

**SUPERIOR RESPONSIBILITY FOR ACTS OF TORTURE COMMITTED BY  
SUBORDINATES UNDER INTERNATIONAL CRIMINAL LAW -  
THE CASE OF U.S. ABUSE AGAINST IRAQI PRISONERS**

**Part I – The case of U.S. abuse against Iraqi prisoners**

*Premise*

In October 2003 Abed Hamed Mowhoush, a former high ranking official of Iraq's Republican Guard, handed himself in to a U.S. Army operating base in Iraq. He was looking for his sons, who had been captured by U.S. soldiers some days before. The U.S. military officials at the base detained General Mowhoush, who was suspected of being one of the major supporters of the Iraqi insurgency. The Iraqi General admittedly commanded an organization that supplied the insurgency with weapons and ammunition. In order to obtain significant details about the insurgency, the U.S. interrogators put General Mowhoush in a "stress position"; this implied, *inter alia*, being interrogated in front of other prisoners in such a manner that would humiliate him<sup>1</sup>. General Mowhoush was then transferred to Al Qaim camp to be interrogated by the Central Intelligence Agency (CIA), Special Forces, and Army soldiers from the 3<sup>rd</sup> Armored Cavalry Regiment (ACR). On November 24, the detainee was interrogated by CIA sponsored Iraqi paramilitaries, and he was beaten with "fists, a club, and a rubber hose"; two days later during another interrogation, two American army soldiers "placed the Iraqi General in a sleeping bag and wrapped the bag in electrical wire. Chief Warrant Officer Lewis Welshofer then leaned on Mowhoush's chest as he continued the questioning."<sup>2</sup> The Iraqi General became unresponsive and died within one hour of "asphyxia due to smothering and chest compression"<sup>3</sup>. As the autopsy showed, he had six fractured ribs, bruises and abrasions with pattern impressions likely administered by the end of an M-16 rifle<sup>4</sup>. On January 21, 2006 a court martial jury convicted Chief Warrant Officer Welshofer of negligent homicide<sup>5</sup>. The charges of murder against other soldiers were dropped. The defense counsel of one of the soldiers stated that: "*the interrogation techniques were known and were approved of by the upper echelons of command of the 3<sup>rd</sup> ACR*"<sup>6</sup>. Colonel Teeples,

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<sup>1</sup> For more details, see C.A. Britt, *The Commissioning oath and the ethical obligation of military officers to prevent subordinates from committing acts of torture*, Georgetown Journal of Legal Ethics, 2006, p. 551 ff.

<sup>2</sup> Cf. C.A. Britt, cit., p. 552.

<sup>3</sup> *Ibid.*

<sup>4</sup> See J. White, *Documents tell of brutal improvisation by Generals*, The Washington Post, August 3, 2005.

<sup>5</sup> N. Riccardi, *No jail time in death of Iraqi General*, Los Angeles Times, January 24, 2006.

<sup>6</sup> Cf. J. White, cit.

commander of the 3<sup>rd</sup> ACR at that time, testified that he “believed the ‘claustrophobic techniques’ were both approved and effective”<sup>7</sup>.

In reality, absolutely no legal basis can be found in the U.S. Army Field Manual<sup>8</sup> for such interrogation techniques, which patently amount to torture or cruel and inhuman treatment under international (and domestic) law<sup>9</sup>. However, facts similar to this unfortunately cannot be said to be exceptional in the context of the recent American military intervention in Afghanistan and Iraq<sup>10</sup>; indeed an impressive set of cases regarding abuse against prisoners detained in U.S. military detention facilities overseas has been brought to the attention of the entire world. Among these, the acts of abuse at *Abu Ghraib*<sup>11</sup> in particular have become ‘famous’ worldwide, being documented by a large number of photos taken by the soldiers who were actually involved in the torture practices<sup>12</sup>.

### *1. Legal issues regarding the criminal responsibilities for the U.S. abuse against detainees in Iraq*

The repeated and systematic occurrence of acts of abuse against detainees in Iraq (and Afghanistan) implies a number of legal questions regarding the criminal accountability of the subjects involved, from the ordinary soldier, direct perpetrator of the offences, up along the chain of command. More specifically, declarations such as Colonel Teeples’s admission that he knew his soldiers used the ‘claustrophobic technique’, and was therefore likely aware of the physical abuse that occurred but did not intervene to stop them, raise substantial questions, which should be taken in serious consideration<sup>13</sup>. No doubt a soldier who intentionally commits torture is responsible for his actions, but what about the officer that ordered, approved or failed to intervene when he knew that torture was occurring?

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<sup>7</sup> Cf. C.A. Britt, cit., p. 552-3.

<sup>8</sup> The Army Field Manual 34-52 (FM 34-52) outlines the permissible interrogation techniques. It is available at [www.fas.org/irp/doddir/army/fm34-52.pdf](http://www.fas.org/irp/doddir/army/fm34-52.pdf).

<sup>9</sup> This paper will not discuss whether such acts amount to torture or cruel, inhuman or degrading treatment under international law. The nature of unlawful acts amounting to torture or cruel, inhuman or degrading treatment is in fact assumed as a starting point of this paper, on the basis of numerous Reports from U.S. Military Investigators, as well as international organizations (the International Committee of the Red Cross) and NGOs (Amnesty International and Human Rights Watch); see *infra* notes 10, 12, 18, 64.

<sup>10</sup> For a complete and documented picture of the acts of abuse, see the Human Rights Watch (HRW) Report, *The Road to Abu Ghraib*, June 2004, available on at <http://hrw.org/reports/2004/usa0604/>.

<sup>11</sup> For the purpose of this paper, the term *abuse* is defined as “treatment of detainees that violated U.S. criminal law or international law or treatment that was inhumane or coercive without legal justification” (cf. the *Jones Report*)

<sup>12</sup> Besides the abuse at Abu Ghraib, comparable and even more extreme cases of mistreatment and torture of prisoners have been documented by the International Committee of the Red Cross and by journalists in U.S. detention facilities in Afghanistan and in numerous other locations in Iraq. See the HRW Report, cit. Several UK soldiers, as well, have been involved in acts of abuse against prisoners in Iraq and have been court-martialed for them.

<sup>13</sup> Cf. C.A. Britt, cit, p. 553.

The first military inquires and criminal proceedings conducted by U.S. authorities on prisoner abuse in Iraq (and Afghanistan) have been regarded as unsatisfactory to the extent that they fail to address the possible responsibilities of the higher echelons for the commission of such crimes. They seemed to be “*too narrowly structured to establish causes of abuse ... and have so far left crucial questions of policy and operations unexamined*”<sup>14</sup>. Then-U.S. Secretary of Defense Donald Rumsfeld describing the case of abuse perpetrated at Abu Ghraib as “*an exceptional, isolated*” case<sup>15</sup> revealed the official line adopted by U.S. authorities: they were just a few “*bad apples*” acting without orders<sup>16</sup>. Such an attitude, however, generated extensive criticism not only from the mass media and public opinion, but also from the U.S. Congress, which criticized the military authorities for not holding higher-ranking officials accountable<sup>17</sup>. Following such pressure, and after the recommendations included in particular in the *Taguba, Fay and Jones Reports* of 2004<sup>18</sup>, in 2006 some criminal investigations started to focus also on the responsibilities at higher levels<sup>19</sup>. The *Jones Report* notably concludes that, while senior level officers did not directly commit the abuse at *Abu Ghraib*, they did bear responsibility for lack of oversight of the detention facility, failing to respond in a timely manner to reports of abuses from the International Committee of the Red Cross (ICRC) and for issuing policy memos that failed to provide clear and consistent guidance on the interrogation of prisoners. The Report outlines two different types of unlawful conduct perpetrated by American soldiers: i) cases of intentional violence or sexual abuse which were committed in violation of law, policy and doctrine and contrary to Army values; ii) cases of incidents which were based on misinterpretation of law and policy and confusion over what interrogation techniques were permitted<sup>20</sup>. Certainly there is no single simple

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<sup>14</sup> See S. Lee Myers and E. Schmitt, Wide gaps seen in U.S. inquires on prison abuse, *The New York Times*, June 6, 2004.

<sup>15</sup> See the HRW Report, cit., p. 1.

<sup>16</sup> Similarly, President George W. Bush, appearing on television, spoke of “*disgraceful conduct by a few American troops who dishonored our country and disregarded our values*”, see HRW Report, cit.

