

## TABLE OF CONTENTS

<b>Summary</b> .....	<b>1</b>
<b>Part One: Overview</b> .....	<b>6</b>
<b>I. A familiar path to torture</b> .....	<b>6</b>
A war mentality without commitment to the laws of war .....	9
Old arguments to justify torture: the concept of ‘necessity’ .....	14
Not just a few ‘bad apples’ .....	18
<b>II. Human dignity denied: torture or ill-treatment of the ‘other’</b> .....	<b>20</b>
From Afghanistan to Abu Ghraib, via Guantánamo .....	23
Interrogation techniques with a discriminatory resonance .....	30
From stripping to sexual assault .....	36
The right to be treated with humanity .....	40
<b>III. Coercive interrogations and international law</b> .....	<b>41</b>
Torture and ill-treatment as international crimes .....	44
<b>IV. Human rights: the route to security, not the obstacle to it</b> .....	<b>46</b>
<b>Part Two: Agenda for action – Commission of inquiry and 12-Point Program</b> ..	<b>49</b>
An independent commission of inquiry is called for .....	49
<b>Point 1 – Condemn torture</b> .....	<b>55</b>
1.1 Words undone by deeds .....	55
1.2 The condemnation is paper thin – The ‘torture memos’ .....	57
1.3 ‘Un-American’ activities? .....	73
1.4 Slippery slope: Undermining public morality.....	80
1.5 Recommendations under Point 1 .....	89
<b>Point 2 – Ensure access to prisoners</b> .....	<b>90</b>
2.1 Incommunicado detention facilitates torture .....	90
2.2 Access to legal counsel .....	91
2.3 Access to doctors .....	93
2.4 Access to relatives.....	96
2.5 Access to the courts .....	98
2.6 Recommendations under Point 2 .....	99
<b>Point 3 – No secret detention</b> .....	<b>100</b>
3.1 Secrecy nurtures torture and “disappearance” .....	100
3.2 Secret detentions and ‘other government agencies’ .....	107
3.3 Recommendations under Point 3 .....	116
<b>Point 4 – Provide safeguards during detention and interrogation</b> .....	<b>117</b>
4.1 Keeping powers of interrogation and detention apart.....	117
4.2 Isolation as an interrogation technique .....	122
4.3 Specific protection for women and child detainees .....	126
4.4 Independent inspection: ICRC, UN and human rights monitors .....	130
4.5 Recommendations under Point 4 .....	133
<b>Point 5 – Prohibit torture in law</b> .....	<b>134</b>
5.1 Putting the President above the law, detainees below the law.....	134
5.2 Domestic legislation to comply with international law .....	139
5.3 Recommendations under Point 5 .....	141
<b>Point 6 – Investigate</b> .....	<b>142</b>

6.1 Investigative record does not inspire confidence .....	142
6.2 Investigating deaths in custody .....	146
6.3 Recommendations under Point 6 .....	152
<b>Point 7 – Prosecute .....</b>	<b>153</b>
7.1 No impunity: from contractors to commander-in-chief.....	153
7.2 Recommendations under Point 7 .....	160
<b>Point 8 – No use of statements extracted under torture .....</b>	<b>161</b>
8.1 The fruit of a poisonous tree .....	161
8.2 Recommendations under Point 8 .....	164
<b>Point 9 – Provide effective training .....</b>	<b>164</b>
9.1 Training has been found wanting .....	164
9.2 Recommendations under Point 9 .....	166
<b>Point 10 – Provide reparation .....</b>	<b>167</b>
10.1 Reparation means more than just money .....	167
10.2 Recommendations under Point 10 .....	169
<b>Point 11 – Ratify international treaties .....</b>	<b>169</b>
11.1 Playing fast and loose with international law .....	169
11.2 UN Convention against Torture .....	170
11.3 Geneva Conventions .....	173
11.4 Ignoring or misusing international expert opinion.....	175
11.5 Optional Protocol to the UN Convention against Torture .....	178
11.6 International Criminal Court.....	179
11.7 Recommendations under Point 11 .....	180
<b>Point 12 – Exercise international responsibility .....</b>	<b>181</b>
12.1 International security cooperation or outsourcing torture? .....	181
12.2 Double standards – setting a bad example .....	187
12.3 Recommendations under Point 12 .....	189
<b>Conclusion .....</b>	<b>190</b>
<b>Compilation of recommendations under 12-Point Program .....</b>	<b>192</b>

# UNITED STATES OF AMERICA

## Human dignity denied

### Torture and accountability in the 'war on terror'

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*A report based on Amnesty International's 12-point Program for the Prevention of Torture by Agents of the State*

#### Summary

*Then [the guard] brought a box of food and he made me stand on it, and he started punishing me. Then a tall black soldier came and put electrical wires on my fingers and toes and on my penis, and I had a bag over my head. Then he was saying 'which switch is on for electricity?'*  
Iraqi detainee, Abu Ghraib prison, 16 January 2004<sup>1</sup>

The image of New York's Twin Towers struck by hijacked airliners on 11 September 2001 has become an icon of a crime against humanity. It is tragic that the response to the atrocities of that day has resulted in its own iconography of torture, cruelty and degradation. A photograph of a naked young man captured in Afghanistan, blindfolded, handcuffed and shackled, and bound with duct tape to a stretcher. Pictures of hooded detainees strapped to the floor of military aircraft for transfer from Afghanistan to the other side of the world. Photographs of caged detainees in the United States (US) Naval Base in Cuba, kneeling before soldiers, shackled, handcuffed, masked and blindfolded. Television images of orange-clad shackled detainees shuffling to interrogations, or being wheeled there on mobile stretchers. A hooded Iraqi detainee sitting on the sand, surrounded by barbed wire, clutching his four-year-old son.<sup>2</sup> And the photos from Abu Ghraib – a detainee, hooded, balanced on a box, arms outstretched, wires dangling from his hands with electric torture threatened; a naked man cowering in terror against the bars of a cell as soldiers threaten him with snarling dogs; and soldiers smiling, apparently confident of their impunity, over detainees forced into sexually humiliating poses. The United States of America (USA), and the world, will be haunted by these and other images for years to come, icons of a government's failure to put human rights at its heart.

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<sup>1</sup> Abdou, 16 January 2004. Statement given to US military investigators. Obtained by The Washington Post. <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/18170.pdf>. This technique is said to be "a standard torture. It's called the 'Vietnam'. But it's not common knowledge. Ordinary American soldiers did this, but someone taught them." Darius Rejali, quoted in *The Roots of Torture*, Newsweek, 24 May 2004.

<sup>2</sup> World Press Photo of 2003. Jean-Marc Bouju, AP. <http://www.worldpressphoto.nl/contest/winner.jsp>

The struggle against torture and ill-treatment by agents of the state requires absolute commitment and constant vigilance. It requires stringent adherence to safeguards. It demands a policy of zero tolerance. The US government has manifestly failed in this regard. At best, it set the conditions for torture and cruel, inhuman or degrading treatment by lowering safeguards and failing to respond adequately to allegations of abuse raised by Amnesty International and others from early in the "war on terror". At worst, it has authorized interrogation techniques which flouted the country's international obligation to reject torture and ill-treatment under any circumstances and at all times.

The US administration has said that it is "strongly committed" to working with non-governmental organizations "to improve compliance with international human rights standards."<sup>3</sup> President George W. Bush has recently said that the USA "support[s] the work of non-governmental organizations to end torture and assist the victims".<sup>4</sup> With this in mind, Amnesty International seeks to provide a framework in this report by which there can be a full accounting for any torture or cruel, inhuman or degrading treatment by US agents, and to prevent future violations of international law and standards.

Part One gives an overview, describing how the US administration has fallen into an historically familiar pattern of abuse to respond to the "new paradigm" it says has been set by the atrocities of 11 September 2001. The war mentality the government has adopted has not been matched with a commitment to the laws of war, and it has discarded fundamental human rights principles along the way. While there are undoubtedly complex challenges and threats in the current situation, the simple fact is that the USA has stepped onto a well-trodden path of violating basic rights in the name of national security or "military necessity".

Throughout history, torture has often occurred against those considered as "the other", and a second section of Part One traces the thread of dehumanization of detainees in US custody from Afghanistan to Abu Ghraib. A third section in Part One outlines the unequivocal and non-derogable international legal prohibition on torture and cruel, inhuman and degrading treatment. The final section stresses that respect for human rights is the route to security, as the US government itself claims, not the obstacle to security, as appears to be the administration's true belief if its detention and interrogation policies are the yardstick.

Part Two is entitled Agenda for Action, and begins with a reiteration of Amnesty International's call for a full commission of inquiry into all US "war on terror" detention and interrogation practices and policies. While the organization welcomes the recent official investigations that have taken place, it believes that a more comprehensive and genuinely independent inquiry is needed to ensure full accountability and non-repetition of abuse. This commission of experts must have all the necessary powers to carry out such an investigation.

The remainder of Part Two is structured around Amnesty International's *12-point Program for the Prevention of Torture by Agents of the State*. The organization has been

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<sup>3</sup> Remarks at Briefing on the State Department's 2002 Country Reports on Human Rights Practices. Secretary of State Colin Powell, Washington, DC, 31 March 2003.

<sup>4</sup> President's statement on the UN International Day in Support of Victims of Torture. White House, 26 June 2004. <http://www.whitehouse.gov/news/releases/2004/06/20040626-19.html>.

working against torture for more than three decades. In addition to its daily efforts against this most tenacious and pervasive of human rights violations, it has conducted three worldwide campaigns for the abolition of torture, launched in 1972, 1984 and 2000. The 12-Point Program that forms the basis of this report was adopted for the most recent of these campaigns and reflects Amnesty International's key findings on how best to prevent torture.

