

Betr: Strafanzeige gegen den US-Verteidigungsminister Donald Rumsfeld, u.a.

Expert Report of Professor Bill Bowring

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Professional qualifications

1. I am a Barrister of Gray's Inn, London, UK, called to the Bar of England and Wales in 1974, and am also Professor of Law at Birkbeck College, University of London. I am a member of the Chambers of Lucy Theis QC at Field Court Chambers, Gray's Inn. I practised at the Bar full time until 1990, when I began my academic career. I still practise in the field of human rights, taking many cases to the European Court of Human Rights, in particular against Latvia, Russia and Turkey.
2. In my scholarly capacity, I am the author of many publications on topics of international law and human rights.¹
3. Since 1994 I have been a Trustee of the Redress Trust, a human rights organisation that helps torture survivors obtain justice and reparation.² It works with survivors to help restore their dignity and to make torturers accountable. It seeks a variety of remedies, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Its national and international programmes are aimed at ensuring that the rights of torture survivors, whoever they are, and wherever they are located, are realised in practice.
4. I am also Chair of the International Steering Committee of the European Human Rights Advocacy Centre (EHRAC)³; President of the European Association of Lawyers for Democracy and Human Rights (EALDH)⁴; an Executive Committee member of the Bar Human Rights Committee of England and Wales⁵; a member of the Council of Liberty, the National Council for Civil Liberties in England and Wales⁶; and an active member of Amnesty International UK.

Opinion

5. On 14 May 2004 the Coalition of International NGOs Against Torture (CINAT)⁷, which includes the Redress Trust, issued a Press Statement⁸ with which I fully associated

¹ See details at <http://www.bbk.ac.uk/law/about/ft-academic/bowring>

² See <http://www.redress.org>

³ See <http://www.londonmet.ac.uk/research-units/hrs/j/ehrac/>

⁴ See <http://www.ejdm.eu/ealdh.htm>

⁵ See <http://www.barhumanrights.org.uk/>

⁶ See <http://www.liberty-human-rights.org.uk/>

⁷ CINAT member organisations: Amnesty International, the Association for the Prevention of Torture (APT), the International Commission of Jurists (ICJ), the International Federation of Action by Christians for the Abolition of Torture (FIACAT), the International Rehabilitation Council for Torture victims (IRCT), Redress and the World Organisation Against Torture (OMCT).

⁸ <http://www.redress.org/news/Iraq%20-%20CINAT%2020%20May%202004.pdf>

myself, stating that we were deeply concerned by the recent reports of torture and other cruel, inhuman or degrading treatment inflicted on Iraqi detainees by US and UK military forces serving under the Coalition Provisional Authority.

6. CINAT drew attention to the fact that torture and other forms of ill-treatment are prohibited in all circumstances: international law allows no derogation from this rule. We hoped that the international outcry which has followed these revelations would act as a warning for the governments concerned and for all other States; there could be no room for complacency.
7. This graphic evidence of abuse, we said, was symptomatic of the alarming trend in recent years for principles of international humanitarian and human rights law to be undermined in the fight against terrorism. This trend was evident not only in the isolation and abuse of prisoners in Iraq but also in other parts of the world, such as Guantánamo Bay and the secret detention centres where prisoners have been deliberately placed outside the protection of the law. Equally disturbing was the current debate on what constitutes appropriate interrogation techniques and the apparent 'acceptability' of the deliberate infliction of certain forms of ill-treatment and torture.
8. CINAT called for a full and public inquiry to establish the facts relating to the allegations of torture and ill-treatment in Iraq. In line with the statement made by the United Nations Special Rapporteur on Torture on 3 May 2004, CINAT appealed to "all countries with forces serving in Iraq to take prompt and effective steps to investigate, prosecute and impose appropriate sanctions on any persons guilty of the alleged violations, as well as to provide an effective remedy and adequate reparation for the victims of these abuses", including compensation and rehabilitation.

