IX

Treatment and Interrogation of Detained Persons

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Media reports of abuse of enemy prisoners of war (EPW) and Security Detainees in Iraq, as well as other reports questioning certain interrogation techniques employed to gain intelligence from those in the custody of the United States have raised concerns regarding the adequacy of the guidance dealing with such matters provided to U.S. Army personnel. This article addresses the current U.S. Army regulatory and doctrinal guidance relevant to the treatment and interrogation of EPW and Security Detainees.

Before turning to this subject, however, I would like to briefly focus on an event that occurred at The Judge Advocate General’s Legal Center and School (LCS), in Charlottesville, Virginia. In the summer of 2004, the LCS hosted its annual Non-Commissioned Officer Conference, at which Army paralegals from around the world gathered to discuss ongoing issues. One of the highlights of this conference is always the presentation of an annual award to an outstanding junior paralegal. The award winner, this year, had the looks of a recruitment poster—early 30s, a college graduate, jump qualified. In fact, he was a Jump Master. As he accepted his award, he expressed thanks to his colleagues, of course, and saluted all of the good legal work that they had accomplished—and then he related this story. While he was in

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Iraq, he had served as a Convoy Commander. In fact, he had served in this capacity well over 50 times. On one such occasion, the convoy became stalled in traffic and, as the vehicles were sitting at a dead halt, a grenade was dropped from an overpass. At that moment, every weapon in the convoy swung in that direction. What followed next, he said, made him exceptionally proud to be an American soldier serving in Iraq. For, even though every weapon had been pointed at the overpass, not a single shot was fired. Why not? Because, he said, a target could not be identified. The personnel in that convoy had complied with the Rules of Engagement. Not a single round was fired. And, I would submit that such behavior is the norm—not the exception.

Do accidents occur? Are crimes committed? Are investigations conducted? Are crimes prosecuted and defended equally aggressively? In each instance, the answer is yes. Yet, if one focuses only on the negative, such as the abhorrent conduct at Abu Ghraib, one loses sight of the fact that the overwhelming majority of U.S. personnel serving in Iraq consistently do the right thing—simply because it is the right thing. Mistakes are made, crimes are committed, investigations may take an apparently overly extended period of time to complete. But, again, I would submit that the actions taken by those servicemen in that convoy, on that particular day in Iraq, as related by that junior enlisted soldier, represent the norm—not the exception.

Turning now to the subject at hand: the current Army regulatory and doctrinal guidance dealing with the treatment and interrogation of EPW and Security Detainees is found in several Army publications. In terms of their application to the situation in Iraq, each publication begins with a premise with which essentially every public international lawyer would agree. Almost all individuals present in Iraq are subject to either the Third or Fourth Geneva Convention.1 Thus, with respect to EPW taken captive in Iraq, the process is a relatively simple one. If the individual was a member of the Iraqi armed forces, he was entitled to Prisoner of War status. As such, he was to be afforded the numerous rights and privileges accorded by the Third Convention. In terms of the interrogation of EPW, this, again, is a very straightforward matter. Article 17 provides:

Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.

....

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of
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war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

Clearly, coercing EPW into divulging information is forbidden.

Although the Third Convention is clear and unequivocal in its requirements for the humane treatment of EPW and the prohibition of coercive interrogations, some have contended that the law is somewhat less certain with respect to Security Detainees. I disagree. The first issue that must be addressed in this regard is the manner in which an individual might become a Security Detainee in Iraq. That is, how does an individual lose his status as a “protected person” under Article 4 of the Fourth Convention— a status that carries with it a broad range of protections and safeguards? The answer is found in the fact that Article 5 of the Fourth Convention enables the Occupying Power to arrest and detain individuals who pose a security threat. Article 78, in turn, enables the Occupying Power to detain or to incarcerate those arrested under the authority of Article 5. These individuals, then, are no longer protected persons; they are, in fact, Security Detainees.

Again, there have been those who have argued that once an individual loses his status as a protected person, he essentially loses those protections accorded him under the Fourth Convention. This, of course, is simply not true. Even with respect to the interrogation of Security Detainees, Article 5 clearly indicates that such individuals must be treated humanely.

The U.S. Army provides both regulatory and doctrinal guidance regarding the treatment and interrogation of EPW and Security Detainees. This guidance has been criticized by some as being unclear or that, given their “nuanced” nature, the relevant regulatory provisions are subject to varying interpretations. Contrary to such assertions, however, it is my view that there is simply no lack of clarity, no lack of precision with respect to the relevant regulatory requirements. Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, addresses the treatment of both EPW and Security Detainees. Paragraph 1-5(a)(1) provides:

All persons captured, detained, interned or otherwise held in U.S. Armed Forces custody during the course of a conflict will be given humanitarian care and treatment. The inhumane treatment of EPW, civilian internees, and retained personnel is prohibited and is not justified by the stress of combat or by deep provocation.