<sup>17</sup> The sole General to be disciplined so far for the maltreatment of prisoners at Abu Ghraib is Brigadier General Janis Karpinski, the former commanding officer at Baghdad's Abu Ghraib prison, who was demoted and relieved of command in 2005. Karpinski herself has declared that other senior figures were to blame for maltreatment of detainees, and that she was a scapegoat. Five colonels and lieutenant-colonels also received administrative punishments or letters of reprimand by the U.S. Army in connection with abuses of detainees in Iraq and Afghanistan.

<sup>18</sup> Article 15-6 Investigation of the 800th Military Police Brigade conducted by MG Antonio M. Taguba (*Taguba Report*); Article 15-6 Investigation of the Abu Ghraib detention facility and 205th Military Intelligence Brigade conducted by LTG Anthony R. Jones (*Jones Report*) and by MG George R. Fay (*Fay Report*) of August 2004; the latter one specifically stressed the individual responsibilities for the prisoner abuse of Lt. Col. S.L. Jordan, Director of the Joint Interrogation debriefing Centre at Abu Ghraib, and his supervisor Col. T.M. Pappas, for their failure to discharge their duties.

<sup>19</sup> The Pentagon recently announced that Lt. Col. S.L. Jordan, the former head of the interrogation centre at Abu Ghraib, will face a court martial in July 2008 for seven violations of the Uniform Code of Military Justice, including dereliction of duty, cruelty and maltreatment. See, E. Schmitt, 26 April 2006.

<sup>20</sup> Cf. the *Jones Report*, cit., p. 4. Indeed in some cases, interrogation techniques amounting to torture or cruel, inhuman or degrading treatment, as will be seen, happened to be allowed by specific military orders which found their legal justification on legal memoranda drafted by U.S. government lawyers, cf. *infra* par. 3.

cause for what happened at *Abu Ghraib* and in other detention facilities in Iraq and Afghanistan; as was affirmed by the American military investigators who drafted the above-mentioned Reports, “the primary causes are misconduct (ranging from inhumane to sadistic) by a small group of morally corrupt soldiers and civilians, a lack of discipline on the part of the leaders and soldiers of the 205<sup>th</sup> MI BDE and a *failure or lack of leadership by multiple echelons* within CJTF-7. Contributing factors can be traced to *issues affecting Command and Control, doctrine, training, and the experience of the soldiers*”<sup>21</sup>. Indeed “the absence of effective leadership was a factor in not sooner discovering and taking actions to prevent both the incidents of *violence/sexual abuse* and the incidents of *misinterpretation/confusion*”<sup>22</sup>.

Thus, the main issue here at stake will be to assess the legal consequences of such lack of leadership, command and control with regard to the criminal liabilities arising from cases such as the abuse perpetrated against Iraqi prisoners. As will be exposed in these pages, superiors may be held criminally liable for subordinates’ crimes not only as a consequence of their positive acts but also as a consequence of their omissions, where the corresponding duty to act has been violated<sup>23</sup>.

## 2. *The prohibition and criminalisation of torture under international and national law*

The prohibition of torture, as well as of cruel, inhuman, or degrading treatment, is absolute under international law<sup>24</sup>. Article 1 of the U.N. Convention against torture and other cruel, inhuman or degrading treatment or punishment of 1984<sup>25</sup> defines torture as:

*“Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has*

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<sup>21</sup> *Executive Summary of Investigation of Intelligence Activities at Abu Ghraib*, 23 August 2004, attached to the Jones and Fay Reports, available at [www.washingtonpost.com/wp-srv/nation/document/fay-report\\_8-25-04.pdf](http://www.washingtonpost.com/wp-srv/nation/document/fay-report_8-25-04.pdf)

<sup>22</sup> *Ibid.*

<sup>23</sup> Besides this, the issue arises whether it is possible to attach criminal responsibility to those subjects, who “legally” endorsed the implementation of such prohibited interrogation techniques, for having contributed to the current situation of misinterpretation/confusion over what is and is not permitted with regard to the treatment of prisoners and thus, indirectly, to the continued perpetration of abuse. Conversely, the circumstance that interrogation techniques amounting to torture happened to be allowed by specific orders governing procedures to be implemented by military units operating in the field poses another major problem: what should an officer do when the procedures of his unit allow the kind of interrogation techniques that amount to torture under national or international law? Due to lack of space such issues, although highly pertinent to the main question, cannot be exhaustively discussed in the present paper. See S. Horton, *Military Necessity, Torture, and the Criminality of Lawyers*, in Kaleck, Ratner, Singelstein, Weiss (ed.), *International Prosecution of Human Rights*, Springer, 2006, p. 169.

<sup>24</sup> See F. Jessberger, *Bad torture – Good Torture?*, *Journal of International Criminal Justice*, 2005, p. 1059-1073.

<sup>25</sup> Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, adopted with U.N. General Assembly Resolution No. 39/46, entered into force on June 26, 1987.

*committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such a pain or suffering is 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 .”*

Not only is torture prohibited by international treaty law; torture is also prohibited by customary international law<sup>26</sup>. The U.N. General Assembly in the preamble of the Convention against torture declared that the purpose of the Convention is to achieve “a more effective implementation of the existing prohibition under international and national law of the practice of torture and other cruel, inhuman or degrading treatment or punishment”<sup>27</sup>. This aim was pursued by requiring that States criminalise torture under their national law [art. 4(1)]<sup>28</sup>. Moreover, article 10 of the Convention mandates each State-party to promote education in the convention’s prohibition against torture for all civil or military personnel who may be involved in the “custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment”<sup>29</sup>.

The unconditional prohibition of torture is a *jus cogens* and *non-derogable* principle under international law<sup>30</sup>. The U.N. Convention reads that “*No exceptional circumstances whatsoever, whether a state of war, or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture*”<sup>31</sup>.

With regard to the state of war, it shall be noted that the four Geneva Conventions of 1949, which are the primary source of international humanitarian law, prohibit every use of “violence to life and person”, as well as “outrages upon personal dignity, in particular humiliating and degrading treatment”. More specifically, pursuant to the III and IV Geneva

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<sup>26</sup> For the affirmation of a general principle under international law prohibiting torture see A. Marchesi, *Il divieto di tortura nel diritto internazionale generale*, *Rivista di diritto internazionale*, 1993, p. 979 ff.

<sup>27</sup> U.N. General Assembly Resolution 39/46, Un/Doc. A/RES/39/46. Besides the general prohibition posed by the fundamental UN Convention against Torture of 1984, torture is banned by international HRL, being prohibited by several international and regional human rights law instruments; see *inter alia* Article 5 of the Universal Declaration of Human Rights of 1950; Article 7 of the International Covenant on Civil and Political Rights; Article 3 of the European Convention on Human Rights of 1950; Article 5 of the African Charter on Human and Peoples’ Rights of 1981; Article 20 of the Cairo Declaration on Human Rights in Islam of 1990.

<sup>28</sup> Under the U.N. Convention against Torture, the criminalization provision applies only to “torture”, which is distinguished from the more general category of “cruel, inhuman or degrading treatment or punishment”. However, according to art. 16(2) of the Convention, this is “*without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment ...*”. See N. Rodley and M. Pollard, *Criminalization of Torture: State obligations under the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment*, E.H.R.I.R., 2006, 115

<sup>29</sup> Pursuant to article 11 in order to prevent any case of torture each State Party shall keep under systematic review interrogation rules, instructions and methods for the custody and treatment of detainees.

<sup>30</sup> See P. Gaeta, *May necessity be available as a defense for torture in the interrogation of suspected terrorists?*, *Journal of International Criminal Justice*, 2004, p. 787.

<sup>31</sup> Article 2(2) of the U.N. Convention against Torture.

Conventions, torture or inhumane treatment of prisoners of war or protected persons are prohibited and constitute grave breaches of the Conventions<sup>32</sup>. Therefore under the Geneva Conventions they amount to war crimes<sup>33</sup>, which create an obligation on every State to prosecute or extradite the alleged perpetrators<sup>34</sup>. Furthermore, common article 3 of the Geneva Conventions, which is known as the ‘human treatment principle’<sup>35</sup> and widely recognized as a customary norm binding all participants in international and non-international armed conflicts<sup>36</sup>, applies to all persons affected by an armed conflict; hence it applies to all prisoners, irrespective of whether they are members of the national armies or insurgents, prisoners of war or “enemy combatants”<sup>37</sup>.