Under each of the 12 Points, Amnesty International illustrates how the USA has failed to meet basic human rights safeguards, thus opening the door to torture and ill-treatment. Detailed recommendations are given under each Point, with the compilation of more than 60 recommendations provided at the end of the report.

Point 1 of the 12-Point Program is "Condemn Torture". In other words, the highest authorities of every country should demonstrate their total opposition to torture and other cruel, inhuman or degrading treatment or punishment. They should condemn torture and ill-treatment unreservedly whenever they occur. They should make clear to all members of the police, military and other security forces that torture and ill-treatment will never be tolerated.

The report recalls the US administration's repeated claims that it is committed to what it calls the "non-negotiable demands of human dignity", and that it is leading the global struggle against torture. A government's condemnation of torture and other ill-treatment must mean what it says, however. The US administration's condemnation has been paper thin, as shown by the series of government memorandums that have come into the public domain since the Abu Ghraib scandal broke. These documents suggest that far from ensuring that the "war on terror" would be conducted without resort to human rights violations, the administration was discussing ways in which its agents might avoid the international prohibition on torture and cruel, inhuman or degrading treatment. During this time, the government's voice was notable by its absence in the public debate in the USA since 11 September 2001 about whether torture is ever an acceptable response to "terrorism". Such silence may also betray a less than absolute opposition to torture and ill-treatment.

In June 2004, in one of several statements by senior United Nations (UN) officials responding to the US "torture memos", Secretary General Kofi Annan emphasized the absolute prohibition on torture and other cruel, inhuman or degrading treatment. He stressed that the prohibition is binding on all states, "in all territories under their jurisdiction or control", and in times of war as well as peace. He added: "Nor is torture permissible when it is called something else. Euphemisms cannot be used to bypass legal obligations."<sup>5</sup>

There is a tendency, not least amongst the US military, to euphemize aspects of war and violence. Killed and maimed civilians become "collateral damage"; torture and cruel, inhuman or degrading treatment become "stress and duress" techniques; and "disappeared" prisoners become "ghost detainees". Euphemizing human rights violations threatens to promote tolerance of them. In similar vein, there has been a noticeable reluctance among senior members of the US administration to call what happened in Abu Ghraib torture, preferring the term "abuse". Members of an administration that has discussed how to push the

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<sup>5</sup> United Nations Press Release SG/SM/9373 OBV/428. 17 June 2004.

boundaries of acceptable interrogation techniques and of how agents could avoid criminal liability for torture might display a particular reticence to call torture by its name.

This reticence, however, is also symptomatic of a tendency by the USA – notwithstanding its pivotal role in the adoption of the Universal Declaration of Human Rights and subsequent international human rights instruments – to reject for itself the standards it so often says it expects of others. The human rights violations which the US government has been so reluctant to call torture when committed by its own agents are annually described as such by the State Department when they occur in other countries. While the State Department reports are positive contributions to the global struggle for human rights, double standards have greatly undermined the credibility of the USA's global discourse on human rights.

The USA's "war on terror" policies show that the prohibition against torture and ill-treatment is not "non-negotiable" as far as the administration is concerned. This is what must change. If a government genuinely opposes torture and ill-treatment, it must act accordingly. From this simple proposition, all 11 other points of the *12-point Program for the Prevention of Torture by Agents of the State* follow.

Impunity allows torture and ill-treatment to thrive. All allegations must be thoroughly investigated, including all deaths in custody (Point 6). Perpetrators of such human rights violations must be brought to justice, preferably in ordinary civilian courts rather than military tribunals as an emerging international consensus now recognizes (Point 7). At the same time, the necessary safeguards must be put and kept in place to prevent any recurrence of torture and ill-treatment. Secret detention must end immediately (Point 3). So too must the use of incommunicado detention, with lawyers, doctors, relatives, and independent monitors granted immediate and continuing access to and information about detainees, and with detainees brought before a judicial authority as soon as possible after arrest (Point 2). There must be a clear delineation between powers of interrogation and detention, with detention conditions fully meeting international standards. Vulnerable detainees, including children and women, should receive particular protections demanded by international law (Point 4). Coerced statements must not be admitted in any trials. Military commissions set up to try "war on terror" detainees, with the power to admit such statements, must be abandoned (Point 8).

Any victims of torture or ill-treatment are entitled to reparations, including compensation for the families of anyone who died as a result of such treatment in custody (Point 10). Training of anyone who comes into contact with detainees is essential, and must include relevant cultural awareness education as well as training in the international prohibition of torture and ill-treatment (Point 9). The numerous conditions the USA attached to its ratifications of international treaties prohibiting torture and other cruel, inhuman or degrading treatment should be withdrawn. It should ratify those treaties and protocols it has not yet ratified (Point 11). In accordance with international human rights law, international security cooperation must rule out the transfer of detainees in conditions or to places where they are at risk of torture or other cruel, inhuman or degrading treatment or punishment (Point 12). US laws must be amended, or reinterpreted, to reflect fully the absolute prohibition on torture and ill-treatment in international law and allow no loopholes, in peacetime, in war, and in the "war on terror," or for anyone, from the foot soldier to the President (Point 5).

On 11 September 2001, President Bush said that “America was targeted for attack because we’re the brightest beacon for freedom and opportunity in the world. And no one will keep that light from shining.”<sup>6</sup> Three years later, the catalogue of human rights violations alleged or known to have been committed by US agents in the “war on terror” tells a different story. Amnesty International urges the US government to adopt a fundamental change in direction and to ensure that all its policies and practices fully comply with international law. The core message of this report is that the prevention of torture and cruel, inhuman or degrading treatment is primarily a matter of political will.

#### **A brief chronology**

11 September 2001 – four US commercial airliners are hijacked. Two are crashed into the World Trade Center in New York, one into the Pentagon and one into a field in Pennsylvania. Almost 3,000 people are killed in this crime against humanity.

7 October 2001 – the USA leads military action against the Taleban government and members of the *al-Qa’ida* network in Afghanistan.

10/11 January 2002 – the first detainees are transferred from Afghanistan to the US Naval Base in Guantánamo Bay, Cuba, in conditions that amount to cruel, inhuman or degrading treatment.

7 February 2002 – the White House announces its decision that the Geneva Conventions do not apply to *al-Qa’ida* suspects captured in Afghanistan, and that neither they nor Taleban members would be eligible for prisoner of war status.

June 2002 – Hamid Karzai appointed as President of interim Afghanistan administration. US forces continue to carry out military operations and detentions in Afghanistan to this day.

20 March 2003 – US-led Coalition forces attack Iraq. On 1 May 2003, President Bush announces that the main combat operations in Iraq are over. A major insurgency against the occupation develops.

28 April 2004 – photographs of torture and ill-treatment of Iraqi detainees by US soldiers in Abu Ghraib prison outside Baghdad are broadcast by CBS News and subsequently around the world.

22 June 2004 – the US administration releases several previously secret memorandums discussing “war on terror” detention and interrogation options “to set the record straight” following leaks.

28 June 2004 – the US Supreme Court rules that the US courts have jurisdiction over the Guantánamo detainees, hundreds of whom have already been held for more than two years without any judicial review, charge, trial or access to legal counsel or relatives.

2001-2004 – The US military has taken more than 50,000 people into custody during its military operations in Afghanistan and Iraq. In Afghanistan, the US has operated some 25 detention facilities, and in Iraq another 17. More than 750 people have been held in Guantánamo. The Pentagon states that 202 have been released or transferred, leaving “approximately 549” in the base by 22 September 2004. An unknown number of detainees have been held in undisclosed locations by the USA or transferred to the custody of other countries.

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<sup>6</sup> Statement by the President in his address to the Nation. 11 September 2001.

## Part One: Overview

### I. A familiar path to torture

*Apologists for torture generally concentrate on the classical argument of expediency: the authorities are obliged to defeat terrorists or insurgents who have put innocent lives at risk and who endanger both civil society and the state itself... The accumulated evidence also gives a clear picture of the 'preconditions' for torture... Incommunicado detention, secret detention and 'disappearance' increase the latitude of security agents over the lives and well-being of people in custody.*

Amnesty International, *Torture in the Eighties*, 1984

The torture and ill-treatment of Iraqi detainees by US agents in Abu Ghraib prison was – due to a failure of human rights leadership at the highest levels of government – sadly predictable.

“It is a recurring theme in history”, said a senior United Kingdom (UK) judge in a criticism of US “war on terror” detentions, “that in times of war, armed conflict, or perceived national danger, even liberal democracies adopt measures infringing human rights in ways that are wholly disproportionate to the crisis”.<sup>7</sup> Certainly, a glimpse at the history of torture in the 20<sup>th</sup> century was enough to ring alarm bells following the crime against humanity that was committed in the USA on 11 September 2001. The situation contained some classic ingredients that would demand principled leadership if human rights were not to suffer in the wake of such an atrocity. In the mix was an elusive, ill-defined and demonized enemy; shortcomings in intelligence-gathering; an official interpretation of the situation as new, unique and requiring special measures; and an apocalyptic picture painted by government of a stark moral choice between “good and evil” faced by society and wider “civilization”.

Amnesty International wrote to President Bush on 25 September 2001 reiterating its condemnation of the appalling crime of two weeks earlier and its support for efforts to bring the perpetrators to justice in accordance with international human rights standards. The organization urged the President to lead his government “to take every necessary human rights precaution in the pursuit of justice, rather than revenge, for the victims of this terrible crime.”<sup>8</sup> The organization regrets that part of the USA’s response to the atrocities has been to allow another chapter in the history of torture and cruel, inhuman and degrading treatment to open. Earlier chapters in this history would have been instructive.<sup>9</sup>

In the late 1960s, for example, the Brazilian state faced social unrest as well as violence from small urban guerrilla groups. In the government’s view, both economic development and national security were under threat. The authorities took a number of

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<sup>7</sup> Guantánamo Bay: The legal black hole. Johan Steyn, 27<sup>th</sup> F.A. Mann Lecture, 25 November 2003.

