# Supplement

## Human Rights Standards Applicable To The United States' Interrogation of Detainees

### Recent Developments

Following the issuance of the Committees' Report in the last week of April, 2004[1], we and all Americans were stunned to learn of the abuses at Abu Ghraib Prison in Iraq. Disclosures since then include allegations of more widespread abuses of detainees in both Iraq and from the conflict in Afghanistan. The scope and causes of these known and alleged abuses and issues of responsibility and accountability are now the subject of investigation by Congress, the Departments of Defense and Justice and the military. At the same time, these recent events and disclosures raise additional legal questions concerning the legal standards applicable to the conflict in Afghanistan and the occupation of Iraq which were not thoroughly addressed in our original Report. It is the purpose of this Supplement to address those questions. We therefore examine the following questions:

(1) What standards are applicable to treatment of detainees during the occupation in Iraq and what standards apply when the occupation ends?

(2) What is the scope of any exceptions to the standards of the Geneva Conventions for interrogation of detainees in Iraq who pose a security threat and/or are suspected of possessing "high value intelligence"?

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Certain terms are used in this Supplement as defined in our Report.

[1] The Report was submitted to the General Counsels of the Department of Defense and the Central Intelligence Agency, the Legal Adviser to the National Security Counsel, and Counsel to the Joint Chiefs of Staff, and the Chair and Ranking Member of the committees for the Armed Services, Foreign Relations, Intelligence and the Judiciary of the Senate and the House of Representatives. These committees have held and are holding hearings on aspects of the Abu Ghraib abuses within their respective jurisdiction.

(3) To what extent do the Geneva Conventions apply to the detainees from the conflict in Afghanistan?

(4) How and to what extent can CIA personnel and civilian contractors be held accountable for any violations of international law resulting from their participation in any abuses in Iraq?

**Application of the Geneva Conventions to the Occupation of Iraq**

The U.S. acknowledges that its presence in Iraq is an "occupation" within the meaning of Geneva IV.[2] The U.S., as occupying power, is consequently subject to provisions for the benefit of "protected persons,"[3] including Article 31's prohibition of "physical or moral coercion to obtain information from them or third parties".[4] It is clear that not only the abuses in Abu Ghraib but also certain practices contemplated by the "Interrogation Rules of Engagement"[5]

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[2] Security Council Resolution 1483, passed on May 22, 2003, constitutes a formal recognition by the UN of the occupation. *See* S.C. Res. 1483, U.N. Doc S/Res/1483 (2003). This resolution also notes the letter from the Permanent Representatives of the U.S. and U.K. to the President of the Security Council, which formally announced to the UN the creation of the Coalition Provisional Authority "to exercise powers of government temporarily." *See Letter from the Permanent Representatives of the UK and the US to the UN addressed to the President of the Security Council*, U.N. Doc. S/2003/538 (May 8, 2003).

[3] On the Geneva Conventions and Geneva IV generally, *see* Part II of our Report.

[4] The ICRC Report also cites Articles 5, 27, 32 and 33 of Geneva IV. *See ICRC Report* at ¶8.

[5] In Senate hearings the Pentagon disclosed "Interrogation Rules of Engagement", attached to this Supplement as Appendix A which listed certain interrogation practices and specified a second group of practices that required approval of the Commanding General (Lt. Gen. Ricardo Sanchez). This second group included: "Isolation [solitary confinement] for longer than 30 days, Presence of Mil [Military] Working Dogs, Sleep Management (72 hrs max), Sensory Deprivation (72 hours max), Stress Positions (No longer than 45 min)". A week following the disclosure of this document, General Sanchez announced that all of the practices in this second group, other than isolation, would not be permitted.

Such form of Rules of Engagement is understood to be one of at least four versions adopted at various times in the fall of 2003 for use in one or more Coalition facilities. It is cited here as illustrative of the approach taken to interrogation standards.

– such as extended sleep deprivation and stressful positions – amount to "physical or moral coercion" and are, therefore, violations of Geneva IV.[6]

Who Are Protected Persons? As noted in the Report at footnote 116, Geneva IV benefits all persons in the hands of an Occupying Power, with exceptions only for nationals of that Power and its allies, nationals of certain neutrals and persons protected by other Geneva Conventions, such as prisoners of war. There is no blanket exception for so-called "unlawful combatants"[7] who fail to qualify as POWs under Geneva III. Once disqualified from POW status, such detainees become protected persons under Geneva IV.

