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Mistreatment of Detainees in the War on Terror: How the Bush Administration's Policies Have Violated International Law and Hurt America

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Table of Abbreviations

CAT - Convention against Torture

CIA - U.S. Central Intelligence Agency

DOD - U.S. Department of Defense

DOS - U.S. Department of State

GC III - Convention (III) relative to the Treatment of Prisoners of War

GC IV - Convention (IV) relative to the Protection of Civilian Persons in Time of War

ICC - International Criminal Court

ICCPR - International Convention on Civil and Political Rights

MI - Military Intelligence Corps of the U.S. Army

MP - Military Police Corps of the U.S. Army

OGA - Other Government Agency (military slang for anonymous personnel thought to be CIA)

OHCHR - Office of the High Commissioner for Human Rights

OLC - Office of Legal Counsel

I. Introduction

The foundation of civil liberty in modern democratic societies is the due process of law, the guarantee that no person shall be deprived of his or her freedom without a just cause, nor receive any punishment not duly and legally prescribed, nor suffer any punishment that would be inhumane or destructive of dignity. In the United States equal justice for all people before the law, during times of peace and war, is enshrined not only in the Constitution but also in the international laws that bind us and connect us with the rest of the world. The promise of fair and equal justice is one of the principles our country was founded upon and an ideal that should earn us the respect and admiration of the world. It is, however, an ideal, one that Americans and citizens of other free nations have done too little to make an everyday reality. Arbitrary arrests, unfair trials, torture and degrading treatment are not remnants of the distant past, and neither are they the sole province of oppressed countries controlled by strongman dictators. For democratic societies they are not entirely new, either. In the United States, for example, the use of torture in correctional facilities and by police officers throughout the country has not been uncommon in the last several decades (Conroy 33). The torture of captured enemies during wartime by American soldiers occurred as well, during the Vietnam War (Greer 372).

These violations, however shameful, do not approach the scope or scale of the most recent assault against the principle of due process in the United States. Beginning during the immediate the aftermath of the terrorist attacks of September 11th, 2001,

and ending only with its departure from power in January 2009, the administration of President George W. Bush placed suspected terrorists under arrest for indefinite periods of time in a manner contrary to the laws of war, denied those prisoners fair trials, authorized the use interrogation techniques, such as stress positions and simulated drowning (also called "waterboarding") that are torturous or degrading to human dignity, and sent suspected terrorists overseas for the purpose of interrogations where torture had a high likelihood of occurring (the so-called "extraordinary renditions"). The Bush administration asserted that these acts are legally justified by presidential military authority and beyond the ability of any law to prevent (Greer 384). One effect of these actions was to reduce the importance of obeying international law and respecting the humanity of prisoners in the minds of American personnel, leading to situations where abusive behavior went beyond the original intent of the administration, such as the infamous abuse of prisoners at Abu Ghraib Prison in Iraq by American military police (Gourevitch 103).

It is tempting, in times of great national crisis, to act with less restraint than the principles of justice would otherwise allow. Let it not be said that Al Qaeda is not a serious threat, because it does pose a grave danger, and in a way that the United States is not used to fighting against. It is true that international terrorist networks cannot be defeated with conventional military doctrine, but that doesn't mean that Americans have to abandon these principles, especially not for the sake of measures which may seem very effective and "tough" but are actually counterproductive. The closest historical analog to the behavior of the Bush administration towards prisoners is the internment of Japanese-American citizens during the Second World War, supposedly to prevent sabotage, a decision which was ordered by President Roosevelt and backed by the Supreme Court. It is well-known today that the danger of sabotage was very small and the internment is considered one of the great shames of the United States' history. The mistreatment of detainees and disregard for international law over the past several years has not only been unnecessary but may have actually strengthened our enemies, and there is little doubt that the attempts to institutionalize and legally justify the use of torture will also go down as one of the most shameful parts of American history.

Other countries that have tried to circumvent the rule of law during times of war or national crisis have suffered for it. The experimental tactics used by the United Kingdom against Irish Catholics only exacerbated the threat of the Irish Republican Army and left a black mark on British history. The Israeli government's attempts to institute legal coercive interrogations in a limited manner led to a spiraling pattern of systemic abuse. Both cases illuminate different ways that ignoring international law can and has harmed the interests of the United States.

The indefinite detention of so-called "unlawful enemy combatants," denying such persons access to impartial courts when they are in custody, and the use of certain interrogation techniques amounting to torture and degrading treatment are all violations of

multiple instruments of international law. They have also hurt the interests of the United States by damaging its reputation and moral authority abroad and encouraging ordinary people of foreign nations to take up arms against us. It will benefit the United States to observe international law in all future endeavors.

II. Overview of International Law Regarding Prisoners

1.Introduction

International law comes in many forms; unlike municipal (i.e., domestic) law, there is not an orderly hierarchy of official law-making bodies in international politics, and for that reason international law arises from the consensus of states. Treaties are written agreements among two or more states, and in modern times they are probably the most important type of international law (Shaw 89).[1] A large number of treaties that regulate state behavior towards prisoners are binding on the United States, many of which reflect broader principles and ideals. For that reason, it will be sufficient to focus on treaties in an analysis of what international laws regulate how the United States must treat detainees in the war on terror.

There are two major types of international law that affect how states must treat those in their power: humanitarian law and human rights law. International humanitarian law, more formally known as *jus in bello*, regulates state practice in times of war; it prescribes how states must treat prisoners of war and civilians in occupied territories, among other things (Shaw 1055). International human rights law regulates the way states treat people in their power in general; in many cases such law explicitly forbids the derogation of certain rights even during wars or emergencies (256). Treaties representing both types of law are binding on the United States and thus are relevant to its conduct in the war against terrorism.

2. Categories of protected persons

The Four Geneva Conventions of 1949 and their Additional Protocols are the core of international humanitarian law, and are universally recognized as law (ICRC). They prescribe legal protections for any imaginable class of person who may come under the control of a belligerent power in the course of an armed conflict. The Third 1949 Geneva Convention (hereafter GC III) protects prisoners of war. Its provisions apply during any period of international armed conflict, regardless of the existence of an official declaration of war or recognition of a state of war by any party to the fighting. GC III defines "prisoners of war" to include regular soldiers of a party to the conflict, duly authorized civilian crews, laborers, correspondents, and mechanics that accompany military units, and members of the merchant marine. Also included are members of militias or resistance movements that follow certain rules: having a clear command structure; wearing a distinctive mark that can be distinguished from a distance; carrying arms openly; and obeying the laws and customs of warfare. Also included are soldiers of a government not recognized by a Detaining Power, which don't necessarily need to meet all the same conditions as militias to qualify for POW treatment. Furthermore, belligerent captives whose status under GC III are in doubt must be treated as if they qualify as prisoners of war until a "competent

tribunal" can determine otherwise.

The Fourth Geneva Convention (hereafter GC IV) protects civilians not otherwise protected by the other three conventions and who are in the power of a foreign state during a war or occupation, if they are nationals of a state belligerent to the conflict. Persons that participate in a conflict without qualifying for protection under GC III would, if they are nationals of a state party to the conflict, be entitled to the protections of GC IV (Dormann 50). The First Additional Protocol to the Geneva Conventions (hereafter AP I) provides additional rules for the conduct of international conflicts. It has not been ratified by the United States, but some of its provisions, notably Article 75, are commonly regarded as reflecting customary international law and are thus binding regardless (Sands 150). Article 75 describes "Fundamental Guarantees," the basic rights accorded to anyone in the power of state party to a conflict who is not otherwise protected by another provision of AP I or any of the four 1949 Geneva Conventions. Civilian nationals of a state that is not a party to a given conflict, for example, would not qualify for protected person status under the Conventions and would therefore fall under Article 75's protection. Article 75 (or more precisely the customary law it reflects, in the case of the United States) thus makes it impossible for anyone to be in the power of a state without having some guarantee of protection under international humanitarian law (Dormann 73).

In the early days of the United Nations two legal instruments were created which were vital to the later development of major human rights treaties. The first is the UN Charter itself, which states that the UN should support universal observance of human rights in Article 55. The second is the Universal Declaration of Human Rights of 1948, which proclaimed a universal standard of rights that should be observed and protected. At the time these were not enforceable in any meaningful way, although they may have become binding to an extent since. Their chief importance lies in the road they paved toward more concrete legal instruments later on (Shaw 261).

The major human rights treaties which regulate state behavior towards detainees are the International Covenant on Civil and Political Rights (hereafter ICCPR) and the United Nations Convention Against Torture, both of which the United States has ratified (OHCR). According to General Comment 31 of the Human Rights Committee, states parties to the ICCPR have an obligation to ensure the rights of all people in their jurisdiction or effective control, even if they are outside said state's territory. Article 5 of the Torture Convention likewise enjoins all state parties to outlaw torture in any territories under their jurisdiction.

3. General rights and treatment

Part II of GC III describes in general terms the rights of POWs, in that they are to be treated humanely, given appropriate medical care, and treated without undue discrimination. Part III, which includes Articles 17-107, describes POW rights in greater detail. Prisoners of war are only required to provide accurate information about their identities, including, name, rank, and social security number or equivalent. Their quarters must be as good as those of

soldiers of the Detaining Power in the same area, particularly regarding space and bedding allowed, and must not be deleterious to the health of prisoners, and are not to be located in a place that is especially close to combat zones. Food and water must be provided sufficiently to keep the prisoners healthy and prevent weight loss, and clothing suitable for the local climate must be given to the prisoners and repaired or replaced as is necessary. Camps must be clean and sanitary, and have necessary facilities for the medical treatment and monthly inspection of prisoners. All prisoners must be allowed to practice their religion, and if there is no clerical official to provide appropriate services among the prisoners then one must be provided by the Detaining Power. Discrimination based on race, religion, nationality, or language is prohibited. Prisoners must be able to write letters to their families informing them of their situations whenever they are captured, transferred to another camp, or hospitalized, and they must be allowed to receive letters and send at least two letters of their own per month, barring difficulties in procuring translators and censors.

GC IV allows for the internment of persons protected by its provisions only if necessary to military security, and guarantees internees largely the same set of rights that prisoners of war have under GC III. It states in Article 5 that, unlike GC III, a protected person engaged in or definitely suspected of hostile activities may be detained without being entitled to certain rights otherwise guaranteed if they would be harmful to the security of the occupying power, such as the right to communication, although full protection must be restored as soon as possible.

Part III of the ICCPR, covering Articles 6-27, guarantees the right to life, protection against degrading treatment, discrimination, and slavery, the right to freedom and practice of religion, the right to recognition as a person under the law, and the right human treatment and respect for their dignity to everyone under the jurisdiction of a state party to the Convention. According to Article 4 certain derogations may be made from the Convention only if required by an emergency situation; Article 4 also states that such derogations can not be applied toward the rights to freedom from torture and discrimination, or the right to free exercise of religion.

4. Fair trial rights

GC III provides that prisoners of war who are accused of crimes must have fair trials in regularly constituted, independent, and impartial courts, by the same procedures under which soldiers of the detaining power would be tried. Proceedings must be held as quickly as possible, and if it is necessary to confine a prisoner before said proceedings such confinement must last no longer than three months. POWs on trial have the right to a qualified advocate, meet said advocate in private, call witnesses in their defense, and appeal decisions. POWs convicted of crimes must have their sentences served in the same facilities and in the same manner as soldiers of the Detaining Power in equivalent situations. Persons who are protected by GC IV have largely the same trial rights as prisoners of war, and if convicted should be kept separate from other detainees. Article 75 of AP I prohibits any sentence or

punishment from being carried out "except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure…"

Article 9 of the ICCPR prohibits arbitrary detention, mandates that anyone charged with a crime be "entitled to a trial within a reasonable time…," and states that anyone under arrest has the right to have a court review the lawfulness of the arrest and order him freed if it is illegal. Article 14 guarantees the rights of all persons facing criminal charges to a legally established, independent, impartial court, to be presumed innocent before being found guilty, to summon witnesses in his defense, and to examine witnesses against him.

5. Prohibitions against torture and other degrading treatment

GC III prohibits the use of torture as an interrogation method in Article 17 and as a method of punishment in Article 87, and in Article 130 lists torture as a "grave breach" of the Conventions requiring state parties to find and bring to trial anyone accused of committing it. Article 32 of GC IV prohibits causing physical suffering of protected persons, including torture, and like GC III lists torture as a "grave breach" in Article 147. Article 75 of AP I prohibits torture and degrading treatment under any circumstances whatsoever. Article 7 of the ICCPR prohibits torture and degrading treatment, and Article 4 lists this as a right that may *not* be derogated in a time of national crisis or emergency.

The Convention against Torture, as might be expected, goes into much greater depth on this issue than other relevant treaties. It defines torture in Article 1 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, 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.