<sup>8</sup> Letter to President George W. Bush from Amnesty International Secretary General Irene Khan, 25 September 2001. <http://web.amnesty.org/library/Index/ENGAMR511442001>.

<sup>9</sup> Examples taken from *Torture in the Eighties*, Amnesty International, 1984, and *Combating torture: a manual for action*, Amnesty International, 2003.



draconian measures, none of which was open to judicial review. The one that had the most direct bearing on the practice of torture was the suspension of the right of *habeas corpus* for anyone charged with crimes against national security.<sup>10</sup> From 1968 to 1973, widespread torture became a feature of the government's campaign against "permanent subversion". On the other side of the continent, the coup in Chile on 11 September 1973 was followed by gross human rights violations. The *Centrál Nacional de Informaciones* (CNI) was the agency most frequently cited as responsible for torture. People detained by, or handed over to, the CNI for interrogation were usually taken to secret detention centres where they could be held incommunicado for up to 20 days. It was during this period that torture was used to obtain information, "confessions", or collaboration. Torture thrives on secrecy.

Also in 1973, faced with a security problem in Northern Ireland, the British government passed emergency legislation. Not only did this relax the rules of evidence for the admissibility of confessions, it also allowed the police to hold those suspected of politically motivated crimes incommunicado for up to three days, raised to seven the following year. In 1976 and 1977 there was a marked increase in allegations of torture and ill-treatment, just as the government was pressing the police for confessions to use in court. A significant factor in the rapid decline in police standards was the failure of government ministers and senior police officers to intervene with interrogators, directly and forcefully, to make it clear that assault and illegal coercion would not be tolerated. The security forces may also have taken the extension of powers granted to them at the expense of the rights of detainees as a signal that the government authorities would tolerate violence towards and coercion of detainees. Torture rears its head when the legal barriers against it are lowered.

From 1987, torture in Israel was effectively legalized. This was made possible because the government and the judiciary, along with much of Israeli society, accepted that the methods of physical and psychological pressure used by the security services were a legitimate means to combat "terrorism". Palestinians, Lebanese and other non-Israeli nationals were seen as "acceptable" victims of torture – and the methods were seen as "acceptable". Torture feeds on discrimination and fear.

Thus the US administration can be seen to have fallen into a familiar pattern since 11 September 2001. Although President Bush said that "this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war," whatever "new thinking" has been done within the administration, the result has been old abuses.<sup>11</sup> They include the denial of *habeas corpus*; the use of incommunicado and secret detention; a pattern of official commentary on the presumed guilt of detainees; the sanctioning of harsh interrogation techniques in the pursuit of "intelligence"; the blurring of the lines between powers of

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<sup>10</sup> A writ of *habeas corpus* is a judicial order to a prison official that an inmate be brought to court so that it can be determined if the detention is lawful or release from custody should be ordered.

<sup>11</sup> Memorandum for the Vice President, the Secretary of State, the Secretary of Defense, the Attorney General, the Chief of Staff to the President, the Director of Central Intelligence, the Assistant to the President for National Security Affairs, the Chairman of the Joint Chiefs of Staff. Subject: *Humane treatment of al Qaeda and Taliban detainees*. The White House, 7 February 2002. <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>.

detention and interrogation; the setting up of military commissions which could admit coerced evidence; and a selective approach to international human rights and humanitarian law obligations. All contributed to conditions ripe for torture and ill-treatment.

The photographs of torture and ill-treatment of detainees in Abu Ghraib prison did not come out of the blue, but followed numerous allegations of abuse in Afghanistan and Guantánamo Bay raised with the US authorities over the previous two years by the International Committee of the Red Cross (ICRC), Amnesty International and others. When it suited the US government's aims in its build up to the invasion of Iraq, the administration cited Amnesty International's reports on torture in that country.<sup>12</sup> When the alleged abuse involved US agents, its response was denial and disregard for the organization's concerns.

In April 2002, Amnesty International wrote to the administration about allegations of ill-treatment of people in US custody in Afghanistan. It never received a reply to its questions and concerns.<sup>13</sup> Ten months before the Abu Ghraib revelations, the organization raised cases of alleged abuses in Iraq by US forces, including the case of Khreisan Khalis Aballey. This 39-year-old man was arrested by the US military at his home in Iraq on 30 April 2003 with his elderly father. According to the allegations, during his interrogation he was made to stand or kneel facing a wall for a week, hooded, and handcuffed tightly with plastic strips. At the same time a bright light was placed next to his hood and distorted music was playing the whole time. During all this period he was deprived of sleep, though he may have been unconscious for some periods. He reported that at one time a US soldier stamped on his foot and as a result one of his toenails was torn off. When, after seven days he was told he was to be released and told he could sit, he said that his leg was the size of a football. He continued to be held for two more days, apparently to allow his health to improve, and was released on 9 May 2003. His father, who was released at the same time, was held in the cell beside his son, where he could hear his son's voice and his screams. Amnesty International did not receive a response to its concerns on this and other cases.<sup>14</sup>

According to the Fay report, one of the military investigations into Abu Ghraib, when the ICRC made allegations of torture or cruel, inhuman or degrading treatment by US forces in 2003 and 2004, "their allegations were not believed, nor were they adequately investigated".<sup>15</sup> Impunity is the friend of torture.

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<sup>12</sup> *A Decade of Deception and Defiance. Saddam Hussein's Defiance of the United Nations*. The White House, 12 September 2002. <http://www.whitehouse.gov/news/releases/2002/09/iraqdecade.pdf>

<sup>13</sup> *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay*, AMR 51/053/2002, April 2002 (with accompanying letter sent on 10 April 2002 to the President, Vice-President, Secretary of Defense, Secretary of State, Attorney General, and National Security Adviser). <http://web.amnesty.org/library/Index/ENGAMR510532002>

<sup>14</sup> *Iraq: Memorandum on concerns relating to law and order*. AI Index: MDE 14/157/2003, 23 July 2003. <http://web.amnesty.org/library/Index/ENGMDE141572003>

<sup>15</sup> Page 64, AR 15-6 Investigation of Intelligence Activities at Abu Ghraib. Conducted by Major General George R. Fay and Lieutenant General Anthony R. Jones. Hereinafter known as the Fay report, with "Jones" page number if from Maj. Gen. Jones's section of the report. <http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf>

## A war mentality without commitment to the laws of war

Prior to 11 September 2001, the USA had “dealt with [terrorist] attacks as primarily a law enforcement matter”.<sup>16</sup> This approach changed after the atrocities of that day. President Bush has said he decided that “we were going to war” the moment he heard that airliners had been crashed into the World Trade Center,<sup>17</sup> and early that afternoon he opened a video teleconference meeting with his principal advisers with the words “we’re at war”.<sup>18</sup> He has characterized the ensuing “war on terror” as a “monumental struggle of good versus evil”.<sup>19</sup> The President has maintained this tone, including in speeches to military audiences in his role as Commander-in-Chief.<sup>20</sup>

A war mentality is dangerous for human rights when a government extends the war framework to cover areas that should appropriately be addressed by law enforcement measures, and even then claims that existing laws of war do not cover this “new paradigm”. Amnesty International does not believe that the so-called “war on terror” mandates a new legal framework. The territories and the circumstances in which the confrontation with *al-Qa’ida* or others actually takes place determine the applicable legal regime, within the existing framework of international human rights and humanitarian law. The US administration’s refusal to recognize this has fed its willingness to countenance the ill-treatment of detainees in the “war on terror”.<sup>21</sup>

The global “war on terror” is described by US officials as a conflict of indeterminate but great length.<sup>22</sup> It is a “war” the end of which will presumably be determined, as has the

<sup>16</sup> White House Counsel. Press briefing by White House Counsel Judge Alberto Gonzales, DOD [Department of Defense] General Counsel William Haynes, DOD Deputy General Counsel Daniel Dell’Orto and Army Deputy Chief of Staff for Intelligence General Keith Alexander. 22 June 2004. <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html>.

<sup>17</sup> “They had declared war on us, and I made up my mind at that moment that we were going to war”. President Bush quoted in *Bush at War*, by Bob Woodward. Simon & Schuster UK Ltd. 2002.

<sup>18</sup> Chapter 10 of the Final Report of the National Commission on Terrorist Attacks Upon the United States (the 9-11 Commission Report). August 2004. <http://www.9-11commission.gov/report/index.htm>.

<sup>19</sup> Remarks by the President in Photo Opportunity with the National Security Team, 12 September 2001.

<sup>20</sup> For example, in an address to troops in Alaska on 16 February 2002, President Bush described the “war on terror” as “this incredibly important crusade to defend freedom”. To applause at the West Point Military Academy in New York on 1 June 2002, he said that: “We are in a conflict between good and evil, and America will call evil by its name”. In an address at the US Army War College in Pennsylvania on 24 May 2004, he said: “We did not seek this war on terror, but this is the world as we find it... Our terrorist enemies... seek control of every person, and mind, and soul... We will persevere and defeat this enemy... May God bless our country.”

<sup>21</sup> According to an ICRC Legal Adviser, the USA’s view that a global international armed conflict is underway “wreaks havoc with a finely tuned and time-honoured balance between the law of armed conflict, human rights and criminal laws, and thus poses grave risks and consequences for human rights and security”. Gabor Rona, *‘War’ doesn’t justify Guantánamo*. Financial Times, 1 March 2004.

