A. Abu Ghraib: its Legacy for Military Medicine

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: MILES, Steven H., *Abu Ghraib: its legacy for military medicine*, The Lancet, Volume 364, No. 9435, 21 August 2004; footnotes omitted]

The complicity of US military medical personnel during abuses of detainees in Iraq, Afghanistan, and Guantanamo Bay is of great importance to human rights, medical ethics, and military medicine. Government documents show that the US military medical system failed to protect detainees' human rights, sometimes collaborated with interrogators or abusive guards, and failed to properly report injuries or deaths caused by beatings. An inquiry into the behaviour of medical personnel in places such as Abu Ghraib could lead to valuable reforms within military medicine.

The policies

As the Bush administration planned to retaliate against al-Qaeda's terrorist attacks on the USA, it was reluctant to accept that the Geneva Convention Relative to the Treatment of Prisoners of War would apply to al-Qaeda detainees. In January, 2002, a memorandum from the US Department of Justice to the Department of Defense concluded that since al-Qaeda was not a national signatory to international conventions and treaties, these obligations did not apply. It also concluded that the Convention did not apply to Taliban detainees because al-Qaeda's influence over Afghanistan's government meant that it could not be a party to treaties. In February, 2002, the US president signed an executive order stating that although the Geneva Conventions did not apply to al-Qaeda or Taliban detainees, "our nation ... will continue to be a strong supporter of Geneva and its principles ... the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity in a manner consistent with the principles of Geneva." This phrasing subordinates US compliance to the Geneva Convention to

undefined “military necessity.”

An August, 2002 Justice Department memorandum to the President and a March, 2003 Defense Department Working Group distinguished cruel, inhumane, or degrading treatment, which could be permitted in US military detention centres, from torture, which was ordinarily banned except when the President set aside the US commitment to the Convention in exercising his discretionary war-making powers. These memoranda semantically analysed the words “harm” or “profound disruption of the personality” in legal definitions of torture without grounding the terms on references to research showing the prevalence, severity, or duration of harm from abusing detainees. Also, the memoranda do not distinguish between coercive interrogation involving soldiers from those employing medical personnel or expertise. For example, both documents excuse the use of drugs during interrogation. Neither document mentions medical ethics codes or the history of medical or psychiatric complicity with torture or inhumane treatment.

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The Interrogation Rules of Engagement posted at Abu Ghraib stated: “[Interrogation] Approaches must always be humane ... Detainees will NEVER be touched in a malicious or unwanted manner ... the Geneva Conventions apply.” These rules were imported from the US operation in Afghanistan and echoed the 2003 memo by the Secretary of Defense. They stated: “Wounded or medically burdened detainees must be medically cleared prior to interrogation” and approved “Dietary manipulation (monitored by med)” for interrogation. Defense Department memoranda define the latter as substituting hot meals to cold field rations rather than food deprivation but there are credible reports of food deprivation.

Although US military personnel receive at least 36 minutes of basic training on human rights, Abu Ghraib military personnel did not receive additional human rights training and did not train civilian interrogators working there. Military medical personnel in charge of detainees in Iraq and Afghanistan denied being trained in Army human rights policies. Local commanding officers were unfamiliar with the Geneva Convention or Army Regulations regarding abuses. [...]

The offences

Confirmed or reliably reported abuses of detainees in Iraq and Afghanistan include beatings, burns, shocks, bodily suspensions, asphyxia, threats against detainees and their relatives, sexual humiliation, isolation, prolonged hooding and shackling, and exposure to heat, cold, and loud noise. These include deprivation of sleep, food, clothing, and material for personal hygiene, and denigration of Islam and forced violation of its rites. Detainees were forced to work in areas that were not demined and seriously injured. Abuses of women detainees are less well documented but include credible allegations of sexual humiliation and rape.

US Army investigators concluded that Abu Ghraib’s medical system for detainees was inadequately staffed and equipped. The International Committee of the Red Cross (ICRC) found that the medical system failed to

maintain internment cards with medical information necessary to protect the detainees' health as required by the Geneva Convention; this reportedly was due to a policy of not officially processing (i.e. recording their presence in the prison) new detainees. Few units in Iraq and Afghanistan complied with the Geneva obligation to provide monthly health inspections. The medical system also failed to assure that prisoners could request proper medical care as required by the Geneva Convention. For example, an Abu Ghraib detainee's sworn document says that a purulent hand injury caused by torture went untreated. The individual was also told by an Iraqi physician working for the US that bleeding of his ear (from a separate beating) could not be treated in a clinic; he was treated instead in a prison hallway.

