Military Detention: uncovering the truth

Story 3 - Australia's knowledge of and role in hiding detainees from the International Committee of the Red Cross at Abu Ghraib

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1. The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

2. Executive summary

From July 2003 to February 2004, an Australian military lawyer, Major George O'Kane, was embedded with United States forces in Baghdad, including at Abu Ghraib prison. During this time, there were a number of incidents in which the US military detained prisoners in a way that breached international law. PIAC has obtained documents revealing that Major O'Kane was aware of two disturbing incidents relating to the US military's detention practices.

O'Kane communicated this information to his Australian superiors. However, the Australian Government failed to raise concerns about this US action. Australia's failure to act suggests some level of complicity in this breach of international law.

Detainee Triple X

In January 2004, Major O'Kane became aware that the US was keeping a detainee, Hiwa Abdul Rahmna Rashul, known as '*Detainee Triple X'*, hidden from the International Committee of the Red Cross (ICRC). Detainee Triple X was detained in Afghanistan and Iraq in breach of international law.

Major O'Kane reported this highly classified and sensitive information to his US and Australian superiors in the Middle East. However, it appears that the Australian military failed to raise a concern about this breach of international law with its ally, the United States. This suggests, at least, serious deficiencies in the effective functioning of the Australian military chain of command.

On his return to Australia, during extensive interviews with Department of Defence officials regarding his role in Iraq, Major O'Kane did not raise Detainee Triple X. It was only after US media made public the detention of Detainee Triple X on 17 June 2004, that Major O'Kane brought his knowledge of the issue to the attention of officials in Australia.

The Australian Government has kept Major O'Kane's knowledge of Detainee Triple X from the public and Parliament. The detention of Detainee Triple X has been widely condemned as breaching international humanitarian and human rights law. However, at no stage did the Australian Government express any concerns with the US about this serious breach. Instead, after the media became aware of Detainee Triple X, the Australian Government simply informed the US Ambassador of O'Kane's knowledge '*for action as appropriate'*.

'Ghost prisoners' at Abu Ghraib

The documents obtained by PIAC also reveal that in January 2004, Major O'Kane was instructed by a senior US military officer to deny the ICRC access to nine people being held in cell block 1A at Abu Ghraib. The US refused the ICRC access on the basis that the nine detainees were undergoing active interrogation at the time of the visit.

However, under the Geneva Convention, the ICRC can only be denied access to detainees for reasons of imperative military necessity and only as an exceptional and temporary measure.

The documents suggest that the US sought to rely on this exemption more broadly, on a systematic basis. The ICRC visits were regarded as an inconvenience as they interrupted interrogations. Major O'Kane said: '*if you break someone down, or persuade them to give up information you don't need them drawing strength from an ICRC visit'*.

The documents show that Major O'Kane, Australia's military representative at Abu Ghraib, did not object to the obstruction of ICRC visits to these detainees. This is despite the fact that O'Kane recognised that the obstruction was at least in part motivated by a desire to "break down" detainees who were being interrogated. Moreover, although this issue was brought to the attention of superior Australian

military officers and the Australian Government, Australia did not formally object to this practice.

3. Detainee Triple X

Major George O'Kane is an Australian military lawyer who was working in the Office of the Staff Judge Advocate, Combined Joint Task Force Seven (CJTF - 7) in Baghdad. He was aware of a US order to keep a detainee, known as Detainee Triple X, hidden from the International Committee of the Red Cross (ICRC).

In mid-January 2004, a female US Major, who was the 800th Military Police Brigade liaison officer, showed Major O'Kane a United States Central Command fragmentary order (FRAGO 1099) on her computer screen.[1] O'Kane read about 80% of the fragmentary order.[2]

The US Secretary of Defense, Donald Rumsfeld, approved the fragmentary order at the request of CIA Director George Tenet.

The US Commander in Iraq, Lieutenant General Ricardo Sanchez, then issued the classified fragmentary order to the 800th Military Police Brigade in November 2003. It contained highly sensitive information. It was an order for the secret detention of a high-value Iraqi detainee.[3] The order demanded that personnel at Camp Cropper not put the detainee's name on a roster of detainees and it demanded that he not be registered with the ICRC.

The detainee was reportedly Iraqi Hiwa Abdul Rahman Rashul, a suspected terrorist and high-ranking member of Ansar al-Islam. Mr Rashul had been captured in Iraq by Kurdish soldiers in June or July 2003.[4] He was transferred to CIA custody. The CIA then removed him to Afghanistan for interrogation.[5] He was returned to Iraq after legal advice from the US Office of Legal Counsel concluded he was a "protected person"

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1 Doc 141.