<sup>22</sup> On 18 September 2001, President Bush said that “this crusade, this war on terrorism, is going to take a while”. On 28 June 2004, the US Supreme Court noted that “the national security underpinnings of the ‘war on terror’... are broad and malleable” and that “[i]f the Government does not consider this unconventional war won for two generations”, then the detention of a person determined by the

fate of so many detainees, by executive decision. There will be no single event to signal its conclusion. President Bush declared one victory achieved on 1 May 2003 when, on the deck of an aircraft carrier off the coast of California, he announced that major combat operations in Iraq were over.<sup>23</sup> However, as the military itself has since pointed out, the US forces on the ground in Iraq "rapidly realized that the war had not ended. They were in a counter-insurgency operation with a complex, adaptive enemy that opposed the rule of law and ignored the Geneva Conventions".<sup>24</sup>

It is tragic that in the "war on terror", the USA has itself undermined the rule of law. Its selective disregard for the Geneva Conventions and international human rights law has contributed to torture and ill-treatment. The presidential decision that none of the detainees captured in the international armed conflict in Afghanistan would be eligible for prisoner of war status, and not to bring any such detainee before a "competent tribunal" to determine status as required by Article 5 of the Third Geneva Convention, contradicted the US Army's own doctrine.<sup>25</sup> The ICRC – the most authoritative body on the provisions of the Geneva Conventions – disagreed with the presidential decision.<sup>26</sup>

The decision to reject the applicability of the Geneva Conventions was in line with the many public messages sent by the administration that the "war on terror" would be waged according to new rules and that those captured during this global "war" could be treated differently. Detainees have even been categorized differently, only adding to the risk that they would be perceived by their guards or interrogators as deserving less than basic protections. Those taken into US custody have been variously classified, beyond previous US military doctrine, as "Enemy Combatant", "Under-privileged Enemy Combatant", "Security Internee", "Criminal Detainee", "Person Under US Forces Control", and "Low Level Enemy Combatant".<sup>27</sup> As the UN Special Rapporteur on torture recently pointed out, however, "although the status of detainees may remain unclear, there is no uncertainty as to the

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executive to be an 'enemy combatant' "could last for the rest of his life". (*Hamdi v. Rumsfeld*). Deputy Secretary of Defense Wolfowitz has said that the "war on terrorism" is "not something we will win in three years, or eight years, or perhaps even decades". American Forces Information Service, News Article, 8 September 2004.

<sup>23</sup> Under a banner reading "mission accomplished", President Bush proclaimed the invasion and occupation of Iraq as a victory in the "war on terror": "The battle of Iraq is one victory in a war on terror that began on September 11, 2001"; "The liberation of Iraq is a crucial advance in the campaign against terror." *President Bush Announces Major Combat Operations in Iraq Have Ended*. 1 May 2003.

<sup>24</sup> Fay report (Jones, page 8), *supra*, note 15.

<sup>25</sup> The US Army's interrogation Field Manual, FM 34-52, (1992) states: "Captured insurgents and other detained personnel whose status is not clear, such as suspected terrorists, are entitled to [Prisoner of War] protection until their precise status has been determined by competent authority".

<sup>26</sup> "[There are] divergent views between the United States and the ICRC on the procedures which apply on how to determine that the persons detained are not entitled to prisoner of war status... The ICRC remains firmly convinced that compliance with international humanitarian law in no manner constitutes an obstacle to the struggle against terror and crime". ICRC press release, 9 February 2002.

<sup>27</sup> *Detainee Operations Inspection*. Department of the Army Inspector General, 21 July 2004.

<http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/DAIG%20Detainee%20Operations%20Inspection%20Report.pdf>

international obligations, standards and protections that apply to them, the prohibition of torture being applicable to all individuals without exception and discrimination, regardless of their legal status.”<sup>28</sup> The ICRC stated in September 2004 that, based on its “decades of experience in visiting places of detention in vastly different, rapidly changing environments”, the organization’s consistent finding is that “only by determining and adhering to a clearly established legal framework does one prevent arbitrariness and abuse”.<sup>29</sup>

The panel appointed in May 2004 by Secretary of Defense Donald Rumsfeld to review the Pentagon’s detention operations (the Schlesinger Panel) pointed out that there was “a failure to plan for a major insurgency” in Iraq and “improvisation was the order of the day”.<sup>30</sup> The Schlesinger and military inquiries have stressed that there was a serious under-resourcing of detention operations in Iraq which contributed to abuses. According to Schlesinger, in October 2003 Abu Ghraib, the largest of the US detention facilities in Iraq, had a detainee population of up to 7,000 and a guard force of about 90 personnel. A Schlesinger Panel member has said that the “extreme lack of resources [and] the policy failure at all levels to assure a clear and stable set of rules for treatment and interrogation further opened the door to abuse”, adding that this situation was “compounded by inadequate training.”<sup>31</sup> Clear policy and effective training become especially crucial at moments of high emotion and high pressure, which can be predicted to be part of any war – as soldiers react to their fellow colleagues being killed or wounded, and interrogators are put under pressure to gain intelligence about the enemy. There is surely responsibility at the highest levels of government – where the decision to go to war is taken – when there is a failure to plan for detention operations, or to ensure an appropriate response to evidence of torture by its troops.

The immediate response of President Bush and other officials to the torture photographs was to claim that the problem was restricted to Abu Ghraib and a few wayward soldiers. On 22 June 2004, after the leaking of earlier government memorandums relating to “war on terror” detention and interrogation options suggesting that torture and ill-treatment had been anticipated, the administration took the step of declassifying selected documents to “set the record straight”. At a press briefing, the White House Counsel explained how after 11 September 2001, the US administration had had to ask questions such as “What is the legal status of individuals caught in this battle? How will they be treated? To what extent can those detained be questioned to attain information concerning possible future terrorist attacks? What are the rules?” He continued: “As we debated these questions, the President made clear that he was prepared to protect and defend the United States and its citizens, and he would do so vigorously, but as the documents we are releasing today show, that he would do so in a manner consistent with our nation’s values and applicable law, including our treaty obligations...”<sup>32</sup> It was the same White House Counsel who two and a half years earlier had

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<sup>28</sup> UN Doc. A/59/324, para. 22. 23 August 2004.

<sup>29</sup> *ICRC reactions to the Schlesinger Panel Report*, 8 September 2004.

<sup>30</sup> Final Report of the Independent Panel to Review DoD Detention Operations. August 2004, [hereinafter, Schlesinger report]. <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>

<sup>31</sup> Dr Harold Brown, written testimony to the Senate Armed Services Committee, 9 September 2004.

<sup>32</sup> Press briefing by White House Counsel et al., 22 June 2004, *supra*, note 16.

drafted a memorandum to President Bush suggesting that determining that the Geneva Conventions did not apply to those captured in Afghanistan would free up US interrogators and make their prosecution for war crimes less likely.<sup>33</sup> That memorandum was not one released by the administration. Indeed, at the 22 June press conference, the White House Counsel made clear that the administration's release of its documents "should not be viewed as setting any kind of precedent". It has kept to this line. Of 23 additional documents requested by the Senate Judiciary Committee, only four had been provided by the administration by 13 October 2004.<sup>34</sup>

If one were to single out one sentence from one of the declassified memorandums that calls into question the administration's stated commitment to its international legal obligations, it might be the following: "Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, *including those who are not legally entitled to such treatment*" (emphasis added).

No detainee can fall outside the prohibition on torture or cruel, inhuman or degrading treatment. To suggest otherwise, as this line does, points to a serious gap in a government's understanding of international law and indicates that it views fundamental human rights as privileges that can be granted, and therefore taken away, by the state. The sentence in question – repeated aloud by the White House Counsel at the June 2004 press briefing with no apparent recognition of the disturbing message contained in it – was in a memorandum signed by President Bush on 7 February 2002, classified as secret for 10 years, and distributed to the main office-holders in his administration.<sup>35</sup> According to the White House Counsel, this document is the "most important" of those released by the administration.

The White House, which maintains that the USA is "steadfastly committed to upholding the Geneva Conventions",<sup>36</sup> has "categorically reject[ed] any connection" between the decision to reject the application of the Geneva Conventions to detainees in Afghanistan and Guantánamo and the torture committed in Abu Ghraib prison in Iraq.<sup>37</sup> Yet its selective disregard for the Geneva Conventions has been part of a policy which has at best sown confusion about interrogation rules among its armed forces, and at worst given a green light to torture or other cruel, inhuman or degrading treatment. Official investigations have concluded that versions of interrogation techniques developed for use against detainees in Afghanistan and Guantánamo, unprotected by the Geneva Conventions, later emerged in Iraq, where the Conventions were held by the US Government to apply.

It is clear that the decision to reject the protections of the Geneva Conventions in the "war on terror" outside Iraq has infected official thinking in the USA. Following the

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<sup>33</sup> 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*. Draft 25 January 2002. <http://msnbc.msn.com/id/4999148/site/newsweek/>. In this report, Amnesty International uses the spellings *al-Qa'ida* and Taleban. Different spellings reflect US government's or others' usage.

<sup>34</sup> For a list of the documents requested, see <http://leahy.senate.gov/press/200406/062204c.html>.

<sup>35</sup> Presidential memorandum, 7 February 2002. *supra*, note 11.

<sup>36</sup> President's statement, 26 June 2004, *supra*, note 4.

