The Bush Administration and the Problem of Torture:

The Limits of Justification

By

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ABSTRACT

The detainment of persons suspected to be part of the Al-Qaeda network in Guantánamo Bay, Cuba, has been of much issue lately. Keeping those persons detained for long periods of time without charges being laid and no access to counsel or to a fair trial has been the subject of much criticism by human rights groups. On the other hand, the detainment of persons in Iraq has received much public attention, due to images released in the media in April 2004, which shocked the world; creating outrage. The pictures revealed the torture prisoners have been subject to in Iraq's most notorious Abu Ghraib prison, which have been argued to be crimes against humanity. In light of this "scandal," several investigations were launched, making various statements – the most common was the reporting of abhorrent "interrogation techniques" practiced on the detainees. This "scandal" has placed the U.S. Bush Administration in the limelight, rendering it defensive. The United States has made several arguments in order to justify its rationale in its "war on terror", as well as the abuse witnessed in the Abu Ghraib pictures. This paper indicates that the U.S. government has gone to great lengths to restrict the application of the Geneva Conventions and to "re-define" torture. It has sought to justify the use of extremely coercive and degrading interrogation techniques, the practice of holding detainees indefinitely, and the "rendering" or handing over of prisoners to third countries known to practice torture.

INTRODUCTION

Justifying the "war on terror":

According to the United States, the events of September 11, 2001 were "an act of war". The sheer magnitude of the attacks, their merciless violence, plus the worldwide impact of the images, according to the U.S., immediately imposed the word "war" as the only one commensurate with the event, and the outrage it had provoked. Less than ten days after the attacks of the World Trade Centre and the Pentagon, President George W. Bush declared a "war on terrorism with a global reach" and announced that the war would end only with the eradication of this "evil." In the fall of 2001, the punishment of the perpetrators of these attacks, and the defeat of their Taliban accomplices following a military campaign in Afghanistan, translated the President's words into deeds.

While the 11 September attacks were the U.S. justification for the war on Afghanistan, the U.S. put forward two sets of justifications for the war in Iraq. One was the purported non-compliance of Iraq with its U.N. disarmament obligations, the illegal pursuit of weapons of mass destruction (W.M.D.) programmes, and alleged possession of at least some of these weapons. The second U.S. justification was that the combination of Iraq's W.M.D. capacities and its supposed association with terrorist networks presented a threat to the U.S. against which it had to defend itself. Although the United States' legal justification of the war before the U.N. rested entirely on the first set of arguments, the Bush administration made an extensive use of the second in its policy pronouncements and in the domestic case it built to support the war.

It quickly became clear, however, that in reality, this "war on terror" was intended to go well beyond its proper remit – the punishment of the state accomplice of the 11

September attackers – and that the Afghan "phase one" would be followed by the Iraqi "phase two". War has come to be a central feature of the political reactions, as well as of the strategy and legal concepts, employed by the United States to wage the global struggle against international terrorism. However, what the United States administration failed to recognise was that war is a reciprocal process: if you are at war with someone, then he is at war with you. As a result, the state of war confers a degree of common dignity on the belligerents, as well as certain rights. However, the issue of rights does not only arise on the basis of war; but is to respected at all times.

Breaching International laws; in defensive position:

On the sixth of March 2003, United Nations Secretary General Kofi Annan told a special meeting of the Security Council's Counter-Terrorism Committee that: "Respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism – not privileges to be sacrificed at a time of tension."[1] In order to have respect for human rights as a central plank of any government's security strategy, international bodies such as the United Nations have ratified several treaties and conventions that defend human rights and establish standards, which different governments are to abide with. The current paper is based on the failings of the United States to meet the Geneva Conventions, which it had ratified many years ago, and how it views and/or justifies them to external international bodies. In its "war on terror", the United States has openly defied human rights and international humanitarian law in the

[1] *United States of America Undermining Security: Violations of human dignity, the rule of law and the National Security Strategy in "war on terror" detentions*.. AI Index: AMR 51/61/2004 - 9 April 2004. Retrieved from the World Wide Web: http://web.amnesty.org/ library/index/engamr510612004 on June 20, 2005. Amnesty International.

name of national security and "counter-terrorism." The "security excuse," whereby governments curtailed and abused human rights under the cloak of the "war on terror", has been particularly apparent in the United States' actions.

In 1973 Amnesty International (A.I.) published its first report on torture. It found that torture "…thrives on secrecy and impunity. Torture rears its head when the legal barriers against it are barred; feeds on discrimination and fear; and gains ground when official condemnation of it is less than absolute"[2]. The pictures of detainees in U.S. custody in Abu Ghraib, Iraq show that what was true thirty-two years ago remains true today.

The U.S. government's seemingly deliberate and continuing use of "coercive interrogation" – its acceptance and deployment of torture and other cruel, inhuman, or degrading treatment – has had this insidious effect, well beyond the consequences of an ordinary abuser. That unlawful conduct is also said to have undermined Washington's much-needed credibility as a proponent of human rights and a leader of the campaign against terrorism. In the midst of a seeming epidemic of suicide bombings, beheadings, and other attacks on civilians and non-combatants across Iraq – all affronts to the most basic human right values – "Washington's weakened moral authority is felt acutely".[3] What most people cannot comprehend is the U.S. rationalization of its actions, and how every undertaking is seen as justifiable by the Bush administration.

Despite the universal outrage generated by the photographs coming out of Abu Ghraib in the spring of 2004, and the evidence suggesting that such practices are being

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[2] *Amnesty International Annual Report*. Published May, 2005. Retrieved from World Wide Web: http://web.amnesty.org/report2005/index-eng. May 26, 2005.
[3] *Human Rights Watch Annual Report*. Published January 2005. Retrieved from the WWW: http://hrw.org/wr2k5/wr2005.pdf May 25, 2005.

applied to other prisoners held by the United States in Afghanistan, Guantánamo and elsewhere, Amnesty International in its 2005 Annual Report claims that neither the U.S. administration nor the U.S. Congress has called for a full and independent investigation. Amnesty International continues to claim that the U.S. government has instead gone to great lengths to restrict the application of the Geneva Conventions and to "re-define" torture. It has sought to justify the use of coercive interrogation techniques, the practice of holding "ghost detainees" and the "rendering" or handing over of prisoners to third countries known to practice torture.

Rather than arguing that the United States has breached the Geneva Conventions, which seems to be the obvious case to the public all around the world, the task here is to study how the U.S. has been seeking to maintain its position in the international community, by justifying its actions, and to maintain that it has not breached the Conventions. Given the legalities surrounding the topic of torture, the United States needed to justify its acts in the Middle East and elsewhere during its "war on terror", in a way most convincing. Being the super-power that it is in the world now, the United States needed to change its image from the perpetrator to the "hero" in its "war on terror." The justifications made by the United States have been facilitated by the shifts and fluidity in the definition of "torture" set by the international bodies and conventions. The point of taking this perspective in the paper is not to promote the U.S. justifications. Instead, it seeks to examine how the U.S. acts have been rationalized by the Bush administration, placing it in such a position, in which it has to justify its undertakings.

In its 2005 annual report, Amnesty International's Secretary General, Irene Khan, stated that the detention facility at Guantánamo Bay "…has become the gulag of our

times, entrenching the practice of arbitrary and indefinite detention in violation of international law" (A.I. Annual Report, 2005). This comment sparked a "war of semantics", so to speak, between A.I. and Washington, which gained global attention, hence placing the United States in the limelight, and a rather defensive position.

In response to Khan's use of the term, *gulag*, President George W. Bush called the report "absurd" several times, and said it was the product of people who "hate America."[4] His administration followed in his words by condemning the A.I. use of the term. However, Amnesty responded by pointing out that the U.S. administration often cites its reports only when that suits its purposes.

Critics throughout the States claimed that the parallel drawn between Guantánamo Bay and a *gulag* does injustice to the suffering experienced at the former soviet camps, while others argue that the Soviet gulag is not even analogous to Guantánamo in the first place.[5] In addition, critics argued that Amnesty erred with its use of the term, *gulag*, as it has given the U.S. administration the opportunity to divert away from the substance of the initial concern voiced by the organization. As such, Reed Brody, special counsel with Human Rights Watch in New York, said he thought the Bush administration had taken cover behind semantics. "We're concerned that the debate over the label is obscuring the real issue," he said.

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[4] Alvarez, Lizette. "Rights group defends chastising of U.S.", The New York Times. Published June 4, 2005. Retrieved from the WWW: http://query.nytimes.com/search/restricted/article?res=F30611FD3F5C0C778CDDAF0894DD404482.

[5] "The term refers to the unit that administered the camp system, which was established in 1929 and operated as a subunit first of the political police (OGPU), then from 1934 to 1957 as part of the USSR Peoples Commissariat of Internal Affairs, a conglomerate agency that includes political police, regular police, ordinary penal institutions and the camps, *inter alia*. In popular usage, however, "gulag" has come to stand for Stalinist labour camps and practices associated with them. Myths about these camps entail that millions died there, and that most of the prisoners were political and innocent prisoners, when facts indicate otherwise. What defined the camps in reality was not cruelty or repression *per se*, but the use of convict labour. Convicts represented an important part of the labour force, and camps were evaluated on the basis of their productivity." Information acquired from Peter Solomon; August 25, 2005.

Given that such an exchange of words could arise between two international institutions regarding the use of the term, *gulag*, to describe the detainment camp in Guantánamo Bay and elsewhere, one would come to wonder how semantics play a role in today's politics. Particularly is the case regarding torture.

Re-defining torture:

In late 2004, The International Committee of the Red Cross (I.C.R.C.) charged in confidential reports to the U.S. Government that the American military has intentionally used psychological and sometimes physical coercion "tantamount to torture" on prisoners in Guantánamo Bay, Cuba[6]. It was the first time that the Red Cross, which has been conducting visits to Guantánamo since January 2002, asserted in such strong terms that the treatment of detainees, both physical and psychological, amounted to torture. The report said that another confidential report in January 2003, which had never been disclosed, raised questions of whether "psychological torture" was taking place (Lewis, 2004). The use of the phrase "*tantamount to torture*" is a curious one as the I.C.R.C. cautiously avoids the direct claim to *torture*. The public audience may ask itself, "What constitutes a treatment as *tantamount* to torture?" More so, "What is the *definition* of torture - how is that definition set – and who decides on it?"

The current paper will discuss how the fluidity, and lack, of absolute consensus on the definition of "*torture,*" as well as its several loopholes, have made it easier for U.S. officials to offer their own interpretations of concepts and actions; and how the United States has sought to reconcile its ratification of human rights instruments, with the

[6] Lewis, Neil A. "Red Cross finds detainee abuse in Guantánamo", The New York Times. Published November 30, 2004.

claims and announcements made by non-governmental organizations that it has violated those instruments throughout its "war on terror."

As the paper will discuss, torture is abhorrent both to American law and values, and international norms. This universal repudiation of torture is reflected in international law and United States criminal law. It is particularly noted in a memorandum from Acting U.S. Assistant Attorney General Daniel Levin to Deputy Attorney General James B. Comey[7], which lists the following as such examples: 18 U.S. Constitution. (U.S.C.) §§ 2340-2340A; international agreements exemplified by the United Nations Convention Against Torture (the "C.A.T.")[8]; customary international law[9]; and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President.

DEFINITIONS OF TORTURE

Human rights treaties define torture in broad terms. The task of interpreting the definitions in practice – and ensuring they are applied consistently – falls to various inter-governmental bodies, which monitor states' compliance with the relevant international treaties. These monitoring bodies, as well as national courts, continually make decisions, which refine and develop the interpretation of what constitutes torture. Therefore, international human rights treaties are "living instruments," reminders, and guidelines evolving and developing over time. Meanwhile, the fluidity in the definition of "torture"

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[7] Memorandum for James B. Comey; Deputy Attorney General; [from Acting Assistant Attorney General Daniel Levin]. *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A*. December 30, 2004.