Article 2 requires state parties to take effective measures to ban torture and states that nothing whatsoever, even a public emergency, can justify torture. Article 3 bans sending a person to another country where there is a real danger of that person being tortured. Article 5 declares that the illegality of torture must extend to all territories under the jurisdiction of the state parties or onboard ships and aircraft registered to the state parties. Article 10 states that anyone involved in the treatment of detainees should be educated on the prohibition of torture, and Article 11 requires state parties to review rules and practices of detention and interrogation with an eye toward preventing torture. Article 16 additionally requires state parties to prevent "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1" from being committed by public

officials in territories under their jurisdiction.

6. Execution and enforcement

a. The Red Cross

The International Committee of the Red Cross (hereafter ICRC or Red Cross) is an international non-governmental organization that has provided assistance to prisoners and the wounded in times of war for since the mid-nineteenth century. It has been closely involved with the creation, implementation, execution, and enforcement of most instruments of international humanitarian law, including the 1949 Geneva Conventions and their predecessors (Shaw 1163).

International law provides the ICRC a special legal mandate to perform humanitarian functions during times of international armed conflict. GC III guarantees the ability of the ICRC to act as a neutral protecting power during a conflict; this entails the authority to ensure the shipments of mail and relief to and from places of internment, receive reports about the labor conditions of prisoners, and propose the creation of a Central POW Information Agency, among others. Article 125 of GC III commits state parties to assist charitable organizations, especially the ICRC, deliver relief to POWs. Article 126 states that ICRC delegates must have the ability to visit any place where prisoners of war are held, employed, or transported without restriction and to hold interviews with prisoners in private. These liberties are not contingent on the ICRC being recognized as a protecting power by the detaining power in question. GC IV provides similar powers to the Red Cross regarding inspections, relief, and insurance of shipments to and from places where persons under its protection are detained.

Unfortunately, the ICRC is limited in its ability to publicly protest against violations that it observes because of its traditional stance on confidentiality. It maintains neutrality in order to more fully guarantee its access to prisoners, refugees, and other persons that may require its help, so the ICRC has very rarely made public its knowledge of transgressions against international humanitarian law (Shaw 1079).

b. Prescriptions for domestic enforcement

The Geneva Conventions also place certain responsibilities on state parties with respect to their enforcement. Both GC III and IV require the dissemination of the text of the conventions in both peace and war, as well as the inclusion of their study in courses of military and civil instruction. Personnel that have responsibility for protected persons must have access to copies of the conventions at all times and receive special instruction as to their provisions. State parties are also required to provide effective legal sanctions against committing grave breaches,[2] bring any person accused of a grave breach to trial regardless of nationality,[3] and to otherwise suppress all acts contrary to the Conventions that are not grave breaches.

The ICCPR requires state parties to protect each right guaranteed by its provisions by the force of domestic law. Articles 4 and 5 of the Convention against Torture require state parties make torture illegal under domestic law and do whatever is necessary to establish jurisdiction over torture in any territory under is control. Articles 6 and 7 mandate that states parties must arrest any person alleged to have violated the

convention and either extradite that person or put the case to its own authorities for the purpose of prosecution.[4]

c. Treaty mechanisms

Since there was no pre-existing organization like the ICRC to manage issues of human rights law, the ICCPR and the Torture Convention both set up special committees with enforcement duties. Part IV of the ICCPR, comprising Articles 28-45, mandates the creation of a Human Rights Committee, whose members are elected by and from the states parties to the Covenant. State Parties are required to submit reports on their efforts to guarantee the rights listed in the CCPR one year after it enters into force, and the Committee has the power to request further reports at any time afterwards. The Committee may also receive complaints from one state party about another's alleged failure to fulfill its obligations under the CCPR and attempt to solve any such dispute by mediating negotiations between the parties involved if it decides that all domestic remedies have been exhausted or unreasonably delayed.[5] In cases where the Committee is unable to resolve and issue it may appoint an ad hoc Commission to further attempt to create an amicable solution. The Committee also has the responsibility to submit an annual report of its activities to the General Assembly of the United Nations. The Committee can issue General Comments that explain and interpret the Covenant's provisions; General Comment 31, mentioned above, is an example of such a comment.

Article 17 of the Convention against Torture prescribes the creation of the Committee against Torture, a body consciously modeled on the Human Rights Committee of the ICCPR (Nowak 586). State parties must submit reports to this Committee not just one year after the Convention enters into force for them but every four years thereafter as well, in addition to whatever other reports the Committee requests. In cases where well-founded evidence indicates the possibility of torture being carried the Committee can invite the state party concerned to cooperate in examining the evidence and making observations based upon it. If it is warranted, the Committee may also make a confidential inquiry into the matter, which may involve visiting the territory of the state party in question. It has similar powers to the Human Rights Committee regarding the power to mediate disputes between state parties if domestic remedies have been exhausted, and it may also receive communications from individuals claiming to be victims of violations of the Convention if a state party with jurisdiction over said individuals recognizes the competence of the Committee to do so.

d. UN organizations

There are also other organizations that are outside of the specific framework of the relevant treaties, which are important to monitoring and investigating the way prisoners and detainees are treated throughout the world, including official bodies of the United Nations. One such organization is the Office of the High Commissioner for Human Rights (hereafter OHCHR), which is the primary executive body of the United Nations responsible for human rights. It coordinates and organizes the efforts of all the UN groups with some responsibility for

human rights (Forsythe 4).

The Human Rights Council, a subsidiary body of the United Nations General Assembly, was created in 2006 in order to more effectively address human rights violations throughout the world. It took over the task from its predecessor, the Human Rights Commission, which came under intense criticism for the poor human rights record of some of its members. The institution of the Council, a body with largely similar powers, intended to ameliorate that problem by having its members elected by the General Assembly (76). It is tasked with performing "Universal Periodic Review," a process that entails the cooperative examination of human rights situations in all member states of the United Nations. The Council may also receive and discuss credible communications regarding "consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances," if domestic remedies have been exhausted. The Human Rights Council also has the power, inherited from the Commission, to establish "special procedures," which are mandates that empower their holders (who are usually expert individuals) to investigate, advise, and make public reports on specific areas of their expertise. Such mandates may be assigned either to specific countries or to thematic issues relating to human rights (Shaw 283).

There is such a mandate regarding torture; the title of the person holding that mandate is "Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment." According to the official web page on the OHCHR's web site, the Special Rapporteur has the responsibility to transmit appeals and other communications regarding torture to state governments, perform fact-finding missions, and make annual reports to the Council and the UN General Assembly. He or she can act with far more independence than most other legally established human rights entities, including the Human Rights Council itself, because he or she is *not* bound by the constraints of the usual exhaustion of domestic remedies rule (Weissbrodt 693). [6]

e. NGOs

There are, of course, many important organizations dedicated to protecting human rights and investigating breaches of international law that are not affiliated with the United Nations or any government at all. Two of the most important non-governmental organizations (or NGOs) that concern themselves with the treatment of prisoners and detainees are Human Rights Watch and Amnesty International.

Human Rights Watch has a relatively small membership, made up of about 230 experienced and influential professionals. It works to promote human rights by conducting investigations into alleged abuses of all sorts throughout the world, publishing their findings publicly (unlike the Red Cross) in order to shame and embarrass abusers through media attention, and encouraging them to make reforms (Korey 309). Through its fact-finding and lobbying it also seeks to influence governments and international organizations throughout the world, especially the United States government (344).

Amnesty International, by contrast, is a mass-movement organization that draws its influence from large grassroots membership. Amnesty International performs many activities draws its influence from large grassroots membership. Amnesty International performs many activities

similar to those of Human Rights Watch, such as fact-finding, observation, appealing to governments and reporting its findings publicly and widely; it also mobilizes its large numbers for other tasks, such as large-scale demonstrations, petitions, letter-writing campaigns, and protests against policies that infringe on human rights (Clark 9). Amnesty International focuses special attention on prisoners that have been illegally detained or abused while in custody, although it deals with other human rights issues as well (12).

f. *Legal prosecutions and punishments* All of the aforementioned executive bodies, committees, and NGOs perform vital tasks such as fact-finding, publishing, and engaging with abusive actors to change their policies. Let it not be said that what they do is unimportant; their operations are necessary to uncovering and preventing illegal abuses of detainees. None of them, however, have the responsibility or the power to enforce international law the way "enforcement" is commonly thought of in domestic law: arresting, charging, trying, and punishing individuals that make transgressions against the law. Historically, that task has fallen, for better or for worse, to state governments.

If an individual commits or orders to be committed an act of abuse against a prisoner of war, then obviously the government of the state to which he is a national has the right and duty to put that individual on trial for the crime. If the abuse is ordered or condoned at the highest levels of government then, of course, there is little chance of such a prosecution actually taking place. There is no universally applicable system of sanction and punishment in international law as exists in domestic law (Shaw 4). Therefore, in such situations the responsibility for capturing and prosecuting alleged abusers has usually fallen to some other state or group of states, according either to the principle of prosecuting offenses committed against themselves or the principle of universal jurisdiction.

Two of the most important examples of the former principle at work are the Tokyo and Nuremberg trials of German and Japanese leaders and soldiers after the Second World War.[7] That a state has a legitimate right to prosecute those who are alleged to have committed war crimes against them or their nationals, so long as fair trial standards are applied, is a longstanding principle of international law appealed to by the Allies to justify the trials. The "victors' justice" challenge, the assertion that a court is illegitimate because it has been created by the winners of a war to judge the defeated, was presented by the defendants at Nuremberg, Tokyo, and other *ad hoc* international courts throughout history, but never with any success (Boister 32). The claim that the Allies were legally unable to combine their jurisdiction and form a single court, which was presented by the defendants at the beginning of the Tokyo trials, was unanimously dismissed out of hand by the court (178).

State governments clearly have a legal right to prosecute alleged war criminals, including POW abusers,[8] and may combine their jurisdictions into a single court. These rights were exercised in the post-World War II trials. The manner in which those rights were used, however, left much to be desired regarding fairness. The trials were conducted as military tribunals, even if they were of an international character, and therefore would probably not pass the requirements for a fair and independent court required by the ICCPR and the Geneva Conventions. The charters which established the Nuremberg and Tokyo Tribunals allowed them to ignore "technical rules of

evidence" and admit anything they deemed to have relevance to the case in Articles 19 and 13, respectively.[9] The Tokyo Tribunal in particular suffered from a host of problems, including *inter alia* political and ethnic bias on the part of the judges, the disproportionately high rejection rate of the defense's evidence, the abnormal length of the trial, and the relative lack of time and resources available to the defense. It did not come close to meeting fair trial standards, even at the time when it took place (Boister 89-114). Regardless of the importance of these trials to the development of modern international law, as a model for carrying out that law today they are sorely lacking.

The latter half of the twentieth century has seen the increasing adoption of the doctrine of universal jurisdiction, which holds that certain crimes are so heinous that any court may charge, try and convict an offender regardless of the territorial limits of its jurisdiction. War crimes, including grave breaches of the Geneva Conventions, have fallen under universal jurisdiction since 1945 (Shaw 595). Article 7 of the Convention against Torture arguably gives states parties the authority to prosecute alleged torturers even when they are not nationals and the alleged crimes are claimed to have occurred outside the territory state in question. During the famous Pinochet extradition hearings, British judge Lord Millet even claimed that the prohibition of torture by custom afforded extraterritorial jurisdiction to national courts even without taking into account treaty law (599). The application of this principle relies on alleged offenders being within the territorial jurisdiction of a state government that is willing to prosecute them, and some governments are more supportive of the doctrine than others. Belgium, for example, has made universal jurisdiction an explicit part of its national law. Several world leaders accused of crimes against humanity have been charged by its courts, including Yasir Arafat, Ariel Sharon and Paul Kagame, and Belgian courts have convicted several Rwandans of participating in genocide (Macedo 3). The United States government, on the other hand, has been generally hostile toward the concept. Some influential political and legal experts argue, not without some merit, that universal jurisdiction could be abused by state governments in order to threaten or punish foreign political opponents that would otherwise be protected by state sovereignty (6). Many state governments will probably refuse to endorse universal jurisdiction because of such concerns, and so as a solution to the problem of punishing transgressors against international law the doctrine will be, by itself, inadequate.

In 2002 an institution was created that seeks, if not to solve, then at least to ameliorate some of the problems involved in enforcing international law by providing the services of a permanent and independent tribunal, namely the International Criminal Court (hereafter ICC). According to Article 5 of the Rome Statute, the international legal instrument which created the ICC, it has jurisdiction over crimes against humanity and war crimes. Article 6 defines "crimes against humanity" to include torture, murder, rape, and imprisonment in violation of international law, while Article 7 defines "war crimes" to include grave breaches of the 1949 Geneva Conventions.

Unfortunately, the United States has not ratified the Rome Statute, arguing that the independent prosecutor may bring politicized charges against Americans who, since the United States is so heavily involved in world affairs, are more exposed than citizens of other countries (Eleas 7). Since 2002 the U.S. government has actively opposed the ICC in a number of ways. Congress has passed an act that prevents federal agencies from cooperating with the ICC and prevents U.S. participation in peacekeeping missions where there is any danger that American personnel will be prosecuted by the ICC (11). Therefore, it is unlikely be involved in the resolution of the issue of detainees in the war against terrorism.

