

# How We Came to Torture

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*What is difficult is separating what we now know from what we have long known but have mostly refused to admit.<sup>1</sup>*

The ghastly pictures from Abu Ghraib have forced America to confront the reality of some of its tactics in the war on terror. The almost pornographic images have prompted quick condemnations of torture and the formation of a host of commissions to examine how the abuse came to pass. While many of the reports are yet to come, those already completed by Army investigators, independent commissions and reporters make clear that the abuse was not simply the product of “bad apples.” Rather, it was at least in part the result of arrogance and callousness at the highest levels of government.

My thesis is as follows: The law of war and international human rights agreements place limits on the conduct of American soldiers on and off the battlefield. Some of these limits apply even when soldiers have captured members of the enemy who have violated the laws of war and are therefore illegal or unprivileged combatants. Adherence to these limits is an important part of military culture, and clear direction for compliance with these rules has been a part of military regulations. Beginning in 2002, members of the civilian leadership of the Bush Administration decided that existing rules were inadequate in the prosecution of the war on terror. They made a series of decisions that changed the rules to permit soldiers to engage in physical abuse. Those changes violated our obligations under international humanitarian and human rights law. The Government’s policies were a moral, legal, and political disaster. At worst, these rules were seen as winking at torture. At best, they sent confusing signals to American troops and contractors in Afghanistan and Iraq.<sup>2</sup> The scandals were predictable; in fact, they were unambiguously predicted.

## I. THE LAW

The protections governed by international law are of two varieties: international humanitarian law, and international human rights laws. Although there are aspects of both that are a part of what is called customary international law, most aspects have been codified in treaties and ratified by the United States. As treaties, they are part of the law of the land; therefore, they are as much “law” as statutes enacted by Congress.

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## Gottlieb

The first set of protections falls under international humanitarian law, which is a part of the law of war. The core of international humanitarian law is the limitations imposed upon parties engaged in war. The limitations deal with what soldiers can do to each other and what they can do to non-soldiers. Agreements have existed for centuries, and they have made a huge difference when they have been followed. After World War II, the nations of the world spent several years attempting to codify the obligations that they believed the civilized world ought to follow in cases of armed conflict. In light of some of the comments made by members of the Bush Administration that the Convention is “obsolete,” it ought to be remembered that the Geneva Conventions followed the worst conflict in human history. World War II was a conflict where rules were sometimes followed and often were not. It was a conflict between states, but it was also a conflict where guerrilla warfare, reprisals against civilians, terrorism and sabotage were endemic. The drafters of the Geneva Conventions were practical individuals who knew something about terrorist tactics.<sup>3</sup>

The Convention distinguishes between armed conflict of an international character and armed conflict of an internal character.<sup>4</sup> It then provides, in cases of international armed conflicts, for certain privileges for combatants. Combatants are those who have the right to participate in hostilities. By far the most important “privilege” possessed by lawful combatants is the right to kill or wound those fighting for the other side, without being prosecuted for war crimes or domestic crimes such as assault or murder. In addition to the combatant’s privilege to engage in hostilities, fighters for party states in an international armed conflict who are captured are ordinarily entitled to prisoner-of-war status.<sup>5</sup> Designation as a prisoner of war means that the prisoner is not treated like a common criminal,<sup>6</sup> and it entitles him to be returned at the conclusion of hostilities.<sup>7</sup>

The Fourth Geneva Convention contains protections directly applicable to “civilians,” who are very broadly defined as those who are not recognized members of an armed force.<sup>8</sup> Civilians who do not fight are not legitimate military targets; those who take up arms remain civilians but become legitimate military targets.<sup>9</sup>

Although the terms “unlawful combatant” and “unprivileged combatant,” do not appear in the Geneva Conventions, it is generally accepted that these terms refer to persons taking a direct part in hostilities who are not entitled to do so and who therefore are not entitled to be classified as prisoners of war upon falling into enemy hands.<sup>10</sup> The United States government has argued that members of Al-Qaeda should not qualify as legitimate prisoners of war.<sup>11</sup> The government is almost surely correct in this view. Al-Qaeda members, for the most part, do not fight on behalf of a party to the Geneva Convention, they do not fight in regular armed forces, and they do not observe other aspects of the law of war.<sup>12</sup>

But the provisions of the Geneva Conventions do not extend just to members of the Armed Forces. The Fourth Geneva Convention defines protected persons as