The protection against torture for every individual in every circumstance is further strengthened by its direct criminalisation under international criminal law. Pursuant to article 8 of the Rome Statute of the International Criminal Court<sup>38</sup>, acts of torture committed in the context of an international or non-international armed conflict amount to war crimes<sup>39</sup>. Torture also constitute a crime against humanity pursuant to article 7 of the Statute, if committed as part of a widespread and systematic attack against a civilian population.

Torture is prohibited also under national law. Within the U.S. system, the U.N. Convention against Torture was ratified and implemented by the U.S. Torture Statute of 1994, 18 U.S.C. sec. 2340 (which contains the definition of torture) and sec. 2340A (which criminalises the violation of the torture prohibition). Therefore, torture undoubtedly amounts to a crime under American domestic legislation, punished with a fine and with imprisonment for up to twenty years or with life imprisonment or even death, if the victim dies from the torture<sup>40</sup>.

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<sup>32</sup> See in particular article 17 of III Geneva Convention, concerning the prisoners of war, and article 31 of the IV Geneva Convention, concerning the “protected persons”.

<sup>33</sup> See articles 130 of the III Geneva Convention and 147 of the IV Geneva Convention.

<sup>34</sup> See articles 129 of the III Geneva Convention and 146 of the IV Geneva Convention.

<sup>35</sup> Article 3 common to the four Geneva Conventions of 12 August 1949, dealing with the *minima* guaranties to be applied during conflicts not of an international character. The commission of “outrages upon personal dignity, in particular humiliating and degrading treatment” are punished, amounting to serious violations of article 3 common to the four Geneva Conventions, i.e. to war crimes in the context of an armed conflict that is not of an international character.

<sup>36</sup> See J.J. Paust, *Command responsibility: Prosecuting military commanders and civilian ministers for violations of the Laws of war*, ILSA Journal of International and Comparative Law, 2006, 601 ff.

<sup>37</sup> Cf. C.A. Britt, cit., p. 560. As is well known, in fact, the U.S. denied the status of “war prisoners” to detainees of the war on terror in Iraq and Afghanistan. However, according to the Supreme Court, common Article 3 to the 1949 Geneva Conventions is applicable also to such detainees who do not qualify for prisoner of war protections (*Hamdan v. Rumsfeld*, see *infra* footnote 62).

<sup>38</sup> The Rome Statute of the International Criminal Court was adopted at the end of the diplomatic Conference of plenipotentiaries held in Rome in 1998 and entered into force in July 2002 following the 60<sup>th</sup> ratification. The Statute and all relevant documentation are available at [www.icc-cpi.int](http://www.icc-cpi.int).

<sup>39</sup> See Article 8, paragraphs 2(a)(ii) and 2(c)(i).

<sup>40</sup> Under the U.S. *Patriot Act* furthermore, conspiracy to commit torture is also a crime, see “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001”, Pub. L. no. 107-56, 115 Stat. 272, which amended 18 U.S.C. sec. 3121-3127.

Certainly, the U.S.A does have a long and advanced tradition with regard to military rules, and since long rejected the use of torture as well as every other form of cruelty also in the presence of a state of war<sup>41</sup>. Military personnel who mistreat prisoners can be prosecuted by a Court martial under various provisions of the Uniform Code of Military Justice (UCMJ)<sup>42</sup>. The current U.S. Army Field Manual ruling on intelligence interrogation, FM 34-52<sup>43</sup>, provides doctrinal guidance, techniques and procedures governing employment of interrogators in support of commander intelligence needs. The Manual itself reiterates that its principles and techniques of interrogation are to be used within the constraints established by the UCMJ and the Geneva Conventions. Thus, ever since, the U.S. policy regarding torture has remained – at least formally - one of “zero tolerance”<sup>44</sup>. However, as was noted by the former U.S. Assistant Secretary of State for democracy, Human Rights and Labor, “today, sadly the U.S. government seems to have not one, but two policies” regarding torture<sup>45</sup>: on the one hand, “in public rhetoric”<sup>46</sup>, the U.S.A. reaffirms its commitment to the worldwide elimination of torture and to prevent and prosecute all acts of torture and other cruel and unusual punishment in all territories under its jurisdiction, on the other hand “something very different seems to be happening in the shadowy areas of U.S. foreign policy”<sup>47</sup>.

### 3. *The post-September 11 ‘emergency policy’ and U.S. military legislation: the confusion about law and policy over permissible interrogation techniques*

Notwithstanding the absolute prohibition and clear definition of torture under international and domestic law, today’s confusion over the legal boundaries of prisoner interrogation techniques by American military personnel has recognizable grounds in some decisions adopted by the U.S. government and top-level military hierarchies. The situation can be traced back to a series of measures taken by the Bush administration in the aftermath

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<sup>41</sup> The first American military code, the *Lieber Code*, promulgated in 1863 by Abraham Lincoln as *General Orders no. 100 to the Armies of the United States in the Field*, has been seen by some authors as the very commencement of international humanitarian law for its human rights oriented content. In Lieber’s view, military necessity must always be balanced by proportionality and humanity. Therefore “military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge - nor of maiming or wounding except in fight, nor of torture to extort confessions....”. Article 14 of General Orders no. 100, made clear that even “military necessity” was subject to law and that under no circumstance it could justify acts of cruelty such as torture. Cf. S. Hornton, cit., p. 171 ff.

<sup>42</sup> Cf. articles 77-134 UCMJ.

<sup>43</sup> Cf. *supra* footnote 8.

<sup>44</sup> See President George W. Bush’s Statement of June 26, 2004 on the UN International day in support of victims of torture (available at <http://whitehouse.gov/news/releases/2004/06/20040626-19.html>). See on the point, H.H. Koh, *Can the President be Torturer in Chief?*, Indiana Law Journal, 2006, p. 1145 ff.

<sup>45</sup> See H.H. Koh, *Can the President be Torturer in Chief?*, cit., p. 1145 ff.

<sup>46</sup> *Ibid.*, p. 1148.

<sup>47</sup> *Ibid.*, p. 1149. The Author suggests that the U.S. policy regarding torture would have passed from one of “zero tolerance” to one of “zero accountability”.

of the September 11, 2001 terrorist attack on the World Trade Centre. In the effort to react as strongly as possible, the Bush administration took some measures that “circumvented”<sup>48</sup> international law: among these, it was decided that suspect terrorists detained in the U.S. naval station at Guantanamo Bay, Cuba (*Guantanamo*) were not subject to the Geneva Conventions<sup>49</sup>; they were labeled as “unlawful combatants” instead of prisoners of war<sup>50</sup>. It was furthermore decided that interrogations at *Guantanamo* could be more ‘stringent’ than those proscribed by FM 34-52, which could be circumvented as a consequence of the non-applicability of the Geneva-Conventions. Such a decision opened the doors to a number of terrible legal abuses that crossed *Guantanamo*’s boundaries and spread to the theatres of war in Afghanistan and Iraq: “If it was permissible for *Guantanamo* interrogators to ignore FM 34-52, officers likely reasoned that it was also permissible to ignore FM 34-52 in Iraq”<sup>51</sup>. It has been patently demonstrated that the interrogation techniques applied in Iraq by U.S. military soldiers derived from those used in *Guantanamo*. In particular, following the arrival at *Abu Ghraib* of US-Major General Miller, who had served as Commander of the Joint Task Force at *Guantanamo*, there was “an informal migration of policies and procedures from one theater to another”<sup>52</sup>. With the ‘legal’ endorsement of some attorneys of the department of Justice and of the department of Defense, the interrogators, when confronted with suspected terrorists, were allowed to deviate from the interrogation techniques proscribed by FM 34-52. The *Bybee Opinion*<sup>53</sup> of August 1, 2002, for instance, explores the question whether U.S. officials can use tactics tantamount to torture against suspected terrorists, without being held liable under the Federal Statute that criminalizes torture. Despite the standing prohibition of torture, the *Bybee Opinion* concludes that American officials can use such tactics in specific cases without being held liable. This conclusion was the result of three legal errors: first, by adopting an extremely narrow definition of torture<sup>54</sup>; second, by declaring that the criminal prohibition against torture does not apply to the President or to the interrogation of “enemy

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<sup>48</sup> HRW Report, cit., p. 1.

<sup>49</sup> U.S. Government lawyers and high ranking officials effectively declared that the war on terror rendered “obsolete” legal restrictions - such as the rules on treatment of prisoners and interrogation of detainees - outlined by the Geneva Conventions of 1949, which were not suitable for “a new kind of warfare”.

<sup>50</sup> Cf. C.A. Britt, cit, p. 556.