2 Doc 141.

3 Jamie McIntyre, 'Pentagon: Iraqi Held Secretly at CIA Request', *CNN* (online), 16 June 2004 <http://articles.cnn.com/2004-06-16/us/ghost.prisoner_1_report-on-prisoner-abuses-800th-military-police-brigade-antonio-taguba?_s=PM:US>; Edward T Pound, 'Iraq's Invisible Man', *US News* (online), 20 June 2004 <http://www.usnews.com/usnews/news/articles/040628/28prison.htm>.

4 Dana Priest, 'Memo Lets CIA Take Detainees Out of Iraq' *Washington Post* (online), 24 October 2004, < http://www.washingtonpost.com/ac2/wp-dyn/A57363-2004Oct23?language=printer>

5 Dana Priest, 'Memo Lets CIA Take Detainees Out of Iraq' *Washington Post* (online), 24 October 2004, < http://www.washingtonpost.com/ac2/wp-dyn/A57363-2004Oct23?language=printer>

under Geneva Convention IV and should be returned to Iraq.[6] He was then held at Camp Cropper, an Iraqi prison near Baghdad airport. The people detaining Mr Rashul did not know his real name so he was referred to as Detainee Triple X.

3.1 Ghost and hidden detainees - breaches international law

The fragmentary order, which effectively ordered the man's detention be kept hidden and that he not be registered with the ICRC, violates a number of principles of international law.

The ICRC is an independent and neutral humanitarian organisation and has a special role in monitoring compliance with international humanitarian law. Its principal purpose is to provide protection and assistance to victims of armed conflict. The Geneva Conventions, and state practice, recognise the special status of the ICRC. The ICRC fulfils the role of a protecting power under the Geneva Conventions. This gives the ICRC the right to visit civilian detainees and prisoners of war, without restriction on the duration and frequency of such visits, and interview such detainees without witnesses.[7] As a result, the ICRC has an important monitoring role regarding the treatment of detainees. It is a principle of customary international law that in international armed conflicts the ICRC must be granted regular access to all persons deprived of their liberty to verify the conditions of detention and to restore contacts between those persons and their families. This means that all states must comply with it regardless of whether this is something they have undertaken to do.[8]

Geneva Convention III (which relates to POWs[9]) and Geneva Convention IV (which relates to civilians[10]) provide for the establishment of an information bureau for detainees. Parties to a conflict must establish an information bureau to facilitate the registration of the details of the detainees who are in their custody. They must also forward such information to relevant parties, to allow for the communication of the information to a detainee's family. Also, detainees have the right to communicate with their families regularly and at the time of their imprisonment to inform them of their captivity.[11] It is clear that these requirements were breached by the US in relation to Mr Rashul. The order to keep Mr Rashul hidden and unregistered was in clear contravention of the US's obligations under the Geneva Conventions regarding the treatment of detainees.

It is not clear what treatment Mr Rashul was subject to during his detention in Afghanistan and Iraq. Geneva Convention III provides for a number of minimum requirements of detention including hygiene and health, sufficient food and clothing,

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6 Dana Priest, 'Memo Lets CIA Take Detainees Out of Iraq' *Washington Post* (online), 24 October 2004, < http://www.washingtonpost.com/ac2/wp-dyn/A57363-2004Oct23?language=printer>

7 Geneva Convention III, Article 126; Geneva Convention IV, Article 76[6], Article 143.

8 Rule 124A

9 Article 122.

10 Article 136.

11 Geneva Convention III, Articles 70 and 123.

and shelter from the hazards of war.[12] At all times, prisoners of war must be humanely treated.[13] If Mr Rashul's treatment fell below any of these standards, the US would be in breach of the Conventions.

It is likely that Mr Rashul's detention also breached international human rights laws. For example, if his treatment fell below the required standards, and he was tortured or subject to cruel, inhuman or degrading treatment or punishment at the hands of the CIA, then the US would have breached numerous human rights treaties.[14] Also, the fact that Mr Rashul's detention occurred outside the framework of detention provided in the Geneva Conventions could mean his detention was arbitrary, in breach of the freedom from arbitrary detention.[15] Indeed, his removal to Afghanistan could be regarded as an enforced disappearance.[16]