“[t]hose who, at any given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are nationals.”<sup>13</sup> The fact that a person has unlawfully participated in hostilities is not a criterion for excluding the application of the Fourth Geneva Convention. In fact, the Convention expressly includes as “protected persons” individuals detained as spies or saboteurs.<sup>14</sup>

This view is supported not just by the language of the Convention, but by the Commentary to the Geneva Convention, published by the Red Cross. This Commentary, which was published in the 1950's, states that:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.<sup>15</sup>

This view of coverage has been consistently supported in United States military law. For example the military manual defining the rights of persons committing hostile acts, states:

If a person is determined by a competent tribunal, acting in conformity with Article V (of the Third Geneva Convention) not to fall within any of the categories listed in Article 4, he is not entitled to be treated as a prisoner of war. He is, however, a “protected person” within the meaning of Article 4 (of the 4<sup>th</sup> Geneva Convention). . . . those protected by the 4<sup>th</sup> Geneva Convention also include all persons who have engaged in hostile or belligerent conduct but who are not entitled to treatment as prisoners of war.<sup>16</sup>

The British Manual of the Law of War on Land reads the same way. It states that:

Regular members of the armed forces who are caught as spies are not entitled to be treated as prisoners of war. But they would appear to be entitled, as a minimum, to the limited privileges conferred upon civilian spies or saboteurs by the Civilian Convention, Art. 5. Members of the armed forces caught in civilian clothing while acting as saboteurs in enemy territory are in a position analogous to that of spies.<sup>17</sup>

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## Gottlieb

The protections accorded to individuals covered by the Fourth Geneva Convention are not extensive, but they do include “rules on humane treatment,” including “prohibition of coercion and of corporal punishment, torture, etc.” as well as rights against collective punishment. Under Article 5 of the Convention, some other rights possessed by detainees, such as rights of communication, can be temporarily suspended where security requires.<sup>18</sup> But the Fourth Convention, if applicable, prohibits physical abuse of prisoners, acts or threats of violence, intimidation and humiliation.<sup>19</sup>

In addition to International Humanitarian Law, International Human Rights Law limits what the United States can do to people taken into its custody. The International Covenant on Civil and Political Rights, to which the United States is a signatory, states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>20</sup> The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment calls on states that are a party to the agreement to act to prevent torture in any territory under its jurisdiction or by any of its citizens.<sup>21</sup> It also calls upon state parties to prevent and prohibit acts of cruel, inhuman or degrading treatment or punishments which do not amount to torture.<sup>22</sup>

The Convention Against Torture makes clear that this Convention is designed to govern the conduct of soldiers in wartime. It states that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”<sup>23</sup>

Torture is defined in the Convention as “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.”<sup>24</sup> The United States reservations to the Convention limits the definition by defining mental pain and suffering as “prolonged mental harm” caused or resulting from the intentional infliction or threatened infliction of severe pain or suffering, the administration or threatened administration of mind-altering drugs, the threat of death, or the threat that another person will be subjected to death or torture.<sup>25</sup> In the reservations accompanying the ratifications, the United States has also stated that it regards the prohibitions against cruel, inhuman and degrading punishment to be equivalent to the prohibitions on cruel and unusual punishment and the due process clause of the Fifth, Eighth and Fourteenth Amendments.<sup>26</sup>

Over the past generation, other democratic systems have been forced to grapple with international terrorism and the limits upon police tactics imposed by international human rights law. In particular, the legality of certain methods of rough interrogation has already been considered by a number of courts. In 1978, in *Ireland v. United Kingdom*, the European Court of Human Rights adjudicated the legality of interrogation practices engaged in by British police in their efforts to control terrorism

committed in Northern Ireland by the Irish Republican Army.<sup>27</sup> At the time the British engaged in their tactics, Northern Ireland was in the grip of a brutal internal war. The IRA had been responsible, in a fairly short period, for literally thousands of shootings, thousands of bombs or other explosions and hundreds of deaths of soldiers and civilians in both Ireland and England. Britain, in response, instituted some extremely harsh detention rules. Included in its regime were the use of stress positions, a method of interrogation which requires individuals, for example, to stand spread eagled against a wall and stand on their toes; hooding; subjection to noise; sleep deprivation; and deprivation of food. Although there was no question that the British government was faced with a severe and serious threat and that these extreme interrogation methods were only authorized against a small percentage of the detainees, the European Court of Human Rights found that the practices violated the European Convention's prohibition of cruel, inhuman or degrading treatment.<sup>28</sup>

In 1999, the Israel Supreme Court also adjudicated the legality of rough interrogation of suspected Hamas terrorists.<sup>29</sup> Terrorist violence in Israel is more longstanding and far bloodier than any threat so far aimed at the United States. The Israeli loss in civilian population (as a proportion of its population) far exceeds the fatalities at the World Trade Center.

