The Abu Ghraib Misdeeds

Will There Be Justice in the Name of the Geneva Conventions?

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1. The images of the Iraqi prisoners abused and humiliated by US privates at the Abu Ghraib prison in Baghdad have toured the world, shocking the international – and in particular the American – public. According to the Taguba Report,1 between October and December 2003, ‘numerous incidents of sadistic, blatant, and wanton criminal abuses’ were inflicted on several detainees. This ‘systemic and illegal abuse of detainees’ was intentionally perpetrated by several members of the military police guard force (372nd Military Police (MP) Company, 320th Military Police Battalion, 800th MP Brigade), in section 1-A of the Abu Ghraib Prison. The allegations of abuse were substantiated by detailed witness statements and photographic evidence. In addition, there were also abuses committed by members of the 325th MI Battalion, 205th MI Brigade and Joint Interrogation and Debriefing Center.2

What was it about these images that elicited such universal shock? Was it the content of the torturous acts committed? Was it the effect of their pictorial visualization?

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2 Taguba Report. ‘Regarding Part One of the Investigation, I Make the Following Specific Findings of Fact’, at para. 6, available online at http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html (accessed 24 September 2004). The abuses included, in particular, acts like: punching, slapping and kicking detainees; jumping on their naked feet; videotaping and photographing naked detainees; forcibly arranging detainees in various sexually explicit positions for photographing: forcing naked male detainees to wear women’s underwear; forcing groups of male detainees to masturbate themselves while being photographed and videotaped; arranging naked male detainees in a pile and then jumping on them; positioning a naked detainee with a sandbag on his head, and attaching wires to his fingers, toes and penis to simulate electric torture; writing ‘I am a rapist’ on the leg of a detainee alleged to have forcibly raped a 15-year-old fellow detainee, and then photographing him naked; placing a dog chain around a naked detainee’s neck and having a female soldier pose for a picture: a male MP guard having sex with a female detainee; using military working dogs to intimidate and frighten detainees and, in at least one case, biting and severely injuring a detainee; taking photographs of dead Iraqi detainees.

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Or was it because of their commission by members of the US Armed Forces – representatives from a state considered one of the strongholds of democracy and freedom? The answer probably is a mixture of all three. The media coverage of Abu Ghraib has had the positive effect of opening the average citizen’s eyes to the brutality of war and that, no matter how well trained an army may be, misconduct is – unfortunately – very likely to occur. The tragedy for the American audience is probably that these acts were not committed by a mean and evil-looking enemy, but by ordinary-looking American people – even the ‘girl next door’. Fortunately, the promptness with which the US military authorities opened the investigations and legal proceedings proves that, notwithstanding the various violations that have occurred in Iraq, and, particularly, in Guantánamo Bay, humanitarian law is not a dead letter and violators are being brought to justice.

2. What do the Geneva Conventions (GCs) of 1949 say about the trials to be held for these violations? What are the standards? What counts can be invoked? Who may be held responsible?

The first issue is whether the misdeeds committed in Abu Ghraib amounted to war crimes. Pursuant to international humanitarian law (IHL), torture is both (i) a grave breach when committed against protected persons – like civilians or prisoners of war – in times of international conflicts, and (ii) a serious violation of the laws of war, no matter whom it is committed against, in times of both international and non-international conflicts. The major difference is that the GCs specify that grave breaches, i.e. the most serious war crimes, are subject to the principle of mandatory universal jurisdiction. As such, any state holding a suspected war criminal in its custody is under the international obligation to prosecute him/her. It does not matter whether the accused or the victim holds the nationality of the custodial state or where the act was committed. These crimes are so heinous that every state is bound to prosecute them. No safe haven is to be provided. This concept arose after the Second World War due to the difficulties in extraditing former Nazi war criminals from many South American countries.

Other serious breaches of IHL which may lead to criminal consequences are referred to as war crimes. Unlike grave breaches, these are ‘simply’ subject to discretionary universal jurisdiction. A third state with custody over an alleged offender, who has no link with said state other than being on that state’s soil, can simply choose whether to prosecute the offender under the heading of universal jurisdiction, but it has no obligation to do so.