Command responsibility

9. It was of particular concern to me that when questioned in November 2005 about the use of torture by Iraqi authorities, US Secretary of Defense Donald Rumsfeld was reported to have responded that he did not consider that US soldiers who see "inhumane treatment" of detainees have an obligation to intervene to stop it. The Chairman of the Joint Chiefs of Staff, however, General Peter Pace, interjected "If they are physically present when inhumane treatment is taking place, sir, they have an obligation to stop it".⁹
10. This is of special relevance to the application of Article 28 of the Rome Statute of the ICC of 1998, which states as follows:

Article 28

Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

⁹ Washington Post, Dana Milbank, "Rumsfeld's War on 'Insurgents'", 30 November 2005

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

11. I note that on 14 April 2006, Human Rights Watch argued that Donald Rumsfeld could be criminally liable for his alleged involvement in the abuse of Mohammad al-Qahtani.¹⁰ This view was confirmed when the US Supreme Court ruled in *Hamdan v. Rumsfeld* that, contrary to what the administration advocated, the Third Geneva Convention applies to detainees in Guantanamo Bay, and as such the Military Tribunals used to try these suspects were in violation of US and international law.¹¹ Dave Lindorff contends that by ignoring the Geneva Conventions the US administration including President Bush, as Commander-in-Chief, is culpable for war crimes.¹²
12. I associate myself with these arguments.

The legacy of the Abu Ghraib prison scandal - the Report by Amnesty International

13. The On 6 March 2006 Amnesty International published its report entitled: "Beyond Abu Ghraib: detention and torture in Iraq".¹³ This has added many important facts to what was already known about the use of torture by coalition forces in Iraq.
14. following section of my Opinion reproduces Amnesty International's Report, with which I associate myself unconditionally.
15. In February 2004, the International Committee of the Red Cross (ICRC) submitted a report to the Coalition Forces which described serious violations of international humanitarian law committed by these forces in Iraq. These included brutality against protected persons during their arrest and initial detention, sometimes causing death or serious injury, as well as various methods of torture and ill-treatment inflicted on detainees. The public release of images in April 2004 showing detainees being tortured and ill-treated by US soldiers at Abu Ghraib prison, caused worldwide shock, horror and outrage. The subsequent US military investigation in Iraq headed by Major General Antonio Taguba found that Coalition Forces were responsible for "systemic" and "illegal

¹⁰ U.S.: Rumsfeld Potentially Liable for Torture Defense Secretary Allegedly Involved in Abusive Interrogation Human Rights Watch, April 14, 2006

¹¹ The Gitmo Fallout: The fight over the Hamdan ruling heats up—as fears about its reach escalate. By Michael Isikoff and Stuart Taylor Jr., Newsweek, July 17, 2006

¹² The Real Meaning of the Hamdan Ruling Supreme Court: Bush Administration Has Committed War Crimes By Dave Lindorff, CounterPunch, July 3, 2006

¹³ <http://web.amnesty.org/library/index/engmde140012006>

abuse of detainees" held at Abu Ghraib prison between August 2003 and February 2004, and concluded that soldiers had "committed egregious acts and grave breaches of international law at Abu Ghraib...".¹⁴

16. Amnesty International interviewed former detainees who disclosed that they were among the prisoners subjected to torture and ill-treatment in US custody at Abu Ghraib. They included women who said they had been beaten, threatened with rape, subjected to humiliating treatment and long periods of solitary confinement. Some former detainees told Amnesty International that they had been forced to lie on the ground while handcuffed and hooded or blindfolded for long periods. They were repeatedly beaten, restrained for prolonged periods in painful "stress" positions and some were also subjected to sleep deprivation, prolonged standing, and exposure to loud music and bright lights, apparently intended to cause disorientation.
17. Other testimonies of detainees who were tortured or ill-treated at Abu Ghraib prison were documented by human rights organizations and in the media. Male detainees complained that they were deliberately degraded by being forced to masturbate in front of female soldiers and to wear women's underwear. They were kept naked, sometimes for several days. Detainees were assaulted and threatened with rape. They alleged too that they were forced, in breach of their religious beliefs, to eat pork, to drink alcohol and to move about on all fours in imitation of dogs.
18. The videotaped testimony of one Abu Ghraib victim, Hussein Mutar, was shown in evidence to a US military court martial sitting in Texas, USA, in January 2005. Hussein Mutar had reportedly been detained on suspicion of car theft and was tortured and ill-treated while held at Abu Ghraib in November 2003.¹⁵ In the evidence laid before the court martial, he identified himself as one of a number of prisoners in a photograph taken by a US guard at the prison which showed several naked male detainees being forced to lie on top of one another. He also spoke of his feelings of humiliation and shame when US guards forced him to masturbate over fellow inmates: "I couldn't imagine it in the beginning that this could happen. But I wished for my death, that I could kill myself, because no one over there would stop what was going on".¹⁶