[8] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, S. Treaty Doc. No.100-20, J465 U.N.T.S. 85. See also, e.g., International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171.

[9] It has been suggested that the prohibition against torture has achieved the status of *jus cogens* (i.e. a peremptory norm) under international law. *See, e.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992); *Regina v. Bow Street Metro*; *Stipendiary Magistrate Ex Parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147, 198; *see also* Restatement (Third) of Foreign Relations Law of the United States § 702 reporters' note 5.

grants any powerful state, such as the U.S., the opportunity to present its own definition of torture in order to justify its actions. For this reason, it would be worth discussing the various definitions of torture provided by different international bodies, including the ostensible perpetrator; the United States administration. This shall demonstrate how the definition of "torture" has been the subject of contestation by the United States administration and as well as non-governmental organizations. In addition, this shall demonstrate how the fluidity of the definition of "torture" has helped, if not facilitated, the United States' justification of its actions throughout its "war on terror." Moreover, laying out the various definitions of the different international bodies will provide a background of information for the reader, for the remainder of the current paper.

I. United States

As used in § 2340 in the U.S. Constitution, torture means

> an act committed by a person acting under the colour of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.[10]

To serve this definition, "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from (18 U.S.C.): a) the intentional infliction or threatened infliction of severe physical pain or suffering; b) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to profoundly disrupt the senses or the personality; c) the threat of imminent death, or d) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application

[10] 18 U.S.C.: 113C, §2340. Retrieved from the WWW: http://www4.law.cornell.edu/uscode/html/uscode18/usc_sec_18_00002340----000-.html August 15, 2005.

of mind-altering substances or other procedures calculated to profoundly disrupt the senses or personality.

In addition, § 2340A; Ss. a) in the U.S. Constitution states that

> …whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than twenty years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

Additionally, it is stated in §2340A; Ss. b) that there is jurisdiction over the activity prohibited in this subsection if i) the alleged offender is a national of the U.S.; or ii) the alleged offender is present in the U.S., irrespective of the nationality of the victim or alleged offender. It is further stated in Ss. c) that a person who conspires to commit an offence under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offence, the commission of which was the object of the conspiracy. Does this subsection of the Constitution hence justify any torture that takes place within U.S. jurisdiction? This will be discussed further in the paper.

Taken at face value, the U.S.A.'s National Security Strategy similarly commits the United States to an approach that has human rights at its core. For example, it emphasizes that the path to a safer world must include "respect for human dignity". In doing so, it echoes the Universal Declaration of Human Rights, adopted in 1948 in response to years of "disregard and contempt for human rights" and which has at its heart a vision of a world in which the dignity of every human being is respected (Rumsfeld, 2003).

Nevertheless, the U.S.A. has built a prison camp at its military base in Guantánamo Bay, Cuba, and filled it with over 500 detainees from around the world. An

unknown number of other people are held in undisclosed locations elsewhere – not even the I.C.R.C., the only international organization which has been able to visit the Guantánamo detainees, knows where these detainees are held or has access to them.

II. U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

For the purposes of this Convention, the term "torture" means any act by which

> severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions (Article 1, C.A.T.).

It is interesting to note that as opposed to the U.S. definition of torture, this C.A.T. definition includes any act described above as torture that is *approved* or *ordered* by a public official or any other person with authority. More importantly, this definition clearly indicates that committing these acts with the *intention of extracting information* constitutes torture.

In addition, Article 2 of the Convention states that each party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction (C.A.T., 1987). It further states that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. Furthermore, the Convention clearly indicates that an order from a superior officer or a public authority may not be invoked as a justification of torture (C.A.T., 1987).

An important clarification of the definition of torture can be found in the U.N. Declaration on Torture of 9 December 1975:

> Torture means any act by which severe pain or suffering whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purpose as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons ... Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading punishment.[11]

This definition includes degradation, in an *aggravated* and *deliberate* form, and hence classifies certain types of coercive interrogation which have taken place in Abu Ghraib, as well as in Guantánamo Bay as torture. Examples of the treatment detainees have received in Abu Ghraib will be discussed further in the paper.

III. Amnesty International

Because Amnesty International "works primarily to combat human rights abuses by states and armed opposition groups," Amnesty usually uses the term "torture" to refer to the deliberate infliction of severe pain or suffering by state agents, or similar acts by private individuals for which the state bears responsibility through consent, acquiescence or inaction.[12] This definition does not address as much detail as the first two definitions discussed above. For example, it does not indicate whether committing such acts under interrogation would still constitute torture or not.

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[11] Arnold, Roberta. "The Abu Ghraib Misdeeds – Will There be Justice in the Name of The Geneva Conventions?" CagePrisoners. Published 24 March, 2005. Retrieved from the WWW: http://cageprisoners.com/articles.php?id=6044 August 7, 2005.

[12] Retrieved from the www: http://www.amnesty.org/uk/torture/definition.shtml August 7, 2005.

Amnesty also uses the term "torture" to refer to deliberate pain or suffering inflicted by members of armed political groups, but it is far from the exact and more particular definition the Convention Against Torture uses.

IV. International Committee of the Red Cross (I.C.R.C.)

The I.C.R.C. does not have its own definition of torture and uses, "when necessary," those already established - or none at all – "as it sees fit in a given situation" (I.C.R.C., 2005). However, the I.C.R.C. uses the broad term "ill-treatment" to cover both torture and other methods of abuse prohibited by international law, including inhuman, cruel, humiliating, and degrading treatment, outrages upon personal dignity and physical or moral coercion.[13] According to the I.C.R.C., the legal difference between torture and other forms of ill treatment lies in the level of severity of pain or suffering imposed. However, what constitutes this legal difference and why is unknown. In addition, torture, according to the I.C.R.C. requires the existence of a specific purpose behind the act – to obtain information, for example. The I.C.R.C. states that "the one [definition] generally accepted today is that of the U.N., which defines torture as being an aggravated form of cruel, inhuman and degrading treatment" (I.C.R.C., 2005).

V. Human Rights Watch (H.R.W.)

No particular definition used by H.R.W. has been found for torture. It is believed that H.R.W. does not have its own definition for torture, and uses, when necessary, those already established, such as that of the Convention Against Torture.

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[13] "What is the definition of torture and ill-treatment?" F.A.Q., International Committee of the Red Cross. Retrieved from the WWW: http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/19F463DBD1D7639FC1256FA90050419C August 21, 2005.

U.S. DECISIONS WARRANTING CONCERN

The Bush administration 's decisions in the "war on terror" received important support in the U.S. from a chorus of partisan pundits and academics who, claiming that an unprecedented security threat justified unprecedented measures, were all too eager to abandon the fundamental principles on which their nation has been founded. Ten such decisions listed in the Human Rights Watch 2005 Annual Report will be collapsed into six[14] for the purpose of this paper. They shall be the central focus of this paper, outlining the U.S. undertakings, which the Bush administration is seeking to justify via its own interpretations of the international laws it has ratified, as well as how the justification and rationalization is made for each.

1- Application of the Geneva Convention regarding Prisoners of War (POWs):

The first of these decisions is that to not apply the Third Geneva Convention to detainees in U.S. custody at Guantánamo, even though the conventions, according to different international bodies, apply to all people picked up on the battlefield of Afghanistan. Senior Bush officials vowed that all detainees would be treated "humanely," but that vow seems never to have been seriously implemented and at times was qualified by a self-created exception for "military necessity." Meanwhile, the effective "shredding"

[14] The ten initial decisions made by the United States that warrant concern are [as suggested by HRW]: 1) the decision not to apply or follow the Geneva Convention regarding POWs; 2) the decision not to apply or follow the Convention Against Torture (CAT); 3) interpreting the prohibition of ill-treatment differently, as opposed to the CAT; 4) the decision to enforce incommunicado detention of suspects in Guantánamo and elsewhere; 5) the decision to not prosecute many soldiers who committed torture, and prosecuting a few in military court; 6) the approval of coercive interrogation; 7) the approval and order of 'water-boarding' in interrogations – a technique which makes the detainee believe he will drown; 8) the decision to execute 'extraordinary rendition'; 9) the decision to oppose the International Criminal Court in prosecution of soldiers; and 10) the enforcement of 'Commander-in-Chief authority' (H.R.W. Annual Report, 2005).

of the Geneva Conventions sent U.S. interrogators the signal that, in the words of one leading counter-terrorist official, "the gloves came off."

The well known announcement of 7 February 2002 made by the White House that the 1949 Third Geneva Convention on Prisoners of War (GCIII) applied to the Taliban but not to members of Al-Qaeda, but that, nevertheless, the Taliban did not qualify as prisoners of war (POW) under the terms of the Convention, provided no legal or seemingly logical grounds for such determination.[15] The content of the announcement and the lack of legal explanation led to strong reactions by the legal community, which almost unanimously underlined that, under Article 5(2) GCIII, members of the Taliban forces were presumed to enjoy POW status, as long as a competent tribunal had not determined otherwise.[16] Furthermore, it was contended with regard to Al-Qaeda members that POW status was most probably to be denied because those fighters did not appear to meet the GCIII combatants' requirements for organized armed groups. According to the majority view, such as that of H.R.W. (2005), even those who were not entitled to POW status remain, however, protected by the guarantees enshrined in the 1949 Fourth Geneva Convention on Civilians (GCIV), such as humane treatment.

Two internal memoranda set forth the views of the State Department[17] and the Justice Department[18] concerning the law applicable to the persons captured during the

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[15] White House, *Fact Sheet on Status of Detainees at Guantánamo,* 7 February 2002. Retrieved from the WWW: http://www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html June 30, 2005.
[16] Vierucci, Luisa. (2004). Is the Geneva Convention on prisoners of war obsolete? The views of the counsel to the U.S. President on the application of international law to the Afghan conflict. *Journal of International Criminal Justice,* 2 (3): 866-871.
[17] U.S. Department of State, Memorandum to the Counsel to the President, Assistant to the President for National Security Affairs, by Colin L. Powell, *Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan,* 26 January 2002. Retrieved from the WWW: http://msnbc.msn.com/id/4999363/site/newsweek/ June 4, 2005.
[18] U.S. Department of Justice, Memorandum for William J. Haynes II, General Counsel, Department of Defence, *Re Application of Treaties and Laws to Al-Qaeda and Taliban Detainees,* prepared by J. Yoo and

Afghanistan conflict. Also of particular interest is the public Counsel's Memorandum,[19] drafted by the Counsel to the President, based on the views expressed by the relevant departments. These documents show that the State Department's views were at odds with those of the Justice Department (Vierucci, 2004). While the former appeared to hold that the GCIII did apply to the conflict in Afghanistan and that only an individual determination of the status of the Taliban could deprive them of POW protection, the latter was adamant that the GCIII did not apply to the conflict and, hence, neither Al-Qaeda nor Taliban members were entitled to POW status. Removed from the protections of the Geneva Conventions, Al-Qaeda and Taliban detainees have been classified variously as "unlawful combatants," "enemy combatants," and "unprivileged belligerents."[20] The Counsel's Memorandum supported the views of the Justice Department but did not fail to underline the policy advantages of the State Department's stand.

According to the Counsel's Memorandum, the U.S. President has the "constitutional authority" to determine the applicability of the GCIII to Al-Qaeda members and the Taliban. While this may be true under the terms of the U.S. Constitution, the exercise of this authority is internationally lawful only to the extent that the presidential determination is, on the merits, consonant with the relevant international rules. Furthermore, it is interesting how convenient this "constitutional authority" is, as the U.S. President may determine the applicability of the Convention only when it does

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R. Delahunty, Office of Legal Counsel, 9 January 2002. Retrieved from the WWW: http://msnbc.msn.com/id/5025040/site/newsweek/ June 4, 2005.