The medical system failed to establish procedures, as called for by Article 30 of the Geneva Convention, to ensure proper treatment of prisoners with disabilities. An Abu Ghraib prisoner's deposition reports the crutch that he used because of a broken leg was taken from him and his leg was beaten as he was ordered to renounce Islam. The same detainee told a guard that the prison doctor had told him to immobilise a badly injured shoulder; the guard's response was to suspend him from the shoulder. The medical system collaborated with designing and implementing psychologically and physically coercive interrogations. Army officials stated that a physician and a psychiatrist helped design, approve, and monitor interrogations at Abu Ghraib. This echoes the Secretary of Defense's 2003 memo ordering interrogators to ensure that detainees are "medically and operationally evaluated as suitable" for interrogation plans. In one example of a compromised medically monitored interrogation, a detainee collapsed and was apparently unconscious after a beating, medical staff revived the detainee and left, and the abuse continued. There are isolated reports that medical personnel directly abused detainees. Two detainees' depositions describe an incident where a doctor allowed a medically untrained guard to suture a prisoner's laceration from [sic] being beaten.

The medical system failed to accurately report illnesses and injuries. Abu Ghraib authorities did not notify families of deaths, sicknesses, or transfers to medical facilities as required by the Convention. A medic inserted an intravenous catheter into the corpse of a detainee who died under torture in order to create evidence that he was alive at the hospital. In another case, an Iraqi man, taken into custody by US soldiers was found months later by his family in an Iraqi hospital. He was comatose, had three skull fractures, a severe thumb fracture, and burns on the bottoms of his feet. An accompanying US medical report stated that heat stroke had triggered a heart attack that put him in a coma; it did not mention the injuries.

Death certificates of detainees in Afghanistan and Iraq were falsified or their release or completion was delayed for months. Medical investigators either failed to investigate unexpected deaths of detainees in Iraq and Afghanistan or performed cursory evaluations and physicians routinely attributed detainee deaths on death certificates to heart attacks, heat stroke, or natural causes without noting the unnatural aetiology of the death. In one example, soldiers tied a beaten detainee to the top of his cell door and gagged him. The death certificate indicated that he died of "natural causes during his sleep." After news media coverage, the Pentagon revised the certificate to say that the death was a "homicide" caused by "blunt force injuries and asphyxia." [...]

The legacy

Pentagon officials offer many reasons for these abuses including poor training, understaffing, overcrowding of detainees and military personnel, anti-Islamic prejudice, racism, pressure to procure intelligence, a few criminally-inclined guards, the stress of war, and uncertain lengths of deployment. Fundamentally however, the stage for these offences was set by policies that were lax or permissive with regard to human rights abuses, and a military command that was inattentive to human rights.

Legal arguments as to whether detainees were prisoners of war, soldiers, enemy combatants, terrorists, citizens of a failed state, insurgents, or criminals miss an essential point. The US has signed or enacted numerous instruments including the UN Universal Declaration of Human Rights, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Standard Minimum Rules for the Treatment of Prisoners, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and US military internment and interrogation policies, collectively containing mandatory and voluntary standards barring US armed forces from practicing torture or degrading treatments of all persons. [...]

The Geneva Convention states: “Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction ... The following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; ... Outrages upon personal dignity, in particular, humiliating and degrading treatment ... 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 war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.” [...]

Pentagon leaders testified that military officials did not investigate or act on reports by Amnesty International and the ICRC of abuses at Abu Ghraib and other coalition detention facilities throughout 2002 and 2003. The command at Abu Ghraib and in Iraq was inattentive to human rights organisations’ and soldiers’ oral and written reports of abuses. [...]

The role of military medicine in these abuses merits special attention because of the moral obligations of medical professionals with regard to torture and because of horror at health professionals who are silently or actively complicit with torture. Active medical complicity with torture has occurred throughout the world. Physicians collaborated with torture during Saddam Hussein’s regime. Physicians’ and nurses’ professional organisations have created codes against participation in torture [**See** infra C., The Tokyo Declaration]. [...] Numerous non-medical groups have asserted that healers must be advocates for persons at risk of torture. [...]

At the operational level, medical personnel evaluated detainees for interrogation, and monitored coercive interrogation, allowed interrogators to use medical records to develop interrogation approaches, falsified medical records and death certificates, and failed to provide basic health care.