Mr Rashul's transfer from Iraq to Afghanistan for interview with the CIA also breached Geneva Convention IV. Article 49 prohibits individual or mass forcible transfers from occupied territory to the territory of any other country, regardless of their motive. Legal advice by Jack Goldsmith, the head of the US Office of Legal Counsel, who had previously advised that removal of detainees outside of Iraq was legally permissible, later ruled that Mr Rashul must be returned to Iraq as a protected person under Geneva Convention IV.[17]

3.2 US inaction

Major O'Kane has claimed that he raised the classified order with his superior officer, US Colonel Marc Warren, the day after he read the order on the US Major's computer screen.[18] Colonel Warren was a lawyer and the Staff Judge Advocate at CJTF - 7 in Baghdad. Major O'Kane said he raised the subject of the order with Colonel Warren because he was worried it would embarrass US authorities if it became public.[19] As of

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12 Geneva Convention III, Article 22 (hygiene and health), Article 26 (food), Article 27 (clothing), Article 23.(shelter). Similar provisions exist in Geneva Convention IV, see Article 89 (food and water), Article 90 (clothing), Articles 91 and 92 (medical treatment), and Articles 83 and 85 (protected accommodation).

13 Geneva Convention III, Article 13.

14 For example the International Covenant for Civil and Political Rights (ICCPR), Articles 7 and 10; the Universal Declaration of Human Rights (UDHR), Article 5; and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

15 ICCPR, Article 9, UDHR, Article 9.

16 Convention for the Protection of All Persons against Enforced Disappearance, Article 2.

17 Dana Priest, 'Memo Lets CIA Take Detainees Out of Iraq' *Washington Post* (online), 24 October 2004, < http://www.washingtonpost.com/ac2/wp-dyn/A57363-2004Oct23?language=printer>

18 Doc 141.

19 Doc 141, 2.

17 June 2004, O'Kane believed the US military authorities had not followed up on his concerns.[20]

Major O'Kane's concern proved to be correct. On 16 June 2004, US media outlets reported on the fragmentary order,[21] and the secret detention of Detainee Triple X became the subject of widespread criticism.[22]

3.3 Australian Government inaction

It is not clear precisely when Australian Department of Defence officials first became aware of Major O'Kane's knowledge of Detainee Triple X.

While still in Iraq, Major O'Kane reported his knowledge of the fragmentary order to his Australian army superior, an Australian Lieutenant Colonel. It is not clear when this occurred; however, it was sometime after he had raised the issue with Colonel Warren (in January 2004) and before 17 June 2004. The Lieutenant Colonel was an Intelligence Officer stationed in the United Arab Emirates at the Australian National Headquarters – Middle East Area of Operations, which was known as Headquarters Joint Task Force 633 (HQ JTF 633).

Major O'Kane's superior should have duly processed this important information, given that it indicated a breach of international law relating to detention. It is not clear whether this occurred. If the Lieutenant Colonel kept such sensitive information to himself, it raises serious questions about the effective functioning of the Australian military chain of command.

Australia's then Minister for Defence, Robert Hill, was informed of Detainee Triple X when he received a memorandum prepared by the Chief of the Defence Force, General Cosgrove, and Secretary of Defence, Ric Smith, dated 17 June 2004.[23] This memorandum was prepared after Major O'Kane raised the issue in an interview with Brigadier Steve Meekin from Defence Intelligence Organisation on the same day. This interview was the first time Major O'Kane had raised the issue with officials in Australia.[24]

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20 Doc 141, 2.

21 Jamie McIntyre, 'Pentagon: Iraqi Held Secretly at CIA Request', *CNN* (online), 16 June 2004 <http://articles.cnn.com/2004-06-16/us/ghost.prisoner_1_report-on-prisoner-abuses-800th-military-police-brigade-antonio-taguba?_s=PM:US>; Edward T Pound, 'Iraq's Invisible Man', *US News* (online), 20 June 2004 <http://www.usnews.com/usnews/news/articles/040628/28prison.htm>.

22 See Edward T Pound, 'Iraq's Invisible Man', *US News* (online), 20 June 2004 http://www.usnews.com/usnews/news/articles/040628/28prison.htm, Jarrett Murphy, 'Rumsfeld Ordered Prisoner Hidden', *CBSNews*, 17 June 2004 http://www.cbsnews.com/stories/2004/06/17/iraq/main624411.shtml>, Josh White, 'Army, CIA Agreed on "Ghost" Prisoners"', *The Washington Post* (online), 11 March 2005 http://www.washingtonpost.com/wp-dyn/articles/A25239-2005Mar10.html.