[19] White House, Memorandum for the President from Alberto R. Gonzales, *Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al-Qaeda and the Taliban,* 25 January 2002. Retrieved from the WWW: http://msnbc.msn.com/id/4999148/site/newsweek/ June 5, 2005.

[20] "Final Report of the Independent Panel to Review Department of Defence Detention Operations [Also known as the Schlesinger Report – as prepared by James R. Schlesinger]," *The Abu Ghraib Investigations*. Ed. Strasser, Steven. PublicAffairs: NY, 2004.

not challenge his ideas. POW status arises *ipso facto* by virtue of the existence of the combatants' requirements, as laid down in Article 4 GCIII. Pursuant to the letter of Article 4(A)(1) GCIII, and in line both with judicial decisions and the vast majority of the legal literature, members of the armed forces are not explicitly required to meet the four conditions (having a responsible command, bearing a distinctive sign, carrying arms openly and abiding by the laws and customs of war) which are set forth in Article 4(A)(2) and are required for organized armed groups (Vierucci, 2004). Members of the armed forces are *supposed* to meet those conditions, and hence, are *presumed* to enjoy POW status if captured. Nonetheless, as ambiguous cases may arise, and in order to avoid undue deprivation of POW status, in 1949, a provision was added whereby, in case of doubt, only a "competent tribunal" may determine the POW status of each individual detainee.[21] It is therefore clear that no administrative authority – not even one at the highest level – may "lawfully" depart from the Third Geneva Convention in determining the POW status of a detainee.

However, the Counsel to the President suggested that in justification, as Afghanistan was a "failed state," not exercising full control over territory and people, and not recognized by the international community, except a few, the Taliban were not a government but a terrorist organization (Vierucci, 2004). It followed that the Geneva Conventions did not apply to the Taliban, since they only bind states, not terrorist organizations. Such contention is refuted by Vierucci (2004) on several grounds. First,

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[21] Art. 5(2) (Third Geneva Convention). *Geneva Convention relative to the Treatment of Prisoners of War*. Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August 1949. Entry into force 21 October 1950. Retrieved from the WWW: http://www.unhchr.ch/html/menu3/b/91.htm July 5, 2005. Note also that this provision has been incorporated into U.S. law through the U.S. Army Regulations 190-198, Enemy Prisoners of War Retained Personnel, Civilian Internees and Other Detainees, October 1, 1997, at 1-6.

she claims that it cannot be denied that, in September 2001, the Taliban controlled over 90 percent of Afghan territory and was, therefore, the *de facto* government of Afghanistan. She further claims that the international community, including the U.S., had repeatedly regarded the Taliban as the authority in control of the territory and responsible for permitting terrorist activities by certain groups, as well as the ultimatum that the U.S. gave to the Taliban following the 11 September 2001 events, asking them to deliver Osama bin Laden to justice (Vierucci, 2004). Moreover, the "territorialization" of the conflict, which followed the 11 September attacks, is argued to have confirmed that the U.S. considered the Taliban as the government responsible for what happened over that territory. Considering the Taliban as a government in 2001 had benefited the United States in its war against Afghanistan, as it gave the U.S. legitimate reason to invade the country, whereas considering the Taliban later in the war as a terrorist organization justified the status of non-POW granted to Taliban and Al-Qaeda members. This inconsistency of the United States and its perception of the Taliban demonstrates the Bush administration's intentions in its "war on terror."

Finally, the principle whereby recognition of a government by a party to the conflict is irrelevant to the application of the Third Convention, as explicitly provided for in Article 4(A)(3) GCIII. It would also seem that perhaps the relevant matter is not whether the Taliban constituted a government, but whether the United States, as a Contracting Party, was bound to apply the Third Convention to a terrorist organization in a Contracting State.

According to Vierucci (2004), the White House position on detaining members of the Taliban for interrogation purposes is legally sound on a number of grounds, which the

United States has voiced. In the first place, the GCIII does allow interrogation of a POW profoundly. Not only does it place an obligation on the POW to provide his name, surname, date of birth and serial number, failing which restrictions of the advantages granted by the Convention may be imposed on the POW,[22] but it also allows for interrogation on other issues, on condition, however, that "no physical or mental torture and any other form of coercion can be inflicted" (Art.17, GCIII). In addition, a POW suspected of having committed a war crime, including acts of terrorism or attacks against civilians, may be subjected to interrogation according to the law of the detaining power.[23]

Secondly, regardless of the prohibition set forth in the GCIII, torture and inhuman and degrading treatment against persons subject to interrogation are prohibited both by international law and under U.S. internal law. It follows that those treatments are, in any case, forbidden also in the conduct of the war against terrorism, even if the Geneva Conventions were not to apply to such a type of war. Thirdly, the GCIII does allow the trial of "terrorists" for war crimes such as wantonly killing civilians and makes a POW prosecutable for war crimes by the detaining power.[24]

The White House conclusion renders the departure from the Counsel's Memorandum only illusory: the White House denial of POW status to the Taliban and Al-Qaeda members is equivalent to denying the applicability of the GCIII to the Afghan conflict. There are, therefore, strong grounds for believing that the White House announcement on the application of the GCIII to the Afghan conflict was only aimed at avoiding that the other parties to the conflict deprive the U.S. armed forces of the protection afforded by the Convention.

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[22] Article 17 of the Third Geneva Convention.
[23] Article 82 of the Third Geneva Convention.
[24] Article 85 of the Third Geneva Convention.

Washington's refusal to apply the Geneva Conventions to those captured during the international armed conflict in Afghanistan and transferred to the U.S. naval base at Guantánamo Bay, Cuba, was challenged by a judicial decision in November 2004. The ruling resulted in the suspension of trials by military commission in Guantánamo, and the government immediately lodged an appeal. The U.S. administration's treatment of detainees in the "war on terror" continued to display a marked ambivalence to the opinion of expert bodies such as the I.C.R.C. and even of its own highest judicial body. Six months after the Supreme Court ruled that the federal courts had jurisdiction over the Guantánamo detainees, none had appeared in court. Detainees reportedly considered of high intelligence value remained in secret detention in undisclosed locations. In some cases their situation amounted to "disappearance".

The government's authority to detain individuals captured on a loosely-defined "battlefield" indefinitely,[25] without charges, access to counsel, or the opportunity to appear before a tribunal to challenge the basis for their detention or their classification as "enemy combatants," was challenged by lawyers' professional associations, civil libertarians, and international human rights organizations, who argued that imprisonment without any form of legal process violated basic human rights and settled international law.[26]

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[25] "The war on terrorism is a global campaign against a global enemy… It will not end until terror networks have been rooted out, wherever they exist." Rumsfeld, Donald H. (2002). Prepared Testimony of U.S. Secretary of Defence Donald H. Rumsfeld before the Senate Armed Services Committee on Progress in Afghanistan, Washington, D.C., July 31, 2002. Retrieved from the WWW: http://www.defenselink.mil/speeches/2002s20020731-secdef3.html August 20, 2005.

[26] On March 13, 2002, the Inter-American Commission on Human Rights (I.A.C.H.R.) ordered the U.S. to "take the urgent measures necessary to have the legal status of the detainees at Guantánamo Bay determined by a competent tribunal" (Centre for Constitutional Rights 2005). Furthermore, in a June 6, 2002 letter to the Organization of American States (O.A.S.), the American Civil Liberties Union (A.C.L.U.) stated that the United States' expressed position that it could hold individuals detained at Guantánamo Bay indefinitely without charge "is a clear violation of Article XXV of the American

2- Application of the Convention Against Torture (C.A.T.):

Another decision is that to not clarify for nearly two years that, regardless of the applicability of the Geneva Conventions, all detainees in U.S. custody were protected by the parallel requirements of the Convention Against Torture, also known as the C.A.T. Even when, at the urging of human rights groups, a senior Pentagon official belatedly reaffirmed, in June 2003, that the convention prohibited not only torture, but also other forms of ill treatment, that announcement was communicated to interrogators, if at all, in a way that had no discernible impact on their behaviour (H.R.W. Annual Report, 2005).

Kenneth Roth, Executive Director of Human Rights Watch, states that the U.S. government's approach to the ratification of international human rights treaties is unique.[27] According to him (2002), once the government signs a treaty, the pact is sent to Justice Department lawyers, who comb through it looking for any requirement that, in their view, might be more protective of Americans' rights than pre-existing U.S. law. In each such case, a reservation, declaration, or understanding is drafted to negate the additional rights protection. These qualifications are then submitted to the Senate as part

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Declaration [of the Rights and Duties of Man], prohibiting deprivation of liberty except according to procedures established by pre-existing law, and mandating 'without delay' judicial review of the detention, and the 'right to be tried without undue delay, or otherwise, to be released'." A.C.L.U. (2003). "Letter to the Organization of American States on Military Detentions and Tribunals." Retrieved from the WWW: http://www.aclu.org/NewsPrint.cfm?ID=10457 &c=111 August 20, 2005.

On March 11, 2003, the Lawyers' Committee for Human Rights (L.C.H.R.) stated, "The U.S. government's position that the detainees are 'enemy combatants,' and that they may be held until the global war against terrorism is concluded, is untenable." L.C.H.R. (2003). "L.C.H.R. Recommendations on Security, Detainees and the Criminal Justice System." Published March 11, 2003. Retrieved from the WWW: http://www.humanrightsfirst.org/us_law/detainees/hrf_recommendations.htm August 20, 2005. In addition, on November 10, 2003, Christophe Girod, the senior Red Cross official in Washington, publicly criticized the United States' position that the Guantánamo Bay detainees could be held indefinitely without legal safeguards. In a May 5, 2004 Operational Update posted on its website, the I.C.R.C., cautioning that "no person captured in the fight against terrorism can be considered outside the law," stated: "There is no such thing as a 'black hole' in terms of legal protection" (I.C.R.C. 2004).

[27] Roth, Kenneth. (2002). An empire above the law. *Bard Globalization and International Affairs Program*, Vol. 2, 32-36.

of the ratification package. As such, the U.S. government entered a reservation limiting the conduct prohibited by the C.A.T. The problem, from the government's perspective, was that Article 16 of the convention precludes not only "cruel and unusual punishments" - the prohibition contained in the Eighth Amendment of the U.S. Constitution - but also "degrading treatment" (Roth, 2002). To avoid any possibility of this provision being interpreted to impose a higher official standard of conduct, the U.S. government adopted a reservation stating that the Convention Against Torture prohibits no more than the "cruel and unusual punishment" provision of the U.S. Constitution.

In a report classified by U.S. Secretary Rumsfeld on detainee interrogations in the "global war on terrorism", jurisdiction over the offence of torture is said to extend to any national of the United States or any alleged offender present in the United States, and could, therefore, reach military members, civilian employees of the United States, or contractor employees[28]. The "United States" is defined to include all areas under the jurisdiction of the United States, including the special maritime and territorial jurisdiction (S.M.T.J.) of the United States. S.M.T.J. is said to be a statutory creation that extends the criminal jurisdiction of the United States for designated crimes to defined areas. The effect is to grant federal court criminal jurisdiction for the specifically identified crimes (Rumsfeld, 2003). As indicated below, the S.M.T.J. is a statutory creation that was designed in order to intentionally exclude Guantánamo Bay from U.S. jurisdiction, and make it a legal exception.

According to the same report by Rumsfeld, the Guantánamo Bay Naval Station (also known as GTMO) is included within the definition of the special maritime and

[28] Draft of *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*. Classified by U.S. Secretary Rumsfeld, 6 March 2003.

territorial jurisdiction of the United States, as it is a U.S. military naval base, and accordingly, "is within the United States for purposes of § 2340." Thus, according to the report, the Torture Statute does not apply to the conduct of U.S. personnel at GTMO.