<sup>37</sup> White House Counsel, in press briefing, 22 June 2004. *supra*, note 16.

publication of the Schlesinger report, for example, the ICRC pointed out that it contained “a number of inaccurate assertions, conclusions and recommendations” on the role of the ICRC and about the laws of armed conflict.<sup>38</sup> For example, the Schlesinger Panel suggests that the Fourth Geneva Convention is “not sufficiently robust and adequate” for the detention of “terrorist” suspects, reminiscent of the memorandum drafted by the White House Counsel for President Bush in January 2002 which characterized provisions of the Geneva Conventions as “quaint”, “undefined” and “obsolete”.<sup>39</sup> Secretary of Defense Rumsfeld echoed this more recently when he said “Some will say, well... in my view it is mental torture to do something that is inconvenient in a certain way for a detainee. Like standing up for a long period or some other thing that someone else might say is not in any way abusive or harmful. And there’s no way to get everybody to agree to all that because when Geneva was prepared and agreed upon, it didn’t go to that level of detail.”<sup>40</sup>

In response to the findings of Secretary Rumsfeld’s appointees on the Schlesinger Panel, the ICRC pointed out that the Fourth Geneva Convention allows internment for imperative security reasons, as well as prosecution, and does not prohibit interrogation. What it does prohibit – a prohibition apparently seen as an obstacle by the US administration – is inhumane treatment. The ICRC added that “the Panel’s suggestion that because Geneva Convention IV would not be ‘sufficiently robust’ it could be waived by decision of individual State parties is a dangerous premise. To accept this argument would mean creating an exception that risks undermining all the humanitarian protections of the law.”

Echoing President Bush’s central premise in the “war on terror” – that this is a “new paradigm” that “requires new thinking in the law of war” – the Schlesinger Panel recommended that:

*“The United States needs to redefine its approach to customary and treaty international humanitarian law, which must be adapted to the realities of the nature of conflict in the 21<sup>st</sup> Century. In doing so, the United States should emphasize the standard of reciprocity... The Panel believes the International Committee of the Red Cross, no less than the Defense Department, needs to adapt itself to the new realities of conflict...”*

The ICRC responded that the organization indeed “continues to initiate or participate in debates about how the Geneva Conventions can best be applied in contemporary situations of armed conflict”. It continued:

*“Nevertheless, a decision to deviate unilaterally from these universally established standards should not be taken lightly. To date, there has been little evidence presented that faithful application of existing law is an impediment in the pursuit of those who violate the same law. Moreover, the standard of reciprocity cannot apply to fundamental safeguards such as prohibition on torture without accepting the risk*

<sup>38</sup> ICRC reactions to the Schlesinger Panel Report. 8 September 2004.

<sup>39</sup> Memorandum for the President from Alberto R. Gonzales. 25 January 2002, *supra*, note 33.

<sup>40</sup> *Secretary Rumsfeld media availability en route to Baghdad*. Department of Defense, 13 May 2004.

*of destroying not only the principle of law, but also the very values on which it is built*".<sup>41</sup>

In similar vein, the most recent version (1992) of the US Army Intelligence Interrogation Field Manual (FM 34-52) states:

*"[The Geneva Conventions] and US policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation. Such illegal acts are not authorized and will not be condoned by the US Army. Acts in violation of these prohibitions are criminal acts punishable under the [Uniform Code of Military Justice]...*

*"Revelation of use of torture by US personnel will bring discredit upon the US and its armed forces while undermining domestic and international support for the war effort. It also may place US and allied personnel in enemy hands at a greater risk of abuse by their captors. Conversely, knowing the enemy has abused US and allied [prisoners of war] does not justify using methods of interrogation specifically prohibited by the [Geneva Conventions] and US policy."*

The Schlesinger Panel noted that the Legal Advisor to the Chairman of the Joint Chiefs of Staff and "many service lawyers" had been among those who, in late 2001 and early 2002, had been concerned that rejecting the Geneva Conventions would "undermine the United States military culture which is based on a strict adherence to the law of war".<sup>42</sup> Their fears, it seems, have been realized.

### **Old arguments to justify torture: the concept of 'necessity'**

In its first major report on torture three decades ago, Amnesty International wrote: "Those who consciously justify torture...rely essentially on the philosophic argument of a lesser evil for a greater good. They reinforce this with an appeal to the doctrine of necessity – the existential situation forces them to make a choice between two evils... The usual justification posits a situation where the 'good' people and the 'good' values are being threatened by persons who do not respect 'the rules of the game', but use ruthless, barbaric, and illegal means to achieve their 'evil' ends."<sup>43</sup>

The concept of "necessity" in relation to torture or ill-treatment has been raised in different ways by the US administration in the context of the "war on terror". Having taken the decision not to apply the Geneva Conventions to those held in Afghanistan and Guantánamo Bay – people whom he has described as "bad people" who "don't share the same values we share"<sup>44</sup> – President Bush sought to dispel concern about the treatment of detainees

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<sup>41</sup> ICRC reactions to the Schlesinger Panel Report. 8 September 2004.

<sup>42</sup> Schlesinger report, page 34, *supra*, note 30.

<sup>43</sup> Page 23, *Report on Torture*. Amnesty International, 1973. Second edition 1975.

<sup>44</sup> Remarks by the President to the travel pool. 20 March 2002, and Press Conference of President Bush and Prime Minister Tony Blair. White House, 17 July 2003.



by saying that they would be treated “in a manner consistent with the principles of Geneva”.<sup>45</sup> This has always been qualified, however, with a loophole for torture, namely the phrase “to the extent appropriate and consistent with military necessity”.<sup>46</sup>

The legal concept of military necessity cannot lawfully be used to override the prohibition on torture. What happens, however, if a government willing to violate this principle perceives “military necessity” to require the torture or ill-treatment of a detainee, especially if it believes that there can be some detainees who “are not legally entitled to [humane] treatment”? One such detainee would appear to be Saudi national Mohammed al-Kahtani, held without charge or trial in Guantánamo on suspicion of being involved in the 11 September 2001 conspiracy and considered to be resistant to standard interrogation methods. An interrogation plan was approved for Mohammed al-Kahtani – described by Secretary Rumsfeld as “a very bad person”<sup>47</sup> – which “outlines the military necessity for doing this [harsh interrogation]”.<sup>48</sup> This followed a request made on 11 October 2002 by military intelligence at Guantánamo for approval of techniques that went beyond normal army doctrine. Techniques including stress positions, sensory deprivation, hooding, stripping, and the use of dogs to inspire fear, were requested and were approved by Secretary Rumsfeld in December 2002 “as a matter of policy”. Blanket approval was not given for other requested techniques such as death threats, exposure to cold weather or water, and inducing the perception of suffocation, but the Pentagon’s General Counsel suggested that these were “legally available” and, according to a 15 January 2003 memorandum from Secretary Rumsfeld could be requested on a case-by-case basis, presumably if “military necessity” was considered to demand such techniques.<sup>49</sup> A 16 April 2003 memorandum signed by Secretary Rumsfeld, which is believed to remain in force, appears to allow for the possibility of these and any “additional interrogation techniques” to be requested on a case-by-case basis.<sup>50</sup>

The authorities have invoked “military necessity” to prevent the ICRC from meeting with certain detainees held in Guantánamo. In February 2002, following President Bush’s decision to reject the application of the Geneva Conventions to those held in Guantánamo, the White House gave assurances that the ICRC would be able to visit all detainees in private.<sup>51</sup> According to leaked military documents, however, at a meeting with the Guantánamo authorities in October 2003, the ICRC raised the cases of four detainees who it had been unable to visit. It was informed by the camp commander that three of them were “off limits...

<sup>45</sup> A policy which the Schlesinger Panel found “vague and lacking”. Schlesinger report, page 81.

<sup>46</sup> Presidential memorandum, *supra*, note 11. See also Rumsfeld memorandum to Joint Chiefs of Staff, 19 January 2002, <http://www.defenselink.mil/news/Jun2004/d20040622doc1.pdf>.

<sup>47</sup> Interview with David Frost (BBC). Department of Defense news transcript, 27 June 2004.

<sup>48</sup> Department of Defense Deputy General Counsel. Press briefing, 22 June 2004, *supra*, note 16.

<sup>49</sup> Action memo. For Secretary of Defense, from William J. Haynes, General Counsel. *Counter-Resistance Techniques*. 27 November 2002. Approved 2 December 2002. <http://www.defenselink.mil/news/Jun2004/d20040622doc5.pdf>.

<sup>50</sup> Memorandum for the Commander, US Southern Command, 16 April 2003. *Counter-Resistance Techniques in the War on Terrorism*. <http://www.defenselink.mil/news/Jun2004/d20040622doc9.pdf>

<sup>51</sup> *Fact Sheet. Status of detainees at Guantanamo*. The White House, 7 February 2002.

due to military necessity".<sup>52</sup> Four months later, in a meeting on 2 February 2004, the ICRC was informed that it could still not see one of the detainees "because of military necessity".<sup>53</sup>

Under Article 143 of the Fourth Geneva Convention, ICRC visits to civilian internees may be denied "for reasons of imperative military necessity", but "only as an exceptional and temporary measure". In Iraq in January 2004, the US authorities invoked "military necessity" when they refused to grant the ICRC access to eight detainees held in Abu Ghraib. According to the Fay report, one of the eight detainees, a Syrian national, was at that time held in a tiny dark cell without windows, toilet or bedding. The use of "extended solitary confinement in dark and extremely small" cells was one of the torture techniques used under the government of Saddam Hussein that the USA cited in its build up to the invasion of Iraq.<sup>54</sup>

The inhumane treatment of this Syrian detainee, facilitated by the invocation of "military necessity", was not limited to solitary confinement in appalling conditions. Around 18 December 2003, he was abused and threatened with dogs. According to the military, there is a photograph of him kneeling on the floor with his hands tied behind his back, while an unmuzzled dog is snarling a few feet from his face. During an ICRC visit in mid-March 2004, the organization's delegates were again denied access to him, and eight other detainees, on the grounds of "military necessity". In January and March 2004, the ICRC questioned the "exceptional and temporary" nature of the denial of access. By the time of its March visit, the Syrian detainee had been under incommunicado interrogation for four months.<sup>55</sup>

Another variation on the concept of "necessity" in relation to torture arose in the now declassified government communications – including in an August 2002 Justice Department memorandum to the White House, and again in an April 2003 Pentagon report *on* "war on terror" interrogations.<sup>56</sup> Both contend that US agents accused of torture might evade criminal liability by arguing the defence of "necessity". For example, they state that "any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing [a terrorist] attack". This crude "lesser evil" approach echoes the moral argument behind the "torture warrant" system proposed by Harvard law professor Alan Dershowitz – the idea that judges could approve torture for use against detainees believed to have information about future terrorist attacks, part of a public debate that the administration has failed to challenge (see Point 1.4).

