REVISITING THE ABU GRAIBH PROSECUTIONS FROM THE PERSPECTIVE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA (ICTY) AND RWANDA (ICTR)

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1. Introduction

In April 2004 several reports appeared concerning abuse and torture of prisoners in the Iraqi Abu Graibh prison in Baghdad, committed at the beginning of 2003 by U.S. military personnel and U.S. Intelligence Officers falling under the U.S.-U.K. Coalition Provisional Authority. In February 2005 similar abuse of prisoners by U.S. soldiers in Afghanistan was reported.1 In response, the Pentagon (U.S. Department of Defence) started an investigation into the abuse at Abu Graibh. However, the public only became aware of the matter in April 2004 when pictures of the abuse featured in *The New Yorker* and broadcast station CBS did a program on these abuses in that same month. On 11 May 2004, the U.S. Congress published the results of its inquiry and pointed out that the abuse had not been a matter of single incidents. Subsequently the U.S. Government apologized. The criminal law consequences were, however, limited; seventeen U.S. soldiers and officers were discharged from military duty. Among those solders, brigade-general Janis Karpinski, who was responsible

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for guarding the U.S. detention units in Iraq, including Abu Graibh. So far, only six low-ranking U.S. military persons have been criminally prosecuted before a U.S. Military Court Martial.

On 15 January 2005, Charles A. Graner Jr., a U.S. Army reservist of the 372nd Military Police Company, was found guilty by the U.S. Military Court Martial of maltreatment of Iraqi prisoners in the Abu Graibh prison and was sentenced to 10 years imprisonment and dishonourable dismissal. These Abu Graibh convictions raise a fundamental (international) criminal law question concerning the possible criminal responsibility of Graner’s superiors for crimes committed in Abu Graibh, particularly since no senior officers or superiors have been criminally prosecuted in this case. This essay addresses this question in the light of recent jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) as to “command responsibility,” particularly the Blaskic judgment by the ICTY Appeals Chamber which also addressed the issue of “superior responsibility” for the treatment of prisoners during armed conflicts.

Criminal prosecution of superiors for international crimes was also at the heart of some of the cases the late honourable judge Laity Kama dealt with during his career. It is therefore that this essay is dedicated to his important contribution to international criminal justice.

2. Procedural History of the Abu Graibh Military Court Cases

2.1. The ICRC and the Taguba Report

In 2003-2004, after the start of the U.S.-U.K. intervention in Iraq on 22 March 2003, multiple maltreatment and abuse of Iraqi prisoners (civilian and military) took place. These crimes were brought to the attention by two reports in particular.

The first is the report of the International Red Cross (ICRC) published in February 2004 concerning the treatment of prisoners of war and other detainees by coalition forces from March to November 2003. This report already canvasses a number of abuses committed by coalition forces in relation to Iraqi prisoners, such as:

(a) brutality against protected persons upon capture and initial custody
(b) physical and psychological coercion during interrogation to secure information