

# US Government War Crimes: Abu Ghraib & the Milosevic standard

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## **Just as Slobodan Milosevic was prosecuted, charges can be brought against George W. Bush and Donald Rumsfeld for the commission of war crimes by their subordinates.**

WHEN A United States court in 2001 ordered the Saddam Hussein Government to pay \$6.7 million to two American citizens, David Daliberti and Bill Barloon, for the torture they suffered at Abu Ghraib prison in 1995, the ruling was hailed by neoconservatives as a landmark one. The Torture Victims Protection Act (TVPA) had been amended in 1996 to let victims bring tort claims against sovereign governments in a U.S. court. Daliberti and Barloon, who had been arrested after “straying” over the Kuwait-Iraq border and held for five months, filed a case alleging torture while in Iraqi custody. Ruling in their favour, U.S. District Judge Louis Oberdorfer said the treatment meted out to the two Americans — being held in cells with no water and toilet, being kicked and threatened with electric shocks to their genitals — was “more than enough to meet the definition of torture in the [TVPA].”

Emboldened by this judgment — and by the fact that the U.S. occupation of Iraq in 2003 would make it easier to enforce the ruling of an American court — Abdullah Alkhuzai, who had been tortured by the Saddam regime at Abu Ghraib in 1991, filed a suit under the TVPA against the former Iraqi President and ‘Chemical Ali’. In November 2003, notice was sent to the two men, who were in U.S. custody, and on June 14, 2004, a federal court awarded Mr. Alkhuzai \$88 million. By then, however, the situation had changed. Abu Ghraib had become synonymous with torture by Americans. So even as Mr. Alkhuzai happily declared, “I feel the USA got my justice for me,” the Bush administration intervened to make sure other Iraqis did not start getting ideas.

Within days of the award, the court was informed of the Justice Department’s interest. “In light of the significant foreign policy interests of the U.S. related to the evolving situation in Iraq, and the legal consequences of various actions of the President ... taken in furtherance of those interests, the U.S. is currently considering its participation in this litigation,” a notice filed by Assistant Attorney General Peter D. Keisler stated.

What are these “legal consequences of various actions of the President” that the notice refers to? Is this merely a reference to the administration’s desire to use the assets of the erstwhile Saddam regime for Iraqi reconstruction rather than for compensating victims? Or could it be an elliptical reference to the torture of Iraqi prisoners by the U.S. Occupation Authority and the fear that judgments of this kind could open the floodgates to similar claims by Abu Ghraib’s most recent victims? Either way, the Justice Department declared last week that Mr. Alkhuzai’s claim was null and void because notice on Mr. Hussein and

`Chemical Ali' had been "improperly served." The wheels of justice had turned full circle.

Parallel with this effort to block tort claims against torture, attempts are under way to cover up the extent to which the U.S. is responsible for grave breaches of the Geneva Conventions by either sanctioning or condoning the torture of Iraqi POWs and civilian captives. The report by Lt. Gen Paul Mikoloashek, released on July 22, blames the "unauthorised decisions of a few individuals" for the "abuse" of Iraqi prisoners and contradicts the earlier findings of Maj. Gen. Antonio Taguba that the abuses were "systemic and illegal." Courts martial are under way against individual soldiers but the sentences pronounced are remarkably light. In May 2004, two U.S. soldiers, Andrew Sting and Jeremiah Trefny, pleaded guilty to giving electric shocks to an Iraqi prisoner. They received 12 and eight months in prison respectively. Daliberti and Barlow got \$6.8 million for being threatened with electric shocks. One wonders how much the Iraqi that Sting and Trefny electrocuted might be awarded if he were to move Judge Oberdorfer's court under the TVPA. And one wonders how the Justice Department would react.

As these trials proceed, no one seems interested in finding out at what level the torture was sanctioned. Above all, there has been little debate about the command responsibility of Defence Secretary Donald Rumsfeld and President George W. Bush in failing to take steps to prevent the torture and killing of Iraqi prisoners. What makes the absence of a debate all the more surprising is the existence of a voluminous paper trail of official memos that indicates the connivance of the Bush administration in devising legal arguments to justify the torture of prisoners captured in its so-called war on terrorism. The memos, generated by the U.S. Justice Department and the Pentagon between January 2002 and April 2003, suggest systematic attempts were made to push the envelope on "aggressive interrogation" of captives.

