



TREATMENT OF DETAINEES IN IRAQ

A summary of the Chatham House International Law Discussion Group session on Thursday 28 September 2006.

The discussion group was chaired by Elizabeth Wilmshurst. Participants included legal practitioners, academics, journalists, and government representatives.

This summary is issued on the understanding that if any extract is used, Chatham House should be credited, preferably with the date of the meeting.

The introductory speaker was Doug Wilson, formerly a legal adviser to the UK Embassy in Iraq, now a legal adviser in the Foreign and Commonwealth Office. He spoke in his personal capacity. What follows is a summary of the whole of the discussion.

There are two categories of prisoners in Iraq: security detainees under Coalition jurisdiction, and criminal detainees who fall under Iraqi domestic jurisdiction.

Security Detainees under Coalition Jurisdiction

Following the military operations by the Coalition, four large US detention centres were established in, known as TIFs – Theatre Internment Facilities. These were located at Camp Bucca at Umm Qasr in South Eastern Iraq, Camp Suse in the Kurdistan area of Northern Iraq, Camp Cropper at Baghdad Airport, and Abu Ghraib Prison in Baghdad itself. Coalition security detainees were held in all these camps. Suse and Abu Ghraib have since been transferred to the Iraqi authorities for criminal detention use, and the 13,000 remaining security detainees in US custody are now held at Bucca or Cropper. The US also created Brigade Internment Facilities at local level and larger regional Divisional Internment Facilities to hold prisoners when first apprehended. The UK too has established an area to hold security detainees, namely the Divisional Temporary Detention Facility in Shaiba Logistics Base. As of 22 September, it had 75 inmates. Camp Bucca, for example was a large sprawling open camp near the Iranian border, with watchtowers and guardhouses, detainees housed in air-conditioned cabins, sports and recreation facilities, and conditions for detainees massively improved.

As demonstration of the US's support for the new Iraqi administration's ongoing reconciliation process, around 3000 security detainees have recently been released.

The legal basis for the Coalition security detainees is clear and comprehensive. The general authority for the actions of the Multi-National Force (MNF) is Chapter VII of the UN Charter, Article 39 of which allows the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to make recommendations "to maintain or restore international peace and security." Under this

mandate, the Security Council authorized the creation and continued operation of the MNF by UNSCR 1546(2004), extended by UNSCR 1637(2005). These resolutions authorize the MNF to “take all necessary measures to contribute to the maintenance of security and stability in Iraq” which includes the authority to enforce “internment where this is necessary for imperative reasons of security.” The powers established by the UNSCRs drew upon Article 78 of Geneva Convention IV; that provision imposes a duty on an Occupying Power to allow for a right of appeal to a detainee and to subject the detention to periodic review within six months.

In practice, the reviews are carried out with greater frequency than once every six months, often monthly. Many detainees are released fairly quickly, although there are a few serious cases that have remained under security detention for some time. The MNF has established a Combined Review & Release Board to determine whether detention remains necessary for imperative reasons of security. Coalition Provisional Authority (CPA) Order 99 established the Joint Detainee Committee, composed of senior representatives from the MNF and the Iraqi Government, and tasked with the setting and monitoring of policy for both security and criminal detainees – including standards for detainees, prosecutions, infrastructure, and detainee management. Detainees do not have a right of legal representation. In practice, the Iraqi Prime Minister’s office retains a veto over any security detainees held over 18 months, although it was not clear whether this veto power had yet been exercised.

Criminal Detainees under Iraqi jurisdiction

The legal regime of Iraqi criminal law is a mix of three separate sources of law: the majority from the Saddam-era criminal codes already in existence, supplemented by CPA orders and legislation enacted by the new Iraqi administrations. Like all the civil and legal institutions in Iraq, Iraqi criminal law, courts and institutions have suffered from 30 years of deep and significant interference during the previous Saddam era. For example, a loyal Ba’athist legal adviser was imprisoned for 5 years for not denouncing a senior General displaying anti-Saddam tendencies. In such a climate, the effective operation of legal and civil institutions was severely hampered – and the effects linger today.

The Iraqi criminal system rests on three pillars: the police, the courts and the prisons. Unlike the army, the police were not disbanded by the CPA, and have continued to operate with many of the same personnel and structures. Although the MNF and CPA have expended considerable effort and funding to reform the police service, there remains a core of Saddam-era senior officers. Many of the methodologies and attitudes of the previous regime continue to operate and inform the police service. It is proving very difficult to reform these long-established ways of operating, exacerbated by the conditions under which the police are required to operate. In many areas of Iraq, the police are under a constant state of attack, and their working conditions and remuneration remain very low.