The administration's previously secret memorandums discussed ways that US agents might escape criminal liability if accused of torture and explicitly argued that the President, as

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<sup>52</sup> Department of Defense Memorandum for Record. *ICRC Meeting with MG Miller on 9 Oct 03*. <http://www.washingtonpost.com/wp-srv/nation/documents/GitmoMemo10-09-03.pdf>.

<sup>53</sup> *ICRC meeting*, 2 February 2004. <http://www.washingtonpost.com/wp-srv/nation/documents/GitmoMemo02-02-04.pdf>. The detainee in question is reported to be Moroccan national Abdallah Tabarak. *A look behind the 'wire' at Guantánamo*. Washington Post, 14 June 2004.

<sup>54</sup> *A Decade of Deception and Defiance*, *supra*, note 12.

<sup>55</sup> Fay report (pages 66 and 86), *supra*, note 15.

<sup>56</sup> *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*, 4 April 2003 (hereinafter Pentagon Working Group report). <http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf>

Commander-in-Chief of the armed forces, could authorize torture. In suggesting very narrow definitions of torture and that US agents could also get away with employing cruel, inhuman and degrading interrogation techniques, the memorandums took a deeply regressive approach to international standards, even as the administration continued to portray itself in public as leading the global struggle against torture. Its approach represents an attack on fundamental values enshrined in international law developed over the past half century or more. It directly contravenes the position of the international community of nations that:

*“No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.”*<sup>57</sup>

The administration claimed that the declassified documents “were circulated among lawyers and some Washington policymakers only”, as if that makes their contents acceptable, and that they “never made it to the hands of soldiers in the field, nor to the President”.<sup>58</sup> However, the administration’s lack of a clear and consistent message that the *international* prohibition on torture and cruel, inhuman or degrading treatment would be strictly respected at all times and under all circumstances, opened the door to abuse.

Moreover, General Paul Kern, who oversaw the Fay investigation, has said that the debate on interrogation policies within official circles “found its way into the hard drives of the computers that we found in [Abu Ghraib] prison”. He pointed out that “those policies were being debated while we were asking soldiers to conduct interrogations. And so they were seeking to find the limits of their authority.” At the same time, the same soldiers were under pressure to produce intelligence. “We need to be crisp and clear in our delivery of orders to these people”, the General concluded, “so that they know what the rules are”.<sup>59</sup>

The White House Counsel said that President Bush “has given no order or directive that would immunize from prosecution anyone engaged in conduct that constitutes torture. All interrogation techniques actually authorized have been carefully vetted, are lawful, and do not constitute torture”.<sup>60</sup> Yet the administration has sanctioned interrogation techniques that, even if each of them did not amount to torture in themselves, have done so in combination, and in any event constituted cruel, inhuman or degrading treatment equally prohibited under

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<sup>57</sup> Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. General Assembly resolution 3452, 9 December 1975. Article 5 of the Code of Conduct for Law Enforcement Officials, adopted by the UN General Assembly in 1979, similarly states: “No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification for torture or other cruel, inhuman or degrading treatment or punishment.”

<sup>58</sup> White House Counsel, in press briefing, 22 June 2004, *supra*, note 16.

<sup>59</sup> Oral testimony to the Senate Armed Services Committee, 9 September 2004.

<sup>60</sup> White House Counsel, in press briefing, 22 June 2004, *supra*, note 16.

international human rights and humanitarian law. By their action as well as inaction, the government set a climate in which torture was more likely to occur. Even today's limited knowledge of the role of the administration suggests, at the very least, a significant degree of executive "acquiescence" – to use the language of Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Convention against Torture) – in the torture and ill-treatment that has been alleged.

The memorandums have caused deep international concern, with senior UN officials seeing the need to reiterate the absolute prohibition on torture and ill-treatment. Referring to the US administration's documents, the UN High Commissioner for Human Rights has stressed: "There can be no doubt that the prohibition against torture and cruel, inhuman or degrading treatment or punishment is non-derogable under international law... Yet we find, remarkably, that questions continue to be raised about this clear dictate of international law, including at high levels of government".<sup>61</sup> The UN Special Rapporteur on torture has written:

*"Legal arguments of necessity and self-defence, invoking domestic law have recently been put forward, aimed at providing a justification to exempt officials suspected of having committed or instigated acts of torture against suspected terrorists from criminal liability. The condoning of torture is per se a violation of the prohibition on torture... A head of State, also in his or her capacity as commander-in-chief, should therefore not authorize his or her subordinates to use torture, nor to guarantee immunity to the authors, co-authors and accomplices to torture. The argument that public officials have used torture having been advised by lawyers and experts that their actions were permissible is not acceptable either. No special circumstance may be invoked to justify a violation of the prohibition on torture for any reason, including an order from a superior officer or a public authority.*

*"The Special Rapporteur has recently received information on certain methods that have been condoned and used to secure information from suspected terrorists. They notably include holding detainees in painful and/or stressful positions, depriving them of sleep or light for prolonged periods, exposing them to extremes of heat, cold, noise and light, hooding, depriving them of clothing, stripping detainees naked and threatening them with dogs. The jurisprudence of both international and regional human rights mechanisms is unanimous in stating that such methods violate the prohibition on torture and ill-treatment."<sup>62</sup>*

### **Not just a few 'bad apples'**

By September 2004, four months after the Abu Ghraib photographs came to light, the administration's theory that the problem was restricted to Abu Ghraib and a few aberrant soldiers had been debunked. Indeed, on 8 September 2004, eight retired US generals and

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<sup>61</sup> *Security under the rule of law*. Address of Louise Arbour, UN High Commissioner for Human Rights to the Biennial Conference of the International Commission of Jurists (Berlin). 27 August 2004.

<sup>62</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Forty-ninth session of the General Assembly. UN Doc A/59/324, 23 August 2004.

admirals wrote to President Bush noting that “no fewer than a hundred criminal, military, and administrative inquiries have been launched into apparently improper or unlawful US practices related on detention and interrogation. Given the range of individuals and locations involved in these reports, it is simply no longer possible to view these allegations as a few instances of an isolated problem”.<sup>63</sup> A day after this letter, the Senate Armed Services Committee was told that there might have been as many as 100 “disappearances” in US custody in Iraq, prisoners hidden from the ICRC at the behest of the Central Intelligence Agency (CIA).<sup>64</sup> At least one of these detainees died in custody, one of numerous deaths in US detention facilities in Iraq and Afghanistan since the “war on terror” began. The death in US custody in Gardez in Afghanistan in March 2003 of a young Afghan soldier, 18-year-old Jamal Naseer, allegedly after he and seven other detainees were tortured over a two-week period, has only come to light in recent weeks and raises further questions about the real extent of the abuses and the adequacy of official investigations into them (see Point 6.2).

On 25 August 2004, the Fay report revealed that 54 military intelligence, military police, medical personnel and civilian contractors had “some degree of responsibility or complicity in the abuses that occurred at Abu Ghraib”, including seven soldiers already charged.<sup>65</sup> It found “failures of leadership..., failures to follow our own policy, doctrine and regulations”, as well as confusion over which interrogation techniques were allowed in which theatre of operation.<sup>66</sup> On 24 August, the Chairman of the Schlesinger Panel, former Secretary of Defense James Schlesinger, had revealed that there had been approximately 300 recorded cases of alleged abuse in Afghanistan, Guantánamo and Iraq, “many of them beyond Abu Ghraib. So the abuses were not limited to a few individuals”.<sup>67</sup> Another of the Schlesinger Panel members, former Secretary of Defense Harold Brown, has suggested that a degree of responsibility for “failure to provide adequate resources to support the custodial and intelligence requirements throughout the theater, and for the confusion about permissible interrogation techniques extend[s] all the way up the chain of command to include the Joint Chiefs of Staff and the Office of the Secretary of Defense”.<sup>68</sup>

The Schlesinger Panel, however, was not critical of the interrogation techniques *per se*, just of the failure to prevent their transfer from Afghanistan and Guantánamo to Iraq. Chairman Schlesinger claimed: “In the conditions of today, aggressive interrogation would seem essential”, and “what constitutes ‘humane treatment’ lies in the eye of the beholder”.<sup>69</sup> Any tolerance for abusive techniques on the part of the investigative body with the widest

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<sup>63</sup> General David M. Brahms, General James Cullen, General John L. Fugh, General Robert Gard, Admiral Lee F. Gunn, General Joseph Hoar, Admiral John D. Hutson, General Richard Omeara. See [www.humanrightsfirst.org/us\\_law/PDF/detainees/Military\\_Leaders\\_Letter\\_President\\_Bush\\_final.pdf](http://www.humanrightsfirst.org/us_law/PDF/detainees/Military_Leaders_Letter_President_Bush_final.pdf)

<sup>64</sup> General Paul Kern, oral testimony to the Senate Armed Services Committee, 9 September 2004.

<sup>65</sup> Fay report, page 8-9, *supra*, note 15.