Which medical professionals were responsible for this misconduct? The US Armed Forces deploy physicians, physicians' assistants, nurses, medics (with several months of training), and various command and administrative staff. International statements assert that every health-care worker has an ethical duty to oppose torture. For example, the UN Principles of Medical Ethics Relevant to the Protection of Prisoners Against Torture refers to "health personnel," "particularly physicians" but it also names physicians' assistants, paramedics, physical therapists and nurse practitioners. Likewise, the Geneva Convention refers to the duties of physicians, surgeons, dentists, nurses, and medical orderlies. Furthermore, the US Armed Forces medical services are under physician commanders and each medic, as with civilian physicians' assistants, is personally accountable to a physician. Thus, physicians are responsible for the policies of the medical system; military medical personnel should abide by the ethics of medicine regarding torture.

Abu Ghraib will leave a substantial legacy. Medical personnel prescribed anti- depressants to and addressed alcohol abuse and sexual misconduct in US soldiers in the psychologically destructive prison milieu. The reputation of military medicine, the US Armed Forces, and the USA was damaged. The eroded status of international law has increased the risk to individuals who become detainees of war since Abu Ghraib because it has decreased the credibility of international appeals on their behalf. [...]

B. Legal Analysis of Torture by US Medical Personnel

> [**Source**: Physicians for Human Rights, "*Broken Laws, Broken Lives, Medical Evidence of Torture by US Personnel and its Impact*", Report, June 2008, available at http://physiciansforhumanrights.org/, footnotes omitted]

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Chapter 4: Patterns of Torture and Ill-Treatment

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Health Professional Complicity and Denial of Medical Care

Some of the detainees reported that they received good and appropriate medical care during their detention. However, both the experiences recounted by the detainees and the medical records available in one of the cases show how physicians and other health workers became, at best, ethically compromised in these detention settings. At worst, health professionals at these sites became enablers of torture by providing medical care in an environment where torture was taking place. In fact, in some cases health professionals may have given interrogators the "green light" to continue with abusive techniques and, in other cases, the health professionals effectively patched the detainees up so that they could be abused further. […]

In Iraq, the availability of professional and humane care was far worse. […] [T]he detainees reported that even accessing medical care was very difficult.

Questions of quality and access, however, do not fully encompass the very problematic role health professionals played […]. Even those health professionals who sought to restrict themselves to clinical roles and steered clear of interrogation support became part of the machinery of torture. PHR has no information about whether physicians or other health personnel reported torture to authorities, but they surely did not intervene to stop torture when they were in its midst or were examining those subjected to it. Moreover, in the one case where medical records are available, it is apparent that the health staff provided pharmacological treatment for suicidal, self destructive, and partly psychotic behavior that is at least partially attributable to the torture – including isolation – the detainee experienced, yet the health providers only marginally intervened to stop his torture.

Nine former detainees evaluated reported that health professionals examined their condition during an episode of torture or physical abuse but, as far as the detainees could tell, made no effort to stop it. One man stated that during his initial interrogation at Baghdad airport someone who seemed to be a doctor was present to monitor his heart and blood pressure. The detainee was suspended in the air, which caused his arm to dislocate. The person whom the detainee surmised to be a doctor put his arm back in its place and then informed the interrogators that they could "continue." A detainee at Abu Ghraib reported that after having electric shock administered, he passed out on the floor. He remembered gaining consciousness as a person whom he believed was a doctor revived him and appeared to grant permission for the interrogators to continue. He also recalled that despite repeated requests for medical attention for his hand, he was only given one tablet daily for pain.

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Moreover, PHR evaluators concluded that the health professionals clearly failed to adequately evaluate, document, or treat severe psychological symptoms and their behavioral manifestations, particularly post-traumatic stress disorder. Finally, despite multiple incidents of self-injurious behavior and suicide attempts by the individual, including banging his head against a wall, attempted hanging, and participating in hunger strike, psychiatrists list "routine stressors of confinement" as part of their findings in diagnosing the detainee. In doing so, they disregarded cruel or ill-treatment as a likely cause of these symptoms. This is reinforced by the fact that when torture ended in the last years of his confinement, so did his symptoms of mental illness. In sum, the health professionals were complicit in the torture of this detainee.

The medical records do not indicate that the health professionals inquired into or documented any form of ill-treatment perpetrated by US soldiers. Instead, their interventions and documentation obfuscate the relationship between the detainee's abuse and ill-treatment in confinement and his deteriorating mental and physical condition.

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Chapter 6: Legal Analysis

Legal Prohibitions against Torture and Ill-Treatment

Many of the practices described in this report are torture under the law. […]

The international agreements promulgated include the International Covenant on Civil and Political Rights (ICCPR) (prohibiting cruel, inhuman or degrading punishment), the Geneva Conventions (including provisions governing prisoners of war and Common Article 3, which prohibits torture and "outrages on personal dignity"), and the UN Convention Against Torture (prohibiting both torture and cruel, inhuman or degrading treatment in all circumstances). These treaties, to which the United States is a party, absolutely prohibit the use of torture and other cruel, inhuman or degrading treatment.