As with the police, the courts suffered during the Saddam era. Patronage was rife and political interference the norm. A candidate for the judiciary at the lower levels had to be a member of the Ba’ath party, with a clean record, at least 28 years old and married. At higher levels there were many cases of regime interference in court operations, including intimidation of witnesses and judges. To intensify the regime’s control over the judiciary, Saddam created the Revolutionary Command Court, directly responsible to him and exerting overall control over judicial decisions in all sensitive cases. For example, after a

Court of Cassation ruling acquitting a high-level official charged with informing for Iran, nine Court of Cassation judges disappeared. The court system in Iraq today is not in an effective operable condition, particularly in rural areas. The courts and administration support systems are lacking in funding and basic infrastructure – in some buildings there are not even desks or chairs. A serious problem resulting from historical judicial interference is that judges lack confidence to resist senior official or police pressure, and intimidation and interference are rife.

There are currently not enough judges to fulfill demand. Many have emigrated or were prevented from advancing under the previous career system – where the non-Ba'athist judges remaining under Saddam were retired or sidelined into smaller rural courts. Today there is insufficient senior judicial experience within the system to cope with demand. There are approximately 850 investigating magistrates in Iraq, a country of 26 million people, although there is now increased funding and more places available at the Judicial Training Institute. Before the invasion, the Iraqi court system was ordered on regional lines only, with no national jurisdiction except at the highest levels. The CPA found that regional courts were not secure or efficient enough to handle many serious criminal cases, and established the Baghdad-based Central Criminal Court of Iraq with national jurisdiction, mainly for serious terror or security offences. Although the police and army are currently operating on a 'war footing', the courts all operate on a normal working week timetable as there is insufficient staff, other resources or the will to increase this.

The third criminal justice pillar, the Iraqi prison system, is split into two areas: remand centres and longer-term prisons under the official mandate of the Ministry of Justice, and other short-term detention centres run by Ministries of the Interior and Defence. Some of these detention centres run by the MOI or MOD are unofficial and/or illegal. (In addition, certain militia groups are thought also run detention centres of their own but there is no known information on these.) The official MoJ prisons are on the whole well-run, with relatively decent standards for inmates and staff within severe budget and resource constraints. The prison authorities receive training from external expert consultants although there have been unforeseen problems. For example, the increase in sectarian violence after the bombing of the holy Shia site of Al-Askari shrine in Samarra spilled over into Basra central prison, where 12 foreign inmates were murdered by unknown militia groups. The guards did not intervene, perhaps because they knew that any interference would create risks for them and their extended families. As far as is known, the militia committing these murders have not been brought to justice.

The prisons run by the Ministries of Interior and Defence usually exist to hold detainees for short periods immediately after arrest before being channelled into the official system. In many of these prisons there is severe overcrowding and a lack of basic facilities, and much abuse is reported. The army has no power to arrest or detain under regular law, but the MoD detention centres exist and operate under state of emergency laws..

A major problem in many official prisons is overcrowding, although it is acknowledged that this is by no means a problem related only to Iraq. Although long-term government policy is not to build too many detention facilities – experience from other states shows that the prison population expands to fill available spaces – two of the large US detention facilities have already been returned to Iraqi authorities, and there is US funding on stream for the further prison construction. This funding is channelled via

foreign construction contractors, and on completion the buildings are handed over to local authorities for full operational control. The overcrowding often leads to violence or abuse fuelled, once again, by historic cultural attitudes cultivated during the Saddam years. Abuse of prisoners was commonplace, and much of today's foreign consultancy effort in this field is focussed on demonstrating the benefits of a prison regime which displays an even-handed approach to inmates. However, this advice does not always have the intended effect, as cases now emerge concerning the physical abuse of junior guards by superiors even when these same superiors do not abuse inmates anymore. In addition, cultural attitudes to prisoners in general are very different from western views, and it is not unknown to hear prospective senior politicians who believe that prisoners "are not human so there is no need for human rights in prison."

An additional issue for future action concerns the forensic systems in the prison services. There is very little understanding of the skill required for technical forensics work, or acknowledgement of the importance of evidence-gathering by these means. The British Embassy in Baghdad has worked with the Baghdad Medical-Legal institute, but since the increase of sectarian violence this Institute is overstretched and cannot devote time or attention to forensics, since it also acts as the central Baghdad morgue.

Iraqi Criminal Procedure

Initially, an investigative judge issues an arrest warrant, or authorizes the issue of an arrest warrant by the police. There should be at least one investigative judge at each police station, to speed up the process of issuing and executing the arrest warrant. In practice, however, the judge is an individual based in a police station and surrounded by armed police, where violence is a common and corruption is widespread. In such situations, lower-ranking investigative judges find it difficult to refuse to authorize arrest warrants requested by the police, so intimidation is a significant factor in the first step of the criminal justice process.

On arrest, a detainee is held in the police holding cells, where conditions are very poor. Often these cells are converted from police accommodation barracks, and senior officers point out that in many police stations officers have similar or worse accommodation for their own officers. The demoralizing effect of the officers' working conditions does not make for very positive treatment of the inmates, and this is an issue on which future attention will be focused. Additionally, the Iraqi legal system differs significantly from many western legal systems in that traditionally weight is initially placed on confessions from suspects, and other evidential issues are accorded far less importance than a suspect's statements. This is of course open to abuse, and the extraction of confessions is not unknown even in cases where the evidence against a suspect would stand up in a different legal system.

