

UNCLASSIFIED

AL90

Eley, Darlyce M

From: Harris, Robert K
Sent: Monday, May 24, 2004 1:28 PM
To: Cummings, Edward R (Main State)
Cc: Legal-L-HRR-dl; Legal-L-PM-dl
Subject: FW: Military to ICRC on Geneva Conventions at Abu Ghraib

RELEASED IN FULL

Ed, JoAnn and Josh,

I imagine you read this.

-----Original Message-----

From: Malioneck, Tom V
Sent: Monday, May 24, 2004 12:49 PM
To: Alder, Lois L; Blanck Jr, John I; Cook, Daphne W; Dalton, Robert E; Haines, Avril D; Harris, Robert K
Subject: Military to ICRC on Geneva Conventions at Abu Ghraib

UNCLASSIFIED per E.O. 12958

New York Times, May 23, 2004

U.S. Disputed Protected Status Of Iraq Inmates

By Douglas Jehl and Neil A. Lewis

WASHINGTON, May 22 - Presented last fall with a detailed catalog of abuses at Abu Ghraib prison, the American military responded on Dec. 24 with a confidential letter to a Red Cross official asserting that many Iraqi prisoners were not entitled to the full protections of the Geneva Conventions.

The letter, drafted by military lawyers and signed by Brig. Gen. Janis Karpinski, emphasized the "military necessity" of isolating some inmates at the prison for interrogation because of their "significant intelligence value," and said prisoners held as security risks could legally be treated differently from prisoners of war or ordinary criminals.

But the military insisted that there were "clear procedures governing interrogation to ensure approaches do not amount to inhumane treatment."

In recent public statements, Bush administration officials have said that the Geneva Conventions were "fully applicable" in Iraq. That has put American-run prisons in Iraq in a different category from those in Afghanistan and in Guantánamo Bay, Cuba, where members of Al Qaeda and the Taliban have been declared unlawful combatants not eligible for protection. However, the Dec. 24 letter appears to undermine administration assertions of the conventions' broad application in Iraq.

Until now, the only known element of the letter had been a provision described by a senior Army officer as having asserted that the Red Cross should not seek in the future to conduct no-notice inspections in the cellblock where the worst abuses took place.

The International Committee of the Red Cross had reported in November that its staff, in a series of visits to Abu Ghraib in October, had "documented and witnessed" ill treatment that "included deliberate physical violence" as well as verbal abuse, forced nudity and prolonged handcuffing in uncomfortable positions.

In Congressional testimony last week, Lt. Gen. Lance Smith, the deputy commander of American forces in the Middle East, asserted that the Dec. 24 response demonstrated that the military had fully addressed the Red Cross complaints.

UNITED STATES DEPARTMENT OF STATE
 REVIEW AUTHORITY: WILLIAM J GEHRON
 DATE/CASE ID: 14 DEC 2004 200303827

UNCLASSIFIED

DOS-001588

UNCLASSIFIED

But the three-page response did not address many of the specific concerns cited by the Red Cross, whose main recommendations included improving the treatment of prisoners held for interrogation.

Instead, much of the military's reply is devoted to presenting a legal justification for the treatment of a broad category of Iraqi prisoners, including hundreds identified by the United States as "security detainees" in a cellblock at Abu Ghraib and in another facility known as Camp Cropper on the outskirts of the Baghdad airport, where the Red Cross had also found abuses.

Prisoners of war are given comprehensive protections under the Third Geneva Convention, while civilian prisoners are granted considerable protection under the Fourth Convention.

But under the argument advanced by the military, Iraqi prisoners who are deemed security risks can be denied the right to communicate with others, and perhaps other rights and privileges, at least until the overall security situation in Iraq improves.

The military's rationale relied on a legal exemption within the Fourth Geneva Convention.

"While the armed conflict continues, and where 'absolute military security so requires,' security detainees 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," the letter says, using abbreviations to refer to Article 5 of the Fourth Geneva Convention.

That brief provision opens what is, in effect, a narrow, three-paragraph loophole in the 1949 convention.

The Red Cross's standing commentary on the provision calls it "an important and regrettable concession to State expediency." It was drafted, during intense debate and in inconsistent French and English versions, to address the treatment of spies and saboteurs.

"What is most to be feared is that widespread application of the article may eventually lead to the existence of a category of civilian internees who do not receive the normal treatment laid down by the convention but are detained under conditions which are almost impossible to check," says the Red Cross commentary, which is posted on its Web site. "It must be emphasized most strongly, therefore, that Article 5 can only be applied in individual cases of an exceptional nature."

An authority on the laws of war, Prof. Scott L. Silliman of Duke University, said that the assertions in the military's letter were highly questionable and that the military lawyers who drafted it may have misconstrued the law.

The category in which prisoners may be excluded from the protections of the Geneva Conventions that the letter cites, Professor Silliman said, are for people who can be shown to be a continuing threat to the occupying force, not people who might have valuable intelligence.

"They may be high value assets but that does not necessarily make them security risks," he said. The provision cited in the letter provides that the protections could be suspended for people suspected of "activities hostile to the security" of a warring state or an occupying power.

In testimony last week on Capitol Hill, Col. Marc Warren, a top American military lawyer in Iraq, defended harsh techniques available to American interrogators there as not being in violation of the Geneva Conventions. He said the conventions should be read in light of "various legal treatises and interpretations of coercion as applied to security internees."

Exactly how the treatment of security prisoners would differ from others under the military's approach was not spelled out in detail, but clearly it would allow their segregation into a separate part of the prison for interrogation, where some of them could be held incommunicado.

UNCLASSIFIED²

DOS-001589

UNCLASSIFIED

The military's letter promised to try to improve prisoners' treatment in some respects cited by the Red Cross, promising, for example, to provide shelters against mortar and rocket attacks "in due course" but noting that the shelters are in short supply for American and allied soldiers. It also said "improvement can be made" to provide adequate clothing and water, and promised speedier judgments and discharges of innocent prisoners.

The letter is addressed to Eva Svoboda of the Red Cross committee, who is identified as the agency's "protection coordinator."

It asserts that the prisoners at Camp Cropper "have been assessed to be of significant ongoing intelligence value to current and future military operations in Iraq."

"Their detention condition is in the context of ongoing strategic interrogation," it said, and "under the circumstances, we consider their detention to be humane."

The Red Cross report said that at the time of the October visits to Abu Ghraib, "a total of 601 detainees were held as security detainees."

"Many were unaware of any charges against them or what legal process might be ahead of them," the undated report said.

Professor Silliman, a former Air Force lawyer who heads the Center on Law, Ethics and National Security at Duke, said the response of authorities at Abu Ghraib to the Red Cross appeared to be part of a larger pattern in which the administration and the military devote great energy to find ways to avoid the jurisdiction of the Geneva Conventions.

"If you look at this in connection with other things that are coming out, it doesn't seem like a snap decision but part of an across-the-board pattern of decision-making to create another category outside the conventions."

He cited a memorandum written in January 2002 by Albert R. Gonzales, the White House counsel, recommending that President Bush decree that the Geneva Conventions do not apply to prisoners from the war in Afghanistan. In the memorandum, Mr. Gonzales said that getting out from under the restrictions of the Geneva Conventions would preserve the government's flexibility in fighting terrorism.

Tom Malione

Analyst for Boundaries - Boundary Waters - Conservation - Environment - Fisheries - Human Rights - Maritime Matters

Office of the Assistant Legal Adviser for Treaty Affairs (L/T)

5420 HST

phone 202-647-1336 (direct)

fax 202-736-7541

UNCLASSIFIED

DOS-001590