Further, this prohibition has also long been a part of customary international law and has risen to the level of *jus cogens*, such that it is now a "higher law" that cannot be violated by any State. All countries are bound by the international instruments to which they are a party as well as *jus cogens* norms. […]

This prohibition against torture is firmly embedded in US law. […] The War Crimes Act (WCA), which applies to any circumstance "where the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States," criminalizes "torture" and "other cruel or inhuman treatment." [**See** United States, War Crimes Act]

In response to claims by the Bush Administration that certain laws did not apply to all detainees in US custody, Congress passed the Detainee Treatment Act (DTA) in 2005. Although the DTA was enacted after the events described in this report, it reaffirmed the longstanding US prohibition on cruel, inhuman, or degrading treatment. It clearly states that the prohibition applies extraterritorially, in contrast to the position of the Bush Administration. […]

Likewise, the Military Commissions Act of 2006 (MCA), which was enacted after the Supreme Court rendered its decision in *Hamdan v. Rumsfeld*, was not in force at the time the detainees evaluated for this report were in custody, but reinforced the already-standing legal prohibition on torture. The MCA amended and narrowed the War Crimes Act to limit the instances in which criminal sanctions could apply to certain "grave breaches" of Common Article 3 of the Geneva Conventions, but includes torture and cruel or inhuman treatment as war crimes.

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Three of these sources of US law are particularly important in assessing the conduct of US personnel against the detainees evaluated for this report.

First, the federal criminal statute prohibiting the commission of torture outside the United States […].

Second, the Geneva Conventions, which are international treaties that govern the conduct of war, outlaw the conduct described here. […]

Even in circumstances of armed conflict where other provisions of the Geneva Conventions do not apply, Article 3, common to all the Conventions, ("Common Article 3") does apply and prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment." Under the law as it applied during the period covered by this report, that is, prior the enactment of the MCA, all violations of Common Article 3 were deemed war crimes under the War Crimes Act.

Third, US military law also outlaws torture. The Uniform Code of Military Justice (UCMJ) is applicable to US military personnel at all times and in all places throughout the world. It establishes penalties for acts of cruelty, oppression or maltreatment.

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Chapter 7: Conclusion and Recommendations

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This consistent pattern, especially when considered in conjunction with the many other reports about detainee treatment, including those from official investigations by the US government, the International Committee of the Red Cross, first-hand accounts, and the media, as well as government documents, leads to the conclusion that United States systematically employed torture and ill-treatment against detainees during the periods covered by this report.

The abusive practices reported by the detainees in this investigation took place in a context of official authorization, legal justification, and tactical standardization (…). Many of the methods used were officially authorized by civilian and military authorities during at least some of the periods during which the detainees were held in US custody. From evidence available, other abusive practices found in this report, such as routine beatings, electric shocks, and sexual violence, do not appear ever to have been authorized, but were nevertheless tolerated within a permissive command environment. The creation of this environment was neither incidental nor accidental. Rather, it resulted directly from a radical and unjustifiable re-interpretation of US and international law that stripped human rights protections from detainees in U.S custody. Legal opinions issued by the Department of Justice and the Department of Defense dehumanized detainees and encouraged the formulation of policies and practices that inevitably led to widespread abuse.

Congress has taken some steps to end many of these practices and authorizations, although some have

been undermined or subverted by the President. The Detainee Treatment Act extends the prohibition on cruel, inhuman or degrading treatment extra-territorially, although a signing statement by the President assumed authority to ignore the law […].

The Defense Department, too, has both repudiated and prohibited many of the interrogation practices and conditions of detention set out in this report. In September 2006, it issued a new field manual on interrogation that requires compliance with the Geneva Conventions and prohibits the use of torture or cruel, inhuman or degrading treatment. […] On the other hand, an appendix in the new field manual continues to permit the use of isolation for up to thirty days per authorization and limiting sleep to four hours a night for individuals who are Unlawful Enemy Combatants and are not designated as Prisoners of War. […]

It must be noted that no independent investigation that includes access to all relevant documents and officials has been conducted of US detainee treatment and interrogation practices during the period covered by this report, and no individuals other than a few enlisted personnel and one officer at Abu Ghraib have been prosecuted for their actions in performing or authorizing the conduct described here. Furthermore, no effort to provide compensation of any kind to the individuals who have suffered grievous harm as a result of the torture and cruel, inhuman and degrading treatment inflicted on them has been forthcoming.