<sup>51</sup> *Ibid.*

<sup>52</sup> Cf. T. Golden & E. Schmitt, *General took Guantanamo rules to Iraq for handling prisoners*, New York Times, May 13, 2004. On the “migration” of interrogation and operational procedures following the arrival of MG Miller at *Abu Ghraib*, see the *Taguba Report*, cit., p. 6 ff.

<sup>53</sup> Memorandum opinion sent by General Jay S. Bybee – then-Assistant Attorney of the Office of Legal Counsel (OLC) to the then-Counsel to the President Alberto R. Gonzales, “Regarding Standards of Conduct for Interrogation under 18 U.S.C. sec. 2340-2340A”. It is available at <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>. It is useful to recall that the “OLC of the United States Department of Justice is the most important legal office in the United States Government, for it authoritatively determines the executive branch’s legal position on matters not in litigation”, see H.H. Koh, cit., p. 1149

<sup>54</sup> According to the Bybee opinion this would be the infliction of “physical pain ... equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death”.

combatants” under Commander-in-Chief authority; and third, by reasoning that any congressional statute that regulates interrogation of suspects is unconstitutional because it violates the President’s Commander-in-Chief powers<sup>55</sup>. Therefore, the *Bybee opinion* claims that lower executive officials can escape prosecution for illegal torture techniques on the ground that “they were implementing the President’s Commander-in-Chief powers”<sup>56</sup>, which would rule out the applicability of the Federal Statute against Torture<sup>57</sup>. The *Bybee opinion*, which was sharply criticised when brought to public attention, was withdrawn by the OLC<sup>58</sup> after two years, which means that for a long time it “stood as the official executive branch interpretation of Federal official’s liabilities with regard to torture and cruel treatment”<sup>59</sup>. All this resulted in an internal situation of extreme confusion over what is and what is not permitted with regard to detention and interrogation of prisoners<sup>60</sup>. In the light of the military’s failure to give clear interrogation guidance and in order to put an end to this lack of clear standards, on December 14, 2005 the U.S. House of Representatives overwhelmingly voted Senator McCain’s proposal imposing “new limits on interrogating detainees in Iraq”, in particular by prohibiting the use of “cruel, inhuman, or degrading treatment”<sup>61</sup>. The day after, the White House - succumbing to strong congressional pressure<sup>62</sup> - backed Senator McCain’s Amendment to the Defense Authorization Act, which was finally included in the 2006 Defense Appropriations Bill. The Amendment applies to all U.S. personnel everywhere with regard to every individual in the custody or physical control of the U.S.A. and requires all U.S. troops to follow Army Field Manual procedures on detaining and interrogating military personnel.

Notwithstanding this and other significant positive signals arising from inside the American system itself<sup>63</sup>, recent legislative initiatives by the U.S. Administration, although

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<sup>55</sup> According to the *Bybee opinion*, “Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief power in the President”.

<sup>56</sup> Thus considering the “just following orders” doctrine as a valid defense.

<sup>57</sup> See H.H. Koh, *cit.*, p. 1150-1.

<sup>58</sup> See the *Levin Memorandum* of December, 30, 2004; “Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, to James C. Comey, Deputy Attorney General, Regarding Legal Standards Applicable under 18 U.S.C. sec. 2340-2340A”, available at <http://www.justice.gov/olc/dagmemo.pdf>.

<sup>59</sup> H.H. Koh, *cit.*, p. 1149-50.

<sup>60</sup> A sample of such confusion is offered by the reported experience of the U.S. Captain Ian Fishback, an Army officer who served in Afghanistan and Iraq, who spent almost two years trying to clarify the rules for interrogation and treatment of prisoners. Searching for clear guidance, he contacted every possible source, including his commanders. Failing to receive any satisfactory directions, he ended up writing to U.S. Senator McCain asking for clear standards for interrogations, what finally resulted in the new legislation included in the 2006 Defense Appropriations Bill. See for more details, C.A. Britt, *cit.*, 554.

<sup>61</sup> See C. Babington & S. Murray, Senate supports interrogation limits, *Washington Post*, October 6, 2005.

<sup>62</sup> For more details see, H.H. Koh, *cit.*, p. 1153-5.

<sup>63</sup> Reference is made, in particular, to the U.S. Supreme Court decision of June 29, 2006, *Hamdan v. Rumsfeld* no. 05-184, which declared the illegitimacy of the Military Commissions set up pursuant to President Bush’s Military order of November 13, 2001, to proceed against “enemy combatants”

officially adopted for the purpose of restoring clear legal standards also with regard to interrogation techniques, are regarded with deep concern. In particular, the Military Commission Act of 2006, which amends the War Crimes Act of 1996, redefines the notion of war crimes as to exclude from the notion of torture the “alternative interrogation procedures” which were developed and implemented by CIA members and U.S. military personnel against suspected terrorists<sup>64</sup>.

#### 4. “Allocating” criminal liability - the need to ascertain higher level responsibilities

Interrogation tactics, such as the use of dogs, terror methods and various other forms of degrading treatment, as the ones that were implemented in Iraq and Afghanistan by U.S. militaries, are patently illegal under international customary and treaty law, human rights law, and criminalised under both international and national criminal law<sup>65</sup>.

Although it is not yet clear whether such torture techniques and mistreatment of prisoners were formally approved or whether they were informally encouraged and at which levels of the U.S. government, a wide debate has arisen among American scholars, lawyers and in the public opinion, resulting in a call to ascertain the criminal responsibilities of high-ranking U.S. military officials and of high-level policy makers<sup>66</sup>. So far only nine low-ranking soldiers have been tried before U.S. Military Courts for their involvement in prisoner abuse at *Abu Ghraib*<sup>67</sup>, which is regarded as unsatisfactory, not only for the sake of *retribution* but also

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detailed out of the U.S.A. for “violations of the laws of war and other applicable law”. See also U.S. Supreme Court decision of June 28, 2004, *Hamdi v. Rumsfeld* no. 03-6696. The Military Commission Act of 2006, though, has already partially nullified the positive effects of these decisions, see M. Miraglia, *Lotta al terrorismo internazionale negli U.S.A.: morte e resurrezione delle military commissions*, Diritto Penale e Processo, 2006, p. 1566 ff.

<sup>64</sup> See S. Horton, *When Lawyers are War Criminals*, unpublished paper, remarks delivered at the ASIL Centennial Conference on the Nuremberg War Crimes Trial, Bowling Green, OH, October 7, 2006. Through this Act, which was given retroactive effect, to September 11, 2001, the Bush administration would seek to grant impunity in particular for the “policy makers”, responsible for the endorsement of “unconventional” or “extraordinary” interrogation techniques such as “waterboarding”, “long time standing” or “hypothermia”.

<sup>65</sup> See the Amnesty International Report of 6 March 2006 “*Beyond Abu Ghraib: detention and torture in Iraq*”, available at <http://web.amnesty.org/library/index/engmde140012006>.

<sup>66</sup> It is interesting to note that a similar debate arose in the U.S.A. during the Vietnam conflict, in particular after the atrocities that occurred in My lai and other villages in March 1968. See, with references, W.H. Parks, *Command Responsibility for war crimes*, Military Law Review, 1973, 1, footnote 1.

<sup>67</sup> According to the U.S. Government, as of October 2005, 54 military personnel could be implicated in the *Abu Ghraib* incidents and there have been 65 courts-martial in relation to the acts of abuse in Iraq, cf. United States of America, Update to Annex One of the Second Periodic Report of the United States of America to the Committee against Torture, 21 October 2005, UN Doc. CAT/C/48/Add.3, available at [www.state.gov/g/drl/rls/55721.htm](http://www.state.gov/g/drl/rls/55721.htm). Twelve officers above the rank of Colonel were investigated for the *Abu Ghraib* abuse, but none of the allegations involved criminal charges cf. T. Bowman, *Top officers are reported cleared over Abu Ghraib*, The Baltimore Sun, April 23, 2005.

and mostly for the sake of *prevention*<sup>68</sup>. It is a recurrent question whether the abuse perpetrated by ordinary American soldiers against detainees in Iraq (or in Afghanistan and in Guantanamo) can be imputed to the higher military echelons, to the top-level policy makers and legal officers, or even to the White House<sup>69</sup>. In the opinion of many, the unlawful interrogation techniques used by U.S. military personnel in Iraq and Afghanistan should be viewed as the result of decisions taken at the highest levels. The fact that Senior U.S. officials, including former Secretary of Defense Donald Rumsfeld<sup>70</sup> and Lieutenant General Ricardo Sanchez<sup>71</sup>, issued orders (although later rescinded) allowing harsher interrogation techniques than those outlined in FM 34-52, led someone to affirm that, not only did they not counter the idea that these techniques were prohibited, but they also made decisions that led to the current situation and therefore they should be held responsible for war crimes<sup>72</sup>.