The interrogation practices carried out by the security services in Israel included many of the same practices carried out by the British -- sleep deprivation, stress positions, and shaking. The court recognized that it was located in a country under threat. But it also recognized that it was located in a country that had signed the Torture Convention and International Covenant on Civil and Political Rights. The Court found that there are no exceptions to the prohibitions on torture contained in the international agreements. It stated that there was no balancing of interests permissible. The court declared illegal intentional sleep deprivation, stress positions, and the use of loud noise and other sensory disruption or deprivation.<sup>30</sup>

## **II. THE BUSH ADMINISTRATION'S RESPONSE**

Regrettably, the Bush Administration ignored this legacy. Instead, it fairly quickly decided that the threat it was facing was entirely unprecedented. Existing treaties were seen as impediments to be overcome. Concerned with the need to acquire as much "actionable intelligence" as possible, by whatever means, the Administration adopted a strategy to permit something close to unfettered power in dealing with terrorist suspects. As early as January 2002, Defense Secretary Rumsfeld labeled the detainees arriving at Guantanamo from the Afghan war as "unlawful combatants."<sup>31</sup> He also stated that the detainees, in his words, were not entitled to "any rights under the Geneva Convention."<sup>32</sup> The following month, he questioned the relevance of the Geneva Conventions to our current situation: "The reality is the set of facts that exist

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## Gottlieb

today with the al-Quaeda and the Taliban were not necessarily the set of facts that were considered when the Geneva Convention was fashioned.”<sup>33</sup> He stated that the concern about our treatment of detainees, much of which came from our allies, was “isolated pockets of international hyperventilation.”<sup>34</sup>

At the same time that Secretary Rumsfeld was declaring the inapplicability of the Geneva Convention, memos written by White House Counsel Alberto Gonzales were arguing for declaring both the Taliban and Al-Quaeda as outside the coverage of the Convention.<sup>35</sup> Gonzales recognized that the Convention prohibited the use of harsh methods of interrogation and pointed out that declaring the Geneva Conventions inapplicable would reduce the threat of war crimes or criminal prosecutions. Despite those advantages, he urged jettisoning the Geneva Conventions and asserted that terrorist violence “renders obsolete Geneva’s strict limitations on questioning of enemy prisoners.”<sup>36</sup>

Gonzales’s approach was taken notwithstanding concern voiced by Colin Powell, on behalf of the State Department, that these policies might “undermine United States military culture which emphasizes maintaining the highest standards of conduct in combat and could introduce an element of uncertainty in the status of adversaries.”<sup>37</sup> Powell also contended that holding the Conventions inapplicable would reverse over a century of United States policy and ultimately endanger our soldiers abroad.<sup>38</sup>

In February of 2002, President Bush announced that neither the Taliban nor Al-Quaeda were entitled to Geneva Convention protection.<sup>39</sup> He did state that Taliban prisoners would be treated as if they were protected by the Third Convention. On the other hand, those accused of being members of Al-Quaeda would be provided no rights under the Convention.<sup>40</sup> At the same time that the Government was asserting this legal position, officials began to attempt to justify the legality of interrogation involving physical abuse. Memos compiled by the Justice and Defense Departments crafted an outlandish definition of torture. These same memos simply ignored the obligation not to engage in cruel and inhumane conduct.<sup>41</sup>

In December 2002, Secretary Rumsfeld approved a set of interrogation methods for Guantanamo that included hooding, sleep deprivation, removal of clothing, chaining detainees to the floor for long periods, isolation and stress positions.<sup>42</sup> These techniques, along with some more deadly methods, became standard operating procedure in Afghanistan.<sup>43</sup> According to the report of Army Major General George Fay, “[F]rom December 2002, interrogators in Afghanistan were removing clothing, isolating people for long periods of time, using stress positions, exploiting fear of dogs and implements sleep and light deprivation.”<sup>44</sup> According to the detainees themselves, beatings were also not uncommon.<sup>45</sup>