In casu, the classification of the acts committed in Abu Ghraib as grave breaches or serious violations of the laws of war is relatively unimportant. The United States has jurisdiction by virtue of the nationality of the offenders and has proven its clear intent to exercise it. It is therefore complying with Article 1, common to the four GCs of

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3 Art. 50 I GC, Art. 51 II GC, Art. 130 III GC and Art. 147 IV GC.
1949, which provides that it is incumbent upon all High Contracting Parties to ‘respect and to ensure respect’ for the Convention in all circumstances. This general obligation is specified not only through the obligation to instruct the armed forces about the content of international humanitarian law, but also through the obligation to prosecute breaches thereof. The Conventions do not contain criminal norms. It is up to the High Contracting Parties to enact criminal legislation aimed at implementing the content of the Conventions. However, this is not a problem either, in the specific case. The United States has a long tradition of war-crimes trials, the most notorious being the Nuremberg Trials.

As observed by Charles Garraway in his comment, most states, and in particular non-governmental organizations (NGOs), fear that the United States, by rejecting the jurisdiction of the International Criminal Court (ICC) and seeking immunity from it for its servicemen, will fail to bring the perpetrators to justice. But, as he rightly pointed out, the ICC is based on the principle of complementarity. The fact that the United States is not a party to the Court does not mean that it will not bring to justice those who have acted unlawfully. The opening of investigations rather proves the US military’s intention to clarify the events and impose order and discipline within its ranks. Moreover, a condemnation by a ‘home’ court will have a much greater impact in the United States than any judgment by an international court.

The question of whether these acts constituted war crimes or grave breaches may become important in assessing the duty of third states to exercise jurisdiction over the offenders, particularly if there are high-ranking officers involved whom the United States does not intend to prosecute.

Both torture and inhuman treatment constitute a grave breach under all four GCs. For example, the Iraqi prisoners abused at Abu Ghraib could invoke a violation of Article 147 of the Fourth GC on the protection of civilians. If it were proven that they were prisoners of war, then they could invoke a breach of Article 130 of the Third GC. The facts suggest that some of the abuses at Abu Ghraib amounted to the crime of torture, i.e. a grave breach of international humanitarian law, international human rights and even US law.5

This latter element rebuts the argument that the US soldiers’ lack of training in international humanitarian law led to their misdeeds. Pursuant to both international and US national law, torture is absolutely prohibited under all circumstances. This fundamental rule should be known to both civilians and soldiers, and there is no need to read the GCs to understand it. The defence that the soldiers were simply obeying orders (an argument which, as Solis points out in his comment, already per se has no standing in international law) can also be invalidated on these lines.

3. While international humanitarian law does not provide for a definition of torture, the Commentary to Article 130 of the Third GC states that:

5 See Filartiga v Peña-Irala, 630 F. 2d 876 (2d Cir. 1980). The US court stated that ‘the torturer has become, like the pirate and the slave-trader before him, hostis humani generis, an enemy of all mankind’.
The word torture refers here especially to the infliction of suffering on a person in order to obtain from that person, or from another person, confessions or information.\(^6\)

Similarly, the Commentary to Article 147 of the Fourth GC notes that:

The word torture has different acceptations. It is used sometimes even in the sense of purely moral suffering, but in view of the other expressions which follow (i.e. inhuman treatment including biological experiments and suffering, etc.) it seems that it must be given here its, so to speak, legal meaning – i.e., the infliction of suffering on a person to obtain from that person, or from another person, confessions or information.\(^7\)

Another important clarification can be found in the UN Declaration on Torture of 9 December 1975, which was unanimously adopted by GA Res. A 3452 (XXX):

Torture means any act by which severe pain or suffering whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purpose as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons … Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading punishment.

A similar definition is provided by Article 1(1) of the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

In \textit{Furundžija}, the International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber stated that although IHL does not provide for a definition of torture, the definition contained in Article 1 of the 1984 Torture Convention applies to any rule of international law on torture, including the ICTY and International Criminal Tribunal for Rwanda (ICTR) Statutes.\(^8\) It further held that this definition has acquired customary status.\(^9\) Pursuant to the jurisprudence of the ICTY, the crime of torture is characterized by the following elements:\(^10\) (i) it consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; (ii) this act or omission must be intentional; (iii) the act must be instrumental to another purpose in the sense that the infliction of pain must be aimed at reaching a certain goal.

In \textit{Kunarac},\(^11\) another ICTY Trial Chamber discussed the following three elements of torture: (i) the list of purposes the pursuit of which could be regarded as illegitimate and coming within the realm of the definition of torture; (ii) the necessity, if any, for the act to be committed in connection with an armed conflict; (iii) the requirement, if any, that the act be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It concluded that the following purposes have certainly become part of customary law: (a) obtaining information or a confession, (b) punishing, intimidating or coercing the

\(^6\) J. Pictet et al., \textit{Commentary to the III GC} (Geneva: ICRC, 1952), 627.