On this basis a complaint was brought on behalf of eleven Iraqi and one Saudi Arabian prisoners against Defense Secretary Donald Rumsfeld and other high-ranking U.S. officials and members of the CIA before the German federal Prosecutor in Karlsruhe<sup>73</sup>. There it was affirmed that: “while none of the high-ranking persons named were personally involved in the abuse, the acts of their subordinates could be imputed to them”. According to the testimony of Brigadier General Karpinski (which is attached to the complaint), a written authorization signed by Rumsfeld, approving a short list of interrogation techniques, hung on a pole outside *Abu Ghraib*. These included: “use of dogs; stress position; loud music; deprivation of food”.<sup>74</sup> No doubt that, if proven, the authorization of such illegal tactics could lead to the conviction of former U.S. Secretary of Defense for the cruel, inhuman and degrading treatment inflicted by U.S. soldiers against Iraqi detainees at *Abu Ghraib*.

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<sup>68</sup> See the conclusions of the *Taguba report*, which considered the implementation of measures tackling the highlighted command insufficiencies essential “to establishing the conditions with the resources and personnel required to prevent future occurrences of detainee abuse”, cit., p. 50.

<sup>69</sup> See, among many, E. Allen, *Chain of Command: can torture in Iraq be linked to the White House?* The Financial Times, June 17, 2004, 21; D. Lindorff, *The real meaning of the Hamdan Ruling Supreme Court: Bush Administration has committed war crimes*, CounterPunch, July 3, 2006; Human Rights Watch, *U.S.: Rumsfeld potentially liable for torture*, April 14, 2006.

<sup>70</sup> Donald Rumsfeld was forced, according to many commentators, to resign on November 8, 2006, following the mid-term election defeat of the Bush administration, also because of the scandals attached to the Iraqi war.

<sup>71</sup> Commander of the U.S. Combined Joint Task Force 7; He commissioned the *Taguba report* to investigate the conduct of the 800<sup>th</sup> Military Police Brigade.

<sup>72</sup> C.A. Britt, cit., p. 556-7.

<sup>73</sup> On the complaint against D. Rumsfeld and others, filed in 2004 before the German Federal Prosecutor in Karlsruhe (responsible for proceedings regarding crimes under international law) by a group of American and German NGOs and Human Rights Lawyers, see F. Jessberger, *Universality, Complementarity, and the duty to prosecute crimes under international law in Germany*, in *International Prosecution of Human Rights*, cit., p. 213 ff. After the rejection by the Federal Prosecutor on February 2005, a second complaint was filed before the same judicial authority in November 2006. The complaint and all relevant documentation are available at [www.diefirma.net](http://www.diefirma.net).

<sup>74</sup> General Karpinski reportedly added that “a handwritten message over to the side that appeared to be in the same handwriting as the signature said ‘Make sure this happens’ with two exclamation marks”, reported by J.J. Paust, *Command responsibility: Prosecuting military commanders and civilian ministers for violations of the Laws of war*, ILSA Journal of International and Comparative Law, 2006, p. 604.

Pursuant to general principles of criminal law, not only the direct perpetration of acts of torture, but also any form of participation or complicity thereto is criminally relevant<sup>75</sup>. Therefore high-ranking officials who instigated, ordered, authorized or approved or otherwise aided and abetted the commission of illegal techniques amounting to torture by their soldiers, are plainly criminally liable of torture under national and international law for their participation or complicity in the crimes committed by subordinates<sup>76</sup>. Furthermore, it should be noted that under international criminal law individuals holding positions of command or authority may be criminally responsible for the subordinates' crimes not only upon evidence of positive acts of participation in the crimes, such as the ordering, authorizing or planning the unlawful act. International criminal law provides for a form of criminal liability, known as *command* or *superior responsibility*, pursuant to which a superior can be held criminally responsible for the crimes committed by his subordinates as a consequence of his failure to prevent or repress such crimes.

The following part of the paper, therefore, analyses the elements required under international criminal law for this form of liability to apply.

## **Part II – Superior responsibility under international criminal law**

### *5. The meaning of the expression “command” or “superior responsibility”*

Often, the repeated and systematic occurrence of crimes in war-time contexts happens to be the result of a criminal policy or plan from the highest echelons exercising command and control over the perpetrators. However, the commission of crimes on a large scale or the systematic violations of the laws of war can also be, on the contrary, the ‘trivial’ consequence of the lack of a clear chain of command and control. Both the exercise of the powers of command and control (in the case of a criminal plan or policy), and the failure to exercise them may imply criminal responsibilities upon superiors and commanders in the presence of the specific requirements under international law.

“*Command responsibility* is an umbrella term used in military and international law to cover a variety of ways in which individuals in positions of leadership may be held

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<sup>75</sup> This principle is further guaranteed by article 4(1) of the UN Convention against Torture, which provides that “each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture”.

<sup>76</sup> A question could arise whether willful blindness, consent or acquiescence would in all cases be covered by the legal concepts of “complicity or participation” as provided for by article 4 of the UN Convention. A strong argument in support of an affirmative answer can be found in the works of the Group that drafted the Convention against Torture, which concluded that “*complicity or participation*” also embraced acts relating to “*cover-up*” or concealment of incidents of torture. Under the UN Convention against Torture, States are therefore obliged to criminalize positive acts aimed at concealing an act of torture or leaving it unpunished.

accountable<sup>77</sup>. In its original meaning this concept is used to cover every type of liability that attaches to a military commander for failing to properly discharge his duties and responsibilities of command. Such a liability for dereliction of duty can in turn be civil, disciplinary<sup>78</sup> or criminal in nature. Of late, however, *command responsibility* refers to superior's criminal liability for the criminal conduct of his underlings. The expression *command responsibility* in the latter sense may be found in literature implied with a broader (*lato sensu*) or a narrower (*stricto sensu*) sense. On the one hand, the type of responsibility that attaches to the superior that ordered, instigated, aided and abetted or anyhow took part in the commission of his subordinates' crimes is often indicated as command responsibility *lato sensu*<sup>79</sup>. On the other hand, command responsibility *stricto sensu* refers to the principle of individual criminal responsibility of superiors for failure to prevent or repress the crimes committed by subordinates. Such a form of liability – which is the specific subject matter of the following paragraphs – concerns the superior who knew or had reason to know that his subordinates were committing or had committed crimes and failed to take proper measures to prevent the commission of such crimes or to punish them. Although nowadays the expression *superior responsibility* is to be preferred, since it comprises both the military commander and the civilian superior, whereas *command responsibility stricto sensu* may be understood as referring only to the military personnel, the traditional military expression is still largely in use also with regard to non-military superiors. Therefore, in the present paper both expressions will be used without implying any substantial difference of meaning.

## 6. Sources and jurisprudential developments of command or superior responsibility

a) *Post Second World War jurisprudence*: Command responsibility has been recognized as a principle of customary international law for a long time<sup>80</sup>. The remote origins of this mode of liability are clearly to be found within the military field<sup>81</sup>. The duty of a commander to control his troops and his corresponding responsibility for their illegal conduct

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<sup>77</sup> M. Damaska, *The shadow side of command responsibility*, *The American Journal of Comparative Law*, 2001, p. 455 ff.

<sup>78</sup> The U.S. Department of Army Field Manual 22-100, for instance, which is titled "Army leadership" stipulates that "leaders have responsibility for what their sections, units or organizations do or fail to do". Such a "command responsibility" doctrine however usually results only in administrative punishment for the officer.

<sup>79</sup> Article 25(3) of the Statute of the International Criminal Court establishes that: "A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (...) (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission (...)". For an analysis of the different forms of individual liability here outlined see G. Werle, *Principles of International Criminal Law*, Asser, 2005, p. 116 ff.

<sup>80</sup> ICTY Judgment, Delalic et al. (IT-96-21-T), Trial Chamber, 16 November 1998 (hereinafter Celebici Judgment), par. 333-4. See also K. Ambos, *Superior Responsibility*, in A. Cassese, P. Gaeta, J. Jones (ed), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, p. 825-48.