> That GTMO is within the special maritime and territorial jurisdiction of the United States is manifested by the prosecution of civilian dependents and employees living in GTMO in Federal District Courts based on S.M.T.J. and Department of Justice opinion and clear intention of Congress as reflected in the 2001 amendment to the S.M.T.J. (Rumsfeld, 2003).

This report contends that Article 7 of the Convention, which bans torture and inhuman and degrading treatment, is not applicable because the U.S. has maintained consistently that the Covenant does not apply outside the U.S. or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during an international armed conflict. Such a proposition is not incorporated in any reservation, understanding, or declaration made by the United States upon ratification of the Covenant. The Human Rights Committee has consistently held that, pursuant to Article 2(1) of the Covenant, the rights enshrined in the Covenant must be respected by each Contracting Party in any place (whether or not under their sovereignty), where they wield effective authority and control over individuals (Cassese, 2004). Hence, the proposition contained in the Report is legally flawed. Consequently, the contention is warranted that the United States' stand on the matter is contrary to the international obligations that it assumed as a State Party to the U.N. Covenant, and uses the S.M.T.J. as a statutory justification of not prosecuting employees at GTMO responsible for crimes.

The Bush administration has also decided to hold some suspects – eleven known and probably many more – in unacknowledged incommunicado detention, beyond the reach of even the International Committee of the Red Cross. Victims of such

"disappearances" are at greatest risk of torture and other mistreatment. For example, U.S. forces continue to maintain closed detention sites in Afghanistan, with the explanation that these detainees need to be kept in secret, for "security reasons." The United States maintains that revealing where these detainees are kept breaches necessary security measures, and endangers the success of the "war on terror." In an interview, Michelle Ratner of Amnesty International stated that being "kept in the dark" about where he is kept or when he'll be released, a detainee is psychologically tortured more so than physically.[29] She further stated; "as long as we cannot have the detainees tried, that camp has no place in the world."

The original detention facility in Guantánamo, Camp X-Ray, its successor Camp Delta, and now Camp Echo, where pre-military commission detainees have been held for months in even greater isolation, have become synonymous with a government's pursuit of unfettered executive power and disregard for the rule of law, in direct contradiction to its stated security strategy. With many of the detainees now well into their third year held in tiny cells for up to 24 hours a day without any legal process, it seems that the current U.S. administration views human dignity and the rule of law as far from non-negotiable when it comes to national security. Furthermore, the United States justifies this by arguing that sometimes human rights have to be sacrificed for the success of the "war on terror."

International concern about Guantánamo continues to grow. As such, Iranian human rights defender and the Nobel Peace Prize Laureate in 2004, Shirin Ebadi, singled it out in her acceptance speech:

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[29] Interview with Michelle Ratner of Amnesty International with "Al-Madar", Abu Dhabi TV, 26 June 2005.

> [I]n the past two years, some states have violated the universal principles and laws of human rights by using the events of 11 September and the war on international terrorism as a pretext... It is in this framework that, for months, hundreds of individuals who were arrested in the course of military conflicts have been imprisoned in Guantánamo, without the benefit of the rights stipulated under the international Geneva Conventions, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[30]

In addition to Guantánamo Bay, there are several camps where detainees are held for indeterminate time. For example, the Central Intelligence Agency (C.I.A.) maintains a large heavily guarded compound in Kabul in a small neighbourhood, "surrounded by forty foot walls, razor wire, and guard towers."[31] The C.I.A. also controls a separate detention and interrogation facility at Bagram airbase, though this has never been officially acknowledged by the United States ('Enduring Freedom,' 2004). Little is known about who is detained there, for how long, conditions of detention, or grounds for release or transfer to other U.S.-controlled facilities. There is also some evidence that the United States detains people in Afghanistan who have been captured outside of the country. Such detainees include those who were captured and arrested in Pakistan, then taken to Afghanistan to be detained.

3- Interpreting the Prohibition of ill-treatment and approving coercive interrogation:

A third decision was that to interpret the prohibition of cruel, inhuman, or degrading treatment narrowly, to permit certain forms of coercive interrogation – that is, certain efforts to ratchet up a suspect's pain, suffering, and humiliation to make him talk. Not surprisingly, those methods became more coercive as they "migrated," in the words

[30] Ebadi, Shirin in her Nobel Lecture December 10, 2003. Retrieved from the WWW: http://www.nobel.se/peace/laureates/2003/ebadi-lecture.html August 18, 2005.
[31] "Enduring Freedom:" Abuses by U.S. forces in Afghanistan." Human Rights Watch, 16 (3): March 2004.

of two Pentagon inquiries, from the controlled setting of Guantánamo to the battlefields of Afghanistan and Iraq.

Both torture and inhuman treatment constitute a grave breach under all four Geneva Conventions. For example, the Iraqi prisoners abused at Abu Ghraib could invoke a violation of Article 147 of the Fourth Geneva Convention on the protection of civilians.[32] If it were proven that they were prisoners of war, then they could invoke a breach of Article 130 of the Third Geneva Convention. The facts suggest that some, if not many, of the abuses at Abu Ghraib amounted to the crime of torture.

This latter element goes against the argument that the U.S. soldiers' lack of training in international humanitarian law led to their misdeeds, an argument frequently made. Pursuant to both international and U.S. national law, torture is absolutely prohibited under all circumstances. This fundamental rule should be known to both civilians and soldiers, and there is no need to read the Geneva Conventions to understand it. The defence that the soldiers were simply obeying orders can also be invalidated on these lines.

Three elements of torture have been discussed in an International Criminal Tribunal for the Former Yugoslavia (I.C.T.Y.) Trial Chamber (Arnold, 2005): (i) the list of purposes, the pursuit of which, could be regarded as illegitimate and coming within the

[32] "Grave breaches to which the preceding Article [146] relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: 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. Article 147, Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949. Entry into Force 21 October 1950.

realm of the definition of torture; (ii) the necessity, if any, for the act to be committed in connection with an armed conflict; (iii) the requirement, if any, that the act be 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. The I.C.T.Y. concluded that the following purposes have certainly become part of customary law: (a) obtaining information or a confession, (b) punishing, intimidating or coercing the victim or a third person, (c) discriminating, on any ground, against the victim or a third person (Arnold, 2005).

The above-mentioned elements were clearly present in the Abu Ghraib case. The acts occurred within the context of an international conflict, against protected persons - if not prisoners of war, then civilians, protected under the Fourth Geneva Convention. Therefore, if the U.S. did not prosecute these crimes, every other state obtaining custody over one of the offenders would be under the international obligation to prosecute him/her.

Another interesting aspect is the question of purpose. In this regard, the Taguba Report established that:

> ... contrary to the provision of A.R. 190-8, and the findings found in M.G. Ryder's Report, Military Intelligence interrogators and Other U.S. Government Agency's interrogators actively requested that M.P. guards set physical and mental conditions for favourable interrogation of witnesses (emphasis added). Contrary to the findings of M.G. Ryder's Report, I find that personnel assigned to the 372nd M.P. Company, 800th M.P. Brigade were directed to change facility procedures to 'set the conditions' for M.I. interrogations. I find no direct evidence that MP personnel actually participated in those M.I. interrogations.[33]

This statement leads to the delicate question of interrogation procedures. Interrogations are often conducted on the verge of legality, especially when the information must be

[33] The "Taguba Report" On Treatment of Abu Ghraib Prisoners in Iraq. Article 15-6 Investigation of the 800th Military Police Brigade. Although the Taguba Report is marked *Secret/No Foreign Dissemination*, it has been widely distributed and made available public worldwide since at least the week of May 2, 2004.

extracted from "so-called" terrorists, under time pressure and with the knowledge that the accused actually "knows" something (Arnold, 2005). In this case, there is the dilemma of the "ticking bomb" theory. The delicacy of the matter lies in the fact that if the acts committed at Abu Ghraib were employed as a systematic method of interrogation in Iraq, then the whole blame may not rest with the few low-ranking soldiers currently under trial, but with personnel much higher up in the hierarchy. This is where the issue of command responsibility may particularly come into play. Up to what level is it possible to incriminate a superior for the misdeeds committed by a subordinate?

Following the occupation of Iraq by the United States, the situation became an international conflict governed by the four Geneva Conventions of 1949. The doctrine of command responsibility is not explicitly referred to in any of them, even though it can be inferred from provisions like common Article 1 or Article 4(2) of the Third Geneva Convention (Arnold, 2005). These require governments to provide respect for the laws of war, in particular by delegating this task to commanders. A commander may incur either direct or indirect responsibility. Arnold (2005) argues that with the former, a superior may be held liable for actively inciting the commission of a crime, e.g. by giving an unlawful order (in which case he becomes primarily responsible as a co-perpetrator).

With the latter form, a superior may be liable for failing to prevent or repress the commission of crimes by his subordinates. Responsibility for omission of intervention is only referred to explicitly in Articles 86-87 of Additional Protocol I of 1977, which may be binding on the United States as customary law (Arnold, 2005). However, indirect responsibility (for omission) is not automatic. As observed by Arnold (2005), it would make no sense to hold a commander responsible for rape just because his subordinates

are. Arnold (2005) argues that commanders should be held liable only where there has been a clear failure to discharge their duties as commanders. Several criteria apply. Pursuant to case law (Arnold, 2005), responsibility arises if the following three-stage test is met: (1) the existence of a superior-subordinate relationship; (2) the superior knew or had reason to know that the criminal act was about to be or had been committed; (3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

The first criterion requires a factual rather than a legal relationship of subordination between the author and the commander. According to Arnold (2005), the superior must have had effective command and control over the author. Hierarchical superiority is not sufficient. This may be important in light of General Karpinski's declarations that although she was in charge of the detention facility of Abu Ghraib, she did not, in fact, have control over the units which committed the abuses (Arnold, 2005). This was used to justify that the torture that did take place in Abu Ghraib were isolated actions – that U.S. officials were unaware of these actions, for otherwise, they would have stopped them. In regards to the second criterion, it is no longer required that a superior actively look for the information. His or her responsibility will be assessed solely on the basis of the information that was already available to him/her (Arnold, 2005). As for the third criterion where neither prevention nor repression was undertaken, superior responsibility arises. Another interesting aspect is the responsibility of a commander in charge of an occupied area. Pursuant to the High Command case, this is a commander who:

> ... is *per se* responsible within the area of his occupation ... regardless of the fact that the crimes committed were due to the action of the state or

> superior military authorities that he didn't initiate or in which he did not participate (Arnold, 2005).

The I.C.T.Y. concluded that commanders in charge of occupied zones may be held responsible for war crimes committed against civilians and prisoners of war in that area by troops not under their command (Arnold, 2005). The subordination of units as a basis for command responsibility is only important for tactical commanders. With regard to commanding generals of occupied territories who are charged with maintaining peace and order, punishing crimes and protecting lives and property of a region, subordination is relatively unimportant. In this case, the responsibility is general and not limited to that of a certain subordinate unit. This may be important, should it be proven that the acts in Abu Ghraib were not isolated, which will be discussed below. Some of the U.S. high-ranking officers in charge of occupied Iraq may in fact be held responsible for the misdeeds committed at Abu Ghraib, even if the authors were not the officers' own subordinates, as the United States administration justifies. But again, the other two criteria - knowledge and failure to act - need to be met.

The approval by Defence Secretary Rumsfeld of some interrogation methods for Guantánamo violated, at the very least, the prohibition of cruel, inhuman, or degrading treatment and possibly the ban on torture. These techniques included placing detainees in painful stress positions, hooding them, stripping them of their clothes, and scaring them with guard dogs. That approval was later rescinded, but it contributed to the environment in which America’s legal obligations were seen as dispensable.

