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The Rules of War

At issue, how we define torture, prisoners, terrorists and lawful orders

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The cameras at Abu Ghraib prison exposed more than the leering faces of a few military police reservists humiliating and assaulting Iraqi detainees.

Each new government memo and investigative inquiry that has surfaced since the scandal broke last spring shows how far America is willing to go, and has gone, to win the war.

The many questions go far beyond whether the reservists, as some of them claim, were merely following orders to soften up prisoners for interrogation.

Has American policy diverged from the Geneva Conventions and international treaties? Are those long-held agreements outdated in a new war? What constitutes torture? Or a terrorist?

Scholars, military officers, politicians and everyday citizens have come to varying conclusions on all of the above. And the court-martial that started Friday at Fort Hood for Spc. Charles Graner, accused in earlier testimony of being a ringleader of the abuses at Abu Ghraib prison, is unlikely to offer definitive answers.

Policy or perversion?

There is at least some consensus on what apparently happened at Abu Ghraib. President Bush condemned the acts exhibited in the photos, and a military judge sentenced one of the seven military police reservists implicated in the abuses to eight years in prison.

Lawyers for the three defendants facing trial at Fort Hood early this year said their clients will plead innocent. What happened to detainees wasn't abuse, the argument goes, because the reservists were following orders to prepare detainees for interrogation.

Observers say Spc. Graner, Spc. Sabrina Harman and Sgt. Javal Davis are unlikely to win their cases based on a "superior-orders" defense. As Army officers convicted of the My Lai massacre of civilians during the Vietnam War found, troops have a responsibility to disobey orders that a reasonable person would know to be illegal or wrong.

After the verdicts, the repercussions of Abu Ghraib are likely to continue. More than 50 others, including military commanders, are being investigated for possible complicity.

The New York-based Center for Constitutional Rights filed a complaint in a German court Nov. 30 against Secretary of Defense Donald Rumsfeld, former CIA director George Tenet, Lt. Gen. Ricardo Sanchez and other top civilian and military officials.

Under German law, the court has the authority to investigate war crimes or crimes against humanity wherever they occur.

The complaint accuses the American officials of war crimes for authorizing what the rights group considers to be illegal interrogation techniques that allegedly led to abuses at Abu Ghraib, Afghanistan and Guantánamo Bay, Cuba.

The claim is under review that could take months. The court could decide to investigate or refer the case back to the U.S. judicial system.

"No question, we committed major violations of the Geneva Conventions," said Michael Ratner, the group's president and lead lawyer on the case. "The gap between U.S. practice and international law is bigger than I've ever seen in my life."

Mr. Rumsfeld and other U.S. officials have repeatedly said in response to the Abu Ghraib scandal that the United States does not torture detainees and that all prisoners are treated according to the Geneva Conventions.

Some Fort Hood soldiers, speaking in off-base interviews in Killeen, said they didn't believe the Abu Ghraib abuses were evidence of wider practices among the military.

"That's not the norm of what's going on over there in Iraq. I think it was an isolated incident," said Lt. Col. Grady King, 42, of Plano, an Apache helicopter pilot with the 101st Army aviation division.

The Abu Ghraib scandal "gave the public a false perception," said Capt. Joe Odorizz, 26, of Staunton, Ill., who is temporarily stationed with the 101st at Fort Hood and was deployed to Iraq for most of 2003.

"That was just one unit that had a breakdown," said Lt. Col. King.

Retired Lt. Col. James Carafano, a senior fellow for national security policy with the conservative Heritage Foundation, said there have been times in U.S. history when fears about national security overtook civil liberties.

For example, there were the internments of Japanese-Americans during World War II, and the roundup of suspected communist sympathizers during the Cold War.

But he sees no evidence that the Defense Department created any slippery slope that led to abuses at Abu Ghraib and elsewhere. And he said he is concerned that observers have been too quick to label the events pictured at Abu Ghraib as torture.

"I want to make clear that there are things that went on at Abu Ghraib that are flat-out illegal. I don't think anybody is defending them," said Col. Carafano, who teaches at the National Defense University. "But some of the things that people have called torture, I had worse things done to me when I was a plebe at West Point.

"I don't think we should torture anybody. But on the other hand, I don't see how you can blame somebody for not giving people special protections when they don't play by the rules."

Unlawful combatants

Col. Carafano was referring to the suspected terrorists, or "unlawful combatants," being held at Guantánamo Bay, who are considered by some to have fallen through the cracks of international law.

Mr. Rumsfeld told a Senate committee in May, after the Abu Ghraib scandal broke, that its detainees at Guantánamo Bay were not protected by the Geneva Conventions because terrorists are not lawful combatants. He added, however, that President Bush had ordered that all Taliban and al-Qaeda prisoners be treated in accordance with the Geneva Conventions.

Alfred Rubin, a Tufts University professor and executive committee chair of the American Branch of the International Law Association, said America probably has not violated the Geneva Conventions in Iraq because neither America nor Iraq declared a state of war.

"But we certainly have violated the moral obligations," Mr. Rubin said.