<sup>81</sup> See the very interesting historical and legal analysis of war crime trials involving command responsibility, starting from the very remote origins of the concept, by W.H Parks, cit., p. 1 ff.

was developed since centuries along national and international paths. With regard to the United States of America, Section IX of the American Articles of War of 1776, enacted on September 20 1776, already provided for a form of command responsibility<sup>82</sup>. However, it was not until the Second World War that this principle addressing the criminal liability of the military commander found its first jurisprudential applications. During the Nuremberg trial and in the subsequent proceedings against German war criminals after the Second World War<sup>83</sup> most of the charges were based on positive acts (of commission). Some important trials before U.S. military courts<sup>84</sup>, however, also referred to culpable omissions and to concepts such as that of “*acquiescence*”<sup>85</sup> in order to ascertain the criminal responsibilities of individuals holding positions of command or authority. Probably the most famous and controversial<sup>86</sup> case of conviction on the basis of the principle of command responsibility is that of Japanese General Yamashita, who was condemned to death by an American military tribunal because he “*unlawfully disregarded and failed to discharge his duty as a commander to control the operations of the members of his command, permitting them to commit the brutal atrocities and other high crimes*”<sup>87</sup>. The most important legacy of the Yamashita trial is to have recognized, with regard to military officers in positions of command, the existence of an affirmative duty to take such steps as are within their power and appropriate to the circumstances to control those under their command for the prevention of violations of the law of war<sup>88</sup>. The doctrine of command responsibility was largely used against Japanese war criminals during the Tokyo trial<sup>89</sup>. In particular, abuses of prisoners were attributed to both civil and military superiors for having failed to prevent them. A kind of collective superior responsibility was applied in order to extend criminal responsibility to the members of the

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<sup>82</sup> In particular the provision contained a form of command responsibility for failure to punish, see W.H. Parks, cit., 5; the A. further notes that “Thus from the very outset of this nation [i.e. the U.S.A], there was imposed upon the military commander the duty and responsibility for control of the members of his command”.

<sup>83</sup> Reference is made to the “subsequent proceedings” i.e. the Trials of war criminals before military allied courts under Control Council Law No. 10. For an overall analysis of such proceedings see H. Ahlbrecht, *Geschichte der voelkerrechtlichen Strafgerichtsbarkeit im 20. Jahrhundert*, Nomos 1999.

<sup>84</sup> See in particular, U.S. v. Karl Brandt et al. (the Medical case), Law reports, vol. II, 171; U.S. v. Wilhelm von Leeb et al. (the High Command case), cit.; U.S. v. Wilhelm List et al. (the Hostage case), Law reports, vol. XI, 1.

<sup>85</sup> “*Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur (...) where his failure to properly supervise his subordinates constitutes criminal negligence on his part. (...) It must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence*”. U.S. v. Wilhelm von Leeb (the High Command Case), Law Reports, vol XI, at 544.

<sup>86</sup> The criticism focused in particular on the legal standard adopted by the judges with regard to the mental element of the accused, which was considered to be one of imputed knowledge or strict liability, see R. Lael, *The Yamashita precedent. War crimes and command responsibility*, Delaware, 1982.

<sup>87</sup> Cf. The United Nations War Crimes Commission, Law Reports of Trials of War Criminals 1947-48 (Law Reports), vol. IV, p. 3 ff.

<sup>88</sup> See W.H. Parks, cit., p. 37.

<sup>89</sup> About the “Tokyo judgment” before the International Military Tribunal for the far East (IMTFE) see B.V.A. Roeling (ed.), *The Tokyo Judgment: the International Military Tribunal for the far East*, 29 April 1946 – 12 November 1949, Amsterdam, 1971.

Japanese government<sup>90</sup>. The standard adopted was extremely broad<sup>91</sup>: the judges went so far as to state that a member of the government becomes responsible for the abuse committed in the prison camp if he did not take adequate steps to prevent or investigate the situation or even if he did not resign<sup>92</sup>. With regard to the jurisprudence after Second World War, it is interesting to note that for the first time not only military but also civilian authorities were found guilty of war crimes and crimes against humanity committed by underlings<sup>93</sup>.

b) *Article 86 of Additional Protocol 1*: The First international instrument that expressly codified command responsibility is article 86(2) of the I Additional Protocol of 1977 to the 1949 Geneva Conventions<sup>94</sup>. The wording of this article, however, did not determine the nature of the responsibility to be attached to the superior for his failure to act, whether penal or disciplinary “as the case may be”<sup>95</sup>. It shall be recalled that as a general rule, criminal responsibility can only be established if the person who failed to act was under a duty to do so<sup>96</sup>. Article 86, paragraph 2, should be read in conjunction with paragraph 1 of the same article and with article 87, which outlines the duties of commanders. Pursuant to articles 86 and 87 of Additional Protocol I, thus, “*with respect to members of the armed forces under their command and other persons under their control*”, commanders have a duty to prevent the commission of breaches of the Geneva Conventions and, where necessary, to suppress and report them to competent authorities. In order to prevent and suppress breaches and

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<sup>90</sup> See in particular the convictions of Mamoru Shigemitsu, and of Koki Hirota, Ministers of Foreign Affairs during the war period where mistreatment of prisoners of war occurred, and relative dissenting opinion of Judge Roeling in, B.V.A. Roeling, *The Tokyo Judgment*, cit.

<sup>91</sup> For a critical reflection on the Tokyo Trial and its convictions, see A. Cassese (ed.), *B.V.A. Roeling, The Tokyo trial and beyond. Reflections of a peace monger*, Polity press, 1994.

<sup>92</sup> “A cabinet member may resign. If he has knowledge of ill-treatment of prisoners, is powerless to prevent future ill-treatment, but elects to remain in the cabinet thereby continuing to participate in its collective responsibility (...) he willingly assumes responsibility for any ill-treatment in the future”, the Tokyo Judgment, cit. vol. 1, p. 30.

<sup>93</sup> In precedents of post World War II in fact “command responsibility has been imposed on, e.g. (i) armed forces commanders in respect of acts of persons whom they can control but are not formally under their authority in the chain of command; (ii) a commander in charge of occupied territory for acts committed in that territory by persons not formally under their command; (iii) an officer with operational authority, but not administrative authority, over the perpetrators, and hence without formal powers of discipline; (iv) the business manager of an enterprise employing concentration camp labor, in respect of the conditions to which the laborers are exposed; (v) a chief of staff to a military governor and (vi) the foreign minister of a country. ICTY Celebici Judgment, par. 370-6.

<sup>94</sup> The U.S.A. has not ratified the Protocol, however its basis and content is so well established that it is considered to be customary international law, therefore applicable also to states that haven't ratified it, see the Affidavit of J. Lobel on *Direct and indirect responsibility of commanders and superiors for war crimes and crimes against humanity under international law*, attached to the complaint against D. Rumsfeld, see supra footnote 73.

<sup>95</sup> Such a determination was left to the domestic law, see M. Damaska, cit., p. 486. Article 86(2) provides that “*The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.*”

<sup>96</sup> See J. De Preux, *Article 86 – failure to act, and Article 87 - duty of commanders*, in International Committee of the Red Cross (ed.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987, par. 3537.

“commensurate with their level of responsibility”, pursuant to article 87(2) commanders shall ensure that their subordinates are aware of their obligations under the Geneva Conventions. The latter provision appears particularly significant for its pertinence to the “very essence of the problem of enforcement or treaty rules in the field”<sup>97</sup>. Such form of liability derives indeed from the concept of “responsible command”<sup>98</sup>:

*“The purpose behind the principle of responsible command and the principle of command responsibility is to promote and ensure the compliance with the rules of international humanitarian law. The commander must act responsibly and provide some kind of organizational structure, has to ensure that subordinates observe the rules of armed conflict, and must prevent violations of such norms or, if they already have taken place, ensure that adequate measures are taken”<sup>99</sup>.*

Command responsibility was then included in the Draft Code of Crimes against Peace and Security of Mankind of 1996 elaborated by the International Law Commission; in its commentary the Commission stated that a military commander can be held criminally liable for the unlawful conduct of his subordinates if he contributes directly or indirectly to the commission of a crime by his subordinates and that he “*contributes indirectly to the commission of a crime by his subordinates by failing to prevent or repress the unlawful conduct*”<sup>100</sup>.

c) *ICTY and ICTR jurisprudence*: the most significant developments regarding this mode of liability were achieved through the extensive jurisprudence of the two International ad hoc Tribunals<sup>101</sup>. Both the statutes of the ICTY and of the ICTR contain an express provision on superior responsibility which states that:

*“The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superiors of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or*

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<sup>97</sup> See J. De Preux, cit., par. 3550. Again, in order to ensure the application of the Conventions and of the Protocol, article 82 also provides that legal advisers must be available to advise the military commanders on the instructions to be given to soldiers in the field and article 83 provides that rules must be disseminated as widely as possible.