A high-level military investigation into complaints by Federal Bureau of Investigation agents about the abuse of detainees at Guantánamo Bay, Cuba, concluded in a report released July 13, 2005 that their treatment was sometimes degrading but did not

qualify as inhumane or as torture. The report was presented by Lt. Gen. Randall M. Schmidt, who conducted the investigation after e-mail messages between F.B.I. agents at Guantánamo and their superiors in Washington were disclosed in a lawsuit.[34]

In the messages, the agents complained that they had seen abusive, possibly illegal behaviour by military interrogators. They spoke of "torture techniques" and described detainees forced into uncomfortable positions for 18 to 24 hours at a time or left to soil themselves (The Star, 2005). General Schmidt told the committee that his investigation could not substantiate some of the F.B.I. accusations. His report said that some of the practices that evoked criticism among the F.B.I. agents were approved interrogation techniques, like stripping detainees, forcing one to wear women's lingerie and wiping red ink on a detainee and telling him it was menstrual blood (The Star, 2005). According to American military investigators, U.S. Guantánamo Bay interrogators degraded and abused a key prisoner, known to be the "twentieth hijacker" of the September 11 attacks, but did not torture him (The Star, 2005). This military report stated that U.S. interrogators particularly told the prisoner that he was a homosexual, forced him to dance with a male interrogator, told him his mother and sister were whores, forced him to wear a leash and perform dog tricks, menaced him with a dog, and subjected him to interrogations up to twenty hours a day for about two months. "As the bottom line, though, we found no torture. Detention and interrogation operations were safe, secure and humane," Schmidt said of the prison at Guantánamo Bay, Cuba (The Star, 2005).

To justify these actions, the Bush administration classified them as degrading treatment, but not torture. This brings us back to the definition of torture earlier discussed, where the U.S. definition of torture did not include degrading treatment, while

[34] Reuters. "Prisoner degraded, but not tortured," The Toronto Star. Published July 14, 2005.

the Convention Against Torture did. Had degrading treatment been said in the definition to constitute torture, these actions would not be justifiable for the Bush administration.

Shortly prior to the release of the F.B.I. report, a Newsweek article warranted great public attention. Special counsel for Human Rights Watch Reed Brody said that "around the world, the United States has been humiliating Muslim detainees by offending their religious beliefs."[35] Newsweek had retracted an article quoting an unidentified U.S. official as saying that a probe into allegations of prisoner abuse at Guantánamo found that interrogators had thrown a Quran into a toilet to rattle Muslim prisoners. The weekly magazine said the sole anonymous source had "backed away" from the account (Al-Jazeera, 2005). However, the United States had demanded that Newsweek retract its article, stating that it was the reason for much bloodshed, and ruining the U.S. reputation overseas, and particularly in the Muslim world. The purported "concern" about the U.S. reputation in the world is what the Bush administration implemented in order to distract the public from the severity of these claims made by the Newsweek article.

However, Brody said condemnation of the Newsweek article, which sparked anti-U.S. protests in Afghanistan and other countries that left at least 14 dead, had been as vocal as to drown out documented complaints of similar mistreatment (Al-Jazeera, 2005). He argued that the controversy over a retracted Newsweek story that U.S. interrogators at Guantánamo Bay desecrated the Quran overshadows genuine incidents of religious humiliation, according to Human Rights Watch. Brody said that H.R.W. had heard allegations that U.S. interrogators had disrespected the Quran from several former detainees, including three Britons and a Russian (Al-Jazeera, 2005). Furthermore, Erik

[35] "Human Rights Watch: U.S. Islam abuse Genuine," Al-Jazeera News at http://www.aljazeera.net. Published May 19, 2005.

Saar, a former Army translator at Guantánamo, has said that guards had routinely tossed the Quran on the ground and stepped on it. There have been other accounts of the Quran being shredded and torn by U.S. interrogators in Guantánamo. Human Rights Watch argued that the Newsweek story would not have resonated had it not been "extensive" U.S. abuse of Muslim detainees and the government's failure to fully investigate all of those implicated. According to Brody, if the U.S. "is to repair the public relations damage caused by its mistreatment of detainees, it needs to investigate those who ordered or condoned this abuse, not attack those who have tried to report on it" (Al-Jazeera, 2005).

Such acts breach the Fourth Geneva Convention, which states that

> …any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations (Article 53, GCIV).

The destruction of the detainees' Qurans falls under this article of the Convention, and demonstrates disrespect for the religion of the detainees. In Article 34, the Third Geneva Convention states that

> Prisoners of war shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities (Article 34, GCIII).

The Convention considers respect for the detainee's religion as a "given," that needs not be mentioned. Such is the case in Article 38: "While respecting the individual preferences of every prisoner, the Detaining Power shall encourage the practice of intellectual, educational and recreational pursuits…" However, the Convention needs to be more transparent in its demand for respect for detainees' religion any and everywhere around the globe, by making such statements directly. The lack of transparency in such

declarations gives the perpetrator much leeway to deny such indirect statements. Nevertheless, this is a case which the Bush administration could not find a justification for.

The contempt for the detainees' religion and culture is demonstrated in a report, prepared by Physicians for Human Rights [P.H.R.], which stated that severe sexual and cultural humiliation took place in Abu Ghraib, Guantánamo and elsewhere.[36] The use of humiliation as a means of breaking down the resistance of detainees, including forced nudity and forced grooming, began when the "war on terror" began.

At Guantánamo, detainees' accounts of forced nudity and sexual humiliation were confirmed by F.B.I. reports. An F.B.I. letter to an Army official states that during late 2002 an agent witnessed a female interrogator at Guantánamo rubbing lotion on a detainee's arms during Ramadan, when "physical contact with a woman would have been particularly offensive to a Muslim male."[37] News reports confirmed that the use of female interrogators violating Muslim taboos regarding sex and contact with women occurred at Guantánamo in 2003 as well. These accounts were confirmed to P.H.R. by a source familiar with conditions there (P.H.R., 2005). According to the source, in 2003 female interrogators used sexually provocative acts as part of interrogation. For example, female interrogators

> sat on detainees' laps and fondled themselves or detainees, opened their blouses and pushed their breasts in the faces of detainees, opened their skirts, kissed detainees and if rejected, accused them of liking men, and forced detainees to look at pornographic pictures or videos (P.H.R., 2005).

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[36] Physicians for Human Rights. "Break Them Down: Systematic Use of Psychological Torture by U.S. Forces." Cambridge: P.H.R., 2005.

[37] Letter from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, Federal Bureau of Investigation. To Maj. Gen. Donald J. Ryder, Department of the Army. July 14, 2004. Retrieved from the WWW: http://www.aclu.org/torturefoia/released/FBI_4622_4624.pdf April 26, 2005.

Although the use of female interrogators appeared to decline in 2004, a source told P.H.R. that humiliation and violation of cultural and religious taboos persisted. Such treatment experienced by detainees was perceived by the United States as that which is different from torture. None of the definitions of torture discussed above directly included or described sexual provocation as a form of torture. Had any of the definitions directly addressed such an issue, the Bush administration would not be free to allow such acts in its prisons. Since it was not included in any of the definitions of torture, the Bush administration could easily justify such actions, by stating that it was just a way of inducing pressure within the detainee to cooperate in the interrogation.

Humiliation of detainees was pervasive at Abu Ghraib. According to the Fay report, "[Military Intelligence] interrogators started directing nakedness at Abu Ghraib as early as 16 September 2003 to humiliate and break down detainees."[38] Forced nudity was used not as a punishment, nor as an exception, but as an accepted method of interrogation. One captain interviewed by Maj. Gen. Taguba said that when he questioned the use of nudity at the prison, he was told "it's an interrogation method that we use."[39] Statements taken by General Fay from soldiers who worked at Abu Ghraib confirm the pervasive use of nudity (Fay Report, 2004). In fact, there have been several testimonies made by soldiers and M.P.s from Abu Ghraib who have stated that they were encouraged by Military Intelligence to carry out such abusive acts, and were also told of a

[38] M.G. George R. Fay. AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade [also known as the Fay Report]. *The Abu Ghraib Investigations*. Ed. Strasser, Steven. PublicAffairs: NY, 2004.

[39] Interview by Maj. Gen. Taguba, CFLCC Deputy Commanding General, US Army with Capt. Donald J. Reese, US Army Reserve. February 10, 2004:127. Retrieved from the WWW: http://www.publicintegrity.org/docs/AbuGhraib/Abu10.pdf April 26, 2005.

"job well done".[40] In addition, Private Lynndie England, one of those charged with abuse in courts martial, as she was in many of the photos released to the media, has stated; "I was instructed by persons in higher rank to 'stand there, hold this leash, look at the camera', and they took pictures for PsyOps [psychological operations]…I didn't really…want to be in any pictures."[41]

Moreover, key senior leaders in both the 800th Military Police (M.P.) Brigade and the 205th Military Intelligence (M.I.) Brigade failed to comply with established regulations, policies, and command directives in preventing detainee abuses at Abu Ghraib and at Camp Bucca during the period August 2003 to February 2004.[42] Some of the findings of the Army Report [Taguba Report] include what M.G. Taguba called "intentional abuse of detainees by military personnel" committed by the following acts:

a) Punching, slapping, and kicking detainees; jumping on their naked feet;
b) Videotaping and photographing naked male and female detainees;
c) Forcibly arranging detainees in various sexually explicit positions for photographing;
d) Forcing detainees to remove their clothing and keeping them naked for several days at a time;
e) Forcing naked detainees to wear women's underwear;
f) Forcing groups of male detainees to masturbate themselves while being photographed and videotaped;
g) Arranging naked male detainees in a pile and then jumping on them;
h) Positioning a naked detainee on a MRE Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture;
i) Writing "I am a Rapest" on the leg of a detainee alleged to have forcibly raped a 15-year old fellow detainee, and then photographing him naked;
j) Placing a dog chain or strap around a naked detainee's neck and having a female soldier pose for a picture;
k) A male M.P. guard having sex with a female detainee;

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[40] "Abuse of Iraqi POWs by GIs Probed." CBS News. Published April 28, 2004. Retrieved from the WWW: http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml April 15, 2005.
[41] Glaister, Dan and Borger, Julian. "1,800 new pictures add to U.S. disgust." The Guardian. Published May 13, 2004. Retrieved from the WWW: http://www.guardian.co.uk/Iraq/Story/0,2763,1215645,00.html August 24, 2005.
[42] Taguba, Antonio M. *Memorandum for Staff Judge Advocate, Coalition Forces Land Component Command, Camp Doha, Kuwait APO AE 09304: Rebuttal to AR 15-6 Investigation of the 800th Military Police Brigade*.1 April 2004.

l) Using military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee;
m) Taking photographs of dead Iraqi detainees (Taguba Report, 2004).

In a particular case, a former detainee at Abu Ghraib testified that a detainee was forced to rape a younger fellow detainee [both blind-folded], to later find out that this "fellow detainee" was his own son (Abu Dhabi TV, 2005).

These findings are amply supported by written confessions provided by several of the suspects, written statements provided by detainees, and witness statements. In addition, several detainees also described the following acts of abuse, which under the circumstances, Taguba found "credible" based on the clarity of their statements and supporting evidence provided by other witnesses:

a) Breaking chemical lights and pouring the phosphoric liquid on detainees;
b) Threatening detainees with a charged 9mm pistol;
c) Pouring cold water on naked detainees;
d) Beating detainees with a broom handle and a chair;
e) Threatening male detainees with rape;
f) Allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell;
g) Sodomizing a detainee with a chemical light and perhaps a broom stick;
h) Using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee (Taguba Report, 2004).