In the case of Iraq, the United States government began with the premise that the Geneva Conventions applied.<sup>46</sup> But even so, the interrogation policies used in Guantanamo and Afghanistan were exported to Iraq and used by American soldiers at

Abu Ghraib and other prison facilities.<sup>47</sup> On September 14, 2003, General Ricardo Sanchez signed a memorandum authorizing many of the interrogation techniques already described but added in detail one not previously approved -- exploiting Arab fear of dogs.<sup>48</sup> The first use of dogs had actually occurred in Afghanistan, where interrogators concluded that the suspects feared dogs because of religious beliefs that those bitten are unhealthy or condemned.<sup>49</sup> While Sanchez's original directive was modified,<sup>50</sup> the use of dogs began almost immediately and culminated in the pictures that were beamed around the world from Abu Ghraib.<sup>51</sup> The Guantanamo methods were accompanied by other methods of interrogation that were designed to exploit Muslim sensibilities, such as stripping detainees naked and leaving them naked for long periods of time.<sup>52</sup>

These methods of interrogation were authorized from the top of the United States Government. Once these powers were placed in the hands of poorly-trained reservists, they morphed into something more sinister. Secretary Rumsfeld may not have specifically authorized the use of the worst tortures that displayed in the pictures last spring, but there should be no mistaking of how short the distance was between practices that the reservists were authorized to engage in or thought they were authorized to engage in and the tortures and humiliations that were in fact committed.<sup>53</sup> The administration authorized the use of dogs, the administration authorized the stripping naked of prisoners, the administration authorized exploiting Islamic concerns for modesty, the administration authorized the causing of physical pain. In Iraq, these procedures were ultimately used against a population that America claimed to be liberating.<sup>54</sup>

The illegal tactics employed by the Bush Administration in its fight against terrorism is not limited to the abuse of interrogation power. One of the tactics that most clearly violates international law is the disappearance of prisoners. This is another tactic that began in Afghanistan and spread to Iraq.<sup>55</sup> Our military has taken individuals who the military believes to be senior leaders of Al-Quaeda to undisclosed locations, where they have no access to the International Committee of the Red Cross,<sup>56</sup> where no notification is given to family members, where there is no oversight of their treatment, where there is, of course, no opportunity to contest the fact that these are the most culpable individuals and, in many cases, where there is no official notification that the people have even been taken.<sup>57</sup> Human Rights Watch has identified thirteen individuals taken in locations throughout the world who have simply disappeared into military custody.<sup>58</sup>

The refusal even to acknowledge the seizure of prisoners has been a regrettable feature of the United States occupation of Iraq. Almost as a matter of course, military authorities have failed to provide information about who had been arrested or why.<sup>59</sup> When arrests were made in the streets, family members were not notified.<sup>60</sup> Most found out only when the prisoners were released, or when the family members were

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## Gottlieb

able to get information from other recently released detainees. Many family members had no information for months about members of their families.<sup>61</sup>

The Third and Fourth Geneva Conventions require a system of notification.<sup>62</sup> The requirement was ignored by the United States military. What may be worse, American forces deliberately hid some “high value detainees” from the Red Cross so that their captivity and the methods of interrogation to which they were being subjected remained secret.<sup>63</sup>

Not surprisingly, these tactics are contrary to international law. The use of disappearances, at least until recently, has been a feature of the most repressive governments on the planet.<sup>64</sup> When Americans are taken abroad, it is justifiable to expect that the American government will learn of their status. That is so even if they are caught in warfare and behaving illegally.

In other cases, the United States engaged in a practice called “rendition,” which is a transferring of individuals from the custody of the United States to other countries, where the transfer is conducted by officials with the expectation that the other countries would torture the prisoners.<sup>65</sup> As one soldier was quoted, “We don’t kick the shit out of them. We send them to other countries, so they can kick the shit out of them.”<sup>66</sup> An official involved in this process is quoted as saying that “If you don’t violate someone’s human rights some of the time, you probably aren’t doing your job. . . . I don’t think we want to be promoting a view of zero tolerance on this.”<sup>67</sup>

### III. WHAT IS TO BE DONE?

The record compiled over the last two years is shameful. American brutality is not justified by the fact that our enemies are brutal. The failure of American enemies to abide by human rights standards or the laws of war does not justify the United States abandoning those restraints. It may well be that the Geneva or Torture Conventions need retooling. But for a country that believes in the rule of law,<sup>68</sup> there is a right and effective way to engage in this process. America should be consulting with its allies and the entire civilized world about how the rules of war and criminal penalties might be adjusted in light of the lessons of the last three years.