Qualification as "torture" or "cruel, inhuman or degrading treatment"

19. In my opinion there is no question but that the actions perpetrated at Abu Ghraib came within the definition of "torture" in article 1 of the UN Convention Against Torture 1984, which states:

Article 1

1. For the purposes of this Convention, the term "torture" means 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 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 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

¹⁴ The "Taguba Report" on Treatment of Abu Ghraib Prisoners In Iraq, Article 15-6 Investigation of the 800th Military Police Brigade, <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html>.

¹⁵ BBC, Abu Ghraib inmates recall torture, 12 January 2005, <http://news.bbc.co.uk/2/hi/americas/4165627.stm>.

¹⁶ CounterPunch, Voices from Abu Ghraib -The Injured Party, 20 January 2005, http://www.ccmep.org/2005_articles/civil%20liberties/012005_counterpunch.htm.

20. Furthermore, those actions which did not amount to torture most certainly amounted to “cruel, inhuman or degrading treatment” with in the sense of Article 16 of the CAT:

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

Subsequent investigations, and command responsibility

21. Following the worldwide disclosure of the abuses of detainees at Abu Ghraib in April 2004, the US authorities undertook various inquiries and reviews, and court- martialled a number of the US prison guards who were depicted in photographs abusing prisoners.
22. Amnesty International have raised the concern that these investigations have mostly been internal military investigations which appear to have focused on the culpability of those within the lower echelons of the military, not on the role and responsibilities of those higher up the chain of command, including at the most senior levels. For example, on 10 March 2005, the US authorities released a summary of the findings of a review carried out by Vice Admiral Albert T. Church, Inspector-General of the US Navy which had been initiated by US Secretary of Defense Donald Rumsfeld in May 2004. The review found "no connection between interrogation policy and abuse".¹⁷ Only the executive summary was made public and the remainder of the 378-page Church Report remains classified. It was revealed, however, that the Church investigation failed to interview any Iraqi detainees or former detainees. Nor did it interview Secretary Rumsfeld.
23. I repeat my contention, above, that strong suspicion must fall on Donald Rumsfeld in view of his “command responsibility”.
24. The US authorities have stated on numerous occasions that its regime of detention in Iraq has fundamentally changed since abuses at the Abu Ghraib prison were exposed. The US government’s second periodic report to the UN Committee Against Torture of June 2005 states: "The Department of Defense has improved its detention operations in Iraq and elsewhere, improvements have been made based upon the lessons learned, and in part because of the broad investigations and focused inquiries into specific allegations. These comprehensive reports, reforms, investigations and prosecutions make clear the commitment of the Department of Defense to do everything possible to ensure that detainee abuse such as occurred at Abu Ghraib never happens again."¹⁸ However, there continue to be reports of torture and ill-treatment of detainees by US troops, which have occurred since the Abu Ghraib prison scandal was exposed.
25. While dozens of US soldiers have been court-martialed in connection with the abuse of detainees, senior US administration officials have remained free from independent scrutiny. According to the US government, as of 1 October 2005 there had been 65 courts-martial in connection with the abuse of detainees in Iraq.¹⁹ In June 2004, two US marines were sentenced to eight and 12 months’ imprisonment by a military court in Iraq. Both men had pleaded guilty to giving electric shocks to an Iraqi prisoner at al-

¹⁷ <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf>.

¹⁸ Second Periodic Report of the USA to the Committee against Torture, UN Doc. CAT/C/48/Add.3, 29 June 2005, Annex 1, Part Two, page 77.

¹⁹ 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.

