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Focus

United States: War
Crimes Act of 1996
18 USC Section 2441

“(a) **Offense.** Whoever, whether inside or outside the United States, commits a war crime, [...]”

(b) **Circumstances.** The circumstances referred to in subsection(a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States [...].

(c) **Definition.** As used in this section the term ‘war crime’ means any conduct - (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party; [...];

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; [...]”

Prosecuting private contractors under US law
for the mistreatment of detainees in Abu Ghraib

Last weeks’ newspapers have been discussing at length the mistreatment suffered by the detainees of the Abu Ghraib prison. Of particular interest in this context is the role played by CIA agents and private contractors in interrogating detainees. Notably, it is alleged that one civilian contractor raped a young male prisoner and others ordered the guards to mistreat the prisoners before interrogation.

Representatives of the US armed forces claim that they have no jurisdiction over such persons since the Uniform Code of Military Justice is only applicable to members of the armed forces (Guardian, 30 April 2004). Indeed civilian contractors do not fall within the purview of section 801, article 2 that deals with persons subject to the UCMJ. One cannot but agree that private contractors cannot be prosecuted according to US military law.

Further, the press reports that “the Justice Department is trying to figure out if the private contractors can be prosecuted under any US law” (Time, 17 May 2004). It is rather surprising that the Justice Department needs so much time to look at US federal law and more particularly at the 1996 War Crimes Act, as amended in 1997, that introduced Section 2441.

Section 2441(b) spells out that members of US armed forces as well as US nationals may be prosecuted for war crimes. This means that CIA agents and private contractors are criminally liable under US federal law *ratione personae*. Concerning the jurisdiction *ratione loci* section 2441(a) gives the US federal courts jurisdiction over offences committed whether in the United States or overseas. Hence, although the alleged crimes were perpetrated on Iraqi territory, US courts are competent to handle the case.

The US court would then need to examine whether the acts perpetrated by these CIA agents and private contractors fall within the scope of section 2441(c) and, more particularly, of section 2441(c)(1) that provides that any act listed as a grave breach in the Geneva Conventions is to be considered as a “war crime”. Undoubtedly the Geneva Conventions are applicable in Iraq by virtue of common article 2(2). The territory of Iraq, a High Contracting Party to the Geneva Conventions, is occupied by the coalition forces.

According to articles 130 GCIII and 147 GCIV, grave breaches are violations of international humanitarian law that are committed against protected persons, i.e., prisoners of war (article 4 GC III) and persons “who are in the hands of a party to the conflict or occupying power of which they are not nationals” (article 4 GCIV). From press reports, it appears that the detainees of Abu Ghraib fall into these two categories. Provided the detainees do not fall under the aforementioned definition, one needs to point that even unconventional combatants shall be treated with humanity and be granted the full rights and privileges of a protected person (Article 5 GCIV).

By virtue of articles 130 GCIII and 147 GCIV, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health are to be considered grave breaches of the conventions. There is hardly any doubt that the rape of a detainee is regarded as a grave breach (see ICTY, *Furundzija* case). As for ordering guards to treat detainees in an inhumane manner, this can also be considered as falling under the grave breaches provision. Consequently, CIA agents and private contractors may be prosecuted under section 2441(c)(1) US federal law.

In addition, it is possible to prosecute these persons under section 2441(c)(3) of US federal law since Common Article 3 is also applicable to international armed conflict (see ICTY, *Tadic Jurisdiction Appeal* case). It is however unlikely that a US court would follow international jurisprudence on the subject. Nevertheless, if it would, it could prosecute private contractors for “outrages upon personal dignity, in particular humiliating and degrading treatment” that would without a doubt apply to the treatment suffered by the detainees in Abu Ghraib since the threshold of applicability is lower than the one enshrined in articles 130 GCIII and 147 GCIV.

This demonstrates that CIA agents and private contractors can be prosecuted under US federal law for the mistreatment suffered by Iraqi detainees in Abu Ghraib.

Responsibility

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