7. Conclusion

Between the Geneva Conventions, their Additional Protocols, and the aforementioned human rights treaties, there is no person, of any category, at any time, in any situation, anywhere in the world, during war or peace, who is not protected to some degree by international law. There can be no detainees or prisoners outside the law as far as the treaty obligations of the United States are concerned, regardless of their status as terrorists or criminals, and no matter whether they are held within or outside of U.S. territory.

III. Violations Committed by the Bush Administration

1. Introduction

Since the terrorist attacks of September 11, 2001, President Bush has authorized a series of military and intelligence operations known collectively as "the war against terrorism." In the course of this war members of the United States military and intelligence services have continuously, willfully, and systematically violated the rights of thousands of prisoners under both humanitarian law and human rights law, under the orders and condoning of top officials including generals, members of the Cabinet, and the President.

American personnel have consistently failed to perform adequate background checks needed to accurately determine whether detainees are POWs, criminals, or innocent civilians who were arrested by mistake or falsely implicated in military or terrorist activity. The rights of habeas corpus and access to regularly established courts have been denied to prisoners in Iraq and Guantanamo Bay based on specious legal reasoning, and hundreds of innocent people have been detained for years before being released without charges. Conditions in prisons run by Americans throughout the world have been inhumanely unhygienic and dangerous, sometime through neglect and sometimes as part of a deliberate plan to weaken the morale of prisoners prior to interrogation. Detainees have been subject to torture and inhuman, degrading treatment by Americans in the course of both interrogations and disciplinary actions. Some prisoners have also been subject to so-called "extraordinary renditions," where they have been transported to other countries for the purpose of being interrogated and tortured by non-Americans. In some cases American forces have extra-judicially killed prisoners or allowed them to be killed by allied forces. All of these actions are both morally outrageous and strictly prohibited by international law.

2. Arrest without just cause

a. Afghanistan

Even during the initial combat operations in Afghanistan during 2001 there were significant problems with the identification and processing of prisoners. A major element of these difficulties was the U.S.'s reliance on the Northern Alliance, a group of anti-Taliban militias. The Alliance provided the bulk of the ground troops during this period so that large numbers of American soldiers would not have to be committed, even though their forces had a history of brutality that rivaled their foes in the Taliban (Worthington Guantanamo Files 5). In the chaos and confusion of the war, a number of people were captured by Northern Alliance soldiers and then turned over to the Americans for interrogation who had very little or no connection at all with the Taliban or Al Qaeda, including travelers, relief workers, low-ranking foot soldiers, refugees, and religious teachers (30-38).

Pakistan was another nominal ally of the United States in the war against the Taliban and Al Qaeda. Pakistani soldiers and government officials proved themselves just as haphazard and careless in rounding up prisoners to be turned over to the United States as the Northern Alliance forces. Thousands of refugees fled across the Afghanistan-Pakistan border during the course of the war, and Pakistani soldiers arrested hundreds of them, mainly foreigners, and turned them over to the Americans on extremely spurious grounds. As with the prisoners captured by the Northern Alliance, there were few people of any real intelligence value among these prisoners, only a diverse mix of foot soldiers, religious scholars, and civilian refugees (49).

The unreliability of American allies to adequately screen prisoners was exacerbated by the United States' own policy of offering bounties for alleged members of the Taliban and Al Qaeda. Numerous prisoners have testified that they were falsely accused of working with or for terrorist groups and then "sold" to the Americans (46). For example, one Saudi Arabian explained that he crossed into Pakistan and was denied access to the Saudi embassy by Pakistani soldiers until they handed him over to the United States in exchange for money (Sebaii 45-46). There is also evidence that Afghani warlords from the Northern Alliance have earned money for transferring suspected terrorists and low-ranking Taliban fighters into American custody (Raman).

American personnel also made their own blunders when it came to identifying and capturing suspected terrorists in Afghanistan, the most incomprehensible being the arrest of five political prisoners that had previously been held by the Taliban. Because these men were foreigners, the Northern Alliance forced them to remain in prison even after the Taliban had been driven off, supposedly for their own safety. Even though they had been imprisoned by the Taliban for being suspected anti-fundamentalist spies, American agents later took them prisoner and sent them to the Guantanamo Bay Prison (Worthington Guantanamo Files 114).

Given the chaotic nature of war in general, the especially disorganized nature of Afghanistan, and the obvious risks that unlawful and unwarranted arrests would

arise from offering these bounties, the United States should have been extremely careful in examining the backgrounds of prisoners and checking the stories of those who claimed innocence. In fact, American officials were incredibly lax in this regard, assuming as a matter of course that most or all of the detainees in U.S.-run prisons in Afghanistan were guilty of committing or conspiring to commit acts of terrorism. The tribunals mandated by GC III to determine whether a belligerent belonged to a protected category of persons were completely absent at this point in time (90). Without any legally-prescribed mechanisms for determining who belonged in prison, the United States has held hundreds of people prisoner without any legally justifiable reason for unacceptably long periods of time before discovering or deciding that they are not threats and subsequently releasing them without charge.

An example of the stubborn refusal of United States government officials to consider that a prisoner might not be a terrorist during this time is the case of Mohammed Sadiq. He was a civilian who was over 80 years old when he was arrested by American soldiers, apparently because one of his family members was suspected of working for the Taliban. Even he, as obviously harmless as he was, spent several months under arrest before the United States released him (Raman). Many others whose innocence could have been determined by a brief investigation immediately after their capture were held prisoner in Afghanistan and Cuba for *years* before being released without charge. There was, for example, Khalid al Morghi, the son of a senior Saudi Arabian military officer, who took a leave of absence from his white-collar job to perform charitable aid work in Afghanistan – hardly the portrait of a hardcore terrorist, or any sort of combatant at all. He was still held, first in Afghanistan and later in Guantanamo Bay, for over four years before being released (Worthington Guantanamo Files 54).

The "competent tribunals" required by GC III to determine the eligibility of prisoners for protection under humanitarian law did not appear until years after the war began, and even then they were too little, too late. The Combatant Status Review Tribunals that were announced in July 2004 suffered from tremendous difficulties for a several reasons. First, the prisoners were denied access to lawyers during the tribunals. Second, the court was allowed to hear secret evidence to which the prisoners had no access. Third, the tribunals were held far away from the battlefield and a long time after the persons in question had been captured, making it very difficult for the defendants to call witnesses who might have known them to testify on their behalf. Finally, even when prisoners did provide addresses or telephone numbers for people that might have testified for them, the court apparently made no effort whatsoever to find them (267).

To sum up, the United States exhibited extreme negligence and willful disregard for international law in the way it processed alleged terrorists and criminals during the early part of the fighting in Afghanistan. The shocking thoughtlessness with which prisoners were initially assumed to be guilty and subsequently held in custody for months or years without an investigation was in direct contravention of international

humanitarian and human rights law[10] and also offensive to common moral sensibilities. The Bush administration and U.S. military and government officials should have anticipated the possibility of wrongful arrests during a confusing and complicated war, but instead displayed an attitude of unwarranted confidence that anyone under arrest must have done something to deserve it, an attitude which it would carry into its handling of the long-term detention, trial procedures, and treatment of prisoners outside of Afghanistan.

b. Iraq

The Abu Ghraib prison facility was taken over by the United States in 2003, initially as part of the creation of a new Iraqi criminal justice system; most of the other prisons in the country had been ransacked beyond salvation by looters, and there were few other options available. It was not intended, at first, to be used for detention operations by the American military (Gourevitch 19).

The increasing frequency of insurgent attacks in Baghdad caused American authorities to change that policy. Iraqis arrested by American soldiers on patrol were put into Abu Ghraib because there was literally nowhere else for them to go, even though the prison's location in a hostile area meant it came under mortar attack frequently. GC III provides that POW camps or other internment areas should not be located in especially dangerous places, and the Red Cross determined that American personnel had not taken sufficient measures to offer protection from shelling to the prisoners (Greenberg 403). Military prisoners and civilian prisoners were supposed to be handled separately from each other, and officially there was an attempt to do that, with a temporary tent encampment meant specifically for the civilians. However, the distinction between the two types of prisoners became less and less meaningful to the guards and administrators as the number of prisoners continued to increase beyond what they had been prepared to handle (Gourevitch 23).

Many prisoners were arrested on little evidence and were held long after they should have been released. In 2003 Red Cross inspectors were told by intelligence officers that they believed well over half the prison population of Iraq was kept there mistakenly (Greenberg 388). It was not uncommon for American soldiers on patrol to arrest anyone and everyone who was around during the aftermath of an attack. Firing weapons in celebration was a fairly common practice in Iraq, and according to a member of the Justice Department's Iraq rebuilding team, people were arrested for doing it (Gourevitch 23). The biggest problem was that it was difficult for these people to get released from Abu Ghraib even after it was fairly apparent that they did not belong. Even when judges and lawyers arranged for a prisoner to be released, the military would sometimes prevent it from happening. Some of the delays were probably just the result of bureaucratic errors, but the increasing demand for useful intelligence about insurgents also started to contribute as well; often prisoners that would otherwise have been released were kept in the prison because of supposed "intelligence value," assessments that the top on-site civilian administrator put little stock in (24).

The system of notification and information dissemination in Iraq was extremely flawed in 2003 as well. It was rare for those making arrests to properly inform suspects or their families of why they were being arrested or where they were taken, and the military usually failed to notify the families of suspects detained while away from their homes that they had been arrested at all. The ICRC, which otherwise would have helped notify families as quickly as possible, often received no or improperly completed paperwork from the United States military, resulting in unnecessary delays (Greenberg 389).

Among all the prisoners at Abu Ghraib, the ones that arguably least deserved to be there were the mentally ill ones, of which there may have been as many as ten. Many were delusional or schizophrenic, engaging in violent and unhygienic behavior that was unsafe for other prisoners, the guards, and themselves. These people should have been in a mental hospital instead of a military prison, or at least under the care of qualified mental health professionals. There were none at Abu Ghraib, and even though many potentially helpful drugs were available at the facility, without doctors to prescribe them guards just gave the mentally ill prisoners Benadryl and tried to deal with their behavior as best as they could (Gourevitch 145).

Many prisoners who were not obviously innocent civilians, including insurgents and some former members of Saddam Hussein's Iraqi military, which had been officially disbanded after the capture of Baghdad, were held by the United States officially as non-POWs because they were not members of a military force of a State Party to the Geneva Conventions. According to one interrogator, a senior intelligence official reported that Defense Secretary Rumsfeld had told him that insurgents were not protected by the Geneva Conventions and all interrogation techniques were usable, including dogs (211). Rather, their detentions were justified as the necessary imprisonment of those suspected of spying, sabotage, or other hostilities. Article 5 of GC IV does allow such detentions, but the ICRC has always held that its provisions should only be applied to exceptional cases and on an individual basis (33). Applying it to the detention of thousands of prisoners at the same time may, arguably, have been within the letter of the law, but it was most certainly in violation of its spirit.

The American soldiers in Baghdad can be excused for being aggressive with initial arrests; however, that people with no apparent connection to insurgents or terrorists were kept imprisoned instead of released quickly is unacceptable. Especially in a war zone with a shortage of space for prisoners, there seems little rationale for detaining more people than absolutely necessary. The same overly confident attitude from Afghanistan, the idea that anyone who was put in jail by an American must have done something wrong, was combined with the chaotic state of the country, its new justice system, and the American command structure to create a situation where many innocent civilians were put in prison for far longer than they should have been.

3. Indefinite Detention and Unfair Trials

The prison at the Guantanamo Bay Naval Base, Cuba, has held over 750 prisoners since it opened in January 2002 (CBC).

None of them had a fair trial or easy access to an impartial court while they were there, a situation that has famously been called a "legal black hole" (Steyn). The legal basis for their imprisonment was President Bush's Military Order of November 13, 2001, which stated that any non-citizens of the United States could be detained, without any specified time limit, if the President believed they were involved in terrorism or if it was in the interests of the United States that they be detained (Greenberg 26).

The Bush administration chose Guantanamo Bay as the location of the prison specifically to prevent the detainees from ever having access to an independent court in which they could challenge their detentions, complain about their treatment, or have a fair trial. A memorandum submitted to the General Counsel of the Department of Defense on 28 December 2001, written by John Yoo and Patrick Philbin, who were both Deputy Assistant Attorney Generals at the time, demonstrates that quite clearly. The memo argued that federal courts should not and probably would not find that they could exercise jurisdiction over an alien detained in Guantanamo Bay, and that chances were small that a judge would decide to grant a habeas corpus hearing in response to a petition filed by such a person (37).

Why was the administration so intent on preventing federal courts from having access to the detention camp? Apparently, top officials had already decided that all of the prisoners were guilty, and they didn't need or want any independent court to get involved and potentially challenge their decisions. Secretary of Defense Donald Rumsfeld, for example, stated publicly in January 2002 that the Guantanamo prisoners were "committed terrorists," and later that same month said that the prisoners were among the worst, most violent criminals in the world. American generals gave statements to similar effect about the prisoners as well (Worthington Guantanamo Files 127). These statements were being made about people who had never appeared in a court of law, much less been convicted in a fair trial.