Taguba further noted in his report that he finds that, contrary to the provision of A.R. 190-8, and the findings found in M.G. Ryder's Report, Military Intelligence (M.I.) interrogators and Other U.S. Government Agency's (O.G.A.), interrogators actively requested that M.P. guards set physical and mental conditions for favourable interrogation of witnesses (Taguba Report, 2004). Contrary to the findings of M.G. Ryder's Report, Taguba (2004) found that personnel assigned to the 372nd M.P. Company, 800th M.P. Brigade were directed to change facility procedures to "set the

conditions" for M.I. interrogations. He found no direct evidence that M.P. personnel actually participated in those M.I. interrogations. M.P. personnel hence would easily not be reprimanded or punished for the events that took place in Abu Ghraib, with the justification that they were simply not present in the interrogations.

As a result of the torture taking place, two Afghans have actually died while in detention at Bagram airbase in December 2002 ('Enduring Freedom,' 2004). Both deaths were ruled homicides by U.S. military doctors who performed autopsies. One died from "blunt force injuries to lower extremities complicating coronary artery disease," according to his death certificate prepared by a military pathologist, which was obtained by the *New York Times* ('Enduring Freedom,' 2004). A military spokesman at Bagram confirmed to reporters from the *New York Times* that the second death was ruled a homicide by a military pathologist, the cause being "pulmonary embolism [blood clot in the lungs] due to blunt force injury to the legs." Both military pathologists, when contacted by Human Rights Watch in November and December 2003, turned down requests to be interviewed ('Enduring Freedom,' 2004). Military officials at Bagram said in March 2003 that the military had launched an investigation into the deaths. But as of this writing in August 2005, they have not announced any results. Moreover, in June 2003, another Afghan died at a detention site in Afghanistan. U.S. military officials in Afghanistan and in the United States have refused to provide any details about this death ('Enduring Freedom,' 2004).

Since the Abu Ghraib scandal broke a year ago, the physical abuse of detainees has understandably gained the most attention, and the U.S. Army has itself labelled the

deaths of 26 detainees as homicides (P.H.R., 2005). According to Physicians for Human Rights, the evidence now available from witness accounts, documents released under the Freedom of Information Act, official investigations, leaked reports from the I.C.R.C., media reports, and inquiries by Physicians for Human Rights, shows that physical forms of torture and cruel, inhuman and degrading treatment served only to punctuate the pervasive use of psychological torture by U.S. personnel against detainees. The Bush administration seems to appreciate the power of psychological torture to extract information, yet focuses on its non-physical nature as a justification for it, claiming that is it "only psychological torture" and "not harmful."

As discussed, the use of the psychologically abusive interrogation methods is immoral and is illegal under the Geneva Conventions and other sources of international law to which the United States is a party, civil domestic law and the Uniform Code of Military Justice. Indeed, when Congress enacted a law to implement the requirement of the Convention against Torture to criminalize torture, it defined precisely what it meant by the criminal act of mental or psychological torture (P.H.R., 2005). The U.S. Congress defined the severe mental pain or suffering that constitutes an element of the crime of torture as including threats of death or injury and the administration or application or threatened administration or application of "procedures calculated to disrupt profoundly the senses or the personality."[43] This definition encompasses exactly the procedures that were used.

Psychological torture also violates long-standing instructions for military interrogations. Army Field Manual 34-52, the Army's guide on interrogations, currently

[43] 18 U.S.C. §2340(2)(B).

being revised, allows psychological methods of interrogation, but draws a very sharp line at psychological coercion and efforts to break down detainees, which it considered both unlawful and ineffective:

> [The] use of force, mental torture, threats, insults, or exposure to unpleasant or inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the U.S. Government. Experience dictates that the use of force is not necessary to gain the cooperation of sources for interrogation. Therefore, the use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear.[44]

The psychological torture is said by the United States to have been motivated by the desire for information through interrogations. However, documents reveal that some detainees at Abu Ghraib had been held 90 days before being interrogated for the first time (Schlesinger Report, 2004). According to the Fay Report (2004), most, though not all, of the violent or sexual abuses occurred separately from scheduled interrogations and did not focus on persons held for intelligence purposes. No policy, directive or doctrine, directly or indirectly, caused violent or sexual abuse. In these cases, soldiers knew they were violating the approved techniques and procedures (Fay Report, 2004).

The Bush administration's appreciation for psychological torture is reflected in an article recently published in the New England Journal of Medicine, which indicates that interrogations of detainees involved Behavioural Science Consultation Teams (B.S.C.T.), which are comprised of at least a psychiatrist and a psychologist, and operated first at Guantánamo Bay, and subsequently, at Abu Ghraib. The purpose of the B.S.C.T. was to essentially participate in the design of interrogation plans and then monitor their

[44] Department of the Army. Army Field Manual 34-52. Intelligence Interrogation. Chapter 1, Interrogation and the Interrogator. May 8, 1987. Retrieved from the WWW: http://www.globalsecurity.org/intell/library/policy/army/fm/fm34-52/ April 26, 2005.

implementation. According to the author of the article, Jonathan Marks, the physicians and psychiatrists are told not to speak out, and hence, the precise nature of their involvement is not clear. [45] However, M.G. Jeffrey Miller, who was, for a time, the Camp Commander at Guantánamo, stated that the whole system was designed to revolve around the input of the B.S.C.T (Marks, 2005). Mounting evidence has been found that physicians, psychiatrists, and psychologists were perhaps having some input into the psychological profiling that would have then assisted interrogators. In one case, a psychologist in an investigation that has been conducted by the army admitted that he was actually present during the interrogation of a detainee.[46]

In brief, medical personnel have been implicated in interrogation practices, which violate international law. Medical personnel have been involved in communicating confidential medical information about detainees, either directly to interrogators, or via behavioural science personnel. That was something that the International Red Cross made clear in a leaked report in November of 2004, and that, which it described as a flagrant violation of medical ethics.

> … it should be made clear a presumption of medical confidentiality for detainees at Guantánamo Bay and at Abu Ghraib and elsewhere, and that physicians should not be asked to violate their codes of medical ethics and should not participate in the design and implementation of monitoring interrogation practices, which violate international law (Marks, 2005).

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[45] Interview with Jonathan Marks, supplement to Bloche MG and Marks JH. Doctors and Interrogators at Guantánamo Bay. N Engl J Med 2005:353(1);6-8. Retrieved July 12, 2005 from the NEJM official website on the WWW at: http://content.nejm.org/cgi/content/full/NEJMp058145/DC1.

[46] Bloche, M. Gregg, & Marks, Jonathan H. (2005). Doctors and interrogators at Guanatánamo Bay. *The New England Journal of Medicine,* 353; 16-8.

The justification for having B.S.C.T. personnel involved in interrogations states that behavioural scientists are the most knowledgeable about how to extract information from the human mind, without necessarily physically torturing them.

4- Prosecution of soldiers:

The fourth decision was the refusal for over two years to prosecute soldiers implicated in the deaths of two suspects in U.S. custody in Afghanistan in December 2002, deaths ruled "homicides" by U.S. Army pathologists. Instead, the interrogators were reportedly sent to Iraq, where some were allegedly involved in more abuse.

As far as the 1984 Convention Against Torture is concerned, Washington argues that the United States is obligated under the notion of torture set out in an "understanding" issued by the U.S. upon ratification.[47] Pursuant to this "understanding," torture is meant to embrace any act inflicting severe physical or mental pain or suffering that is 'specifically intended' to cause such pain or suffering. Thus, the United States has accepted the binding value of Article 1 of the Convention to the extent that it is interpreted consistently with U.S. law, which, under 18 U.S.C. § 2340, requires a "specific intent" to inflict severe physical or mental pain (Cassese, 2004). Based on the distinction between "general" and "specific" intent in U.S. criminal law,[48] Washington concludes that "specific intent" implies that one may be accused of torture only if his *specific intent* was to cause pain or suffering:

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[47] Declarations and Reservations (unless otherwise indicated, the declarations of reservations were made upon ratification, accession or succession) [Signatories 74, Parties 136]. As of 23 April 2004. Retrieved from the WWW: http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm August 17, 2005.

[48] According to a case brought before the U.S. Supreme Court, *United States v. Lewis,* 628 F. 2nd 1276 (CA10 1980), cert. denied, 450 *United States Supreme Court Reports* (U.S.) 924 (1981), general intent is knowledge with respect to the *actus reus* of the crime, while specific intent denotes a special purpose or will.

> the *infliction of such* [i.e. severe] *pain must be the defendant's precise objective*. If the [U.S.] statute [on torture] had required only general intent, it would be sufficient to establish guilt by showing that the defendant 'possess knowledge with respect to the *actus reus* of the crime'…If the defendant acted, knowing that severe pain or suffering was reasonably likely to result from his actions, but no more, he would have acted only with general intent… (Cassese, 2004, emphasis added).

However, if, instead,

> …the defendant knows *that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent* even though the defendant did not act in good faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control (Cassese, 2004, emphasis added).

Cassese (2004) further notes, showing that an individual acted with a "good-faith belief" that his conduct would not produce the result that the law prohibits negates specific intent. A defendant could negate a showing of specific intent to cause severe mental pain or suffering by showing that he had acted in good faith that his conduct would not amount to the acts prohibited by the U.S. statute. Thus, in such a case, if a defendant has a "good-faith belief" that his actions will not result in prolonging mental harm, he lacks the mental state necessary for his actions to constitute torture.

According to Cassese (2004), this reading of the Unites States' "understanding" in the light of the U.S. statute on torture is open to the interpretation that, for Washington, torture is confined to sadistic acts or acts of depravation: if an interrogator severely and repeatedly beats up a detainee, causing him severe pain, or denies him food and sleep for many days, and in addition, steadily subjects him to loud noise, all this for the purpose of extracting information or a confession from him, then this interrogator is not guilty, even if his conduct causes intense suffering in the detainee; his goal was only to get that

information or confession – not to bring about pain, which is just an accidental consequence of his behaviour. The very notion of torture would be

> …stultified, and the historic rationale for the emergence of the ban on torture in both domestic and international law (to proscribe resort to this abhorrent behaviour as a means of extorting confessions or information) would be negated by a sleight of hand (Cassese, 2004).

This interpretation of the U.S. "understanding" is countered on two grounds. First, Cassese (2004) states that it would be at variance with the construction of the same clause apparently advanced in the 1999 U.S. Report on the implementation of the Convention, where the emphasis seemed to be on elements other than the "specific intent", as well as the statement made in 2000 by the U.S. delegate to the U.N. Committee Against Torture.[49] On that occasion, the U.S. representative, by arguing that the United States' understanding was not, or was not intended to be, at odds with the definition of torture laid down in Article 1 of the Convention, implicitly excluded that the notion of "specific intent" could limit, as far as the United States was concerned, the scope of the prohibition of torture. However, the U.N. Committee Against Torture eventually took a different view. It implicitly held that the United States' "understanding" was incompatible with the object and purpose of the Convention, and that the U.S. should "withdraw its reservations, interpretations and understandings relating to the Convention."[50]

Secondly, whatever the possible interpretation of Washington and the statement before the Committee Against Torture, it is, according to Cassese (2004), apparent that

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[49] Convention Against Torture summary record in CAT/C/SR.427, § 6 – as cited in Cassese, 2004.

Cassese, Antonio. (2004). Are international human rights treaties and customary rules on torture binding upon U.S. troops in Iraq? *Journal of International Criminal Justice,* 2: 872-878.

[50] Report of the Committee Against Torture. Twenty-third session (8-19 November 1999), Twenty-fourth session (1-19 May 2000), U.N. doc. A/55/44), at 32 (§§ 179a and 180a) – as cited in Cassese, 2004 (emphasis added).

the United States' "understanding" would be in glaring conflict with both the wording of Article 1 of the Convention and the object and purpose of the Convention. This inconsistency clearly derives from the will of the U.S. authorities to subsume the notion of torture, as set out in the Convention.

