Human Rights Committee has noted, this is particularly important as regards the right of a detainee to have access to counsel (particularly applicable in this case regarding civilians and those accused of Iraqi penal offenses or crimes against the coalition), not only to assist in the prisoner's defense, but as an additional protection against the possibility of ill-treatment.(31)

II. LEGAL RESPONSIBILITY OF STATES AND INDIVIDUAL CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW

A complete picture of State and individual responsibility for the abuses detailed in the media, the Taguba Report and the ICRC Report is impossible due to space constraints and the incomplete facts currently available. However, a few comments on the applicable legal principles follow.

As regards potential U.S. responsibility, as a party to all the relevant human rights treaties and the Geneva Conventions, the United States has a duty to fulfill its obligations under those international conventions. As regards the ICCPR, the Human Rights Committee has insisted on the duty of States to take action against the acts prohibited in article 7 of the Covenant, providing that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment." The prohibition against torture and the right to life are peremptory, non-derogable norms that cannot be departed from no matter how grave the situation.(32) Under the Fourth Geneva Convention, the U.S. is required to provide effective penal sanctions for grave breaches (such as torture or inhuman treatment) and to "take measures necessary for the suppression of all [other] acts contrary to the provisions of [GC IV]."(33) Similarly, the Torture Convention requires States Parties to prevent, promptly and impartially investigate (and, if called for, prosecute) acts of torture "committed in any territory under its jurisdiction."(34) These treaties therefore impose specific obligations on the United States, in addition to any general principles of State Responsibility for harm that might apply as a matter of customary international law.

Additionally, individual perpetrators and their superiors may be individually criminally liable, either for direct participation in any crimes alleged, or under the doctrine of command responsibility. Possible charges include Grave Breaches of the Geneva Conventions (GC III, arts. 129-130; GC IV, arts. 146-147, including wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, or wilfully depriving a prisoner of war or protected person of the rights of fair and regular trial). They may also be responsible for torture or enforced disappearance of persons, as crimes prohibited under treaty and customary international law, both as substantive offenses and as predicate offenses to charges of crimes against humanity. Finally, although the U.S. has no legislation directly punishing crimes against humanity, and is not a party to the ICC Statute, if the crimes committed were widespread or systematic, constitute an attack on a civilian population, and were carried out pursuant to a state or organizational policy, they could be characterized as crimes against humanity.(35)

Although the standard for command responsibility varies slightly depending on the instrument and jurisdiction involved, guidance as to the general responsibility of civilian and military leaders under international law may be drawn from article 28 of the ICC Statute. Regarding military commanders, article 28 (1) provides that commanders who either knew or should have known of the offenses committed, and who failed to take all "necessary and
reasonable measures within [their] power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution" shall be criminally responsible for crimes committed under their effective command and control, or effective authority and control, as a result of their failure to exercise control properly over his or her forces. Similarly, article 28(2) provides that other superiors (i.e., civilian officials), may be responsible for crimes committed by their subordinates if all three of these conditions are met: first, the superior either knew, or consciously disregarded, information which clearly indicated that the subordinates were committing or about to commit such crimes; second, the crimes concerned activities within the effective responsibility and control of the superior; and third, the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress the crimes or to submit the matter for investigation and prosecution. Generally, wilful blindness may not effectively shield a commander or superior from criminal responsibility. (36)

1. CNN Headline, 8 Iraqi Police Killed in Kirkuk Bombing, Feb. 23, 2004. CNN reported that 17 military personnel had been relieved of duty as a result of a criminal investigation into alleged abuse of Iraqi detainees at Abu Ghraib prison in Baghdad. Apparently the story did not receive much air time in the United States, but received significant coverage abroad.


5. 18 U.S.C. 2340A.

6. 18 U.S.C. 2441 (providing federal district courts with jurisdiction over grave breaches and violations of common article 3 of the Geneva Conventions committed by (or against) U.S. nationals).


10. Taguba Report, supra note 3, at pp. 7-8 (summarizing report of MG Ryder).

11. The U.S. government has acknowledged the applicability of the Geneva Conventions to Operation Iraqi Freedom, but resisted their application to Operation Enduring Freedom regarding the invasion of Afghanistan, particularly as regards the detainees at Guantanamo. However, CF at Abu Ghraib appear not to have received instruction and training in Geneva law, Taguba Report, supra, at p. 18, para. 30, 32; p. 27, para. 19-21; and a debate is emerging as to whether there may have been some conflation of the principles applicable and persons serving in the two conflicts. Tim Golden & Eric Schmitt, General Took Guantanamo Rules to Iraq for Handling of Prisoners, N.Y. Times, May 13, 2004, at A1.

12. British Forces are also subject to Protocol I to the Geneva Conventions (adding considerable detail to the Conventions), but as the U.S. has not ratified Protocol I, its application is not discussed here.

14. GC III, art. 3.
15. GC IV, art. 5.
16. Id., art. 27.
17. Id., art. 31.
18. Id., art. 32.

19. Other categories of persons apparently found in the prisons are Iraqi criminals accused of committing crimes against other Iraqis, presumably either held over from the Saddam era or newly imprisoned by the Iraqi police or Coalition Forces (Taguba Report, at p. 7), as well as a category cryptically referred to as "Retained Personnel," a category of EPWs that include medical personnel, chaplains, and members of the Red Cross or Red Crescent. See <http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf>. The Taguba Report also makes reference to "High Value Detainees" (who may have valuable intelligence or other value), "Other Detainees," and "Ghost Detainees," described as individuals, whose identities were unknown by the 800th MP Brigade, but who were held at Abu Ghraib at the request of Other Government Agencies, and were "moved around the facility to hide them from a visiting ICRC survey team." Taguba Report, supra note 3, at p. 18, para. 33. The Report suggests that maybe 60 percent of those incarcerated were picked up for "crimes against the Coalition," and that many could have been released who were not. Id. p. 17, para. 24.