**Are There Exceptions To The Geneva Conventions For "Security" Detainees Or Detainees Who Possess "High Value Intelligence"?[8]**

U.S. military authorities maintain that interrogation of certain detainees possessing "high value intelligence" does not have to comply with certain restrictions of Geneva IV because of an exception provided in Article 5 of Geneva IV with respect to persons who threaten the security of a state – so-called "security detainees".[9] This view is based on a misinterpretation of the plain meaning and purpose of Article 5.

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6 A February 2004 report of the International Committee of the Red Cross ("ICRC"), only recently disclosed, describes abuses that are "part of the process" in the case of persons arrested in connection with suspected security offenses or deemed to have "intelligence value." *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation*, February 2004 ("ICRC Report")www.derechos.org/nizkor/us/doc/icrc-prisoner-report-feb-2004.pdf.

7 *See* Report, fn. 7.

8 On May 23, 2004, it was disclosed that the Coalition response to the ICRC communication cited above asserted that certain detainees in question were "security detainees" not subject to the full obligations of Geneva IV. *See* Douglas Jehl and Neil A. Lewis, "The Reach of War: The Prisoners," N.Y. TIMES, May 23, 2004, at A12.

9 For example, in a December 24, 2003 Letter from Brigadier General Janis L. Karpinski to the ICRC regarding ICRC's visits to Camp Cropper and Abu Ghraib in October 2003 (attached to this Supplement as Appendix B), General Karpinski states: "[W]hile the armed conflict continues, and where 'absolute military security so requires' security internees will not obtain full GC protection as recognized in GCIV/5, although such protection will be afforded as soon as the security situation in Iraq allows it."

Article 5 provides for two categories of temporary exceptions to certain of its standards in the case of detainees who are definitely suspected of being threats to the security of a Party. The first paragraph of Article 5 provides that "where in the territory of a Party to the conflict," that Party determines that an individual protected person is definitely suspected of, or engaged in, activities hostile to the security of the State, the Party can suspend that person's rights and privileges under Geneva IV, where the exercise of such rights are prejudicial to the security of the State.[10] The plain language of this paragraph limits a Party's ability to suspend certain protections of Geneva IV to situations where a party to the conflict determines that a protected person is posing a security risk in that party's territory. Accordingly, this paragraph plainly has no application to protected persons detained by the U.S. in Iraq, because such detainees are not persons posing a security risk in the territory of the United States.[11] Rather, the United States, as an Occupying Power, is subject to the provisions of a separate paragraph of

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[10] Specifically, Article 5 provides in part:

> Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State...

*See* Geneva IV, Art. 5 (emphasis added).

[11] Even in a case covered by paragraph 1 of Article 5, the detainee must be treated "with humanity." *See* the definition of humane treatment in Common Article 3 of the Geneva Conventions quoted and discussed below, which would clearly exclude the abuses found at Abu Ghraib and probably a number of the practices contemplated by the "Interrogation Rules of Engagement." If the first paragraph's broad right of derogation were interpreted to apply to occupied territory, it would make the second paragraph's narrow derogation superfluous, contrary to principles of interpretation that seek to give meaning to all provisions.

Article 5 applicable to occupation. That separate paragraph[12] applicable to occupation permits the Occupying Power, where absolute military necessity so requires, temporarily to deny "rights of communication" – but no other rights – for a person detained as a spy or saboteur or as a threat to the security of the Occupying Power. Therefore, during occupation, even detainees who pose a security risk to the Occupying Power have the same protection against coercion as any other detainee.