Of all the memos, the one written on August 1, 2002, by Jay S. Bybee, Assistant Attorney General, for Alberto R. Gonzales, Counsel to the President, makes for the most disturbing reading. Parsing a U.S. court judgment under the TVPA in *Mehinovic vs. Vukovic*, Mr. Bybee disputes "the court's determination that a beating in which `Vuckovic hit plaintiff Subasic and kicked him in the stomach with his military boots while Subasic was forced into a kneeling position' constituted torture. To be sure this beating caused Subasic substantial pain. But that pain pales in comparison to the other acts described in this case. To the extent the opinion can be read to endorse the view that this single act and the attendant pain, considered in isolation, rose to the level of `severe pain and suffering', we would disagree with such a view based on our interpretation of the criminal statute."

What Mr. Bybee was telling the White House was that inflicting "substantial pain" on a prisoner during interrogation would not constitute torture since torture requires "severe pain." Is it all that improbable that armed with this advice, the message went down to footsoldiers like Trefny and Lyndie England at Abu Ghraib that it was all right to hurt their captives?

Elsewhere, Mr. Bybee said that "even if an interrogation method were to violate USC 2340 [the U.S. Torture Statute], the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign... [since] the information gained from interrogations may prevent future attacks by foreign enemies." Mr. Bybee also comes close to the crime of conspiracy to commit torture: "Even if an interrogation method might arguably cross the line drawn in Section 2340 and application of

the statute was not held to be an unconstitutional infringement of the President's Commander-in-Chief authority," he advises, "we believe that under the current circumstances certain justification defences might be available that would potentially eliminate criminal liability." Among these: the "standard criminal law defences of necessity and self-defence."

It is astonishing that despite the existence of such documents — and only censored versions of these memos have been released — there is no clamour within the U.S. to bring charges against Mr. Bush and Mr. Rumsfeld for the commission of war crimes by their subordinates.

Louise Arbour, chief prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY), had no such documentary evidence when she indicted Yugoslav President Slobodan Milosevic in 1999 on four counts of crimes against humanity and violations of the laws of war. The crimes concerned the death of 340 Kosovar Albanians at the hands of the Yugoslav security forces. Paragraph 84 of the indictment states that "in as much as he has authority or control over the VJ (Yugoslav army) ... Slobodan Milosevic, as president of the FR of Yugoslavia ... is also criminally responsible for the acts of his subordinates." Para 88 states, "A superior is responsible for the acts of his subordinate(s) if he knew or had reason to know that his subordinate(s) was/were about to commit such acts or had done so and the superior failed to take necessary and reasonable measures to prevent such acts..."

Ms. Arbour's indictment of Mr. Milosevic was a political one but the logic about command responsibility is robust. The Statute of the International Criminal Court uses similar language but then neither the U.S. nor Iraq is a party. Ms. Arbour is now the U.N. High Commissioner for Human Rights. The body has no legal teeth but the former ICTY prosecutor has added to its impotence by not speaking out against Washington's attempts to hush up the torture issue. On July 29, Dr. Halima Warzazi, outgoing chair of the U.N. subcommission on the protection of rights, made an impassioned plea that the world remember Abu Ghraib. What, she asked, had been the reaction to the photographs of torture by those whose job it was to detect and condemn flagrant violations of human rights? Ms. Arbour, who has that job, and who spoke after her, preferred silence on the issue.

With U.N. bodies powerless, the only place Abu Ghraib's Iraqi victims can seek justice is in the U.S. itself. Criminal prosecutions can perhaps be filed under the Torture Statute and War Crimes Act and tort claims under the TVPA.

Soon after he ordered the invasion of Iraq, Mr. Bush publicly declared that those who mistreated prisoners would be considered war criminals. On March 23, 2003, he was asked for his reaction to the Iraqi capture of U.S. soldiers. "I expect... the POWs ... to be treated humanely. And — just like we're treating the prisoners that we have captured humanely. If not, the people who mistreat the prisoners will be treated as war criminals."

The U.S. legal system, and beyond that, the American court of public opinion, owes it to the world to turn Mr. Bush's promise into reality

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