20. See, e.g., GC IV, arts. 5, 27, 31, 32.
22. Id., pp. 7-9; Taguba Report, supra note 3, pp. 17-18. The Report and recent testimony suggest that some of the abuses may have stemmed from the influence of military intelligence officers who had asked (or ordered, it is not clear) military police to set "favorable conditions" for subsequent interviews by stressing or softening up detainees. Taguba Report, supra, p. 8; Eric Schmitt, Rumsfeld Aide and a General Clash on Abuse, NY Times, May 12, 2004, at A1.

24. Id., p. 12, para. 25.
25. See, e.g., GC III, arts. 13, 14, 17, 87, 99; GC IV, arts. 27, 5, 31, 32.
26. The Statute of the Iraqi Special Tribunal, art. 12 generally tracks the ICC definition, although it omits enforced sterilization and apartheid as predicate crimes, and has slight linguistic differences, not relevant in this situation.

28. This may also be characterized as a crime against humanity under article 7(1)(i) of the ICC Statute, if the other preconditions for its application are met.
29. ICCPR, art. 10(1).
30. See generally, Standard Minimum Rules, supra note 27, Rules 84-93.
31. Human Rights Committee General Comment No. 20, United Nations Compilation of
General Comments, p. 140, para. 11.
32. See ICCPR, art. 4(2); Torture Convention, art. 2(2).
33. GC IV, art. 146. See also, Scheffer, Beyond Occupation Law, supra, at. 856.
34. Torture Convention, arts. 2, 12.
35. ICC Statute, art. 7.
36. See, e.g., The Prosecutor v. Delalic, et al., IT-96-21-T, Judgment, para. 387 (Nov. 16,
1998).

† Notes and Questions [Textbook author]
1. Secretary Rumsfeld appointed the Independent Panel to Review Department of Defense
Detention Policies. In its August 2004 Final Report, the panel found as follows:

The events of October through December 2003 on the night shift of Tier 1
at the Abu Ghraib prison were acts of brutality and purposeless sadism. We know
these abuses occurred at the hands of both military police and military intelligence
personnel. The pictured abuses, unacceptable even in wartime [President Bush
declared an end to hostilities on May 1, 2003], were not part of authorized
interrogations nor were they even directed at intelligence targets. They represent
deviant behavior and a failure of military leadership and discipline. . . . [W]e do
know that some of the egregious abuses at Abu Ghraib which were not
photographed did occur during interrogation sessions and that abuses during
interrogation sessions occurred elsewhere.

. . . As of mid-August 2004, 155 investigations into the allegations have
been completed, resulting in 66 substantiated cases. Approximately one-third of
these cases occurred at the point of capture or tactical collection point, frequently
under uncertain, dangerous and violent circumstances.

Abuses . . . were widespread and, although inflicted on only a small percentage
of those detained, there were serious both in number and in effect. No approved
procedures called for or allowed the kinds of abuse that in fact occurred. There is no
evidence of a policy of abuse that in fact occurred. Still, the abuses were not just the
failure of some individuals to follow known standards, and they are more than the failure
of a few leaders to enforce proper discipline. There is both institutional and personal
responsibility at higher levels.

See Executive Summary, at
did the Abu Ghraib prison guards violate? If you were the prosecutor assigned to their cases,
what sources of US and International Law would you examine to determine their potential liability?

2. Based on your reading of the earlier Calley case, would orders or encouragement from
superior officers have relieved the Abu Ghraib soldiers from any responsibility they incurred?
such orders or encouragement were given, should that play any role in their sentencing?

3. Numerous pictures were taken:
(a) Obviously despicable tactics were used to degrade these detainees. Senior in country commanders disclaimed any knowledge of this treatment of Iraqi and other detainees at Abu Ghraib prison. Is it likely that the more that the guards taunted the prisoners, the more likely they operated in an environment that condoned their acts? Would complete ignorance of the relevant commander, that these degrading events were taking place, relieve her from liability for the guards’ conduct under International Humanitarian Law—e.g., the Third Geneva Convention regarding treatment of POWs?

(b) You will recall the widely distributed pictures of Saddam Hussein, when he was captured from an underground “rathole” near his hometown of Takrit. The International Red Cross claimed that this publication violated Hussein’s right to privacy. Local tribal leaders added that this publication was just another example of US and British insensitivity to some basic tenets of Islam (which later included the claimed desecration of a copy of the Qur’an, which was supposedly flushed down a toilet at the Guantanamo Bay, Cuba detention facility). What argument could one make, that the US or UK violated the Laws of War by allowing Hussein’s pictures to be published? If you had the discretion to do so, would you prosecute the responsible individuals who disseminated those pictures? Would you be doing your job if you did not? For a related story, see Associated Press, Paper Prints More Photos of Saddam in Jail, New York Times on the Web (May 21, 2005).

4. For updated information on Abu Ghraib prosecutions and sentences, see <http://www.ccny.cuny.edu/library/Divisions/Government/Iraqbib.html#PrisonsD>. For related details on Abu Ghraib, see <http://jurist.law.pitt.edu/hottopics/abughraib.php>. In March 2005, US Secretary of State Rumsfeld offered his resignation to President Bush over this scandal. The President refused to accept it. Rumsfeld was the temporary target of a potential German court prosecution. The German Federal Prosecutor refused to launch an investigation.