<sup>98</sup> Such a concept was already included in the Hague Conventions of 1907; in particular article 1 of the Annex to the Fourth Convention, respecting the laws and customs of war on land, requested that an armed force be “*commanded by a person responsible for his subordinates*” as a necessary condition to fulfill in order to be accorded the status of a lawful belligerent; Article 43 of the same Annex also requires that armed forces be placed “*under a command responsible (...) for the conduct of his subordinates*” that “*(...) shall take all measures in his power to restore, and ensure as far as possible, public order and safety, while respecting, unless absolutely prevented the laws in force in the country*”, for references see W.H. Parks, cit., p. 10-11.

<sup>99</sup> ICTY Judgment, Hadzihasanovic (IT-01-47-PT), Trial Chamber, 15 March 2006, par. 66.

<sup>100</sup> See the ILC Commentary on the 1996 Draft, available at [www.untreaty.un.org/ilc/texts/instruments](http://www.untreaty.un.org/ilc/texts/instruments).

<sup>101</sup> International Criminal Tribunal for the former Yugoslavia (ICTY), established pursuant to Security Council Resolution 827/1993; International Criminal Tribunal Ruanda (ICTR) established pursuant to Security Council resolution 955/1994. Both the statutes and all judgments of ICTY and ICTR are available online, respectively at [www.un.org/icty](http://www.un.org/icty) and [www.un.org/icttr](http://www.un.org/icttr).

*had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof*<sup>102</sup>.

On this basis, the jurisprudence of the ICTY and of the ICTR, which largely elaborated on the subject, constantly found that three elements need to be proven for superior responsibility to be fulfilled: 1) a superior-subordinate relationship between the accused and the alleged perpetrators of the crimes; 2) the mental element of the superior, i.e. that the superior knew or had reason to know that the perpetrator was about to commit the crime or had done so; 3) the failure to take the necessary measures to prevent the crime or to punish the perpetrators thereof<sup>103</sup>. Notwithstanding some initial doubts<sup>104</sup>, the judges have interpreted the term *superior* so as to cover both the military commander as well as the civilian superior. It is undisputed today that superior responsibility extends also to civilian leaders, as Heads of State or Government officials or other civilians holding positions of authority<sup>105</sup>:

*“The principle of superior responsibility applies not only to military commanders, but also encompasses political leaders and other civilian superiors in positions of authority. The crucial question is not the civilian status of the accused, but the degree of authority he or she exercised over his or her subordinates”*<sup>106</sup>.

Moreover, not only *de jure* but also *de facto* commanders and superiors may incur criminal liability under this doctrine. The judges of the ad hoc Tribunals, in fact, consistently found that the mere absence of formal legal authority over the perpetrators of the crimes does not rule out the imposition of superior responsibility on the subject, as long as he exercised *effective control* over them, in the sense of having the material ability to prevent and punish the commission of the offences. No doubt, a chain of command or authority and control is a necessary prerequisite to impute superior responsibility. However, according to this jurisprudence, criminal liability can attach to the superior also with regard to acts perpetrated by subjects who are not directly subordinate to him in the chain of command<sup>107</sup>. Indeed such a concept of *indirect subordination* was already used during the post Second

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<sup>102</sup> Cf. Article 7(3) of ICTY Statute and article 6(3) of ICTR Statute.

<sup>103</sup> See ICTY Celebici Judgment, par. 346. A fourth element can be rightly added, namely the commission of the crime by others than the superior, see ICTY Judgment, Oric (IT-03-68-T), Trial Chamber, 30 June, par. 294.

<sup>104</sup> ICTR Judgment, Akayesu (ICTR-96-4-A), Trial Chamber, 2 September 1998, par. 490-1.

<sup>105</sup> ICTY Celebici Judgment, par. 356, confirmed in appeal, Appeal Chamber, 20 February 2002 (hereinafter Celebici Appeals Judgment), see in particular par. 196, 240, 354-63. As in this judgment, most of the cases of civilian superior responsibility the ICTY has had to deal with referred to “camp commanders”, i.e. to subjects having the power to control detention camps, who were held responsible for crimes committed by prison guards against the prisoners of the camp. As affirmed in the Aleksovski case “*it does not matter whether he was a civilian or military superior, if it can be proved that, within the Kaonik prison, he had the powers to prevent or to punish in terms of Article 7(3)*”, ICTY Judgment, Aleksovski (IT-95-14/1-A), Appeals Chamber, 24 March 2000, par. 76.

<sup>106</sup> ICTR Judgment, Kayishema and Ruzindana (ICTR-95-1-T), Trial Chamber, 21 May 1999, par.213-6.

<sup>107</sup> See ICTY Judgment, Strugar (IT-01-42-T), Trial Chamber, 31 January 2005 (hereinafter Strugar Judgment), par. 362 ff.

World War jurisprudence and recognized within the meaning of article 86 I Add. Prot.<sup>108</sup>. This implies also that more than one superior may be held responsible for the same crime committed by subordinates<sup>109</sup>. These arguments do not exclude of course the need to maintain the link of subordination; as was affirmed, in fact, “great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote”<sup>110</sup>. A position of command is indeed always a necessary precondition for the imposition of command responsibility, which means that persons in non-command positions, such as advisers to a military commander or unit, who may be in a position to influence commanders, will not be held criminally responsible on that basis<sup>111</sup>.

#### 7. *The elements of superior responsibility under article 28 of the Rome Statute of the International Criminal Court*

Superior responsibility under article 28 of the Rome Statute of the International Criminal Court (ICC) provides for an independent basis for individual liability distinct from the other modes of liability under article 25 of the Statute<sup>112</sup>. According to the wording of article 28<sup>113</sup>, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by his subordinates as a result of his failure to exercise control properly where he knew or should have known that the crimes were being committed, or about to be committed, and he failed to take all necessary and reasonable measures within his power to prevent or repress the crime or to submit the matter to the competent authorities.

Article 28 focuses on the concept of effective command/authority and control of the superior over the perpetrators of the crimes. Such a decisive criterion - the “effective control” - to impute superior responsibility applies to *de jure* as well as to *de facto* commanders; it applies *mutatis mutandis* also to civilian superiors. The Statute of the ICC for the first time expressly recognizes the applicability of this mode of liability to civilian superiors. The constituent elements of *command responsibility* regarding military commanders or persons effectively acting as military commanders (art. 28, lett. a), partly differ from the constituent elements of *superior responsibility* of civilian superiors (art. 28, lett. b). It may be noted that with regard to civilian superiors more difficulties arise in demonstrating the holding of powers to prevent and punish, i.e. effective control over the perpetrators of the crimes; civilian

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<sup>108</sup> See J. De Preux, *Article 87*, cit, par. 3555.

<sup>109</sup> Cf. ICTY Strugar Judgment, par. 365.

<sup>110</sup> ICTY Celebici Appeals Judgment, par. 197-8.

<sup>111</sup> ICTY Celebici Judgment, par. 364-370.

<sup>112</sup> See *supra* footnote 79.

<sup>113</sup> Article 28 is generally interpreted as being consistent with existing customary law on the subject and “constitutes an adequate restatement of it”, see C.M. Bassiouni, *Crimes against humanity in International Criminal Law*, Kluwer, 1999, p. 443.

leaders, in fact, lack the power of command typical of military commanders<sup>114</sup>. As a consequence, also the duties of civilian superiors at the basis of superior responsibility partly differ from those of military commanders, in particular with regard to the duty to punish<sup>115</sup>. Besides the differences already outlined by the jurisprudence of the ad hoc Tribunals, which are reflected in the wording of article 28<sup>116</sup>, under the latter provision, two different standards are required for superior responsibility to be fulfilled as regards the mental element. On the one hand, to be held responsible for the crimes of his subordinates a civilian superior must at least have “*consciously disregarded information which clearly indicated*” the commission of the crimes; on the other hand, with regard to the military commander it suffices that he “*should have known*” “*owing to the circumstances at the time*” about the commission of the crimes. Thus, in the latter case the superior can be punished also on the basis of a negligent behaviour, which represents an exception to the general rule adopted by the Statute, i.e. that the crimes falling under the competence of the Court may be punished only if committed with intent and knowledge<sup>117</sup>. According to this provision, if a commander is negligent by failing to require and obtain complete information on the on-going events and on the conduct of his troops (in other words if he loses control over his soldiers) he may not plead innocent arguing that he did not know about the crimes.