CPA criminal procedure, confirmed by the new administration, required an arrested person to be seen within 24 hours by an investigative magistrate, the lowest level judicial official. In practice, however, there are never enough investigating magistrates so suspects are usually seen firstly by a trainee magistrate or law student. An arrested suspect is to be brought before a magistrate within 72 hours, who may authorize continued detention for up to 6 months or less as required for the investigation and charge. In practice, it is difficult to know whether this is adhered to because of severe administration problems and the lack of audit trail. On completion of the investigation, the detainee appears before a magistrate, is informed of the charges and has the right to

legal representation. The magistrate decides whether to refer the case up to a trial chamber.

On conviction, the detainee is transferred from the MoJ remand centre to long-term facilities. In practice, many inmates have not left the police cells on sentencing, and are not in the MoJ system. There is a massive backlog of long-term prisoners in remand and police custody. The administrative facilities for releasing prisoners on completion of their sentence are also ineffective. Authorities cannot keep track of the prisoners within the system and it is not unknown for an inmate to remain incarcerated for up to 2 years after his sentence has officially ended.

The major problems facing the Iraqi detention system could be summarized as: funding, staffing and resource issues; judicial intimidation; severe social and infrastructural disruption; and serious effects from Saddam-era cultural attitudes. The UK policy on Iraqi criminal justice is to focus on long-term solutions and systemic issues, and to draw on external experts advising on prisons, justice, military and security issues – but it is acknowledged that these problems are all long-term and cannot be resolved simplistically.

Other Points Raised in Discussion

As regards the role of the ICRC, although it is granted access to all main detention centres operated by the Coalition (US and UK) and Iraqi official facilities, security remains a serious impediment to accessing rural Iraqi prisons and visits are only conducted under MNF guard. The ICRC currently visits 18 detention centres in Northern Iraq and 4 elsewhere in Iraq. They have not visited Abu Ghraib since early 2005, when an ICRC colleague was killed there. There is no access granted to the US's BIF and DIF temporary detention centres. These are occasionally in remote or unsafe areas, and detainees are not held for very long, averaging 2 to 3 days only before transfer to a main camp.

The institutional role of women in the Iraqi criminal justice system is very small, but increasing gradually. There are a few separate female prisons with female guards, and other prisons have separate women's wings, also staffed by female guards. There are very few female police officers or judges. There is a small number of female prosecutors and lawyers, and the most recent intake of the Judicial Training Institute contained two women out of 170 trainee judges.

There was some discussion of the extent of Iraqi jurisdiction over MNF forces. CPA Order 17 authorized the MNF States to retain the "right to exercise within Iraq any criminal and disciplinary jurisdiction conferred on [their personnel] by the law of that Sending State over all persons subject to the military law of that Sending State." This is similar (though not identical) to host state agreements concluded between other countries with regard to visiting forces. Iraq therefore cannot exert jurisdiction over the MNF forces unless the Coalition Sending States waives its immunity from Iraqi legal process. The prosecuting authority of the relevant State (eg UK,US) liaises with Iraqi institutions for any violations by that State's MNF personnel, but the decision to prosecute is not a political decision, and based on evidential and legal issues only.

A speaker raised the existence of a dynamic between the Iraqi criminal justice system and the current trial of Saddam. Although the Saddam trial is being undertaken by a special court which is independent from the main the criminal justice system, it could be seen as a microcosm of the problems endemic within the Iraqi system itself. Despite their problems, however, local Iraqi opinion is strongly that the Saddam trials should remain an Iraqi issue – reflected in the international law principle of complementarity that allows a local tribunal to take jurisdiction over its own local crimes if possible.

Private security contractors are not involved in running any Iraqi criminal prisons, which are staffed by Iraqi personnel only – although foreign security consultants and government seconded experts do act as advisers to the Iraqi MoJ and prison authorities.

The problem of sectarian allegiances and tensions is felt within the criminal justice system as with all areas of Iraqi society. Influences of sectarian militias are felt over the police force, magnified by strong sectarian allegiances. Although wide disagreement exists within Iraq over the proportion of different religious or ethnic groups, no accurate census has been carried out for many years. The generally accepted population spread within Iraq is thought to be roughly 60% Shia, 20% Sunni, 5% Kurdish and the remainder a mixture of different minority groups. As ethnicity is often identified by birthplace or name, even secular people sometimes cannot escape the tagging of sectarian allegiances. In this issue the police as an institution are no different from any other Iraqis.

Arabic interpreters are relied on throughout the MNF and the various Coalition States' missions. Although most of the high-level diplomats are fluent Arabic speakers, many of the technical specialist contractors are not, and the use of interpreters is significant. The interpreters are usually locals with English qualifications but not formal interpreting training. Security is often provided for the interpreter and family for the high-profile interpreting positions.

The CPA maintained a good website for viewing its orders and regulations, but there is no similar point of access for legislation from the new Iraqi administration. A project is underway to translate and upload Iraqi legislation onto a website.

Summary prepared by Greg Falkof