What Standards Apply When The Occupation Ends? The occupation will continue under Article 6 as long as *de facto* the U.S. "exercises the functions of government" in Iraq. This result cannot be varied by agreement with Iraqi "authorities." Article 47 provides that agreements between the authorities of the occupied territories and the Occupying Power are not effective to deprive protected persons of the protections of Geneva IV. The ICRC Commentary confirms that Article 47 applies where the Occupying Power has installed and maintained a government in power. For the occupation to end there must be an independent national government internationally recognized exercising the full functions of government. The establishment of a transitional regime that failed to exercise the full functions of government would not terminate the occupation. When the occupation does end, Article 31 will no longer apply. However, in any armed conflict that may continue between remaining U.S. armed forces in Iraq and Iraqi resistance – a non-international (non-state) armed conflict – the minimal protections of Common Article 3 of the Geneva Conventions would apply.

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[12] The second paragraph of Article 5 provides, in part:

> Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

**The Applicability of the Minimal Safeguards of Common Article 3 of the Geneva Conventions**

Working documents dating from early 2002 have recently become public exposing internal dialogue within the Administration about the application of the Geneva Conventions to the Afghan conflict.[13] White House counsel, the Office of the Vice President, the Department of Justice and Department of Defense civilian attorneys, over the objections of Secretary of State Powell and the Joint Chiefs of Staff, argued that the Geneva Conventions did not apply to detainees from the Afghan conflict. The purposes of this interpretation were to preserve maximum flexibility with the least restraint by international law and to immunize government officials from prosecution under the War Crimes Act, which renders certain violations of the Geneva Conventions violations of U.S. criminal law.

Ultimately, the President accepted application of the Geneva Conventions in principle to the conflict with the Taliban, while asserting that Taliban personnel did not qualify under Geneva III for status as prisoners of war. However, the Administration denied that the Geneva Conventions applied at all to Al Qaeda and to the broader War on Terror, although it announced that it would adhere to comparable humanitarian standards. (*See* Report at text accompanying footnote 95, *et seq.*) Official correspondence from the General Counsel of the Department of Defense dated June 25, 2003, appended to our Report, stated that the U.S. would comply with applicable international law, including the Convention Against Torture And Other Cruel, Inhuman, or Degrading Treatment ("CAT").

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[13] *See, e.g.*, Michael Isikoff, "Double Standards? A Justice Department memo proposes that the United States hold others accountable for international laws on detainees—but that Washington did not have to follow them itself." *Newsweek*, May 22, 2004, *available at* <www.msnbc.msn.com/id/5032094/site/newsweek/>.

Notwithstanding those assurances, the foregoing raises serious issues regarding the application of the Geneva Conventions in the War on Terror, notably the minimal protections of Common Article 3 and the actual standards applied in the field.

Each of the four Geneva Conventions has a "Common Article 3", which provides a safety net in non-international armed conflicts (not between State parties) which are not covered by the full protection of the Conventions.[14] The prime example is an armed conflict not between nation-state parties to the Conventions, but between one state-party and non-state forces occurring on the territory of a party to the Geneva Conventions, as in the case of the conflict in Afghanistan after the formation of the Karzai government. In such conflicts, Article 3 expressly applies to armed forces who have "laid down their arms" (surrendered) or been detained. Its broad terms cover all detainees including captured unprivileged or "unlawful" combatants.[15]

The internal Administration memoranda mentioned above argue that Common Article 3 does not apply at all to Al Qaeda's activities in the Afghanistan conflict because,

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[14] Article 3 provides, in pertinent part:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
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> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
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> . . . (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

*See* Geneva Conventions, Art. 3 (emphasis added).

[15] In classic inter-state conflicts, combatants might qualify for prisoner of war status under Geneva III or, if disqualified from that status, be subject to the lesser, but significant, protections of Geneva IV. In other armed conflicts, all combatants are covered by Common Article 3.

inasmuch as Al Qaeda operated cross-border and with support from persons in countries outside Afghanistan, that conflict is not an armed conflict of a non-international character within the meaning of Article 3. According to a Justice Department memorandum of January 2002 by then Justice Department official and now Professor John Yoo, and his recent op-ed article[16], Article 3 was intended to apply only to large-scale and entirely internal civil wars, for which it cites the example of the Spanish Civil War of the 1930's.[17] In fact, the Geneva Conventions are structured in terms of international armed conflicts (between State parties) and non-international (non-inter-State) conflict. There is no indication that there is any category of armed conflict that is not covered by the Geneva Conventions.[18] Nor should the different status of the Taliban and Al Qaeda in the conflict in Afghanistan affect the question of whether the Geneva Conventions apply to that armed conflict, as Professor Yoo argues. Although their different status may affect *how* the Geneva Conventions apply to these different groups, it does not affect the question of *whether* the Geneva Conventions apply. The Geneva Conventions apply to the totality of a

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[16] *See* John Yoo, "Terrorists Have No Geneva Rights," THE WALL STREET JOURNAL, May 26, 2004, at A16.