23 Doc 141.

24 Doc 141.

Major O'Kane did not tell Department of Defence officials about his knowledge of the fragmentary order in two previous interviews, on 7 and 10 June 2004. Mike Pezzullo, Head of Defence Infrastructure, conducted the interviews, in the presence of Commodore Mike Smith, Lieutenant Colonel Roy Abbott and Ms Mignon Patterson. They were part of the Iraq Detainee Fact-Finding Team (IDFFT) set up to investigate Australian involvement with detainees in Iraq. During the two lengthy interviews,[25] Mr Pezzullo questioned Major O'Kane about his role in Iraq, including his investigation of abuses at Abu Ghraib and the advice he gave about proposed interrogation techniques and detention matters. Despite the relevance of the detention of Detainee Triple X to these issues, Major O'Kane failed to raise his knowledge of the fragmentary order. It was only on 17 June 2004, the day after the existence of Detainee Triple X became international news, that Major O'Kane seems to have raised the issues directly with Defence officials in Australia.

It is reasonable to expect that information about Detainee Triple X should have reached the Minister for Defence soon after Major O'Kane notified his superior, the Australian Lieutenant Colonel, about the matter. This does not appear to have happened. But when Major O'Kane raised the issue with Brigadier Meekin, the Minister for Defence was informed immediately.

The Australian Government should have communicated its concern to the US Government as soon as it became aware of the fragmentary order. It should also have put on record its concern that the treatment of Detainee Triple X amounted to a failure to respect international laws relating to armed conflict.

The Australian Government did none of these things. Instead, all it did was bring the issue to the '*attention of US authorities'*.[26]

On other occasions, the Australian Government had raised difficult issues with its allies.[27] Why, then, did the Minister for Defence simply respond to the memorandum about Detainee Triple X by stating no more than it '*should be brought to the attention of US authorities as they might be relevant to US investigations"*? [28]

Following the Minister's direction, on 6 July 2004, Mr Pezzullo sent a letter to the US Ambassador, regarding Major O'Kane's knowledge of the fragmentary order. The letter stated: '*The Minister for Defence has requested that this information be brought to the attention of the Embassy of the United States for action as appropriate'*.[29]

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25 See docs 39 and 40.

26 Doc 128.

27 See Doc 132.

28 Doc 141.

29 Doc 128.

Although the existence of the fragmentary order was public knowledge by this time, the Australian Government should still have put on record its concerns about the treatment and detention of Detainee Triple X, particularly given the public assurances by the Defence Minister, Robert Hill, who said in May 2004 that if he had he been aware of abuses in Iraq before they were in the public domain, he would have '*made inquiries and expressed a view*'.[30]

However, an email obtained by PIAC between staff at Defence and the Department of Foreign Affairs and Trade (DFAT) suggests that the Government never intended to follow up on abuses with the US. The email states:

> The correspondent quotes Mr Downer [the then Minister for Foreign Affairs] as saying in recent DFAT/NGO consultations on human right that DFAT "would be willing to follow through on particular cases of alleged human rights abuses carried out by US-led forces in Iraq to establish that these are properly investigated and appropriate action taken". We will need to get around this somehow.[31]

In fact, there is nothing in the released documents to indicate that the Australian Government expressed any concern about the legal and moral issues raised by Detainee Triple X's secret detention.

3.4 Summary: Detainee Triple X

The documents reveal that the Australian Government has kept hidden the fact that an Australian military lawyer was aware of an illegal fragmentary order regarding Detainee Triple X. Although Major O'Kane raised the fragmentary order with his US and Australian superiors soon after he became aware of it, it seems that no further action was taken. Only after the existence of the fragmentary order was made public, did Major O'Kane raise the issue again with Defence officials in Australia. The Australian Government should have taken a strong position regarding the illegal detention and expressed its serious concerns to the US. However, the issue was simply brought to the attention of the US for '*action as appropriate'*.

4. Preventing ICRC access to detainees

During an ICRC inspection of Abu Ghraib in January 2004, Major O'Kane was instructed to deny the ICRC access to nine people who were detained in cell block 1A.

Major O'Kane was responsible for facilitating ICRC visits to detention facilities in Iraq in late 2003 and early 2004. In October 2003, ICRC visits had been conducted without notice, as the ICRC was entitled to do under international law. However, during December 2003, Major O'Kane discussed with the ICRC improvements to their visits, including agreed dates for the visits.[32] Major O'Kane explained that due to the constant

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30 Minister Hill, *7.30 Report*, 3 May 2004, http://www.abc.net.au/7.30/content/2004/s1100546.htm.