- Mahmudiya prison, south of Baghdad.²⁰ At least nine US soldiers were tried before US military courts for their involvement in the high-profile incidents of torture or ill-treatment of detainees at Abu Ghraib prison. Sentences ranged from non-custodial disciplinary measures to 10 years' imprisonment.²¹ According to the US government, 54 military personnel could be implicated in the incidents at Abu Ghraib prison.²²
26. Amnesty International was concerned that several of those tried and convicted by US military courts for committing serious human rights violations in Iraq, including torture or ill-treatment, have received sentences that fail to reflect the gravity of these violations.
 27. In September 2004, a 1st Lieutenant in the US Army was referred to trial by court-martial on charges including conspiracy, aggravated assault, involuntary manslaughter and obstruction of justice. The case involved incidents on 5 December 2003 in which an Iraqi detainee was forced into the Tigris River near Balad, and on 3 January 2004 in which two Iraqi detainees were forced off a bridge into the Tigris near Samarra. One of the detainees, 19-year-old Zaidoun Hassoun, drowned in the latter incident. The lieutenant was facing a maximum sentence of 29 years' in prison. In the event, he was sentenced to 45 days' confinement following a two-day court-martial in Fort Hood, Texas, on 14 and 15 March 2005. Based on a pre-trial agreement, the commanding authority did not pursue the manslaughter charge and the soldier instead pleaded guilty to assault charges.²³
 28. On 23 January 2006, a US court martial convicted a US army interrogator of the killing of 'Abd Hamad Mawoush and sentenced him to forfeit \$6,000 of his salary over the next four months, to receive a formal reprimand and spend 60 days restricted to his home, office and church. 'Abd Hamad Mawoush, a major general in the Iraqi army under the government of Saddam Hussain, died in a US detention facility in Al Qaim in northwest Baghdad on 26 November 2003, two weeks after he had handed himself in to the US military. He died after being interrogated while allegedly being rolled back and forth with a sleeping bag over his head and body, and the interrogator sat on his chest and placed his hands over his mouth. According to witness testimony, the interrogator also stood by while Iraqi personnel of the US Central Intelligence Agency (CIA) subjected 'Abd Hamad Mawoush to a brutal beating with hoses. The convicted interrogator had faced a maximum penalty of life imprisonment on charges of murder. However, the court martial found him guilty of lesser charges of "negligent homicide and dereliction of duty," which carries a maximum of three years' imprisonment.²⁴
 29. Several UK soldiers have also been charged in connection with alleged torture or ill-treatment and the deaths of detainees. On 21 December 2005, the Court of Appeal of England and Wales ruled in a case arising from the death in September 2003 of 26-year old Baha Dawoud Salem al-Maliki (also known as Baha Mousa) and the deaths of five other Iraqis in the case of *R (Al-Skeini) v Secretary of State for Defence*. Delivering judgment, Lord Justice Brooke recounted what had occurred when UK troops raided a

²⁰ The Guardian, US marines plead guilty to prisoner abuse, 3 June 2004

²¹ Army News Service, L.B. Edgar, Court sentences England to 3 years, 28 September 2005, http://www4.army.mil/ocpa/read.php?story_id_key=7988. Army News Service, L.B. Edgar, Harman found guilty for Abu Ghraib, 19 May 2005, http://www4.army.mil/ocpa/read.php?story_id_key=7348.

²² 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.

²³ 7th Infantry Division and Fort Carson Public Affairs Office, Press release, Court martial verdict and sentence, 16 March 2005.

²⁴ Los Angeles Times, Nicholas Riccardi, No Jail Time in Death of Iraqi General, 24 January 2006. See also: Amnesty International: United States of America: Guantanamo and beyond: The continuing pursuit of unchecked executive power, 13 May 2005, AI Index: AMR 51/063/205, pages 110-115.

Basra hotel, where Baha Moussa worked as a receptionist, on the morning of 14 September 2003. The troops, who were seeking to locate one of the partners who ran the hotel:

“... rounded up a number of the men they found there, including Baha Mousa. Baha Mousa's father, Daoud Mousa, had been a police officer for 24 years and was by then a colonel in the Basrah police. He had called at the hotel that morning to pick up his son at the end of his shift, and he told the ... lieutenant in charge of the unit that he had seen three of his soldiers pocketing money from the safe. During this visit he also saw his son lying on the floor of the hotel lobby with six other hotel employees with their hands behind their heads. The lieutenant assured him that this was a routine investigation that would be over in a couple of hours. Colonel Mousa never saw his son alive again. Four days later he was invited by a military police unit to identify his son's dead body. It was covered in blood and bruises. The nose was badly broken, there was blood coming from the nose and mouth, and there were severe patches of bruising all over the body. The claimants' witnesses tell of a sustained campaign of ill-treatment of the men who were taken into custody, one of whom was very badly injured, and they suggest that Baha Mousa was picked out for particularly savage treatment because of the complaints his father had made. The men who were arrested had been taken from the hotel to a British military base in Basrah City called Darul Dhyafa".²⁵