#### 8. *The importance of preventive measures under the superior responsibility doctrine*

Under international law the original meaning of command responsibility is thus to ensure that the provisions of international law are respected. As has been variously reaffirmed in jurisprudence “*the doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates*”<sup>118</sup>. The concept of superior itself has been interpreted in terms of hierarchy encompassing the concept of control. “*As long as a superior has effective control over subordinates, to the extent that he*

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<sup>114</sup> A question has arisen within ICTY jurisprudence, whether “substantial influence” is a sufficient basis in order to impute criminal liability under the superior responsibility doctrine; the judges denied this possibility, see ICTY Judgment, Kordic and Cerkez (IT-95-14/2), Trial Chamber, 26 February 2001, par. 414 ff.

<sup>115</sup> “It cannot be expected that a civilian authority will have disciplinary power over his subordinate equivalent to that of the military authorities in an analogous command position ...”, ICTY Judgment, Aleksovski (IT-95-14/1-T), Trial Chamber, 25 June 1999, par. 78. “Under the effective control test, there is no requirement that the control exercised by a civilian superior be of the same nature as that exercised by a military commander”, ICTR Judgment, Bagilishema (ICTR-95-1A-T), Appeals Chamber, 7 June 2001, par. 55.

<sup>116</sup> Depending on the status of the superior, whether a military commander, a person “effectively acting as a military commander” (lett. a) or a civilian (lett. b), article 28 uses different expressions to designate the kind of relationship required to link the subject and the perpetrators of the offences. In the first case it speaks of “forces under his command and control”, whereas in the other two of “effective authority and control”.

<sup>117</sup> See article 30 of the Rome Statute.

<sup>118</sup> ICTY Strugar Judgment, par. 359; ICTY Celebici Appeals Judgment, par. 377.

can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control”<sup>119</sup>. Therefore, under international law persons with powers of command/authority and control are burdened with “*Garantenstellungen*”, whereby superiors bear a legal obligation to act in order to prevent or repress the commission of criminal acts by their subordinates. The failure to adopt “*all necessary and reasonable measures*” within their powers to prevent or repress the commission of the crimes extends the criminal liability for such crimes to the superior<sup>120</sup>.

Preventive measures, in particular, may consist in the implementation of an adequate chain of command, as to ensure effective links and communication between different levels of command; in the implementation of an adequate reporting system<sup>121</sup>; in the selection of qualified personnel; in the appropriate training of military personnel engaged in operations in the field<sup>122</sup>; in a detailed evaluation of the foreseeable specific risks of the operation in question<sup>123</sup>; and, last but not least, in the issuance of specific orders aimed at neutralizing as far as possible the specific risks. In particular with regard to the commission of war crimes, this issue is strictly connected to the organization of the armed forces: no doubt a commander cannot do everything himself, especially in time of war, to ensure the laws of war are respected. However he remains responsible for the conduct of his armed forces if he did not take all the necessary measures in the given circumstances to properly implement a functioning system of command and control. That is why proper military organization and training for the soldiers to be sent in the field are particularly relevant. In particular specialists should be available at the appropriate levels, including “*specialists in the treatment of prisoners*”, “*in addition to legal advisers, to undertake, at the request of the commanders concerned, such tasks as may be assigned them in advance, for which they should be specially prepared, with a view to guaranteeing the best possible application of the* [Geneva]

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<sup>119</sup> ICTY Celebici Appeals Judgment, par. 198.

<sup>120</sup> The judges of the ICTY stated that “*For the acts of his subordinates as generally referred to in the jurisprudence of the Tribunal does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act (...)*”, ICTY Judgment, Halilovic (IT-01-48-T), Trial Chamber, 16 November 2005, par. 54.

<sup>121</sup> In the Hostage case the U.S. Military Tribunal affirmed that “a commander of occupied territory may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence”, United States v. Wilhelm List et al., Law reports of Trials of War Criminals, Vol XI, 759.

<sup>122</sup> See e.g. the *Taguba report* on the point: Jordan, trained as a civil affairs officer, was put in charge of the Abu Ghraib centre from its creation in September 2003 to December 2003. As he stated during the official investigation on the Abu Ghraib abuse, he had “*no training on the military side of what constitutes interrogation operations*”.

<sup>123</sup> See the Report of the Commission of inquiry into the events in the refugee camps in Beirut, the Kahan report, February 8, 1983, available at [www.us-israel.org](http://www.us-israel.org); see W.D. Burnett, *Command Responsibility and a case of study of the criminal responsibilities of Israeli military commanders for the Pogrom at Shatila and Sabra*, Military Law review, 1985, p. 71 ff.

*Conventions and the protocol when the time arrives, as well as setting in motion procedures for the suppression of breaches when necessary*<sup>124</sup>.

## Conclusions

It would, of course, be both inappropriate and beyond the scope of my work to establish whether U.S. military commanders, CIA members or high-level governmental officials of the Bush administration may be held liable, on the basis of the superior responsibility doctrine, for the unlawful acts committed by American soldiers against Iraqi prisoners. On the issue it may be observed that the above-mentioned International Criminal Court has no jurisdiction on the alleged crimes since neither the U.S.A nor Iraq have ratified the Rome Statute yet<sup>125</sup>. On the other side, however, it may be noted that international criminal law is not only administered at a 'central level', i.e. by international tribunals; especially following the adoption of the Rome Statute many States implemented international criminal law principles and provisions into their domestic legislation. As a consequence of this process some States have now adopted the principle of universal jurisdiction, pursuant to which, with regard to international crimes, jurisdiction can be exercised no matter where the crime occurred or by whom it was committed. An example of this is the German Code of Crimes against International Law of 2002<sup>126</sup>, which paved the way for the already mentioned complaint brought against Donald Rumsfeld et al. before the German federal Prosecutor in Karlsruhe in 2004 and, following the first dismissal, again in November 2006<sup>127</sup>. No doubt it remains the primary responsibility of the State having jurisdiction over the alleged crimes to deal with the criminal responsibilities of its nationals, also in the case of commission of international crimes. In dismissing the first case brought against Donald Rumsfeld and other U.S. officials in February 2005, the German federal Prosecutor stated that: "*there are no indications that the authorities and courts of the United States of America are refraining, or would refrain, from penal measures as regards the violations described in the complaint*". However, should the fears about the recently passed Military Commission Act of 2006<sup>128</sup> prove to be true – i.e. that it would try to immunise U.S. officials from the alleged crimes - this would indeed be an argument to demonstrate the unwillingness of American authorities to ascertain the possible responsibilities<sup>129</sup> of high-ranking U.S. officials with regard to the offences outlined in the complaint<sup>130</sup>.

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<sup>124</sup> J. De Preux, *Article 87*, cit., par. 3563.

<sup>125</sup> Pursuant to article 12 of the Rome Statute the Court may exercise its jurisdiction if the crime has been committed on the territory or by a national of a state that is a Party to the Statute.

<sup>126</sup> Code of Crimes against International Law (*Voelkerstrafgesetzbuch*, VStGB) of 29 June 2002.

<sup>127</sup> See *supra* footnote 73.

<sup>128</sup> See *supra* part I par. 3.

<sup>129</sup> See the Affidavit subscribed by J. Paust, Professor at the University of Houston Law Center, attached to the Complaint filed against D. Rumsfeld and others before the German federal prosecutor

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in Karlsruhe in November 2006, concluding that: *“the Bush administration has been unwilling for more than five years to prosecute any high-level members of the administration for international crimes and it is extremely unlikely that high level members and former members of the Bush administration will be prosecuted in the U.S.A. for authorizing, abetting or participating in international criminal activity or for dereliction of duty, although several such persons are reasonably accused for such improprieties”*.

<sup>130</sup> Opinion expressed by M. Ratner, President of the Center for Constitutional Rights, Press release of November, 14, 2006, Presentation-conference of the complaint filed before the German federal Prosecutor in Berlin. Certainly the request pending before the German federal Prosecutor is one of extreme seriousness because of its potential political ramification. Although it appears likely that the complaint will not have any judiciary follow-up in Germany, the complaint is significant in itself since it suggests that, no matter where war crimes occur or who commits them, impunity will not be tolerated.