Pursuant to the indictments against Corporal C. Graner, Specialist J.C. Sivits, Staff Sergeant I.L. Frederick II and Sergeant J.S. Davis, regarding the abuses found in Abu Ghraib, the charges-brought under the Uniform Code of Military Justice (U.C.M.J.) - include "dereliction of duty for wilfully failing to protect detainees from abuse, cruelty and maltreatment" (Arnold, 2005). They all seem to have been tried as primary perpetrators. However, the question is whether there are officers who were in charge of the detention facility who may be charged with dereliction of duty for having failed to supervise those responsible for the prisoners. Although it is a good sign that seven low-ranking soldiers have been investigated and one sentenced to prison,[51] some non-governmental organizations, such as Human Rights Watch, have been critical and have called on the U.S. Congress to appoint an Abu Ghraib Investigation Commission. Their major criticism is that none of the current investigations involves high-ranking officers and that none of the military courts has been charged with investigating the role of the C.I.A. or civilian authorities or policy makers.

As pointed out by Arnold (2005), however, the fact that a court may be military rather than civilian in nature is not necessarily an indicator of its justness or fairness. In many cases, military trials are harsher than civilian ones in that the requirement to observe discipline has a clearly higher threshold. Military courts, moreover, offer several

[51] "Sivits Found Guilty," Associated Press. Published May 19, 2004. Retrieved from the WWW: http://www.military.com/NewsContent/0,13319,FL_trial_051904,00.html?ESRC=eb.nl August 19, 2005.

advantages. Because of their expertise, they are more expeditious (Arnold, 2005). The personnel are better acquainted with the environment in which the accused has been called to act and can therefore better assess the situation. Also, in cases like the one at hand, military justice is interested in bringing to justice the perpetrators as soon as possible, since this type of misconduct could not only jeopardise the military's mission, but also discredit U.S. troops both at home and abroad. Arnold (2005) argues that the mere fact that a soldier may be tried by someone else wearing a uniform is by no means an indicator that the judge may be more lenient; the opposite is true. The intention of military justice to try those responsible for serious breaches is further proved by the fact that, unlike civil courts, their jurisdiction is "attached" to the person of the serviceman and thus follows him or her wherever he or she goes.

5- Commander-in-Chief Authority:

The fifth decision is that made by the Justice Department, the Defence Department, and the White House counsel to concoct dubious legal theories to justify torture. Despite objections from the State Department and professional military attorneys, these government departments, under the direction of politically appointed lawyers, offered interpretations of the law that President Bush has "commander-in-chief authority" to order torture.

In a memorandum of 22 January 2002, the U.S. Department of Justice stated that, in the United States, customary international law, not having the rank of federal law, is not binding on the Executive Branch, and, therefore, any presidential decision concerning a particular armed conflict overrides any contrary rule of customary international law (Cassese, 2004). Assuming that the proposition is correct that a presidential decision,

constituting a 'controlling executive act', overrides customary international law, it remains unclear whether the U.S. President issued a decision with regard to Iraq that was similar to that concerning the Taliban and Al-Qaeda fighters' detainment and status (as POW or not), or whether it was, instead, the U.S. Attorney General who issued a decision on the matter.

In any case, whatever the legal condition under U.S. law, Cassese (2004) claims that it is indisputable that, by engaging in serious ill-treatment and torture of prisoners of war in Iraq, U.S. troops failed to abide by the customary rule on torture (a rule that has also acquired peremptory character). Cassese (2004) argues that he U.S. Government has thus violated international law, thereby incurring state responsibility. Under a well known principle of international law, states may not invoke domestic difficulties in implementing international law to justify their failure to comply with such law.

These policy decisions, taken not by low-level soldiers but by senior officials of the Bush administration, created an "anything goes" atmosphere, an environment in which the ends were assumed to justify the means. Sometimes the mistreatment of detainees was merely tolerated, other times it was actively encouraged or even ordered (Cassese, 2004). In those circumstances, when the demand came from on high for "actionable intelligence" – intelligence that would help respond to the steady stream of U.S. casualties at the hands of extraordinarily brutal Iraqi insurgents – it was hardly surprising that interrogators saw no obstacle in the legal prohibition of torture and mistreatment.

The military lawyers assigned to defend Guantánamo detainees tried by military commission have filed a brief in the U.S. Supreme Court. In it they describe the

government's detainee policy as a "monarchical regime" in which President Bush asserts the power to create a "legal black hole" (A.I., 2004). They too, in effect, call upon the authorities not to repeat history. They suggest that the executive is relying on "the antiquated environment" of half-century old U.S. Supreme Court precedent "instead of addressing the world as it exists today."[52]

Finally, if President Bush has "commander-in-chief" authority, what makes him any different from Saddam Hussein and the various forms of torture ordered and approved by him during his three-decade reign of Iraq? The justification that seems to be made by the Bush administration with this regards is that the U.S. President is a "fair and democratic" president, who always makes peace-motivated decisions, in comparison to Saddam Hussein, for example, who is blatantly and simply a "tyrant." The solid evidence implemented to demonstrate this difference is yet to be found.

6- Rendition:

The sixth decision is the sending of suspects to governments that practice systematic torture. This is also known as "outsourcing torture"[53] and even more so as "rendition." Sometimes diplomatic assurances are sought that the suspects would not be mistreated.

On May 12, 2005, Human Rights Watch and seven partner organizations released a statement, which said that Western governments are undermining the global ban on

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[52] *Al Odah et al v United States*, In the Supreme Court of the United States, Brief of the military attorneys assigned to the defence in the Office of Military Commissions as *amicus curiae* in support of neither party, 14 January 2004.

[53] "Renditions and Diplomatic Assurances: 'Outsourcing' Torture", Human Rights News. Retrieved from the WWW: http://hrw.org/campaigns/torture/renditions.htm June 6, 2005.

torture by transferring suspects to countries known for routinely torturing prisoners. [54] In the statement, the groups called on governments to cease reliance on diplomatic assurances as a safeguard against torture and ill-treatment, and further urged the international community to make clear that the use of diplomatic assurances in the face of risk of torture violates the abuse prohibition in international law against torture and ill-treatment ("Outsourcing Torture," HRW, 2005). This prohibition includes the obligation not to transfer people to places where they face a risk of such abusive treatment (the *nonrefoulement* obligation).[55] In addition, they urged the international community to ensure that any person subject to transfer has the right, prior to transfer, to challenge its legality before an independent tribunal. The statement stated that the legal review must include an examination of all relevant information, including that provided by the receiving state, and any mutual agreements related to the transfer. Moreover, it stated that persons subject to transfer must have access to an independent lawyer and a right of appeal with suspenseful effect ("Outsourcing Torture," HRW, 2005).

Article 3 of the Convention Against Torture (C.A.T.) states that "no State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture" (C.A.T., 1987). No exceptions are allowed, even in time of war or public emergency. The

[54] "Global Torture Ban Under Threat: Governments cannot hide behind the big leaf of diplomatic assurances," Human Rights News, May 12, 2005. Retrieved from the WWW: http://hrw.org/english/docs/2005/05/12/eca10661.htm May 15, 2005.

[55] The *nonrefoulement* obligation enshrined in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol permits an exception to this principle in very narrowly defined circumstances. However, no such exceptions are permitted under the general international legal ban on torture and refoulement as enshrined in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 7 of the International Covenant on Civil and Political Rights; and under customary international law.

global ban on torture includes a ban on sending people – no matter their alleged crime or status – to any country where they would be at risk of torture or ill-treatment.

In the face of this absolute ban, many sending governments, including the United States, have justified such transfers by referring to diplomatic assurances they sought from the receiving country that the suspects would not be tortured or ill-treated upon return. Article 3 of the Convention further states that for the purpose of determining whether there are such grounds, "the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights" (C.A.T., 1987). "Governments know fully well that assurances don't protect against torture… If the practice is allowed to continue unchecked, it will do real damage to the global ban on torture" (H.R.W., 2005).

The joint statement issued by Human Rights Watch and its partners also calls on the international community to reject any attempts to establish minimum standards for the use of diplomatic assurances against the risk of torture and ill-treatment ("Outsourcing Torture," HRW, 2005). It is questionable whether diplomatic assurances against torture can be made to work, as attempting to create guidelines is simply going to legitimize their use, undermine the torture ban, and ultimately expose more people to abusive treatment ("Outsourcing Torture," HRW, 2005).

In addition to H.R.W., the groups signing on to the statement included Amnesty International, Association for the Prevention of Torture, International Commission of Jurists, International Federation of Action by Christians for the Abolition of Torture, International Federation for Human Rights, International Helsinki Federation for Human

Rights, and World Organisation Against Torture.[56] The groups issued the statement to inform ongoing discussions in international human rights bodies - including the U.N. Committee Against Torture - as to why diplomatic assurances against torture are inherently unreliable.

The July 2002 interim report of the Special Rapporteur on Torture to the General Assembly, specifically focusing on the prohibition of torture in the context of counter-terrorism measures, reaffirms the absolute nature of the prohibition, and calls on states not to extradite anyone

> …unless the Government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of ill-treatment upon return, and that a system to monitor the treatment of the persons in question has been put into place with a view to ensuring that they are treated with full respect for their human dignity.[57]

The Special Rapporteur has thus created the highest of bars to reliance on diplomatic assurances in the context of returns where a person would be in danger of torture or ill-treatment.

According to the Joint Statement (2005), diplomatic assurances are problematic for a number of reasons. The essential argument against diplomatic assurances is that the perceived need for such guarantees in itself is an acknowledgement that a risk of torture

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[56] "Call for Action against the Use of Diplomatic Assurances in Transfers to Risk of Torture and Ill-Treatment". *Joint Statement by Amnesty International, Association for the Prevention of Torture, Human Rights Watch, International Commission of Jurists, International Federation of Action by Christians for the Abolition of Torture, International Federation for Human Rights, International Helsinki Federation for Human Rights, and World Organisation Against Torture*, Human Rights News. Released May 12, 2005.

[57] Interim report of the Special Rapporteur on Torture, Theo van Boven, to the General Assembly A/57/173, July 2, 2002. The Special Rapporteur's July 2003 report to the General Assembly states that both the U.N Human Rights Committee and the Committee against Torture have also recently reaffirmed the absolute nature of the principle of *non-refoulement* "and that expulsion of those suspected of terrorism to other countries must be accompanied by an effective system to closely monitor their fate upon return, with a view to ensuring that they will be treated with respect for their human dignity." Report by the Special Rapporteur on Torture, Theo van Boven, to the United Nations General Assembly, A/58/120, July 3, 2003, para. 15.

and other ill-treatment exists in the receiving country. Furthermore, the Joint Statement (2005) states that they are based on trust that the receiving state will uphold its word when there is no basis for such trust. The statement also argues that it defies common sense to presume that a government that routinely flouts its binding obligations under international law and misrepresents the facts in this context can be trusted to respect a promise in an isolated case.

Moreover, states have a legal interest in ensuring that torture and other ill-treatment are prevented and prohibited, and that all persons are protected from such treatment, anywhere and in all places (Joint Statement, 2005). According to the statement, implicit in such a legal interest is a general duty of enforcement and remedy on the part of the whole international community, and the principle that states also have an obligation not to facilitate violations of the ban on torture and other ill-treatment, not only by their own agents but also by agents of another state (Joint Statement, 2005). Transferring individuals to states where they are at risk of torture and other ill-treatment, under the rationale of inherently unreliable diplomatic assurances, flies in the face of this principle.

Another problem relates to post-return monitoring mechanisms, which some governments, including the United States, argue can make diplomatic assurances work (Joint Statement, 2005). The Joint Statement (2005) indicates that torture and other ill-treatment are practiced in secret and its perpetrators are generally expert at keeping such abuses from being detected. People who have suffered torture and other ill-treatment are often reluctant to speak about it due to fear of retaliation. Post-return monitoring schemes often lack many basic safeguards, including private interviews with detainees without

advance notice to prison authorities and medical examinations by independent doctors (Joint Statement, 2005).