\(^7\) J. Pictet, \textit{Commentary to the IV GC} (Geneva: ICRC, 1952), 598.

\(^8\) \textit{Judgement, Furundžija} (IT–95–17/1), Trial Chamber, 10 December 1998, § 160. Reference was made to the decision of the ICTR’s Trial Chamber in \textit{Akayesu} (ICTR–96–4–T), Trial Chamber, 2 September 1998, § 593.

\(^9\) \textit{Ibid.}


\(^11\) \textit{Kunarac, supra} note 10, at §§ 484–485.
victim or a third person. (c) discriminating, on any ground, against the victim or a third person.

The above-mentioned elements were clearly present in the Abu Ghraib case. The acts occurred within the context of an international conflict, against protected persons (if not prisoners of war, then civilians, protected under the Fourth GC). Therefore, if the United States did not prosecute these crimes, every other state obtaining custody over one of the offenders would be under the international obligation to prosecute him/her.

Another interesting aspect to be discussed is the question of purpose. In this regard, the Taguba Report established that:

... contrary to the provision of AR 190-8, and the findings found in MG Ryder’s Report, Military Intelligence interrogators and Other US Government Agency’s interrogators actively requested that MP guards set physical and mental conditions for favorable interrogation of witnesses (emphasis added). Contrary to the findings of MG Ryder’s Report, I find that personnel assigned to the 372nd MP Company. 800th MP Brigade were directed to change facility procedures to ‘set the conditions’ for MI interrogations. I find no direct evidence that MP personnel actually participated in those MI interrogations.

This statement leads to the delicate question of interrogation procedures. Unfortunately, interrogations are often conducted on the verge of legality, especially when the information must be extracted from ‘so-called’ terrorists, under time pressure and with the knowledge that the accused actually ‘knows’ something. In this case, there is the dilemma of the ‘ticking bomb’ theory. The issue was discussed by the Israeli Supreme Court.12 The delicacy of the matter lies in the fact that if the acts committed at Abu Ghraib were employed as a systematic method of interrogation in Iraq, then the whole blame may not rest with the few low-ranking soldiers currently under trial, but with personnel much higher up in the hierarchy. This is where the issue of command

12 HCJ 5100/94 The Public Committee Against Torture in Israel v The Government of Israel et al., Decision of 6th September 1999, available at www.hamoked.org.il/items/260-eng.pdf (accessed 24 September 2004). For an analysis, see the report of the Public Committee Against Torture, 'Flawed Defence: Torture and Ill-Treatment in GSS Interrogations. Following the Supreme Court Ruling 6 September 1999–6 September 2001', Jerusalem, September 2001, at 8, available online at http://www.stoptorture.org.il/eng/images/uploaded/publications/13.pdf (accessed 24 September 2004). One argument is that when you are absolutely certain that the person you are about to interrogate is planning an attack, you should be allowed to exercise some ‘physical pressure’ on him/her in order to save the lives of hundreds of citizens. The counter-argument is that such acts may lead an innocent person to confess to something that she or he did not do, just to be relieved of the pain. But the main reason why torture should be prohibited at all times is that it is inhumane. Moreover, a regime could always invoke a just cause such as the persecution of terrorists in order to torture and eliminate the political opposition, as occurred in Chile and Argentina under the military dictatorships. It is for this reason that torture is and shall be forbidden at all times and under all circumstances. This was also ruled by the Israeli Supreme Court in 1999, which outlawed the General Security Service’s use of coercive methods of interrogation, thereby overturning the 1987 conclusion of the Landau Commission of Inquiry (Commission of Inquiry into the Methods of Investigation of the GSS Regarding Hostile Terrorist Activities, October 1987). Excerpts of the official English translations appeared in 23 Israel Law Review (1989) 146 that ‘moderate physical pressure’ in the interrogations of detainees suspected of hostile terrorist activity shall be allowed.
responsibility may particularly come into play. Up to what level is it possible to incriminate a superior for the misdeeds committed by a subordinate?