The simplest solution to preventing the detainees from filing for habeas corpus or otherwise justifying their release would have been to classify them as prisoners of war, which Secretary of State Powell indeed argued should have been done (Greenberg 123). However, for reasons which will be explained below, the administration decided to classify them as "unlawful combatants" in an attempt to prevent the Geneva Conventions from applying to them (Worthington Guantanamo Files 128). The government was trying to have it both ways: locking up prisoners indefinitely and without putting them on trial as if they were POWs, but otherwise behaving as if they were criminals.

The administration wasn't entirely opposed to the idea of trials, but it wanted those trials on its terms and more or less under its control. The same Military Order that President Bush issued to justify the detention of suspected terrorists also provided for military tribunals to determine whether suspected terrorists were guilty of war crimes, and that the danger to the United States posed by such persons necessitated that the rules of law and evidence in normal cases could not be applied. According to the order, appointments to said commissions

would be made by the Secretary of Defense, and either he or the President could review and decide on the conviction or sentencing of a trial. Furthermore, any person subject to such a tribunal would be unable to appeal the decision in any American, foreign, or international court (Greenberg 25-28). Because the judges would be military officers who take orders from the President they could never be truly independent of executive authority (Koh "The Case Against Military Commissions" 339). Military tribunals as prescribed by the President's Military Order would almost certainly never meet the fairness and independence requirements of either the Geneva Conventions or the ICCPR.

One need not turn to hypothetical situations to see how unfair a trial by military commission would be, of course. The first military trial of an "unlawful combatant" to be successfully concluded (in July 2008, more than six years after the Guantanamo prison opened) was the trial of Salim Hamdan, a man accused of working as a driver and bodyguard for Osama bin Laden. (It was, in fact, because of his exclusion from parts of an earlier trial that the Supreme Court decided that military commissions violated the Geneva Conventions in *Hamdan v. Rumsfeld*.) The trial was riddled with problems, including the hearing of secret testimony behind closed doors, the acceptance of hearsay evidence of highly dubious validity, and the presentation of pointless, prejudicial evidence, supposedly meant to inform the jurors about the nature of Al Qaeda, but which served only as terrifying propaganda (Worthington "A critical overview").

What's worse, the court's sentence seems to have no relationship with the reality of Hamdan's detention. A Pentagon spokesman has stated that even when Hamdan is finished serving his sentence,[11] he may still be subject to potentially indefinite detention as an "enemy combatant" (CNN). This is nothing less than a mockery of justice and a demonstration of the paradoxical reasoning of the Bush administration. Hamdan was deprived of prisoner of war rights for allegedly violating the laws of war, but even after he has been convicted and punished according to what passes for justice in Guantanamo, the administration wants to hold him indefinitely as something other than a POW anyway. This, at least as much as anything else, should prove that President Bush and his advisors did not care about justice or the rule of law, whether international or domestic, when it comes to the detainee victims of the war against terrorism.

4. Torture

a. Overview

Torture and activity degrading to human dignity have been used during the war on terror by the United States, at first, as interrogation methods, in spite of the unequivocal ban on such techniques by international law. The use of such techniques was authorized at the highest levels of the civilian and military command structure (Greenberg 360).

b. Torture by American personnel

i. Afghanistan

The use of torture and degrading treatment began early on during military operations in Afghanistan, even before the official opening of any permanent prison sites. Notably, in December 2001 John Walker

Lindh, known colloquially in the U.S. media as "the American Taliban," was made to pose for humiliating photographs, threatened with death, taped to a stretcher while naked during interrogations, and denied medical treatment for his injuries, including a bullet wound in his leg, for several days (Worthington Guantanamo Files 82). The office of Secretary of Defense Rumsfeld, who was monitoring the interrogation closely, authorized the military interrogators in charge of Lindh to "take the gloves off" during the process (Roth and Worden 165). Another detainee who, like Lindh, immediately received extra attention from American soldiers and interrogators because of his race and nationality, was David Hicks, an Australian who fought for the Taliban. Hicks has claimed in an official affidavit that shortly after he was handed over to American authorities he had guns pointed at him and was threatened with death, and that later he was imprisoned onboard a naval ship where he was not given sufficient quantities of food. He also stated that he was transported to unknown locations and forced to kneel in uncomfortable positions for hours at a time while being struck by guards before being transported to the Kandahar prison (Bonner).

A permanent prison in Kandahar opened in January 2002, and for the first time a large number of prisoners were entered into the interrogation system. At first the interrogators tried to hew to the rules of behavior set by the Geneva Conventions and military regulations, but as the demand for useful intelligence increased they became more violent. Many prisoners were physically beaten, restrained, had their fingers broken, or had hard objects thrown at their heads during interrogations. Even these methods, brutal as they were, are relatively tame compared to the most extreme techniques used by some interrogators outside the usual Military Intelligence chain of command, including Special Forces soldiers and agents of the CIA and FBI. These extreme techniques included burning prisoners with scalding liquids and cigarettes, sexual violations, and application of electrical shocks. Many prisoners asserted that these actions were often photographed and that those photographs were used in later interrogations to threaten prisoners (Worthington Guantanamo Files 94-98).

The behavior of the prison guards was, if anything, even worse. The relaxation of Geneva Convention standards, combined with the general spirit of taking vengeance for the September 11 terrorist attacks, made the American guards especially prone to violent overreactions and arbitrary abuses. American soldiers were told that their prisoners were "nobodies," and at least one believed that if the Geneva Conventions had been applied and the prisoners labeled as "soldiers" then they would have been treated with more respect (Jehl). Beatings were common responses to rule violations, and prisoners were often denied adequate amounts of sleep because of "inspections" during the night that forced them to stand outside in the cold. Even harsher exposure to extreme cold was not unheard of at Kandahar, either, as many prisoners stated that they were exposed to the cold while naked, and at least one had cold water thrown on his body during the night. "Stress positions," the binding of prisoners in a way meant to cause them

physical pain, was also fairly common.

Psychological abuses also occurred, often in tandem with the physical ones. Prisoners were often forced to go naked while they were abused and were mocked and photographed in the process. Many had their beards, which are important to maintain for Muslims, shaved against their wills. Although each detainee was given his own copy of the Koran, some guards damaged and desecrated the holy books in order to taunt them; yelling insulting profanities about Islam and the Prophet Mohammed were fairly common as well (Worthington Guantanamo Files 88).

The Kandahar facility was the main U.S.-run prison in Afghanistan for only a few months, and in the spring of 2002 many detainees were transferred from that location to the prison at Bagram Air Force Base, which has served as the central United States military prison in the country ever since. As a prison camp Bagram left much to be desired, with hastily thrown together cells and pens made from wood and barbed wire, and windows boarded up with rusty sheets of iron (Worthington Guantanamo Files 170).

The abuse from guards and interrogators did not improve during the transition from Kandahar, either. Stress positions and sleep deprivation were incorporated into interrogation routines as pressure to obtain intelligence grew stronger. Even the most well-trained and ethical military interrogators went farther than they had before the move, keeping prisoners awake in long sessions for as long as the interrogators themselves could stay up, a process informally called "monstering." The name reflected that these early interrogators considered it the worst, cruelest technique that they were willing to use. When new, less experienced interrogators were sent to work at Bagram they increased the upper limit of sleep deprivation to 36 hours, ordered increased amounts of isolation and handcuffing outside of interrogation rooms, and generally allowed themselves to use other coercive techniques with greater frequency as time went by (Mackey 471). Unwarranted violence from the guards was as bad as it had ever been in Kandahar, if not worse, and the litany of beatings, humiliations, religious insults, death threats, rapes, and electrical torture continued unabated (Worthington Guantanamo Files 170).

The perhaps inevitable result of this culture of abuse was death; at least two Bagram inmates have died as a result of physical abuse from guards. Both confirmed deaths were largely caused by reservists untrained in detention using powerful blows to the legs as disciplinary measures. Mullah Habibullah was shackled in a holding cell and struck in the legs repeatedly over several days before he succumbed to his injuries and died (Worthington Guantanamo Files 188). The second man, known only as Dilawar, was chained and beaten repeatedly for apparent non-compliance during an interrogation, and died after five days. Official press releases ascribed the deaths only to heart attacks, but documentation from army doctors indicates that the damage to the legs was the most important factor (McCoy 126). Two of the soldiers directly involved in the deaths were convicted of criminal abuse in 2005 and sentenced to only a few months imprisonment; no officers were prosecuted at all (BBC

News).

ii. Guantanamo Bay

During most of the first year of its existence, interrogations at the Guantanamo Bay detention facility were fairly mild. During this time mistreatment involved general conditions, like open-air cages for living quarters and insufficient amounts of food, an atmosphere of uncertainty leading to intense fear, and large amounts of verbal abuse from the guards (Worthington Guantanamo Files 132). The worst, most violent transgressions were committed by the Extreme Reaction Force, or ERF, a squad of soldiers in riot gear who would respond to minor or nonexistent misbehavior with incredible savagery. Tarak Dergoul, a Guantanamo detainee that was frequently targeted by the ERF because he organized prisoner strikes, was so traumatized by his experiences that he needed psychological counseling after his release (Rose).

Conditions in Guantanamo became much worse in October 2002 when, due to frustrations from the lack of good intelligence, Major General Geoffrey Miller was appointed as the new commander of the base. His predecessor was considered "soft" for allowing detainees to keep their Korans and criticizing guards for committing verbal abuse (Goldenberg). It was Miller that decided that the best way to obtain results was to coordinate the activities of the Military Police guards and the Military Intelligence interrogators - as he put it, to "set the conditions." This meant that every aspect of the lives of the detainees was geared toward making them "break" under interrogation. In practice, this meant more beatings of "uncooperative" prisoners by guards, including, the continued use of the ERF teams, and the institution of new interrogation routines involving prolonged exposure to extreme temperatures and sleep deprivation (Worthington Guantanamo Files 193).

Miller's appointment roughly coincided with high-level decisions to explicitly authorize more violent forms of interrogation. In November 2002 Defense Secretary Rumsfeld responded positively to a request for new interrogation methods, explicitly allowing such techniques as stress positions, sensory and sleep deprivation, removing religious paraphernalia, the forced shaving of facial hair, and the use of dogs to frighten detainees. Rumsfeld rescinded his authorization several weeks later (Greenberg 237-239). According to an official log that was leaked to *Time* magazine, during that interim the harsh techniques were used against Mohammed al-Qahtani, infamously known as the "twentieth hijacker" of the September 11th attacks, including sleep deprivation and stress positions. Additionally, female interrogators would frequently invade his personal space in order to humiliate him.[12] Recently, the top legal military official in Guantanamo Bay has stated that she will not refer al-Qahtani to prosecution because the treatment he suffered amounts to torture (Woodward).

The administration was apparently pleased with the changes that General Miller had brought to Guantanamo Bay. In September 2003, he was sent to Iraq in order to provide a similar overhaul to the interrogation operations at the Abu Ghraib prison outside Baghdad, where the same practice of using the guards to constantly maintain an

environment supposedly conducive to successful interrogations was instituted and mentioned in the Army's internal investigation of abuse (Goldenberg).

iii. Iraq

An ICRC report released in 2004 and based on data gathered between February and November 2003 indicates that during that period in Iraq some level of brutality on the part of United States military personnel was present in every step of the detention process. At the time of arrest soldiers would often threaten or strike suspects who had their hands cuffed behind their backs. During transfers to prisons the treatment was even worse, as several severe beatings were reported, many resulting in serious injuries and a least one resulting in death. At least two cases of major burns caused by forced contact with hot metal surfaces were also reported (Greenberg 390). The very worst documented instances of mistreatment, which rose to the level of torture according to the Red Cross, occurred during interrogations performed by members of the US Army's Military Intelligence Corps.

The most common technique used by Military Intelligence (or MI) interrogators at Abu Ghraib was the solitary confinement of interrogation subjects in completely empty, totally dark rooms, for days at a time, while naked; cooperation with interrogators merited "rewards" such as beds, clothing, and light. Other abusive methods observed by the Red Cross included sleep deprivation, binding of the hands in a manner that caused wrist wounds, and being forced to walk through the facility's hallways while naked. The ICRC medical inspector discovered that several detainees had psychological problems, such as poor memory and suicidal tendencies, which were judged to have resulted from the physical and mental stress of their interrogations (Greenberg 393).

Oddly enough, the report stated that the worst sorts of abuse mostly did not occur to detainees that were being held in regular prison facilities run by military police. It noted that guards sometimes slapped or shoved detainees, and that one disciplinary measure used against detainees was forced exposure to the sun while handcuffed for as many as four hours, in addition to the more ordinary measures of temporary solitary confinement and withholding of cigarette rations (Greenberg 397). That raises the question: Why was it that most of the soldiers charged and convicted with crimes in regard to the Abu Ghraib scandal were members of the Military Police Corps, and not MI personnel, when their behavior was relatively benign by comparison?