30. Court-martial proceedings have since been instituted, although trials have yet to take place, against seven military personnel, including the commanding officer who has been charged with negligent performance of duty. Three of the seven military personnel have been charged with "inhuman treatment" of the detainee.²⁶
31. In another case, UK Attorney General Lord Goldsmith announced in July 2005 that four UK soldiers would stand trial in connection with the death of Ahmed Jaber Karim 'Ali, one of four men detained on suspicion of looting in May 2003 in Basra. It has been alleged that UK servicemen, allegedly punched and kicked the suspects and then forced them into the Shat Al-Basra canal, causing Ahmed Jaber Karim 'Ali to drown.²⁷
32. In a further case, a court martial convicted three UK soldiers in February 2005 of abusing detainees in May 2003 at Camp Breadbasket, near Basra, and sentenced them to between 140 days and two years' imprisonment.²⁸
33. Members of the MNF have immunity from prosecution under Iraqi criminal and civil law, as stipulated by United Nations (UN) Security Council resolution 1546 (2004) with its attached exchange of letters between the Iraqi and US authorities. Investigations into human rights violations committed by the MNF in Iraq and the bringing to justice of those responsible, therefore, are entirely in the hands of their own national authorities.

²⁵ [2005] EWCA Civ 1609, see paras 28 and following, in Lords Justice Brooke's judgment. The Al-Skeini case was one of six test cases brought by the families of Iraqi civilians who are alleged to have been tortured or killed by UK soldiers during the UK occupation of South-Eastern Iraq. In the same judgment, the Court of Appeal of England and Wales also ruled that the UK Human Rights Act 1998 (HRA) is in principle capable of having extra-territorial effect when a person falls within the "jurisdiction" of the UK under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Thus, the Court held that the HRA can apply to UK authorities outside the territory of UK. The Court also held that the lower court had been wrong to draw the line at "quasi-territorial" premises such as a UK-run prison in Iraq, since the ECHR concept of jurisdiction was in principle broader than that. For example, it could extend to a person who was under arrest at an Iraqi hotel. However, the Court held that the notion of jurisdiction was not broad enough to include persons who were at liberty and not yet in the control of UK forces. Finally, the Court held that that the system for investigating deaths at the hands of UK armed forces personnel was seriously deficient, including in its lack of independence from the commanding officer, and it needed to be scrutinized.

²⁶ BBC, UK soldiers face war crimes trials, 20 July 2005, <http://news.bbc.co.uk/1/hi/uk/4698251.stm>.

²⁷ CNN, British trio charged with war crimes, 19 July 2005, <http://www.cnn.com/2005/WORLD/europe/07/19/britain.iraq/>.

²⁸ The Guardian, Audrey Gillan, Soldiers in Iraq abuse case sent to prison, 26 February 2005.

34. Amnesty International was concerned that military investigations and prosecutions in connection with human rights violations committed by members of the MNF may not meet international standards of impartiality.
35. Amnesty International considered that the torture and ill-treatment to which prisoners in Abu Ghraib prison and other places of detention controlled by occupying powers were exposed prior to the handover of power amounted to war crimes.²⁹ Amnesty continued to call on the governments whose troops have been involved in the military operations³⁰ (42) in Iraq to ensure that there is no impunity for anyone found responsible for war crimes, regardless of position or rank.

Conclusion

36. I agree strongly with the conclusions of Amnesty International. In view of all the information set out above, I wish to add my own voice to those who call for the prosecution under German law of Donald Rumsfeld and his associates.

Professor Bill Bowring
University of London
7 November 2006

²⁹ Torture or inhuman treatment is a grave breaches of the Fourth Geneva Convention according to Article 147. Grave breaches are war crimes according to international law, as reflected in the Rome Statute of the International Criminal Court (Article 8 (2-ii)). The Geneva Conventions were fully applicable in Iraq during the occupation until the handover of power on 28 June 2004. Cruel treatment and torture in non-international armed conflict are also war crimes under the Rome Statute of the International Criminal Court (ICC).

³⁰ The UN and the ICRC have both declared that the occupation of Iraq ended on 28 June 2004, following the handover of power from the Coalition Provisional Authority (CPA) to the Interim Iraqi Government.