The lack of a clear international definition of a terrorist and the undeclared-war loophole to the Geneva Conventions have been manipulated by many nations, Mr. Rubin and other experts said.

"I'm afraid that many states do torture their people and do misuse their labels, including the Israelis, the Palestinians, the Spaniards, the Irish and the British in Northern Ireland, the Russians in Chechnya," said Mr. Rubin, adding that he now might have to add America to the list.

Jordan Paust, a University of Houston law professor who has written extensively about the Geneva Conventions, said the administration has used faulty logic to justify its actions.

"The use of dogs for interrogation, stripping people naked for interrogation purposes, and hooding for interrogation ... any one of those three are war crimes," he said. So is transporting unlawful combatants out of occupied territory, to Guantánamo Bay for example, he added.

"We are talking about potential criminal liability at the highest levels of government and civil liability as well," Mr. Paust said.

As an Army officer and professor of international law in the Judge Advocate General's school, he worked with the Pentagon to upgrade law-of-war training in the wake of the My Lai massacre.

According to the United States' 1956 military manual, anyone picked up during an international conflict who is not a prisoner of war is protected under Geneva's civilian convention, Mr. Paust said.

In addition to torture, the civilian convention also prohibits cruel, degrading, humiliating, inhumane or even intimidating treatment.

The irony, Mr. Paust said, is that far from helping in the war on terror, the new policies regarding interrogations have strengthened terrorists and insurgents. And he said one result could be increased danger for U.S. troops.

"If, for example, the treatment of human beings captured during combat becomes something like the Rumsfeld model for treatment, our soldiers will be in harm's way," he said.

Drawing the line

During a pretrial hearing in December for Sgt. Davis, who is accused of assaulting and abusing detainees at Abu Ghraib, his civilian lawyer, Paul Bergrin, said, "There is a very thin, gray line between what amounts to torture and what amounts to abuse."

He noted that stress positions, sleep deprivation and dogs had been approved for use in interrogations at Guantánamo Bay. "Where do we draw the line?" Mr. Bergrin asked.

"Well, we've got to draw it somewhere," replied Col. James Pohl, the military judge.

In the latest of a series of government memos on the issue, the Justice Department said on Dec. 30 that torture does not have to involve excruciating pain of the magnitude caused by serious physical injury, such as organ failure.

In earlier government memos, the standard for torture had been intense, prolonged pain.

Eugene Fidell, a Washington D.C.-based lawyer and president of the National Institute of Military Justice, said the information that has emerged from the blizzard of memos and inquiries into Abu Ghraib needs to be integrated through a national commission or congressional investigation.

"I think it can be confusing, and not just to the average G.I.," said Mr. Fidell, who represented Capt. James Yee, the Muslim Army chaplain who was cleared of espionage accusations at Guantánamo Bay.

"Well-meaning, intelligent, junior and not-so-junior officers may find themselves mystified by this. There is the fog of war, but there is also the fog of law. And large parts of the rule book have been kept secret," he said.

A bipartisan panel of national security experts is lobbying Congress and other government officials to adopt new rules it formulated in a number of areas, including detentions, interrogations and assassinations.

A national debate over acceptable practices that balance national security, civil liberties and standards of due process began with the passage of the USA Patriot Act after the Sept. 11 attacks, said Juliette Kayyem, the panel's co-director and a lawyer and scholar at Harvard University's John F. Kennedy School of Government. But the discussion didn't go far enough, she said.

"I think Abu Ghraib in some ways is the consequence of that failure to figure out what are the detailed rules that were going to govern us as we wage a long-term worldwide effort against terrorism," she said.

The panel included judges, counterterrorism experts and current and former federal officials, including the Pentagon's senior policy adviser, retired Brig. Gen. Robert Barnes, and the CIA's former general counsel, Robert McNamara Jr.

Their report, "Long-term Legal Strategies for Preserving Security and Liberty in the War on Terror," recommends scrapping the special military commissions being used at Guantánamo Bay and relying instead on traditional civilian and military courts. They also advocate highly coercive interrogation practices to deter a specific threat, but only if the president gives written authorization.

"The people in the field are nervous that they're going to cross an imaginary line. We owe it to the people we're telling to go wage this war to provide them with guidance, to both curb unlawful activity but also to ensure that the most aggressive tactics" permissible are used, Ms. Kayyem said.

Do we need Geneva?

The administration says it is not abandoning the Geneva Conventions. But Mr. Rubin, though appalled by what happened at Abu Ghraib, said that maybe America should.

"It's a matter of weighing costs and benefits. Causing pain to somebody who knows where the bomb was hidden that would kill 10 kindergartners seems to me to be legitimate. I don't know whether that would be torture, but it wouldn't be wrong," he said.

But Mr. Paust, the retired Army officer who lived through the My Lai scandal, disagrees.

"Iraq isn't a different kind of war. And Afghanistan, finding the Taliban, wasn't a different kind of war. Terrorism is not new, either," he said.

"I'm not impressed that 9-11 has called for radical change in the Geneva Conventions. Neither are the Europeans, nor the International Committee of the Red Cross, nor any countries I know."