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C. The Tokyo Declaration

[**Source**: The Tokyo Declaration; Adopted by the 29th World Medical Assembly Tokyo, Japan, October 1975; available on http://www.wma.net/e/policy/c18.htm]

World Medical Association Declaration of Tokyo. Guidelines for Medical Doctors Concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment.

Adopted by the 29th World Medical Assembly Tokyo, Japan, October 1975.

PREAMBLE

It is the privilege of the medical doctor to practise medicine in the service of humanity, to preserve and restore bodily and mental health without distinction as to persons, to comfort and to ease the suffering of his or her patients. The utmost respect for human life is to be maintained even under threat, and no use made of any medical knowledge contrary to the laws of humanity.

For the purpose of this Declaration, torture is defined as the deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the orders of any authority, to force

another person to yield information, to make a confession, or for any other reason.

DECLARATION

1. The doctor shall not countenance, condone or participate in the practice of torture or other forms of cruel, inhuman or degrading procedures, whatever the offense of which the victim of such procedures is suspected, accused or guilty, and whatever the victim's beliefs or motives, and in all situations, including armed conflict and civil strife.
2. The doctor shall not provide any premises, instruments, substances or knowledge to facilitate the practice of torture or other forms of cruel, inhuman or degrading treatment or to diminish the ability of the victim to resist such treatment.
3. The doctor shall not be present during any procedure during which torture or other forms of cruel, inhuman or degrading treatment is used or threatened.
4. A doctor must have complete clinical independence in deciding upon the care of a person for whom he or she is medically responsible. The doctor's fundamental role is to alleviate the distress of his or her fellow men, and no motive whether personal, collective or political shall prevail against this higher purpose.
5. Where a prisoner refuses nourishment and is considered by the doctor as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially. The decision as to the capacity of the prisoner to form such a judgment should be confirmed by at least one other independent doctor. The consequences of the refusal of nourishment shall be explained by the doctor to the prisoner.
6. The World Medical Association will support, and should encourage the international community, the national medical associations and fellow doctors to support the doctor and his or her family in the face of threats or reprisals resulting from a refusal to condone the use of torture or other forms of cruel, inhuman or degrading treatment.

Discussion

1. How would you qualify the US military intervention in Iraq? Can the US deny the applicability of IHL? Can the US President set aside his country's commitment to the Geneva Conventions in exercising his discretionary war-making powers? Can the US unilaterally re-interpret international treaties?
2. a. Do detainees in Iraq benefit from POW status? If they do not, are they perforce protected civilians if they are Iraqi nationals? Even if they are "unlawful Enemy Combatants"? Does this category exist under IHL? Does it grant any protection? Is it different from the protection granted to POWs? To protected civilians?
   b. Does the status of detainees (whether POWs, protected civilians or not) have an impact on the obligations of medical personnel toward them?
3. Are the members of military medical services subject to the same obligations as civilian health care personnel? May military orders or procedures differ from established principles of medical ethics?
4. a. Documents A. and B. of this case state that, in this particular context, a "collaboration" has been established between the medical staff and those in charge of interrogating prisoners and detainees. Is such collaboration possible? Never? Sometimes? If yes, under what conditions and in which circumstances?

b. Under IHL, may medical staff refuse to cooperate in interrogating prisoners? In acts of torture? Must they refuse to perform acts equivalent to acts of torture? Must they denounce acts of torture perpetrated by military staff? Can they be punished for refusing to obey? (GC III, Arts 13, 14, 17, 30; GC IV, Arts 16, 27, 29, 31, 32, 91, 92, 129, 137 and 138; P I, Arts 11 and 16; CIHL, Rules 87, 88, 90-93, 104, 118, 121-123, 127)

5. a. Which acts and omissions by medical personnel mentioned in Documents A. and B. violated IHL? In your opinion, do the principles of medical ethics applicable in peacetime differ from those applicable in situations of armed conflict? (GC III, Arts 13, 14, 17, 30, 31, 120, 122(2), (3), (5) and (6); GC IV, Arts 16, 27, 29, 31, 32, 91, 92, 129, 137 and 138; P I, Arts 11 and 16; CIHL, Rules 87, 88, 90-93, 104, 118, 121-123, 127)

b. Do these violations amount to grave breaches of IHL? Do they amount to war crimes?

c. Can physicians, physicians' assistants and/or nurses who collaborated with or tolerated such violations be held accountable for acts ordered by military officials? For acts not specifically authorized? Does the fact that the acts of ill-treatment were authorized or endorsed by medical personnel preclude criminal responsibility of the military or civilian staff who committed them?