Part of the answer is that some MP guards were committing serious abuses that the ICRC apparently did not observe or collect information about. In accordance with General Miller's transplanted Guantanamo policy the MPs took orders regarding prisoner treatment from interrogators, who consisted mostly of MI personnel, but also anonymous officials thought to be working for the FBI or CIA, called OGA (for "other government agencies") by the guards. The MPs were responsible for maintaining the sleep deprivation of certain prisoners with yelling, door slamming, or loud music and taking away clothes from certain detainees and providing only women's underwear for them to wear, in order to humiliate them.

Often the MPs were instructed to "soften up" detainees prior to interrogations; how exactly was left to their discretion, but the most common method was forcing them to exercise for several minutes (Gourevitch 98). This behavior had psychological repercussions, not only for the prisoners but for the guards as well. One MP guard described how the process had numbed him to the point where he was no longer shocked or repulsed by what he was asked to do. Torturing prisoners at the behest of interrogators had become a normal experience for him (104). Given the deleterious effects on the moral sensibilities of the MPs, it is not surprising that they displayed unwarranted violence towards prisoners on their own later.

The best-known image of abuse from Abu Ghraib is a photograph of a man wearing a poncho and hood, standing on a box with wires attached to his hands. On November 3rd, 2003, the MPs had been told that this prisoner was lying about his identity and were instructed to make him to confess his real name. At first his treatment was typical - sleep deprivation, yelling, stress positions, forced exercise. Then, inactive electrical wires were tied to his fingers, and the prisoner was told he would be electrocuted if he fell off of the box he was standing on (177). It looks bad, and it *is* bad, but for all of the photograph's infamy it doesn't come close to being the worst abuse at the prison, even by the Military Police.

The most egregious acts carried out by MPs on their own initiative and not at the behest of interrogators took place a few days later. A group of seven prisoners thought to have instigated riots out in the tents were transferred to the MI cells, and for several hours before the guards brought them to their cells they were stripped naked, beaten about the hands, feet, face and chest, verbally assaulted, forced to form a "pyramid" or "dog-pile" while being photographed, and put in positions simulating sex and masturbation. The MPs had never committed abuse on that scale before, and they never did again (196). It was unusual enough that several guards felt the need to report the incident to superior officers, but none of them seemed to make much of it (200).

Because of reports of prisoner abuse, lax discipline, and prisoner escapes at Abu Ghraib, an investigation was launched. The result was an Army document referred to as the "Taguba Report" after the general in charge of the investigation. The report found that abuse of prisoners by guards had occurred; in addition to the aforementioned examples, improper use of military dogs, threatening detainees with rape and death by gunshot, and pouring phosphoric substances from chemical lights onto detainees were also described in the report. Of the thirteen people named as suspects, two were civilian contractors, one was an MI sergeant, and the rest were all members of the Military Police, none above the rank of Staff Sergeant (Greenberg 417). General Taguba also found that the guards at Abu Ghraib had insufficient training in detention operations and the rules of international humanitarian law, and that copies of the Geneva Conventions were not provided in sufficient numbers to American personnel or the prisoners, and that prison commander General Karpinski had done too little to disseminate information and prevent abuse. He

recommended an overhaul of operating procedures, training in detention and the laws of war for all personnel involved with prisons, and an inquiry into MI interrogators regarding their role in prison abuse (420).

When the shocking photographs of the abuse at Abu Ghraib taken by soldiers were leaked to the press and shown on national television some sort of action was necessary. Several Military Police and a few Military Intelligence soldiers were court-martialed and convicted of crimes such as assault, conspiracy, or dereliction of duty. Only one commissioned officer, who was found innocent, was court-martialed. A few others faced fines and administrative reprimands, and Brigadier General Karpinski was demoted one rank and relieved of her command. No one was charged with torture or war crimes. No OGA or civilian interrogators were ever brought to trial. Brigadier General Jane Karpinski, the MP commander, was demoted one rank. General Miller was never brought to account for his recommendations, and senior officials were not held responsible for allowing the situation to deteriorate to such a level in the first place (270). Lieutenant General Ricardo Sanchez, who had authorized the use of extreme psychological torture techniques that had been developed by the CIA without telling the MP commander or officers, faced no official consequences either (McCoy 134). What the guards did in Abu Ghraib was wrong, and they should have been punished for it; using orders from a superior as a justification for war crimes has been a non-starter since the Nuremberg trials. However, that doesn't mean that those who gave the orders, and those who created conditions where such orders could conceivable be given and carried out, do not bear any responsibility either.

iv. Secret prisons

In addition to the major prisons in Iraq, Afghanistan, and Cuba, smaller prisons officially known as "black sites" that were operated by the Central Intelligence Agency existed in those countries and other places throughout the world, including Thailand and Eastern Europe. These black sites were used for the purpose of detaining and interrogating prisoners thought to possess especially important information about Al Qaeda or other terrorist organizations without any official oversight or acknowledgment of their existence. The so-called "ghost" prisoners were held secretly, without access to lawyers, agents of the press, or representatives of the Red Cross, and their CIA interrogators were allowed to subject them to the same types of degrading and torturous methods that had been used in Abu Ghraib and Guantanamo (Priest "CIA Holds Terror Suspects").

Several "enhanced" interrogation techniques were also officially authorized for use at the black sites in addition to what was standard elsewhere, including a severe form of stress positions that could be used on a prisoner for over forty hours at a time, constantly dousing naked prisoners with cold water while locked in a cold cell, severe sleep deprivation, sensory deprivation and bombardment and, most infamously, waterboarding. This latter method involves binding a prisoner, covering his mouth, and pouring water onto his face in order to cause the same physiological and mental

sensations as drowning. These procedures were used against about a dozen prisoners believed to be senior members of Al Qaeda who possessed important information, including Khalid Sheik Mohammed (or "KSM"), who is regarded as the primary planner of the September 11th attacks (Ross). Waterboarding was used on three of these prisoners; KSM, Abu Zubaydah, and Abd al-Rahim al-Nashiri (Bradbury "Re: Application of United States Obligations Under Article 16 of the Convention Against Torture" 6). Zubaydah was waterboarded 83 times in August 2002, and KSM suffered it 183 times in March 2003, averaging out to approximately 3 and 6 waterboarding sessions per day, respectively (37).

The other ghost prisoners, while not subjected to the most extreme "enhanced" techniques, still suffered a great deal, especially the ones being held in the black sites of Afghanistan. Several prisoners who have been released from the secret prisons in that country reported multiple forms of torture and abuse, including sleep deprivation, starvation, and exposure to extreme cold weather. One unidentified inmate of a secret prison in Afghanistan that was codenamed the "Salt Pit" had his clothing removed on the orders of a CIA interrogator and subsequently died of hypothermia in his cell during the night (Priest "CIA Avoids Scrutiny").

The black sites represent the very worst excesses of the Bush Administration's detainee policy. The level of torture, the secrecy and lack of accountability, and the total subversion of due process and international law went beyond even the Guantanamo Bay camp. Fortunately, much like Guantanamo the black sites were ordered closed by an executive order of President Obama shortly after his inauguration. Unfortunately, the fact that these senior Al Qaeda members, including Khalid Sheik Mohammed, underwent waterboarding and other forms of torture and degrading treatment will immensely complicate their future trials.

c. Extraordinary renditions

The term "extraordinary rendition" refers to the practice of secretly transporting a prisoner to another country, generally the same one where the prisoner in question was born, and giving him into the custody of that country's security forces in order to be interrogated and potentially prosecuted. In itself the idea is not necessarily illegal, but since 2001 the Bush administration has turned over many prisoners to foreign countries when there has been a high probability, or even an expectation, that they would be tortured while in their custody, contravening Article 3 of the Convention against Torture.

Renditions were practiced on a limited basis during the 1990s, exclusively for individuals with standing arrest warrants or *in absentia* convictions in foreign countries (usually Egypt), with safeguards to protect innocent people from rendition and some sort of assurance that torture would not take place, although even back then those assurances were generally not worth much (Mayer). As bad as the program was in the 1990s, the flaws of the rendition program were magnified as its use was expanded after September 2001.

Under the Bush administration the CIA has renditioned several people only suspected of terrorism, and in many cases the

evidence connecting these persons with terrorist organizations was very weak. For example, Maher Arar is a Canadian citizen who was born in Syria. He was arrested in an airport because he knew (vaguely) another man suspected of terrorism. On that flimsy basis Arar was transported to Syria, where he was held for a year and tortured by security personnel before being released without charges; the Syrians had apparently not found any connection between him and any terrorist organization in that time (Mayer).

In addition to Egypt and Syria, prisoners were also renditioned to other countries where torture and prisoner abuse are known to be fairly common, including Uzbekistan and (to a lesser extent) Jordan. CIA officials not only suspected that these countries were torturing the prisoners that they were receiving from the United States but expected it; the senior CIA operative in the Uzbek capital told the British ambassador that he knew that the Uzbek government was torturing prisoners for information (Grey). At least one man was transported from Pakistan to Morocco expressly because the Moroccans were willing to use methods that the Pakistanis weren't, including the infliction of small cuts all over the body over a long period of time (Worthington Guantanamo Files 230).

It is impossible to imagine that the threat of prisoners being tortured once sent into the custody of these countries is not substantial enough to qualify for Article 3 of the Convention against Torture. In carrying out extraordinary renditions government agents not only neglected their responsibilities under the Convention against Torture but actively sought to violate its requirements.

IV. Legal Justifications

Members of the Bush administration have presented a number of legal arguments, both internally and externally, which justify or excuse the abusive treatment of detainees suspected of involvement in terrorist activities and direct responsibility for committing the most unpalatable abuses away from top officials. These arguments are severely lacking in a number of respects, although not to the point of being frivolous. It is therefore necessary to examine them in some detail in order to present thorough counterarguments.

1. Inapplicability of International Law

Starting in the early years of the war on terrorism, several legal advisors within the White House advanced arguments to the effect that the Geneva Conventions could be interpreted to not apply to prisoners suspected of terrorist activity. They also asserted that other elements of international humanitarian and human rights law could not restrict the decisions of the President regarding the matter of detainees who posed a potential security threat to the United States.

Deputy Assistant John Yoo drafted a memorandum for the United States Department of Defense in January 2002 that put forth three reasons why members of Al Qaeda would not be protected by the Geneva Conventions if they were captured in Afghanistan: Al Qaeda is not a State Party to the Geneva Conventions; the war in Afghanistan is neither a war between states nor a civil war, and therefore is not under the purview of the Conventions; and Al Qaeda members do not obey the laws of war as

required by GC III Article 4(a)(2), such as carrying arms openly and wearing uniforms or visible symbols to distinguish themselves from civilians (Greenberg 49).

This memo also argued that members of the Taliban would not need to be afforded protections under the Conventions even though Afghanistan is a State Party because Afghanistan was a failed state while the Taliban controlled it, and because the Taliban was connected so closely with Al Qaeda that the two organizations could not be legally distinguished from each other (50). Even if international humanitarian law applied in Afghanistan, the memo argued, Taliban members would still not be protected by GC III because of their failure to meet the Article 4(a)(2) requirements, and that competent tribunals required by Article 5 would be unnecessary if the President determined that all Taliban members failed to meet those requirements, thus supposedly removing "doubt" as to their legal status and obviating the need for the tribunals to eliminate it (110). It stated that even if the substance of the Geneva Conventions or other instruments of international humanitarian law were a part of customary international law, it would not matter because customary law is not the federal law of the United States and therefore is incapable of binding the powers of the President (112).

Shortly after receiving the memorandum described above, Alberto Gonzales sent his own memo to President Bush, advising him of the positive and negative ramifications of disregarding the Geneva Conventions in the Afghanistan war.[13] In his arguments against the likelihood of the negative outcomes happening, Gonzales asserted that the Bush's official orders to treat prisoners "humanely" would prevent severe backlashes from other countries and the undermining of American military culture (119-121). On 7 February 2002, President Bush gave orders to the effect that GC III did not apply to Al Qaeda and that all Taliban detainees were to be considered unlawful combatants instead of POWs, but that they should be treated humanely anyway "[a]s a matter of policy" but not a matter of law (135).

An internal report on detainee interrogation was largely informed by these Justice Department opinions, and also asserted that the United States has held that the ICCPR does not apply to international military operations (243).

2. Redefining Torture

Lawyers working in the Bush administration advanced extremely restrictive municipal and international legal definitions of the word "torture" in a pair of controversial memos, both of which were dated 1 August 2002 and were sent to Alberto Gonzales. The first, written by Assistant Attorney General Jay Bybee of the Office of Legal Counsel, concerned the application of domestic legal prohibitions of torture. The second, by Deputy Assistant Attorney General John Yoo, was about international law and what it would allow in interrogations of Al Qaeda members.