31 Doc 59.

32 Doc 39, 47.

attacks being made on the Abu Ghraib facility that notice of the ICRC's visits would allow for improved security arrangements.[33]

Prior to the 4 January 2004 visit, a US Brigadier General/Colonel, who was the Commander of the Military Intelligence Brigade, had decided to refuse the ICRC access to the nine detainees. Previously, he had sought to refuse access to the entire cell block of twelve detainees. However, the number of 'hidden' detainees was reduced to nine as a result of negotiations with the ICRC at a coordination meeting.[34]

Major O'Kane had not intended to be at Abu Ghraib on 4 January 2004. However, the US Brigadier General/Colonel asked that he stay and facilitate the ICRC visit.[35]

The US refused to give the ICRC access to these detainees on the ground that they were undergoing active interrogation at the time of the ICRC visit. The US relied on Article 143 of Geneva Convention IV to deny the ICRC access.[36] Geneva Convention IV provides for the protection of civilian persons during armed conflicts. Article 143 provides that the ICRC can visit all places of detention, to interview detainees without witnesses, and that the duration and frequency of the visit shall not be restricted. It includes a limited exemption, which states:

> Such visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.

A similar exemption exists in Geneva Convention III, which applies to prisoners of war.[37]

The ICRC was prevented from interviewing the nine detainees on that occasion. However, the US gave the ICRC the names of the nine detainees so that they could be interviewed on a subsequent visit.[38]

Major O'Kane reported that the '*ICRC weren't really happy'* about that arrangement.[39] He added: '*they'll come in going we require access to everywhere. They don't refer to that there is an exemption in Geneva IV…They've got their own agenda*.'[40] Major O'Kane explained that the US's rationale for the exclusion of the ICRC was: '*if you break someone down, or persuade them to give up information you don't need them drawing strength from an ICRC visit*'.[41] According to Major O'Kane, the Brigadier

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33 Doc 39, 47.
34 Doc 39, 57–61.
35 Doc 39, 58.
36 Doc 39, 59.
37 Geneva Convention III, Article 126.
38 Doc 39, 60.
39 Doc 39, 58.
40 Doc 39, 58-9.
41 Doc 39, 59.

General/Colonel was '*not going to have interrogations interrupted by the ICRC he obviously understands that – they were entitled to interview them in due course*'.[42]

4.1 US attempt to avoid application of international law

Major O'Kane's responses suggest that the US's application of the exemption to deny the ICRC access was used too readily. One can infer that the US regarded the ICRC visits as an inconvenience because they sought to interrupt interrogations.

Although Article 143 authorises the denial of the ICRC access to detainees, this is clearly limited to situations of imperative military necessity. It is not clear from O'Kane's comments what the imperative military necessity was to justify denying the ICRC access. In addition, Article 143 states clearly that denial of access by the ICRC to detainees can only occur if it is an exceptional and temporary measure. O'Kane's comments suggest that the US was pursuing a general policy, at least in relation to detainees in a particular cell block, not to allow interrogations to be interrupted by ICRC visits, and that this was at least partly motivated by a desire to "break down" those detainees being interrogated.

Perhaps the US simply did not want the ICRC to have access to this particular cell block. Cell block 1A was later revealed to be at the centre of the abuse at Abu Ghraib; as Major O'Kane himself stated, the cell block is now "notorious".[43] It is reasonable to conclude that the US failed to respect the terms of the Geneva Conventions, in breach of article 1.[44]

4.2 Summary: ICRC denied access

Major O'Kane seems to have accepted the US decision to exclude the ICRC from visiting the nine detainees. Although at the time he was following the order of the US Brigadier General/Colonel, Major O'Kane could have raised the issue with his Australian commander at a later date, as he did regarding the fragmentary order. He does not appear to have done so. This is despite the fact that he believed that at least part of the reason the US was obstructing the ICRC access was because they were trying to '*break down*' some or all of the nine detainees undergoing '*active interrogation'*.

The documents obtained by PIAC suggest that Major O'Kane – who was a military lawyer and the Australian Defence Force's representative at Abu Ghraib – did not appear to have had concerns about the US's conduct, which arguably was inconsistent with the Geneva Conventions. Moreover, after Major O'Kane informed the Australian Government, during an interview in June 2004, that the US was obstructing access by the ICRC to certain detainees, the Australia Government seems not to have expressed any concern to the US.

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42 Doc 39, 60.

43 Doc 39, 57.

44 Geneva Convention III, Article 1 and Geneva Convention IV, Article 1.

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