The events of September 11, 2001 knocked America off-balance. It is past time to regain that balance. Americans need to understand that they will and should be judged by what they do, not what they say they are doing. What the United States ought to aim for was captured, in part, by the Chief Justice of the Israeli Supreme Court, in *Public Committee Against Torture v. Israel*:

We are aware that this decision does not ease dealing with the reality of Israel’s situation. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open



before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.<sup>69</sup>

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**Notes**

- \* Professor, University of Kansas School of Law. The article is an adaptation of a speech given at the University of Kansas School of Law, on September 10, 2004, as part of a forum entitled "The New Normal: The Law and the War on Terror Three Years After September 11." I thank Ruth Anne French, B.A., University of Kansas, 2005, for her research assistance.
- 1. Mark Danner, *The Logic of Torture*, NEW YORK REVIEW OF BOOKS, June 24, 2004, at 70. Danner is one of a number of superb reporters whose work has been one of the few inspiring aspects of the scandal.
- 2. See The Honorable James R. Schlesinger et al., Final Report of the Independent Panel to Review DoD Detention Operations 10 (Aug., 2004).
- 3. See Marco Sassoli, *Use and Abuse of the Laws of War In the "War on Terrorism*, 22 LAW & INEQ. J. 195, 209 (2004).
- 4. E.g., Convention III Relative to the Treatment of Prisoners of War, adopted August 12, 1949, arts. 2-4, xx U.S.T. xxx, xx U.N.T.S. xxx [hereinafter Geneva Convention III], available at <http://www.genevaConventions.org> & <http://www.unhchr.ch/html/menu3/b/91.htm>; see also Protocol II Addition to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, available at <http://www.genevaConventions.org/>.
- 5. Geneva Convention III, *supra* note 4, at art. 4.
- 6. See *id.* at pt. II.
- 7. *Id.*, at pt. IV.
- 8. Convention IV Relative to the Protection of Civilian Persons in Time of War, adopted August 12, 1949, pt. I, arts. 3-4, xx U.S.T. xxx, xx U.N.T.S. xxx [hereinafter Geneva Convention IV], available at <http://www.genevaConventions.org>.
- 9. *Id.* pt. I, art. 5.
- 10. E.g. Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants*, 85 IRRC 45, 46 (2003); see also Sassoli, *supra* note 3, at 208-209.
- 11. Jim Garamone, *Geneva Convention Applies to Taliban, not Al Qaeda*, AMERICAN FORCES INFORMATION SERVICE, Feb. 7, 2002, at [http://www.defenselink.mil/news/Feb2002/n02072002\\_200202074.html](http://www.defenselink.mil/news/Feb2002/n02072002_200202074.html); see also Memorandum from Alberto R. Gonzales, Counsel to the President, to the President (Jan. 25, 2002) (copy on file with author).
- 12. Garamone, *supra* note 11.
- 13. Geneva Convention IV, *supra* note 8, pt. I, art. 4.
- 14. *Id.* at art. 5; see also Dörmann, *supra* note 10, at 50.

15. COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949 vol. IV (Oscar Uhler & Henri Coursier eds.), *available at* <http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/18e3ccde8be7e2f8c12563cd0042a50b?OpenDocument> (last visited Nov. 4, 2004).
16. Dörmann, *supra* note 10, at 51 (quoting US Military Manual, FM 27-10, The Law of Land Warfare 31, 98 (1956)).
17. Dörmann, *supra* note 10, at 52 (quoting British Military Manual Part II – The Law of War on Land n° 96 (1957)).
18. *See* Geneva Convention IV, *supra* note 8, pt. I, art. 5.
19. *E.g. id.* at pt. I, art. 3.
20. International Covenant on Civil and Political Rights, pt. III, art. 7 (adopted Dec. 16, 1966), *available at* [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm).
21. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, pt. 1, art. 2, 1465 U.N.T.S. 85, *available at* [http://www.unhchr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhchr.ch/html/menu3/b/h_cat39.htm).
22. *Id.* at pt. 1, art. 16.
23. *Id.* at pt. 1, art. 2.
24. *Id.* at pt. 1, art. 1.
25. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United States Reservations, pt. II, (adopted Dec. 10, 1984) *at* <http://www.unhchr.ch/html/menu2/6/cat/treaties/Convention-reserv.htm>.
26. *Id.* at pt. 1.
27. *See* Republic of Ireland v. United Kingdom, 80 Eur. Ct. H.R. (1979), *available at* <http://www.wroldii/prg/eu/cases/ECHR/1978/1.html> and <http://www.law.qub.ac.uk/humanrts/ehris/ni/icasel/intcaseA.htm>.
28. *See id.* at 79.
29. H.C. 5100/94, Public Committee Against Torture v. Israel, *available at* <http://62.90.71.124/eng/verdict/framesetSrch.html>.
30. *Id.*
31. Charles Aldinger, *Detainees Unprotected by Geneva Convention – Pentagon*, REUTERS, *at* [www.reuters.com](http://www.reuters.com) (Jan. 11, 2002); *see The Road to Abu Ghraib*, HUMAN RIGHTS WATCH, June, 2004 at 5 *available at* <http://www.hrw.org/reports/2004/usa0604/usa0604.pdf>.
32. Aldinger, *supra* note 31.
33. Garamone, *supra* note 11.
34. Charles Aldinger, *Rumsfeld Slams 'Hyperventilation' Over Captives*, REUTERS, *at* [www.reuters.com](http://www.reuters.com) (Feb. 8, 2002).
35. *See* Garamone, *supra* note 11.
36. *Id.*
37. Colin Powell, Memorandum to Counsel to the President (Jan. 26, 2002) cited in HUMAN RIGHTS WATCH, *supra* note 31, at 6.
38. *Id.* *See also* *Final Report of the Independent Panel to Review DoD Detention Operations* 33-34 (Aug. 2004).
39. *Id.* at 80-81, app. C.
40. *Id.*
41. Jay S. Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President: Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A (Aug. 1, 2002). *See also* Jay S.

- Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Status of Taliban Forces under Article 4 of the Third Geneva Convention of 1949, (Feb. 7, 2002).
42. *Final Report, supra* note 38, at 68. *See also* R. Jeffrey Smith, *Documents Helped Sow Abuse, Army Report Finds*, WASH. POST, Aug. 30, 2004, at A1.
43. *Final Report, supra* note 38, at app. E.
44. George R. Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*, Aug. 23, 2004, at 29.
45. *Id.* at 64-5, 68, 71, 73-82.
46. *Final Report, supra* note 38, at 36, 79-80, 82..
47. *Id.* at 37-38, 68, 82-83. *See also* LTG Anthony R. Jones, *AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade*, Aug. 23, 2004. at 5, 16. *See also* George R. Fay, *supra* note 44, at 24-26, 119.
48. *Final Report, supra* note 38, at 9, app. D. *See also* Fay, *supra* note 44, at 24-26, 83.
49. Fay, *supra* note 44, at 83.
50. *Final Report, supra* note 38, at 77, 83.
51. Fay, *supra* note 44, at 68, 83-87.
52. *Id.* at 10, 60-61, 68-70, 87-92.
53. *Final Report, supra* note 38, at 10. *See also* Fay, *supra* note 44, at 56-7, 61-2, 90, 135.
54. Fay, *supra* note 44, at 69. *See also* HUMAN RIGHTS WATCH, *supra* note 31, at 4.
55. HUMAN RIGHTS WATCH, *supra* note 31, at 12.
56. *Final Report, supra* note 38, at 87.
57. HUMAN RIGHTS WATCH, *supra* note 31, at 2, 12.
58. *Id.* at 12.
59. Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment, and Interrogation, February 2004, *available at* [http://www.globalsecurity.org/military/library/report/2004/icrc\\_report\\_iraq\\_feb2004.htm](http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.htm).
60. *Id.*
61. *Id.*
62. Geneva Convention III, *supra* note 4, at Part III, Section V.
63. Fay, *supra* note 44, at 64, 66.
64. HUMAN RIGHTS WATCH, *supra* note 31, at 2.
65. *Id.* at 2, 10-11.
66. Dana Priest and Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1.
67. *Id.*
68. *Final Report, supra* note 38, at 34, 79.
69. H.C. 5100/94, Public Committee Against Torture v. Israel., *available at* <http://62.90.71.124/eng/verdict/framesetSrch.html>.