The Bybee memo referred to the definition of torture that is found in the United States Code Section 2340, the operative words being "severe physical or mental pain or suffering." It attempted to refine that definition further, by showing that the phrase "severe pain" as used in other

American statutes meant an indicator of dangerous and permanent physical damage. Bybee argued that this phrase meant the same thing in the legal definition of torture, and that therefore pain

> …must rise to a similarly high level - the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions – in order to constitute torture. (Greenberg 176)

Section 2340 further defines "severe mental pain of suffering" as "prolonged mental harm" caused by certain intentional acts, such as the infliction of pain, administration of drugs, or threats to do the same. Bybee focused on the word "prolonged" in interpreting the statute, arguing that the strain from long interrogation would probably not qualify, whereas actions resulting in post-traumatic stress disorder or depression possibly could. The memo also argued that any potential defendant must have intended to cause this prolonged mental harm in order to be guilty under the terms of Section 2340; if he acted with some other purpose in good faith with the belief that his actions would not result in that kind of mental damage, that should provide a sufficient defense against prosecution regardless of the actual outcome of his actions, according to this argument (178).

Regarding cruel, inhuman, or degrading treatment, the memo notes that the Convention against Torture calls only for state parties to "prevent" such acts from being carried out in areas under their jurisdiction. This is interpreted to mean that the CAT does not require such acts to be criminalized, further demonstrating that "torture" is at the farthest, most extreme end of the spectrum of methods of inflicting pain (185).

Ultimately, the Bybee memo concluded that the word "torture" legally referred to only the most extreme actions of inflicting physical and mental pain, and that there were many acts which would be cruel and degrading without actually being on the same level as torture (214).

The John Yoo memo noted that when the United States acceded to the Convention against Torture, the administration of the first President Bush included a reservation to the treaty to the effect that it understood "torture" as relating to the Convention to have the same definition as found in Section 2340, and that it was ratified with this meaning in mind. Because treaties cannot affect a state without its consent, the memo argued, it is by this definition of torture that the United States is bound by the CAT (220). Taken together with the Bybee memo sent to Alberto Gonzales on the same day, this means that the same very narrow and extreme definition of what constitutes torture also applies to the treaty obligations of the United States under the CAT.

Additionally, legal opinions regarding the legality of specific interrogation methods were also issued by the Justice Department. One was sent to the CIA's General Counsel by Jay Bybee on 1 August 2002, the same day the memos regarding the general definition of torture were officially transmitted. This memo regarded techniques the CIA wanted to use in the interrogation of suspected Al Qaeda leader Abu Zubaydah, including forced standing, stress positions,

physical blows, sleep deprivation, and waterboarding (Bybee 2). It ultimately concluded that all of the techniques failed to qualify as "torture" under the international legal obligations of the United States (18). Another memo concerning techniques that could be used on "a High Value al Qaeda Detainee" during CIA interrogations was issued in May 2005, covering a greater number of methods (including force nudity and dousing with cold water) that still encompassed stress positions and waterboarding (Bradbury "Re: Application of 18 U.S.C. 18 § § 2340-2340A" 7-13). As with the previous memo, the conclusions was that all the techniques were legal so long as they were monitored to prevent serious threats to the safety of the detainees (45).

3. Shifting responsibility down the chain of command

The scandal regarding the treatment of prisoners at Abu Ghraib required, to a much greater extent than any other aspect of the Bush administration's detainee policy, a public response and the punishment of the parties responsible. At first the entirety of the blame was laid squarely at the feet of the individual soldiers who had personally committed the abuses seen in the publicly available photographs. Later on, public reports and investigations forced some top officials to take some responsibility, at least verbally; as noted above, no one higher-ranking than a non-commissioned officer was ever convicted in a court of law for the Abu Ghraib abuses, and no one at the White House or the Pentagon was fired or forced to resign immediately.

In May 2004, shortly after the photographs of detainee abuse in Abu Ghraib were shown to the public, both Defense Secretary Rumsfeld and President Bush attempted to limit the blame to the relatively few American personnel seen in them. In a press briefing, Rumsfeld decried the actions of those people and referred to their actions as "exceptional and isolated" (DefenseLink). Rumsfeld stated that he took responsibility for what had happened in Abu Ghraib during Congressional hearings a few days later, but considering that he did not resign and was not investigated his words seem to have little meaning (Shanker).

President Bush went on Arab television in early May to claim that he was appalled by the scandal, that it would be thoroughly investigated, and that all responsible would be brought to justice (Stevenson). On 24 May Bush called the abuses the actions of "a few" soldiers in an address that was televised in the United States (Roth and Worden 146).

The investigations which followed were damning to upper-level military and civilian leaders, but not to the point where any sort of punishment was recommended or implemented. One panel, which was led by former Defense Secretary James Schlesinger and appointed by Rumsfeld to investigate the scandal, released a report in August 2004 which blamed failures of leadership on the part of top officials at Central Command and the Pentagon for creating a climate and culture that was conducive to allowing abuses. It also accused them of having missed several warning signs about what was happening at Abu Ghraib. However, it also held that the scenes in the photographs were not

the result of direct orders and were merely excesses of the prison "night shift" out of control. Critically, the panel did not recommend that Secretary Rumsfeld or any other senior civilian or military leader resign or face some other punishment (Watson). Other internal military investigations came to similar conclusions; that general policy errors had contributed to what had happened in Abu Ghraib, but that top policy makers should not be held accountable the way the actual guards were. In spite of the involvement of Central Intelligence Agency interrogators at Abu Ghraib and their actions toward detainees there, no one recommended investigating CIA leaders (Roth and Worden 153).

V. Refuting the Bush administration's arguments

1. Why international law is applicable

a. Reasons why Geneva should be applied to Afghanistan

The argument that Afghanistan was a failed state, that the Taliban was therefore not its legitimate government, and that it therefore was not a State Party to the Geneva Conventions, might have been valid had it been consistent with the practice of the United States and other countries. In fact, however, although the Taliban had not been recognized as the *de jure* leaders of Afghanistan the international community, including the United States, had treated it as having obligations under Afghanistan's treaties, including the Geneva Conventions, as then Secretary of State Powell stated in a memo to Alberto Gonzales advocating the application of international humanitarian law in Afghanistan (Greenberg 124). In fact, the term "failed state" carries no weight in international law, and Afghanistan's legal rights remained intact even through years of divisive warfare (de Nevers 385). The decision to treat Afghanistan as a failed state unable to live up to its treaty obligations was therefore not a reasoned decision based on the facts, but rather a loophole that the administration tried to use in order to carry out its favored detention policies with less resistance from the international community.

Legal advisers from the Department of State agreed with Powell that the Geneva Conventions should have been applied in Afghanistan. The United States had always recognized them whenever it brought its forces into conflicts in the past, which was a legacy the DOS was reluctant to break with. The UN Security Council had called on all parties to the conflict in Afghanistan to adhere to humanitarian law in a resolution from 1998, and not recognizing the application of those laws would be inconsistent on the part of the United States. Furthermore, the DOS legal department held that it would not be possible to apply the Conventions to the Taliban but not to Al Qaeda; either everyone involved in the Afghanistan conflict was protected by law, or none of them were (Greenberg 129).

Other individuals and organizations, including the ICRC and the Secretary General of the United Nations, have also criticized the rationale for not applying the Geneva Conventions to the conflict in Afghanistan. They have argued that any prisoner must automatically be treated as a POW unless and until a court removes any doubt that he or she does not qualify for such protections. These critics have also argued that Taliban soldiers qualify as members of military

forces loyal to "an authority not recognized by a the Detaining Power" as described under Article 4 (a)(3) of GC III. Such fighters would thus need to be treated as prisoners-of-war regardless of their obedience to the laws and customs of war as described in 4 (a)(2) (Greenberg 587).

b. Need for competent tribunals

The legal argument that the President of the United States can decide that all members of a fighting militia fail to meet the requirements of GC III Article 4 (2) is weak for a number of reasons. It ignores the possibility, however remote, that any units or individual members of that militia might meet the requirements for prisoner of war status in spite of general trends within the organization towards noncompliance. Also, giving the executive branch the power to unilaterally decide that thousands of fighters are, essentially, in violation of the laws and customs of war, circumvents traditional standards of due process for accusations of criminal behavior. Classifying thousands of people as criminals, or even alleged criminals, without the involvement of a single impartial judge violates the need for fairness in legal proceedings required by international humanitarian and human rights law; an independent court is needed to ensure that justice is carried out correctly, even when dealing with potential war criminals captured on the battlefield.

Even accepting for the sake of argument that every single member of an armed militia can be classified as a war criminal at once, the need for tribunals to hear the cases of captured prisoners would still not be eliminated. Even without legal doubt that any member of a certain organization fails to meet the legal standards required by GC III, doubt may still remain whether a given individual is, in fact, a member of said organization. It has been shown that civilians were arrested by United States military and intelligence personnel in Afghanistan and Pakistan under the mistaken assumption that they were members of the Taliban or Al Qaeda, and that many of them were imprisoned either in Afghanistan or Guantanamo Bay for months or years afterward. These errors would almost certainly have been reduced in frequency and duration if tribunals had existed to swiftly review the cases of detainees claiming to have been wrongly arrested.

c. AP I Minimum Standards

The First Additional Protocol to the Geneva Conventions has not been ratified by the United States; however, Article 75, which guarantees certain rights for prisoners involved in armed conflicts regardless of their status, is widely regarded as having entered or become customary international law regarding this matter (Sands 150). John Yoo dismissed the importance of customary international law in his January 2002 memo, however, thereby attempting to negate AP I and other elements of the Geneva Conventions that may have entered into custom.

It is true that customary law is not approved by the United States Congress; however, that does not mean that it should be ignored so flippantly. That would overlook the historical and continued importance of custom to the development of international and domestic law throughout the world. Declaring that it has no power and can be safely ignored is disingenuous and self-serving. Moreover, it overlooks the fact

that United States courts have accepted the validity of customary international law regarding torture and degrading treatment (Greenberg 600),

d. Human Rights Treaties

The prohibitions against torture in the ICCPR and the Convention against Torture apply wherever the States Party to them have jurisdiction. The CAT specifically requires its prohibitions against torture and degrading treatment to be a part of the rules and duties of any government officials of a State Party involved in the detention or interrogation of prisoners anywhere in the world. The UN Committee against Torture has found that several methods used by American interrogators constitute torture or degrading treatment under the terms of the CAT, including frequent beating, excessive binding of limbs, exposure to low temperatures, long periods of sleep deprivation, and sensory bombardment (Greenberg 568). More specifically, the Committee against Torture found that the patterns of physical abuse and indefinite detention of prisoners at Guantanamo Bay violated the Convention and called on the United States to close the prison (McCoy 219).

The prohibitions against torture and degrading treatment found in Article 7 of the ICCPR are absolute and do not countenance any exceptions for national security or any other purpose. The Human Rights Committee has found in the past that methods including sleep deprivation, hooding, and others that have been used by American forces violate Article 7 regardless of how or why they are used (Greenberg 592),

2. Why some techniques used by the U.S. are torture

Jay Bybee's August 2002 memo went very far in asserting that the term "torture" could be legally applied only to an extremely narrow set of practices and that forms of interrogation that might be considered objectionable were legal under domestic and international law. The memo was fought by certain Justice Department lawyers, generated a powerful backlash from legal experts after it became publicly available, and was also inconsistent with the practices of the United States regarding interrogation methods in foreign countries. It's definition of "torture" has been rejected, and many lawyers, politicians, and NGOs have since applied that word to American practices.

a. Legal arguments

After its public release the arguments of the Bybee memo were roundly criticized by legal experts. For example, in testimony given before the Senate Judiciary Committee in January 2005, the Dean of Yale Law School Harold Koh called the opinion "clearly erroneous." He stated that the narrow definition of "torture" contained within it contradicted the ordinary and commonly understood meaning of the word, and that it would exclude many of the heinous actions carried out by Saddam Hussein's security forces. Dean Koh also argued that the memo's interpretation of the Convention Against Torture to legally permit the use of cruel, degrading, and inhuman treatment risked giving officials working for the executive branch license to abuse people in their custody.

Even lawyers who were working at the Justice Department objected to the reasoning of the Bybee memo. Jack Goldsmith, who

became the head of the Office of Legal Counsel in October 2003, decided that this torture and interrogation policy was legally problematic shortly afterward. He worked with other OLC lawyers to have that policy overturned and the opinion withdrawn – which had almost never happened over the course of a single administration before – until he resigned in July 2004 (Klaidman). The OLC prepared a new opinion to replace the Bybee memo which was officially released in December 2004; this new opinion contained less restrictive definitions of "torture" and "physical and mental suffering" (Levin).

b. U.S. government practices

The Department of State issues an annual report on the state of human rights practices in every other country throughout the world. It is generally written without undue partisan political input, and the 2003 report condemned as torture the use of interrogation methods in foreign countries. Unfortunately, the United States itself had been using these techniques against suspected terrorists held in its custody.