4. Following the occupation of Iraq by the United States, the situation became an international conflict governed by the four GCs of 1949. The doctrine of command responsibility is not explicitly referred to in any of them, even though it can be inferred from provisions like common Article 1 or Article 4(2) of the Third GC.13 These require governments to provide for respect for the laws of war, in particular by delegating this task to commanders. A commander may incur either direct or indirect responsibility. With the former, a superior may be held liable for actively inciting the commission of a crime, e.g. by giving an unlawful order (in which case he becomes primarily responsible as a co-perpetrator). With the latter form, a superior may be liable for failing to prevent or repress the commission of crimes by his subordinates.14 Responsibility for omission of intervention is only referred to explicitly in Articles 86–87 of Additional Protocol I of 1977, which may be binding on the United States as customary law. The customary character of the doctrine was confirmed by post-Second World War jurisprudence and the ICTY.15

However, indirect responsibility (for omission) is not automatic. As observed by Garraway, it would make no sense to hold a commander responsible for rape just because his subordinates are. Commanders should be held liable only where there has been a clear failure to discharge their duties as commanders. Several criteria apply. Pursuant to case law,16 responsibility arises if the following three-stage test is met: (1) the existence of a superior-subordinate relationship; (2) the superior knew or had reason to know that the criminal act was about to be or had been committed; (3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

The first criterion requires a factual rather than a legal relationship of subordination between the author and the commander. The superior must have had effective command and control over the author. Hierarchical superiority is not sufficient. This may be important in light of General Karpinski’s declarations that although she was in charge of the detention facility of Abu Ghraib, she did not, in fact, have control over the units which committed the abuses.

The second criterion is that the commander actually knew, or had all the possible information to know, of the facts. In this regard, the practice has changed since the Second World War and it is no longer required that a superior actively look for the information. His or her responsibility will be assessed solely on the basis of the information that was already available to him or her.

The third cumulative criterion is that the superior failed to take all feasible measures

15 R. Arnold, supra note 13, at 201. See Delalić (IT-96–21), Trial Chamber, 16 November 1998, § 333.
16 Delalić, supra note 15, at § 346. See also United States v Soemu Toyoda, Official Transcript of Record of Trial, 5005–5006, cited in Delalić, at § 339.
5. Pursuant to the indictments against Corporal C. Graner, Specialist J.C. Sivits, Staff Sergeant I.L. Frederick II and Sergeant J.S. Davis, the charges – brought under the Uniform Code of Military Justice (UCMJ) – include ‘dereliction of duty for wilfully failing to protect detainees from abuse, cruelty and maltreatment’. For example, Sergeant Davis was charged for having directed the detainees into a pile and then jumping on them (a breach of Article 81 UCMJ), but also for having intentionally failed to discharge his duty to protect the detainees (Article 92 UCMJ). Specialist Sivits was instead charged with breaches of Article 81 UCMJ for maltreatment of subordinates and for having negligently failed to protect the detainees from abuse. They all seem to have been tried as primary perpetrators. However, the question is whether there are officers who were in charge of the detention facility who may be charged with dereliction of duty for having failed to supervise those responsible for the prisoners.

Although it is a good sign that seven low-ranking soldiers have been investigated and one sentenced to prison, some NGOs such as Human Rights Watch have been critical and have called on the US Congress to appoint an Abu Ghraib Investigation Commission. Their major criticism is that none of the current investigations involves
high-ranking officers and that none of the military courts has been charged with investigating the role of the CIA or civilian authorities or policy makers.

As pointed out by Garraway, however, the fact that a court may be military rather than civilian in nature is not an indicator of its justness or fairness. In many cases, military trials are harsher than civilian ones in that the requirement to observe discipline has a clearly higher threshold. Military courts, moreover, offer several advantages. Because of their expertise, they are more expeditious. The personnel are better acquainted with the environment in which the accused has been called to act and can therefore better assess the situation. Also, in cases like the one at hand, military justice is interested in bringing to justice the perpetrators as soon as possible, since this type of misconduct could not only jeopardize the military’s mission – the US presence in Iraq has certainly been made more difficult since the revelations – but also discredit US troops both at home and abroad. The mere fact that a soldier may be tried by someone else wearing a uniform is by no means an indicator that the judge may be more lenient; the opposite is true. The intention of military justice to try those responsible for serious breaches is further proved by the fact that, unlike civil courts, their jurisdiction is ‘attached’ to the person of the serviceman and thus follows him or her wherever he or she goes. It is not a failure of the US military justice system that, under its laws, civilians are not subject to its jurisdiction; rather, it is up to civilian courts to attend to those. This is in line with human rights standards. For similar reasons, the Swiss military justice system, which until recently had jurisdiction over civilians accused of war crimes, is now discussing about delegating this competence to civilian courts. The fact that military personnel shall, whenever possible, be tried by military courts is furthermore supported by Article 84 of the Third GC.