Paragraph 1-5(b) further notes:

All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex or other criteria. The following acts are prohibited:
murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishment, execution without trial by proper authority, and all cruel and degrading punishment.

Additional guidance on the issue of the treatment of EPW and Security Detainees is found in Army Field Manual 3-19.40, *Military Police Internment/Resettlement Operations.* Specifically, paragraphs 5-1 and 5-2 state that physical torture or moral coercion must not be used in connection with civilian internees and Security Detainees. They must be protected against violence, insult, public curiosity, bodily injury, reprisal, and sexual attack.

The photos of abused prisoners at Abu Ghraib generated much of the initial attention focused on the treatment and interrogation of those individuals held by the United States, and the issue of interrogation, in particular, has continued to be a matter of intense media scrutiny. Army Field Manual 34-52, *Intelligence Interrogation,* deals with both EPW and Security Detainees. This FM provides that “EPWs, captured insurgents, civilian internees, other captured, detained or retained persons, foreign deserters, or other persons . . . are protected by the Geneva Conventions.” It further states that “the [Geneva Conventions] and U.S. policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults or exposure to inhumane treatment as a means of or aid to interrogations. Such illegal acts are not authorized and will not be condoned by the U.S. Army.” Very importantly, it also goes on to say that violations of these prohibitions are criminal acts, punishable under the Uniform Code of Military Justice.

The *Intelligence Interrogation* manual specifically addresses prohibited interrogation techniques. It provides that “physical or mental torture or coercion revolve around eliminating the source’s free will, and are expressly prohibited by the [Geneva Conventions].” Torture is defined as “the infliction of intense pain to body or mind to extract a confession or information, or for sadistic pleasure.” Examples of physical torture cited in the FM include: electric shock; infliction of pain through chemicals or bondage; forcing an individual to stand, sit or kneel in abnormal positions for prolonged periods of time; food deprivation; and any form of beating. Cited examples of mental torture include mock executions, abnormal sleep deprivation, and chemically induced psychosis. “Coercion” is defined as:

actions designed to unlawfully induce another to compel an act against one’s will . . . to include: threatening or implying physical or mental torture to the subject or to his family or others; intentionally denying medical assistance or care in exchange for information or cooperation; and, finally, threatening or implying that rights guaranteed by the [Geneva Conventions] will not be provided unless cooperation is forthcoming.
Questions have been raised as to whether the Intelligence Interrogation manual accurately reflects both the domestic and international law obligations of the United States. I can assure you that it does. Twelve years ago, the International and Operational Law Division of the Office of The Judge Advocate General of the Army conducted an intense legal review of FM 34-52 and produced a 12-page, single-spaced, legal opinion detailing the manner in which US legal obligations were to be set forth in this publication.

Once again, I would submit that the regulatory and doctrinal guidance relevant to the treatment and interrogation of EPW and, very importantly, Security Detainees, is quite clear, and it should be well understood as to those actions that can—and cannot—be taken. Equally clear is the fact that, if an interrogator engages in proscribed activities, he or she is subject to prosecution under the Uniform Code of Military Justice. This is precisely what U.S. Army military intelligence personnel are taught. The Intelligence Collection manual, published in 1992, provides carefully considered, thoughtful, and lawful guidance, guidance that has never been modified.

Some have suggested that, given the nature of the “Global War on Terrorism,” detainee interrogation techniques that obviously go well beyond those sanctioned in current Army doctrine should be permitted. I would object to the use of such interrogation methods for a number of reasons. First, once you cross that interrogation Rubicon dictated by both international and domestic law, you immediately subject individual service members to potential civil and criminal litigation. I am unconvinced that any form of a “necessity defense” argument would protect these individuals from prosecution under either the Uniform Code of Military Justice or in an international forum. Second, instructing military intelligence personnel to now engage in questionable interrogation techniques would contravene 30 to 40 years of previous training. Third, as the Intelligence Collection manual observes, “Revelation of use of torture will bring discredit upon the US and its armed forces, while undermining domestic and international support for the war effort.” Finally, there is the matter of reciprocity. Once the United States condones actions that go beyond those always considered to reflect accepted international norms, these practices will almost automatically become, in my view, the benchmark for interrogation methods deemed suitable for use by both State and non-State actors. For all of these reasons, it is critically important that the United States continue to adhere to the humanitarian treatment standards set forth in the Geneva Conventions and other relevant international agreements.
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Notes


2. The relevant portion of Article 4 provides, “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”

3. Specifically,

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.

4. Headquarters, Department of the Army, AR 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1, 1997), available at http://www.usapa.army.mil/pdf files/r190_8.pdf. This is a multi-service regulation that also is also applicable to the Air Force, Marine Corps and Navy.


7. Id. at 1.7.

8. Id. at 1–8.

9. Id.

10. Id.

11. Id.

12. Id.