<sup>66</sup> General Paul Kern, oral testimony to the Senate Armed Services Committee, 9 September 2004.

<sup>67</sup> Press conference with members of the Independent Panel to Review Department of Defense Detention Operations (Schlesinger Panel). Department of Defense News Transcript, 24 August 2004.

<sup>68</sup> Dr Harold Brown, written testimony to Senate Armed Services Committee, 9 September 2004.

<sup>69</sup> Written statement of James Schlesinger to the Senate Armed Services Committee, 9 September 2004.

remit of the reviews conducted since the Abu Ghraib scandal, and the one promoted by the government as the most independent of these investigations, is cause for serious concern.

It was also clear that on the question of accountability the Schlesinger Panel took a limited view. Former Secretary of Defense Harold Brown has suggested that in the case of high-level administration officials, punishment was not an option and that the matter of their accountability rests with the electorate at election time.<sup>70</sup> James Schlesinger suggested that the resignation of the Secretary of Defense “would be a boon to all of America’s enemies” and that “his conduct with regard to [the issue of interrogation policy] has been exemplary”.<sup>71</sup> The other panel members, retired General Charles Horner and former member of Congress, Tillie Fowler, agreed. This was consistent with the position Tillie Fowler had taken in an interview before the panel had begun its work, in which she had made it clear that Secretary Rumsfeld was not to be the focus of their review. Referring to the Abu Ghraib revelations, she was quoted as saying: “The Secretary is an honest, decent, honourable man, who’d never condone this type of activity. This was not a tone set by the Secretary.”<sup>72</sup> Yet in December 2002 Secretary Rumsfeld authorized stripping, isolation, hooding, stress positions, sensory deprivation, and the use of dogs in interrogations. In November 2003, he in effect authorized a “disappearance” by ordering military officials in Iraq to keep a detainee off any prison register (see Point 3.1). In international human rights terms, his conduct, and that of the administration as a whole, has been far from exemplary. Indeed, he and the administration have authorized human rights violations.

## **II. Human dignity denied: torture or ill-treatment of the ‘other’**

*Make no mistake: every regime that tortures does so in the name of salvation, some superior goal, some promise of paradise. Call it communism, call it the free market, call it the free world, call it the national interest, call it fascism, call it the leader, call it civilisation, call it the service of God, call it the need for information; call it what you will, the cost of paradise, the promise of some sort of paradise... will always be hell for at least one person somewhere, sometime.*  
Ariel Dorfman, Chilean writer, May 2004<sup>73</sup>

Moazzam Begg, a dual UK/Pakistan national, was abducted in January 2002 from Pakistan by US agents and taken to the US air force base in Bagram in Afghanistan where he claims to

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<sup>70</sup> “To take the highest level, take the level of the Secretary of Defense, I don’t think that you can punish somebody, demand resignation, on the basis of some action, an individual action, by somebody far down the chain. I think at that level, the decision has to be made on the basis of broad performance. And indeed at the very highest level, it’s made at election time... The Secretary of Defense has to decide whether he’s lost confidence in his under-secretaries or his assistant secretaries on the basis of their performance. And the electorate has to decide on the basis of its confidence at election time”. Oral testimony to the Senate Armed Services Committee, 9 September 2004.

<sup>71</sup> Press conference with members of the Schlesinger Panel, *supra*, note 67.

<sup>72</sup> Wide gaps seen in US inquiries on prison abuse. *New York Times*, 6 June 2004.

<sup>73</sup> *Are there times when we have to accept torture?* Ariel Dorfman. *The Guardian* (UK), 8 May 2004.

have been subjected to “pernicious threats of torture, actual vindictive torture and death threats – amongst other coercively employed interrogation techniques”. He has alleged that he was interrogated “in an environment of generated fear, resonant with terrifying screams of fellow detainees facing similar methods. In this atmosphere of severe antipathy towards detainees was the compounded use of racially and religiously prejudicial taunts.”<sup>74</sup>

On 7 October 2003, an Iraqi man, Amin Sa'id al-Sheikh, was arrested in Baghdad and taken to Abu Ghraib prison. The sworn statement he gave on 16 January 2004 to military investigators looking into allegations of abuse suggests that anti-Muslim sentiment was still running high among at least some US military personnel:

*“They stripped me naked, they asked me, ‘Do you pray to Allah?’ I said, ‘Yes’. They said, ‘Fuck you’ and ‘Fuck him’... One of them told me he would rape me. He drew a picture of a woman to my back and makes me stand in shameful position holding my buttocks. Someone else asked me, ‘Do you believe in anything?’ I said to him, ‘I believe in Allah’. So he said, ‘But I believe in torture and I will torture you.’... Then they handcuffed me and hung me to the bed. They ordered me to curse Islam and because they started to hit my broken leg, I cursed my religion. They ordered me to thank Jesus that I’m alive. And I did what they ordered me. This is against my belief.”<sup>75</sup>*

Throughout history, torture has often occurred against those considered as the “other”. The UN Committee against Torture has stated that “discrimination of any kind can create a climate in which torture and ill-treatment of the ‘other’ group subjected to intolerance and discriminatory treatment can more easily be accepted.”<sup>76</sup> Even in regular internment facilities in Iraq, the ICRC noted a “widespread attitude of contempt” on the part of the US guards towards detainees.<sup>77</sup> The UN High Commissioner for Human Rights has reported that detainees in Iraq have even been humiliated upon release: “Among the examples given were that prisoners were released in the middle of the night, handcuffed, with Mickey Mouse drawn on their shirt...”<sup>78</sup>

Torture involves the dehumanization of the victim, the severing of all bonds of human sympathy between the torturer and the tortured. This process of dehumanization is made easier if the victim is from a despised social, political, religious or ethnic group.

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<sup>74</sup> Letter from Moazzam Begg, Guantánamo Bay, copied among others to Amnesty International, dated 12 July 2004. [http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/01\\_10\\_04.pdf](http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/01_10_04.pdf).

<sup>75</sup> Translated statement: <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/151362.pdf>.

<sup>76</sup> World Conference against racism, racial discrimination, xenophobia and related intolerance, contribution of the Committee against Torture to the preparatory process, UN Doc. A/CONF.189/PC.2/17, 26 February 2001.

<sup>77</sup> *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation*. February 2004. [Hereinafter, report of the ICRC, February 2004]. The ICRC *inter alia* called for respect for the “cultural sensitivity” of detainees. [http://www.globalsecurity.org/military/library/report/2004/icrc\\_report\\_iraq\\_feb2004.pdf](http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf)

<sup>78</sup> E/CN.4/2005/4, 9 June 2004.

Discrimination paves the way for torture and ill-treatment by allowing the victim to be seen not as human but as an object, who can, therefore, be treated inhumanely.

Anti-Muslim sentiment increased in the USA in the wake of the atrocities of 11 September 2001. Amnesty International welcomed President Bush's early statements calling for citizens to respect Muslim and Middle Eastern members of their communities<sup>79</sup>, but is concerned that the same message – that any form of retaliatory injustices would not be tolerated – does not appear to have been forcefully and directly transmitted to US law enforcement and military agencies. In November 2001, Amnesty International wrote to the US government raising allegations that immigration detainees arrested in the USA after 11 September were being subjected to more punitive conditions than before in some facilities, and that people of Muslim or Middle Eastern origin were being treated more harshly than other inmates. Reports included detainees being placed in solitary confinement and denied exercise; being required to wear full restraints, including leg-irons, during visits; being denied contact visits with families; being given an inadequate diet; and being denied personal possessions and copies of books in Arabic, including the Koran.<sup>80</sup> The subsequent Justice Department investigation confirmed such allegations, including of racial abuse of detainees.<sup>81</sup>

In its November 2001 memorandum, Amnesty International urged the US Government to stay fully committed to upholding principles of non-discrimination in the current challenging climate. It urged that "all precautions are taken to ensure that people are not arrested or detained or otherwise treated unfairly on grounds of their ethnic origin, race or religion."<sup>82</sup> The organization believes that the authorities have failed in this regard as they have taken the "war on terror" outside the US mainland. The absence of appropriate cultural training was part of the problem. The Fay report into Abu Ghraib found that "guard and interrogation personnel were not adequately trained or experienced and were certainly not well versed in the cultural understanding of the detainees".<sup>83</sup> Intelligence officers going to Guantánamo apparently had no cultural awareness training until at least a year after the detentions began.<sup>84</sup> One of Major General Antonio Taguba's recommendations following his

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<sup>79</sup> Letter to President George W. Bush. <http://web.amnesty.org/library/Index/ENGAMR511442001>. The organization also welcomed "the strong action taken by the Department of Justice to respond to attacks and acts of discrimination perpetrated against people perceived to be Muslim or of Middle Eastern origin in the wake of 11 September." USA: *Memorandum to the US Attorney General – Amnesty International's concerns relating to the post-11 September investigations*, AI Index: AMR 51/170/2001. <http://web.amnesty.org/library/Index/ENGAMR511702001>.

<sup>80</sup> *Memorandum to the US Attorney General*, *supra*, note 79.

<sup>81</sup> *The September 11 detainees: A review of the treatment of aliens held on immigration charges in connection with the investigation of the September 11 attacks*. Office of the Inspector General, June 2003. <http://www.usdoj.gov/oig/special/0306/index.htm>.

<sup>82</sup> *Memorandum to the US Attorney General*, *supra*, note 79.

<sup>83</sup> Fay report, page 45, *supra*, note 15.