The types of techniques used by the United States which the State Department criticized foreign countries for using include, but are not limited to, stress positions, exposure to extreme temperatures, sleep deprivation, and waterboarding (Roth and Worden 143). Now, it would certainly be possible to make a serious argument that some of those methods are not, depending on how they are used, severe enough to constitute torture; the State Department isn't an absolute authority on such things, after all. However, that the DOS was willing to criticize these methods so strongly in an official, publicly available document means that these methods are legally and morally objectionable, at least to the point where they rise to the level of cruel, degrading, or inhuman treatment. Even saying for the sake of argument that the State Department is in the wrong and that some of the above techniques do not rise to the level of torture does not make them acceptable. The use of such techniques by anyone, regardless of their exact legal classifications, should never be tolerated.

c. Severity of techniques

There are, on the other hand, certain interrogation methods which unquestionably constitute torture according to the plain meaning of the world, the definition found in the ICCPR and the Convention against Torture, and even by the unreasonably severe definitions of the Bybee memo. International human rights organizations have unequivocally denounced them, and their victims have been left with permanent physical injuries and disabilities, as well as dangerous and long-lasting mental illnesses as a result of their treatment.

Several prisoners held at Guantanamo were driven to suicidal behavior by the conditions of fear, uncertainty, and constant abuse at the prison camp. During the first eighteen months of the camp's operation there were twenty-eight officially recognized suicide attempts and over three hundred instances of prisoners acting in a self-abusive manner. A mass suicide attempt in 2003 involving twenty-three prisoners led to only two attempts being officially reported, while the others were classified as merely "self-injurious." It seems that the use of that classification in Guantanamo should be

with some suspicion (Worthington Guantanamo Files 271). Less severe instances of mental illness have also been disproportionately common among the Guantanamo prisoners, as a group of British citizens released in 2004 reported that a fifth of the prisoners were taking anti-depressant medications and approximately a hundred had other clearly visible forms of mental illness (280).

Interrogations and abuse by American personnel in Iraq have also been known to cause severe mental and physical harm. Red Cross doctors that were part of the delegation visiting Abu Ghraib concluded that certain prisoners they interviewed at the prison displayed signs of mental illness including memory loss, anxiety, problems speaking or the inability to speak, and suicidal tendencies as a result of their interrogations by MI personnel (Greenberg 393). Official United States military documents that had been suppressed but later released also revealed that several Iraqi prisoners died while in custody at Abu Ghraib and secret CIA facilities; a dozen of these deaths were ruled either homicides or "unexplained" on death certificates. For example, an Iraqi air force general who surrendered to American troops in November 2003 died several days later as a result of beatings from CIA and MI interrogators at a makeshift facility in the desert (McCoy 144).

The "enhanced interrogation techniques" used by the CIA at its secret locations have come under particularly harsh criticism by humanitarian organizations throughout the world, as most of them clearly constitute torture or extremely cruel and degrading treatment. A leaked internal document from the International Committee of the Red Cross, for example, labeled these techniques "torture" based on interviews with prisoners who had experienced them. Many prisoners reported that stress positions and forced standing were the most physically painful methods (Shane, "Book Cites Secret Red Cross Report"). Severe sleep deprivation also qualifies as one of the approved "enhanced" methods that unquestionably qualifies as torture; the late Menachim Begin, who experienced such methods while he lived in the Soviet Union, even wrote that the desire for uninterrupted sleep can feel even worse than hunger or thirst (Conroy 34).

One method that has been the particular focus of controversy and debate is "waterboarding," the "enhanced technique" that has been used on the smallest number of prisoners and arguably the most severe. "Waterboarding" can refer to variety of means for cutting off the victim's air supply with water, all of which produce physical and mental sensations similar to drowning. The question of whether waterboarding constitutes torture has been in the national consciousness ever since its use on prisoners suspected of being high-ranking Al Qaeda members was first revealed; the past three Attorney Generals of the United States have been asked at their Senate confirmation hearings whether they believe the technique is illegal torture. Neither Alberto Gonzales nor Robert Mukasey were willing to categorically and unequivocally answer the question, which is disconcerting when one considers the painful and debilitating nature of the technique.

Waterboarding is undoubtedly torture, by any standard, even Jay Bybee's "death or organ failure" criteria, because of the extremely painful and terrifying feelings it elicits and because it does indeed feel very similar to death by drowning. It has been known to cause long-lasting psychological damage[14] resulting in years of anxiety and panic attacks, thus fulfilling even the strict criteria for "mental suffering" found in the Bybee memo. American courts have even convicted Japanese soldiers of war crimes because they waterboarded prisoners during the Second World War (Amnesty International).

Other legal experts also consider it torture. Daniel Levin, for example, served as an Assistant Attorney General in 2004 and wrote the more moderate legal opinion on the legality of interrogation methods which replaced the Bybee memo. After volunteering to undergo waterboarding personally, he concluded that it would constitute torture unless done in a very restricted way, and that the Bush administration had not provided effective protocols for its application. Levin was fired, perhaps unsurprisingly, after Alberto Gonzales became Attorney General (Greenburg and de Vogue). The current Attorney General of the United States, Eric Holder, declared unequivocally that waterboarding is torture during his own Senate confirmation hearing, an indication of a fortunate reversal in interrogation policies from the Bush administration (Montanaro).

3. *Why abuse was systemic and a result of top-down authorization*

From all the abuses that have been described above it should be fairly clear that torture carried out by American personnel is far more wide-ranging than the mere presence of a few poorly supervised "bad apples" could account for. The memos and orders regarding the lack of Geneva Convention rights for detainees, the authorization of indefinite detention and extreme methods of coercive interrogation, and legal justifications for permitting acts of torture and degrading treatment all draw a line of causality and responsibility between decisions made in the White House and mistreatment of prisoners throughout the world.

Because torture has been universally regarded as morally abhorrent for the past few hundred years, orders to commit it in the recent past have often been couched in euphemisms and permissive messages instead of plain language. Official declarations from top American civilian and military leaders, including the application of the term "enemy combatants" by President Bush and statements from military leaders calling detainees "very dangerous" or "like dogs" served to dehumanize them and sent signals that inhumane treatment for them would be acceptable (Roth and Worden 162-164). The President, the Secretary of Defense, or other leaders may not have given direct orders to, for example, the "night shift" at Abu Ghraib to beat, threaten, and humiliate the prisoners there, but their actions and words did create a tolerant environment that allowed them and many of their fellow service members throughout the world to consider such behavior acceptable. They are responsible, at the very least, for not doing nearly enough to prevent these abuses, and possibly for the deliberate creation of a pro-torture atmosphere (170).

There are also cases of torture and inhumane treatment by Americans that were approved and ordered by high-ranking American officials, like the aforementioned "take the gloves off" authorization from Rumsfeld to John Walker Lindh's interrogators (165). He also personally signed off on the use of stress positions and forced nudity on detainees at Guantanamo Bay (Greenberg 237). Waterboarding, sleep deprivation, and stress positions were legally validated for use on Abu Zubaydah by an official Justice Department opinion of which White House and CIA leaders were undoubtedly aware (Bybee 18). The specifics of the CIA's "enhanced" methods were chosen and initially approved by select members of the National Security Council, including Vice President Cheney, Attorney General John Ashcroft, and National Security Advisor Rice. Further requests for permission to use the techniques in specific cases were consistently approved by this group (Greenburg, Rosenberg and de Vogue).

Prisoner abuse occurred in every theater of operations where the "War on Terror" was waged, and not because of a small number of soldiers who didn't know any better. The most senior Bush administration leaders specifically condoned the use of illegal methods in several cases and fostered an atmosphere of disrespect for the rule of law and the human dignity of detainees that led to many other abuses.

VI. Why Enforcing and Respecting International Law is in the Best Interest of the United States

Obeying international law isn't a pointless endeavor which restricts our actions without generating any benefits. On the contrary, adhering to the law would increase the standing of the United States throughout the world, discredit our enemies, protect our soldiers, and convince people all over the world to be more cooperative.

1. Comparative Analysis

In discussing the effects of indefinite detention, torture, and cruel, inhumane, or degrading treatment on a state's ability to fight a war, especially one with a heavy focus on counterinsurgency operations, it will be useful to briefly examine twp other cases of torture sponsored by democratic states in similar situations. They are: first, the arrest of hundreds of Northern Irish Catholics and experimental torture of about fourteen of them by the United Kingdom in 1971; and second, the time from 1987-1999 where Israeli security forces were legally allowed to use limited levels of coercive interrogation techniques against Palestinian detainees.

a. The United Kingdom and Northern Ireland, 1971

In the early 1970s the violent unrest among Catholics in Northern Ireland was rapidly escalating, and the British government felt that it had to take drastic measures to prevent further deterioration, starting with "internment," indefinite detention with no need for evidence or courts. Hundreds of Catholics suspected of membership or sympathy with the Irish Republican Army were rounded up and "interned" in August 1971 (Conroy 4). The operation was poorly implemented, and several internees were arrested because of outdated intelligence or mistaken identity. Beatings with clubs were standard for all the internees (Melaugh). Fourteen men were taken from the regular

prison camps to secret locations where a course of experimental coercive interrogation techniques focusing on sensory deprivation[15] was applied to them over the course of eight days.

The men were forced to stand against a wall in a painfully uncomfortable position while hooded, beaten severely whenever they collapsed from this standing position, exposed to cold temperatures, deprived of sufficient amounts of food and sleep, and subjected to overwhelming sound recordings that prevented anything else from being heard. After the end of this ordeal the prisoners were moved back to the regular internment camps (McGuffin 57-60). During the course of these abuses many men suffered from both visual and audio hallucinations such as music, religious sermons, and fantasies of escape and suicide (73). In 1978 the European Court of Human Rights ruled that the five techniques did not rise to the level of torture but did constitute inhuman, degrading, and illegal treatment, contrary to the opinion of the Republic of Ireland and Amnesty International. No British soldiers or officials were prosecuted for their roles in the affair (Conroy 187).

Rather than improving the security situation in Ireland, the internment and torture caused a marked downturn. Nonviolent Irish nationalists refused to participate in Northern Ireland's government out of protest, and Catholics gave more support to the Irish Republican Army, which stepped up its own level of violent action (Melaugh).

The parallels with the United States are striking. In both cases, a government resorted to extreme, extralegal and illegal methods of imprisonment and interrogation in order to eliminate a threat posed by a terrorist group. Also in both cases, the "tough" methods did relatively little to impede the actual extremists and instead hurt mostly innocent people, infuriating local populations and encouraging them to support the terrorists' cause.

b. Israel during the Landau Commission era, 1987-1999

Israel has had well-known, chronic problems with its military and security forces mistreating Palestinian civilians for years, even up to the present day (B'Tselem "Absolute Prohibition"). The problem of torture being used on prisoners was especially acute, however, during a twelve-year period when coercive interrogation methods were formally legalized.

After a pair of scandals concerning the lack of transparency and use of violence in Israel's security forces, a commission headed by Justice Moshe Landau was appointed to investigate the matter. The Landau Commission concluded in 1987 that the security forces should be provided with legal guidelines for the use of a "moderate" amount of force during interrogations, so that they could be effective without having to hide their actions from public scrutiny (Conroy 213). The Commission's proposal attempted to limit both the intensity of coercive methods used through official regulations and the number of suspects to which they could be applied by limiting their use only to prisoners who had knowledge of imminent attacks (the "ticking time bomb" scenario) on civilians. Both attempts failed completely

The methods used by the Israelis routinely exceed the limits set in the Landau

Commission's guidelines rose to the level of torture, and included sleep deprivation, exposure to extreme temperatures, stress positions, sensory bombardment, and violent shaking. At least one Palestinian prisoner died from being shaken too much (Roth and Worden 36-37). Security forces also arrested, harassed, and abused the wives of men being interrogated in order to force out confessions of wrongdoing or otherwise pressure the husbands (B'Tselem "Detention and Interrogation"). The security services also claimed far too many cases of detainees having vital information necessitating coercion. Activists, religious leaders, Islamic charity workers, and others – nearly every Palestinian interrogated by Israel during this time – was tortured by Israeli security during this time period, justified by the specter of the "ticking time bomb" (Roth and Worden 40). The Israeli justice system did not check these abuses until the High Court of Justice banned all the coercive techniques of the security services for violating domestic and international law in 1999.

The possibility of torture being legally allowable in a limited fashion is shown false by Israel's example. Without absolute legal and ethical prohibitions against torture, the torturers become desensitized to it and practice it routinely. As in the United States, allowing limited amounts of violent coercion, even with guidelines and requirements for authorization, caused a culture of abuse to spread throughout the system, leading to widespread violations of international law (41-42).

2. The importance of Geneva Convention protections for American soldiers

Many military and legal experts have called upon the United States government to respect the Geneva Conventions, not out of love for esoteric, abstract legal principles, but for the simple fact that the Conventions make our troops safer. International humanitarian law often protects American soldiers when they are captured, and even when we are faced with enemies that do not respect the law they should not be allowed to bring us to their level. By placing conflicts in which we participate under the auspices of the Geneva Conventions and following the law we would make it easier to bring justice to those who would abuse captured Americans. Treating our enemies better than they treat us demonstrates American integrity, improves our moral standing, and makes it more likely that others will follow our example in the future (De Nevers 387).