In addition, when diplomatic assurances fail to protect returnees from torture and other ill-treatment, there is no mechanism inherent to the assurances themselves that would enable a person subject to the assurances to hold the sending or receiving governments accountable. Hence, as the Joint Statement (2005) indicates, diplomatic assurances have no legal effect and the person they aim to protect has no effective recourse if the assurances are breached.

The Joint Statement (2005) further claims that another problem stems from the fact that the sending government has no incentive to find that torture and other ill-treatment has occurred following the return of an individual – doing so would amount to an admission that it has violated its own *nonrefoulement* obligation. As a result, both the sending and receiving governments share an interest in creating the impression that the assurances are meaningful rather than establishing that they actually are.

Reliance on diplomatic assurances when transferring persons at risk of torture is increasingly common practice by the United States. United States law permits the use of assurances in immigration cases, and authorities have disclosed that it is U.S. policy to seek them as well in so-called "extraordinary rendition" cases and to effect transfers of detainees from custody at Guantánamo Bay (H.R.W., 2004). Since April 2004, further evidence has come to light that the U.S. government is transferring persons suspected of terrorist activities to countries where torture is a serious human rights problem.[58] Many such transfers take place without any procedural safeguards – that is, according to

[58] "Developments regarding Diplomatic Assurances Since April 2004: United States," Human Rights Watch. Published April 2005. Retrieved from the WWW: http://hrw.org/reports/2005/eca0405/5.htm May 18, 2005.

international law - completely outside the law. These "extraordinary renditions" have occurred both from U.S. territory and from other countries, either by the direct seizure of foreign nationals on foreign territory by U.S. agents, or the transfer of foreign nationals to third countries by the host authorities facilitated by the use of U.S. aircraft and/or personnel.[59] In February 2005, high-level U.S. officials defended this renditions program and claimed that it is U.S. policy to seek and secure assurances from the receiving state that a rendered person will be treated humanely upon return (Jehl and Johnson, 2005). Persons subject to such renditions have no ability to challenge the legality of their transfers, including any assurances against torture or ill-treatment that the U.S. government may have been proffered by a receiving state (CBS 60 Minutes, 2005).

In spite of the diplomatic assurances the United States claims to seek before "rendering" a detainee, rendition is favoured by the Bush administration, as it places the onus on the receiving country to torture the person and extract information. In such a case, the Bush administration believes that the U.S. would not seem to be responsible – it would have "washed its hands' of responsibility over him.

The use of assurances against torture is expressly provided for in U.S. law only in immigration cases in which a person subject to removal raises a claim under the Convention against Torture (CBS 60 Minutes, 2005). According to the Code of Federal Regulations (C.F.R.), 8 C.F.R. § 208.18(c), the secretary of state may secure assurances from a government that a person subject to return would not be tortured (H.R.W. Developments regarding diplomatic assurances, 2005). In consultation with the secretary

[59] CBS 60 Minutes, "CIA Flying Suspects to Torture?" March 6, 2005. Retrieved from the WWW: http://www.cbsnews.com/stories/2005/03/04/60minutes/main678155.shtml March 7, 2005; Douglas Jehl and David Johnson, "Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails," *New York Times*, March 6, 2005. Retrieved from the WWW: http://www.nytimes.com/2005/03/06/politics/06intel.html March 7, 2005.

of state, the attorney general determines whether the assurances are "sufficiently reliable" to allow the transfer in compliance with the obligations of the United States under the Convention against Torture. Once assurances are approved, any claims a person has under the convention will not be given further consideration by U.S. authorities (H.R.W., Developments regarding diplomatic assurance, 2005). The reliability assessment of the assurances is not reviewable by a court. The U.S. government has also stated that it seeks and secures assurances against inhumane treatment before transferring detainees from Guantánamo Bay to their home countries or to third countries.[60] To date, the detainees held by U.S. forces have no right to challenge the reliability or sufficiency of such assurances before an independent tribunal.

The U.S. government responded that it is U.S. policy not to send any detainee to a place where it is more likely than not that the detainee would be tortured upon return. It also claimed that in cases where there was a risk of torture, the government sought and secured diplomatic assurances against such treatment (H.R.W. Developments regarding diplomatic assurances, 2005). The U.S. government argued, however, that none of the information regarding negotiations for transfers out of Guantánamo Bay should be made public, including information related to the reliability or sufficiency of assurances against torture, nor should it be subject to judicial review.

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[60] The Department of Defence General Counsel's Office has stated in the past that transfers within its purview, including the transfers of detainees from Guantánamo Bay back to their home countries or to third countries, only occur with assurances against torture. See letter from William J. Haynes II to Senator Patrick Leahy, June 25, 2003. Retrieved from the WWW: http://www.hrw.org/press/2003/06/letter-to-leahy.pdf March 25, 2005: "Should an individual be transferred to another country to be held on behalf of the United States, or should we otherwise deem it appropriate, United States policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country." See also letter from William J. Haynes II to Kenneth Roth, Executive Director of Human Rights Watch, April 2, 2003. Retrieved from the WWW: http://www.hrw.org/press/2003/04/dodltr040203.pdf March 25, 2005.

The U.S. government argues that if the Court were to entertain petitioners' claims, it would inject itself into the most sensitive of diplomatic matters. It further argues that such judicial review could involve scrutiny of United States' officials' judgments and assessments on the likelihood of torture in a foreign country, including judgments on the reliability of information and representations or the adequacy of assurances provided, and confidential communications with the foreign government and/or sources therein.

The administration's rejection of judicial review of the detentions contradicts the "security strategy's" guarantee of "limits on the absolute power of the state". In refuting the need for judicial intervention, the executive has announced that it would institute a process of annual executive review of detentions (A.I., 2002). This inadequate substitute for judicial review is a part of the recent upsurge in information about the detainees provided by the administration since the U.S. Supreme Court announced that it would consider the question of whether the domestic courts have jurisdiction over the Guantánamo detainees. The administration has also pointed to the multi-step screening process it says it uses to determine if the detention of any particular individual is necessary, and notes that a sign of the efficiency of this process is that only a small fraction of those captured in Afghanistan were designated for detention at Guantánamo (A.I., 2002). It adds that once in Guantánamo, there is further assessment of the detainee, including via "interviews". The US claims that "vital" intelligence has been obtained from these interrogations.

It remains unclear whether the U.S. government will be required at some point in the future to reveal information regarding assurances against torture from states to which Guantánamo detainees will be transferred. It is increasingly clear, however, that the U.S.

government is limited in its ability to monitor and enforce any such assurances. On March 16, 2005, Pentagon spokesman Lt. Commander Flex Plexico admitted as much when he stated that although the government seeks assurances from countries that Guantánamo detainees will be treated humanely upon return, "[w]e have no authority to tell another government what they are going to do with a detainee."[61]

To this day, the Bush administration has failed to repudiate many of these decisions. It continues to refuse to apply the Geneva Conventions to any of the more than 500 detainees held at Guantánamo (despite a U.S. court ruling rejecting its position) and to many others detained in Iraq and Afghanistan. It continues to "disappear" detainees, despite ample proof that these "ghost detainees" are extraordinarily vulnerable to torture. It refuses to disown the practice of "rendering" suspects to governments that torture. It refuses to reject in anything but vague and general terms that many specious arguments for torture contained in the administration lawyers' notorious "torture memos". And it still refuses to disavow all forms of coercive interrogation or to adopt a clear policy forbidding it. Instead, the United States has only provided justifications for these decisions made throughout its "war on terror." Indeed, it reportedly continued as late as June 2004 – long after the Abu Ghraib mistreatment became public – to subject Guantánamo detainees to beatings, prolonged isolation, sexual humiliation, extreme temperatures, and painful stress positioning – practices the I.C.R.C. reportedly called "tantamount to torture."

[61] "Freed Pakistanis Jailed at Home," *Associated Press*, March 29, 2005.

CONCLUSION

The understanding of what constitutes torture is not fixed for all time. The enduring image of torture in the popular imagination is that of the political prisoner in the interrogation chamber. But torture and ill-treatment are inflicted on a much broader range of people than is generally realised. The global "war on terror" has inflicted detainees with torture from Guantánamo Bay, Cuba, to as far as Iraq's most notorious Abu Ghraib prison and Afghanistan's several detention centres.

The United States has bent both its internal judicial rules and international law to accommodate the concept of "war on terror," with a result widely perceived as biased and needlessly vindictive. Throughout this "war on terror" led by the Bush administration, several "security measures" have been implemented under the cloak of "counter-terrorism," which continue to breach international laws. From detaining people indefinitely, to using coercive interrogations, the United States continues to defy international laws regarding torture. Instead of meeting the customary and international laws set by the U.N. Convention Against Torture, as well as the Fourth Geneva Convention and so forth, the United States has sought to justify its undertakings in the "war on terror."

The current paper found that in order to justify its undertakings, the United States has claimed that it did not consider the Taliban as an internationally-acclaimed legal government. Meanwhile, the U.S. has also claimed that members of Al-Qaeda did not qualify as prisoners of war. Furthermore, the United States claims that there is an actual and dramatic difference between torture, and extreme humiliation and degradation that has taken place in Abu Ghraib and Guantánamo. Moreover, the U.S. administration

seems to concoct dubious legal theories to justify torture, such as offered interpretations of the law that President Bush has "commander-in-chief authority" to order torture. The H.R.W. 2005 Annual Report states that by that theory, "Slobodan Milosevic and Saddam Hussein may as well be given the keys to their jail cells, since they, too, presumably would have had 'commander-in-chief authority' to authorize the atrocities they directed" (HRW, 2005).

Amnesty International was correct when it argued that the U.S. government has gone to great lengths to restrict the application of the Geneva Conventions and to "re-define" torture. It has sought to justify the use of extremely coercive and degrading interrogation techniques, the practice of holding detainees indefinitely and the "rendering" or handing over of prisoners to third countries known to practice torture. Therefore, there are strong grounds for believing that these White House claims were only aimed at legalizing their treatment of detainees in Guantánamo Bay, Abu Ghraib, and incommunicado detention centres throughout the world, where "ghost detainees" remain.

The current paper covered the fluidity and lack of consensus attached to the definition of torture in the international community. This inconsistency and fluidity has facilitated the United States' manipulation of the definition of "torture," in order to justify its actions. The definition of torture found to be agreed upon by most parties, and has the most common ground, is that of the U.N. Convention Against Torture. It states that torture is an act in 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, or for any reason based on discrimination of any kind, when such

> pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions (Article 1, C.A.T.).

The paper has also found that U.S. administration has tailored the definition of torture to be so narrow that only acts "specifically intended" at causing particular pain and suffering constitute as torture. More so, the definition could possibly be so narrow as to bluntly describe it as sadistic acts performed on a detainee.

By the time I neared the end of the current paper, a particular question that I was asked became more prevalent. People frequently asked; "So why did they [the U.S.] do it [the actions in the prisons, revealed in the Abu Ghraib photos]?" I was expected to have the answer to that question, which I have come to realize is more complicated than it can ever be. If one follows his/her own biases, and particularly in this era, in which the United States had made an enemy out of itself to so many people around the world, the question could be answered very simply and easily. However, if one chooses to take the path of academia to answer such a question, he/she may need much more time and multi-disciplinary experience, in order to arrive with the most extensive answer. Little do we know, it may still not be the complete answer. All that is encompassed in this paper is one question that may help lead to such an answer: What is torture, and to what extent can it be justified?

* I would like to dedicate this research paper to every Iraqi who has suffered due to torture, and particularly to every mother who has lost her child and/or husband to it.

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