[17] The Spanish Civil War is an ironic example for the Administration to rely on given the internationalization of that conflict with the indirect involvement of the governments of the Soviet Union on one side and Germany and Italy on the other, and including the commitment of a covert Luftwaffe unit, the Kondor Legion, and the Italian Legione Aviazione but without overt State conflict. It is inconceivable that the drafters of the Geneva Convention would have favored less humanitarian protection for a non-State armed conflict that crossed borders than for either a strictly internal conflict or a classic State conflict; yet that is the position advocated within the Administration.

[18] The authoritative ICRC Commentary refers to the application of the Conventions "to *all* cases of armed conflict, including internal ones" at 26 (italics in original). Whether a particular event is "armed conflict" is another question. There is no doubt that initial U.S. air and ground operations in Afghanistan and certainly the invasion of Iraq were armed conflict. Whether other operations in the "War on Terror" constitute armed conflict is beyond the scope of this Supplement, but to the extent that the Administration characterizes a particular event as armed conflict in order to invoke indefinite detention of combatants or trial by military commission under the law of armed conflict, it cannot disclaim the application of the entire law of armed conflict, including the Geneva Conventions, when compliance becomes inconvenient. *See* President's Military Order of November 23, 2001 (declaring the attacks by Al Qaeda to be "on a scale that created a state of armed conflict").

In circumstances not constituting armed conflict, other legal standards apply, including CAT and the International Covenant on Civil and Political Rights ("ICCPR"), as more fully discussed in the Report.

conflict including the regular forces, irregulars (whether or not privileged combatants) and civilians.

With respect to interrogation in armed conflict, Common Article 3 requires humane treatment generally and specifically forbids "cruel treatment and torture" or "outrages upon personal dignity, in particular humiliating and degrading treatment." Such provisions were violated not only by the conduct photographed at Abu Ghraib, but also by practices reported to have been engaged in at other U.S. facilities not only in Iraq, but, if reports are accurate, also from the conflict in Afghanistan.

**Enforcement of the Geneva Conventions and the Anti-Torture Statute against Civilians**

Our Report fully described the provisions of the Uniform Code of Military Justice defining the standard of treatment for military detainees and providing for criminal enforcement through courts martial of the Geneva Conventions, as applied by regulations and orders, and defining other offenses that would be violated by abuse of detainees.

Because the Congressional investigation and news reports have noted the possible involvement of civilian contractors and CIA personnel in the Abu Ghraib abuses and elsewhere, it is appropriate to consider further the enforcement of such standards against civilians, as well as the military. The War Crimes Act[19] criminalizes as a "war crime" the commission in the U.S. or

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[19] 18 U.S.C. § 2441 (2004) provides, in relevant part:

> (a) Offense. Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
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> (b) Circumstances. The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States . . .
>
> (c) Definition. As used in this section, the term "war crime" means any conduct -

abroad of a "grave breach" of the Geneva Conventions, violation of Common Article 3, and certain other international offenses, where the perpetrator or the victim is a member of the Armed Forces or a U.S. national. (With respect to the military, given the other recourse against active service members, the statute applies only to those who may have been discharged before prosecution and therefore were outside the jurisdiction of courts martial or who are being prosecuted jointly with civilians.)

The jurisdictional basis for enforcing the War Crimes Act against civilian contractors or others "accompanying" the Armed Forces outside the U.S. is likely to be the Military Extraterritorial Jurisdiction Act ("MEJA") cited in our Report at footnotes 66 and 72.[20] Indeed, the Department of Justice has recently announced that it is asserting jurisdiction under this statute to open a criminal investigation regarding a civilian contractor in Iraq. MEJA

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> (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party . . .
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> . . . (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict . . .

*See* 18 U.S.C. § 2441. An internal Administration document referenced above argued against application of the Geneva Conventions specifically to develop a defense against application of the War Crimes Act, in case government officials were alleged to have committed grave breaches of the Geneva Conventions and other offenses thereunder.

[20] The Military Extraterritorial Jurisdiction Act provides, in relevant part:

> (a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—
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> (1) while employed by or accompanying the Armed Forces outside the United States; or
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> (2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice), shall be punished as provided for that offense.

*See* 18 U.S.C. § 3261. Application to members of the Armed Forces is, however, limited to those no longer subject to the UCMJ (usually because of discharge) or accused of committing an offense with civilian defendants.

provides federal court jurisdiction over federal offenses with a penalty of more than one year, thus excluding an offense like simple assault, while including violation of the War Crimes Act or the anti-torture statute implementing CAT, 18 U.S.C. § 2340A[21], both of which provide for life imprisonment or even capital punishment in crimes causing death. A significant issue under MEJA is whether a contractor was "employed" by the Armed Forces (expressly within the Act), was employed by a contractor serving the Armed Forces or was employed by the CIA. In the latter cases, the reach of MEJA would depend on whether the defendant was "accompanying" the Armed Forces, a factual matter in the circumstances.

**Conclusion**

Disclosures since we issued our Report indicate violations of the Geneva Conventions in Iraq, where the Administration acknowledges they apply, and a mistaken belief that they have no application at all to detainees in the War on Terror, such as suspected Al Qaeda detainees from the conflict in Afghanistan. Investigations by Congress, the Justice Department, and the military must be pursued vigorously to uncover any violations of international and U.S. law, to prosecute any violations of the War Crimes Act or the Uniform Code of Military Justice, and to determine accountability not merely of subordinate personnel who engaged in such conduct, but of all those in the civilian and military hierarchy who may have authorized or condoned unlawful conduct..

Misinterpretations of the Geneva Convention and CAT must be corrected. It appears that Article 5 of Geneva IV is being misused to evade the protections against coercive interrogations to obtain information from detainees with "high value intelligence." Furthermore,

[21] As noted in the Report at the text accompanying footnote 66, enforcement of 18 U.S.C. § 2340A was severely limited as to the offenses committed at U.S. military or government facilities by the technical effect of an amendment in the USA Patriot Act. The Report recommends legislation to correct that presumably inadvertent nullification of this important criminal statute.

the protections of Common Article 3 are claimed not to apply to detainees from the armed conflict in Afghanistan at Guantanamo, Bagram and elsewhere, although the Administration claims to have assured comparable humane standards. The photographs from Abu Ghraib show that detainees in Iraq have been deprived of CAT's protections against both torture and cruel, inhuman and degrading treatment that also amounts to cruel and inhuman treatment under the U.S. Constitution and of the standard of treatment established for the military under the UCMJ, and allegations have been made of violations of such standards in Afghanistan and elsewhere. We urge the Administration to re-examine its positions and live up to the legal obligations clearly imposed upon it by the Geneva Conventions, CAT and the UCMJ.

We again urge, as we did in our Report, that civilian and military personnel engaged in the detention and interrogation of detainees in Iraq, Guantanamo and elsewhere receive thorough education, training and clear instructions concerning their obligations under international and U.S. law.

We also urge the restoration of the role of Judge Advocate Officers in advising on, and monitoring, interrogations on site.[22]

Finally, we recommend that gaps in U.S. law to punish violations of our international legal obligations under the Geneva Conventions and CAT be remedied by Congress. Our Report discusses the need to cure deficiencies in 18 U.S.C. § 2340A, which criminalizes torture. The Military Extraterritorial Jurisdiction Act should be amended to extend jurisdiction over violations of U.S. law committed by all persons employed by, or serving at the direction of, any U.S. intelligence agency, not merely those that "accompany" the Armed Forces.

[22] A member of a participating Committee was recently advised by senior JAG officers that the prior practice of having JAG officers monitor interrogations in the field for compliance with law and regulations had been curtailed at the direction of senior officials.

Above all, we urge all those who set the tone and climate for our military and civilian government personnel to establish respect for our treaty obligations and the rule of law in the treatment of detainees.

Dated: New York, New York
June 4, 2004

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