John Hutson, who is the President of the Franklin Pierce Law Center and a former admiral of the United States Navy, articulated very clearly in Congressional hearings the importance of the Geneva Conventions to the safety of American troops. He argued that war needs to be conducted in a way that will allow for peace, that the Geneva Conventions lay out a way to accomplish that goal, and that only by complying with those laws itself will the United State be able to compel others to follow them too. The primary concern of all the U.S. policymakers who adhered to GC III after 1949 was the well-being of Americans, and by deriding its requirements we would be removing safeguards from our soldiers and rejecting the community of nations. Admiral Hutson points out that, as the United States has more soldiers deployed abroad than every other

nation in the world combined, we should rightfully be the most concerned about maintaining the integrity of international humanitarian law (Hutson).

No less an expert on prisoner of war abuse than Senator John McCain has also called on the American people to respect international law in the wake of the Abu Ghraib scandal. Cautioning against the view that the ICRC were mere "do-gooders" and that obeying the law hinders our soldiers, Senator McCain argued that the Red Cross and the Geneva Conventions protect our soldiers, and that those who committed abuses increased the danger for American troops in this and future wars by undermining those safeguards. He also asserted that the United States should seek to maintain its integrity and standing as a nation governed by the rule of law which meets universal standards of fair treatment towards prisoners (McCain).

Military veterans and legal experts alike believe that international humanitarian law is vital to the well-being of American soldiers abroad. Those who sacrifice to protect us need and deserve the protections of the Geneva Conventions.

3. The ineffectiveness of coercive interrogation

The reasoning behind the acceptance of violent, coercive interrogation methods amounting to cruel, humiliating, inhuman treatment or torture relies on necessity and expediency. Such methods may be thought necessary in order to obtain vital, life-saving information from recalcitrant terrorists, or at least to obtain it quickly enough to prevent an attack or effectively disrupt a terrorist network. While this dilemma between committing universally reviled acts of brutality and possibly allowing thousands of civilians to be killed poses an interesting philosophical question, in actual practice no such dilemma exists. There is no evidence that violently coercive interrogation yields accurate information, whereas there is much evidence that legal, non-violent techniques have produced good results even when used against modern terrorists.

A study of the effectiveness of interrogation methods was published by the Center for Strategic Intelligence Research in December 2006. This study crucially found that there was no rigorous research on whether coercive interrogation methods used in the fashion that American personnel had been applying them were effective, but that the majority of anecdotal information suggested that such techniques were not effective. It specifically concluded that the application of pain to an uncooperative interrogation subject would be more likely to reduce compliance than increase it, and that the use of stress-inducing methods impair the cognitive functions of the brain of those subjected to them, thus potentially reducing the accuracy of subsequently acquired information (Fein 35).

Academic researchers are not the only ones who have claimed that torture does not reliably yield accurate information; American military interrogators who have operated on both fronts hold the same opinion. One MI officer who served in Afghanistan, for example, wrote that degradation such as what took place in Abu Ghraib does not facilitate intelligence gathering, and that all the successes he and his unit achieved were accomplished without threats,

beatings, or humiliation (Mackey xxv).

Colonel Steven Kleinman, an intelligence and interrogation specialist of the United States Air Force, denounced the coercive interrogation as ineffective while testifying before Congress. He argued that the perceived effectiveness of such techniques skewed the public debate over torture and that extreme physical or emotional stress should not be viewed as necessary for gathering information or appropriate for punishing terrorists. He stressed that properly conducted interrogations induce *cooperation* between prisoners and interrogators, whereas coercive methods can only force *compliance* from a prisoner; communist interrogators often forced confessions of war crimes from American prisoners-of-war during the Korean and Vietnam wars, for example, but these were mostly false and therefore useless from an intelligence standpoint. Colonel Kleinman also noted, much like the aforementioned CSIR study, the "natural fragility of memory," and that coercive methods would not only make it more likely for prisoners to be unable to recall specific information, but also for them to unintentionally give out misinformation. He concluded that coercive interrogation fails to extract information from prisoners fully or accurately.

The specific methods chosen as the CIA's "enhanced interrogation" repertoire do not have a history of eliciting accurate information. They were based on methods that some members of the United States militarily voluntarily undergo in a limited fashion during Survival, Evasion, Resistance, and Escape (or SERE) training courses. The reason these personnel are trained to resist the SERE techniques is that they were used against American POWs by the Chinese during the Korean War, a fact that high-level government officials who approved the enhanced interrogation methods were unaware of. The Chinese used them mostly to extract false confessions of war crimes; a study of their effects published in 1956 stated that the Chinese methods led to suggestibility and memory loss, not truth (Shane and Mazzetti). The SERE methods which became the "enhanced interrogation techniques" are more useful for making people say what they are supposed to say than they are for acquiring accurate intelligence.

Debates are ongoing as to what information exactly has been gained from using coercive interrogation methods on Al Qaeda members. Mohammed al-Qahtani, who was tortured at Guantanamo Bay, accused many other prisoners there of affiliation with Al Qaeda during his interrogations only to recant, claiming he had lied to stop his suffering (Zagorin). It is unclear exactly what intelligence was extracted from KSM and Zubaydah during the time when they were subjected to waterboarding. Former CIA officials and Bush administration leaders have claimed that the use of the technique led to the acquisition of vital intelligence, whereas others (such as FBI Director Robert Mueller) have claimed that coercive interrogations did not yield intelligence that directly prevented a terrorist attack. There are conflicting reports about when and under what circumstances Zubaydah and KSM revealed information (Shane "Interrogations' Effectiveness May Prove Elusive"). Even if these torturous methods had been necessary

to acquire the information these Al Qaeda leaders gave up, the high cost of using them[16] probably negated the benefits of it. In all likelihood, however, all the intelligence gained from the high value Al Qaeda detainees probably could have been elicited through legal, non-coercive methods.

The effectiveness of nonviolent interrogation methods has been borne out not just historically, but even during the current war against terrorists in Iraq. Following the media exposure of the Abu Ghraib abuses, military interrogators deliberately set out to use different methods, ones that wouldn't debase or degrade prisoners and shock the consciences of American citizens. These techniques involved respecting prisoners, their circumstances and their beliefs, establishing connections and incentives for cooperation, and compliance with the standards set by GC III (Alexander "How to Break a Terrorist" 6).

Treating prisoners humanely lead to significant intelligence coups in Iraq, where obtaining information about the operations and command structure of Al Qaeda in Mesopotamia was of paramount importance in preventing suicide bomb attacks and other disruptive, violent attacks. By establishing relationships with prisoners and offering them (often false) hopes for solving the problems that had driven them to violence in the first place, military interrogators were able to extract vital details about safe houses and relationships between important figures (136). On at least one occasion a prisoner offered an explanation for why and how he had been mistakenly arrested, and the interrogators made an effort to verify his story instead of continuing to assume he was lying, the sort of effort that would have kept a lot of innocent people of Guantanamo Bay if it had been consistently applied by American personnel in Afghanistan earlier in the war (166).

4. Effect torture and indefinite detentions have had had on international perceptions of the United States

The standing of the United States as a leader in morality, ethics, and upholding the rule of law has suffered tremendously because of the Bush administration's illegal policies. Negative reactions to indefinite detention and torture have been especially strong among Middle Eastern Muslims; many of them have been convinced to join extremist organizations and fight against the United States because of these policies.

Global perceptions of the United States declined significantly during the Bush administration, especially among predominantly Muslim countries but in Europe as well. How much of that is because of American policies regarding detainees would be difficult to pin down exactly, with other factors such as support for Israel or the unilateral invasion of and continued American presence in Iraq contributing as well. Regardless, positive views of the United States declined in over two-thirds of the countries where data was available (Pew Global Attitudes Project).

Images of the prison at Guantanamo Bay and its orange-suited inmates have become iconic in predominately Muslim countries. Stories of disrespect, abuse, and torture have spread through the media and the personal accounts of those who have been released and returned to their homes. The sexual

humiliation and abuse of detainees, as well as stories of American soldiers demeaning the religious traditions of Muslims, such as beards and the sacredness of the Quran, have strengthened the idea that the war against terrorism is just a front or disguise for a war on Islam itself (Sengupta). This is important because research has shown that Muslims who believe that the United States is waging a war on Islam are more likely to support violence against American soldiers and civilians (Weber 1).

The severe worsening of violent attacks in Iraq in 2004 and 2005 after the Abu Ghraib scandal bears this out. One veteran went so far as to blame half the casualties in Iraq on fighters who joined terrorist groups because of America's torture policies, and that those policies led to the deaths of about as many people killed in the September 11th terrorist attacks (Alexander "I'm Still Tortured").

VII. Conclusions

The illegal and counterproductive methods of the past must be completely eliminated in order for there to be a chance for the United States to restore its reputation, repair the damage done to our ability to lead, and prevent lawlessness from taking over the country. The Geneva Conventions should be applied to the all military operations against terrorists, and all military operations of the future in general, as both a matter of policy and law. Torture, cruel, inhuman and degrading treatment, and any other sort of coercive interrogation method must be banned absolutely for all U.S. personnel, who should be required to use nonviolent interrogation techniques instead. The Guantanamo Bay prison and the black sites should be closed, and all prisoners either treated as prisoners of war as GC III demands, charged as criminals in a normal American court or released. Those responsible for torture should be investigated and prosecuted to the fullest extent of the law.

Fortunately, many of these policies are already being carried out by the new President of the United States, Barack Obama. He has ordered the closing of the CIA black sites, banned waterboarding and other torture methods, and ordered the prison at Guantanamo Bay Naval Base closed and the prisoners' files re-reviewed, a process which reportedly will take about a year.

Unfortunately, the new policies aren't perfect. Obama's Justice Department has continued to try to deny prisoners at Bagram Air Force Base in Afghanistan the right to challenge their detentions (Savage). President Obama has also stated that he doesn't want the government to investigate people responsible for torture as the CAT requires it to, although Congressional Democrats may press on with that issue regardless. Additionally, there will probably be difficulties finding places to put many of the released prisoners from Guantanamo. The case of the Uighur prisoners, who face difficulties finding new homes because of pressure from the Chinese, is probably the most extreme case of such problems (Spiegel and Demick). Despite this, the new administration represents a real possibility for redemption from this sordid affair.

Endnotes

[1]International law can also come from custom, which is based on traditions of state practice. It is the oldest form of international law, but it can be hard to define where customary law exists and exactly what its provisions are (Shaw 69). Treaties may codify or reflect preexisting customary law, of course, and it is possible for treaty provisions to create customary law, depending on how widely adopted they are and other considerations (Shaw 90).

[2]Article 130 of GC III defines grave breaches as "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention." And Article 147 of GC IV defines them as "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

[3]See discussion of universal jurisdiction, below.

[4]*Ibid*.

[5]The "exhaustion of domestic remedies rule" flows from the legal principle of state sovereignty; most human rights treaties explicitly include it as a provision (Shaw 254).

[6]The current Special Rapporteur for torture is Manfred Nowak, an Austrian lawyer specializing in human rights, according to his official biography on the OHCHR website.

[7]The 1949 Geneva Conventions, obviously, did not operate during the war. However, the 1929 Geneva Convention afforded a largely similar set of rights to prisoners of war; that particular Convention definitely bound the German government, and the Japanese government made an agreement with the Allies near the opening of hostilities to observe the Convention. A majority of judges at the Tokyo trial later decided this agreement was legally binding on Japan (Boister 184).

[8]The Trial of Major War Criminals in Nuremberg and the International Military Tribunal for the Far East in Tokyo both included prisoner of war abuse among the war crimes with which they charged the leaders of Germany and Japan (North) (Boister 196). Other trials which followed focused on lower-ranking war criminals and also included alleged POW abusers from both Germany and Japan (Truman Library) (Kerr 296).

[9]The Charter of the International Military Tribunal established the rules and procedure for the Nuremberg Trials, and the Charter of the International Military Tribunal for the Far East did the same for the Tokyo Trials.

[10]Specifically, Article 42 of GC IV and Article 75, paragraph 3 of AP I state that protected persons must not be held for longer than is necessary, and Article 9, paragraph 3 states that anyone who is arrested with criminal charges must be brought before a judge and given a trial within a reasonable time frame

[11]Hamdan was sentenced to five and half years of imprisonment, with time already spent in Guantanamo Bay counting toward it; his sentence will be up in January 2009.

[12]This was part of a general pattern of attacking men who practiced Islam by targeting their religious beliefs. In addition to the aforementioned invasion of space by females and forced shaving of facial hair, the ICRC also gathered credible testimony from detainees at Guantanamo indicating that guards had physically disrespected the Quran, the holy book of Islam (Labott).

[13]It was in the discussion of the positives of ignoring Geneva that Gonzales made the infamous comment about the nature of the war on terror making parts of GC III "obsolete" and "quaint."

[14]Because it simulates death by drowning, waterboarding is arguably a form of mock execution. One study of the effects of torture found that psychological problems were significantly higher among victims who had experienced a mock execution (Conroy 180).

[15]Specifically, a combination of sleep deprivation, starvation, forced standing, hooding, and bombardment with white noise, later referred to as "the five techniques" (Conroy 6).

[16]See section on international perception of the United States, below.

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