<sup>84</sup> *New intel course trains Al Qaeda interrogation*. Army News Service, 24 February 2003. An instructor noted that the course would have a component on cultural awareness, adding that "most of these soldiers are Christians and know nothing about the Muslim religion". Without proper safeguards,



investigation of US abuses in Iraq was that there should be an immediate deployment to Iraq of a mobile training team whose expertise should include "Arab cultural awareness".<sup>85</sup>

Colonel Henry Nelson, a US Air Force psychiatrist assigned to assist the Taguba investigation, concluded that among the factors contributing to the abuse was that soldiers sent to Iraq were immersed in Islamic culture for the first time and that "there is an association of Muslims with terrorism".<sup>86</sup> The US administration has played its part in this dangerous perception. The constant refrain of senior administration officials, including President Bush in his role as Commander-in-Chief of the armed forces, labelling detainees who have neither been charged with nor convicted of any offence as "terrorists", "killers", "dangerous", "the worst of a very bad lot", and "bad people", and holding them outside the protection of the law, always risked encouraging abuse.<sup>87</sup>

### **From Afghanistan to Abu Ghraib, via Guantánamo**

Allegations of abuse by US forces in Afghanistan have been persistent. The Fay report confirmed that from December 2002 (there are also allegations of abuse from before then), "[US] interrogators in Afghanistan were removing clothing, isolating people for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation."<sup>88</sup> The Schlesinger Panel noted that Special Operations Forces in Afghanistan had been implicated in "a range of abuses... similar in scope and magnitude to those found among conventional forces".<sup>89</sup> Amnesty International and others have raised allegations of abuse in Afghanistan with the US authorities, with little or no response.

Abdullah's arrest along with 33 others took place at 3am in a compound near Kandahar in Afghanistan on 18 March 2002. He told Amnesty International in October 2002 after his release that US forces broke down all the doors and took everybody outside. The detainees had their hands zip-tied behind their backs and were taken to Kandahar air base, where they were forced to lie on the gravel for several hours, their hands cuffed, now with metal handcuffs, behind their backs. Abdullah said that during this time he was kicked in the ribs and that he and all his fellow detainees were hooded and searched by dogs. They were subjected to forced shaving. He said that he was shaved of his entire facial and body hair by a

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AI notes that such training – on "how to extract intelligence from Al Qaeda detainees", could be double-edged. Ill-treating through use of cultural sensitivities is prohibited as is any ill-treatment.

<sup>85</sup> Article 15-6 Investigation of the 800<sup>th</sup> Military Police Brigade (hereinafter the Taguba report).

<http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html>

<sup>86</sup> *Soldiers vented frustration, doctor says*. Washington Post, 24 May 2004.

<sup>87</sup> Journalist Seymour Hersh has reported an interview he had with a former Marine assigned to guard duty at Guantánamo in 2003 in which the soldier said that the guards were encouraged by their squad leaders to "give the prisoners a visit" once or twice a month, when there were no journalists around, to "rough up" the detainees: "We tried to fuck with them as much as we could – inflict a little bit of pain", the Marine is quoted as saying. Hersh reports: "As far as he was concerned, the former Marine added, the prisoners at Guantánamo were all terrorists: 'I thought everybody was a bad guy'." *Chain of Command: The road from 9/11 to Abu Ghraib*. Seymour M. Hersh. Allen Lane, 2004. Pages 12-13.

<sup>88</sup> Fay report, page 29, *supra*, note 15.

<sup>89</sup> Schlesinger report, page 13, see *supra*, note 30.

woman. He was then put in a cage, under a tent, with about 14 others, including a boy of about 15. Some in the cage refused to eat because they did not want to have to use the toilet, a portable pot in the corner. Abdullah said that during interrogation, he was handcuffed, shackled and hooded, and that a female interrogator pulled and pushed him. He said that the cultural violations were the most traumatizing aspects of the treatment.

Two years later, an elderly Afghan man was arrested in his village by US marines in June 2004 and detained for three days. Noor Mohammad Lala alleged:

*"They told me to take off my shirt. I said 'How can I do that?' Then I told myself 'Take your shirt off.' When I took off my shirt, they told me to undo my belt. I found that very painful. I felt like I was having a nervous breakdown. In my entire life I'd never exposed myself. With respect, I have a bladder problem and I could not stop urinating. After that I was so humiliated I couldn't see for my pain. When they took off my trousers I had my eyes closed. I was totally disoriented, they stood me up in the container. When they stood me up like this, they took off all my clothes. I was completely naked, I'm not telling you a lie. They told me to look straight ahead, not to look around. While I was standing, I'm not lying to you, they kicked my feet apart with their boots and they were touching me. That's how it was I did not know what was going on. That's the sort of treatment I received. That's what they did. When I looked around there was only an interpreter, no one else. He told me to get dressed, my bottom was wet. I would not be a Muslim if I lied to you. When I put on my clothes, I rubbed it off. And this happened when I'm old, white-bearded with no teeth. And this outrage happened to me."*<sup>90</sup>

Amnesty International has been told by the Afghanistan Independent Human Rights Commission of another elderly man who approached them after his release from US custody in 2004. At first he said that he was too ashamed to talk about it, but he later revealed that along with other detainees he had been stripped naked and kept in a container.

One of eight Afghan soldiers arrested by US Special Forces on 1 March 2003 has said that he and his fellow detainees were treated "like animals" when taken to the US base in Gardez. An investigation by the Crimes of War Project has revealed allegations by the detainees that they were subjected to torture and ill-treatment during their 17 days in custody, including repeated beatings, electric shocks and immersion in cold water. They were hooded and shackled during interrogations. One of the detainees, Jamal Naseer, died in custody (see Point 6.2).<sup>91</sup> Another Afghan national, Syed Nabi Siddiqi, has said that he was ill-treated during his 22-day detention in US custody in Gardez, Afghanistan, in July 2003. He says that he was blindfolded, kicked and beaten, and had his clothes removed:

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<sup>90</sup> (Translation). *Taliban Country*. SBS Dateline. 11 August 2004. <http://www.sbs.com.au/dateline/#>. Noor Mohammad Lala's son, Wali Mohammad, has also described such a strip search on him, during which he says some 20 US soldiers were "laughing and mocking" and taking photographs: "They disrespected us and undermined our dignity. They brought shame on us before the whole world."

<sup>91</sup> *A torture killing by US forces in Afghanistan*. Crimes of War Project. [www.crimesofwar.org](http://www.crimesofwar.org).

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*“Then they asked me which animals – they made the noise of goats, sheep, dogs, cows – I had had sexual activities with. They laughed at me. I said that such actions were against our Afghan and Islamic tradition, but they again asked me, ‘Which kind of animals do you want to have sex with?’ Then they...beat me with a stick from the back and kicked me. I still have pains in my back as a result.”<sup>92</sup>*

After Gardez, Syed Nabi Siddiqi said that he was flown to the US air base in Kandahar, where the ill-treatment continued, including when the soldiers “brought dogs close to us, they were biting at us”. In a witness statement in 2004, former detainee Tarek Dergoul recalled his detention in Kandahar:

*“[I]n Kandahar I was hooded whilst being taken to interrogation and some of the time during interrogation. I was interrogated at least three or four times a week for up to seven or eight hours a day. Sometimes I was just left sitting in the interrogation tent with nothing, no food or toilet facilities. The guards in Kandahar regularly tore up the Qur’an and threw it. My body hair was shaved, including my pubic hair... After three months in Kandahar I was flown to Guantanamo Bay, Cuba, on 1 May 2002... I was stripped naked, given a full body search and pictures were taken of me naked.”<sup>93</sup>*

Tarek Dergoul states that he was again stripped and given another full body search on arrival in Guantánamo, despite the fact that since leaving Kandahar he had been handcuffed, shackled and blindfolded the entire time. Swedish national Mehdi Ghezali has told Amnesty International that he and his fellow detainees were stripped, shaved of their facial and head hair and photographed before being transferred to Guantánamo. He says that they were also stripped and photographed on arrival in the naval base. He, like others, has described a punitive regime in Guantánamo that has shown little respect for human dignity. For example:

*“One prisoner had removed his ID-strap that the prisoners were forced to wear around their wrist. As punishment, the guards shackled both his hands and feet in his cell for more than 10 hours. During this time, the prisoner was not given any food and was not allowed to go to the toilet, although he had to. He could not hold himself. It was very degrading for him.”<sup>94</sup>*

Souvenir T-shirts, available for soldiers to purchase in the Navy Exchange shopping mall in Guantánamo perpetuate a view of “war on terror” detainees as less than human. One depicts a rat in a turban, orange jumpsuit and shackles, with the words *Guantanamo Bay: Taliban Lodge* around it. Another depicts six shackled rats in orange jumpsuits, surrounded

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<sup>92</sup> ‘They said this is America... if a soldier orders you to take off your clothes, you must obey.’ The Guardian (UK), 23 June 2004.

<sup>93</sup> Witness statement of Tarek Dergoul in the case of *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 69, 21 May 2004.

<sup>94</sup> Interview with Amnesty International, Sweden, 27 July 2004. Mehdi Ghezali said that he was handed over to US custody by authorities in Pakistan in December 2001, and flown with others to Kandahar. He says he was dragged and beaten at Kandahar, and told “Now we are going to take you to a place where they are going to shoot you”.

by the caption *Al Qaeda six-pack – Guantanamo Bay, Cuba, Home of the sand rat*. Such “humour” takes on a different meaning when set against the experiences of real detainees. In a poem sent from his cell in Guantánamo to his brother in Kabul, Wazir Mohammed wrote, “I’m in a cage like an animal; No-one’s asked me am I human or not”.<sup>95</sup> Fellow detainee Sayed Abbasin told Amnesty International after his release in 2003 that the Guantánamo prison camp was “like a zoo”. French detainee Nizar Sassi wrote of Guantánamo to his family: “If you want a definition of this place – you don’t have the right to have rights”.<sup>96</sup> The administration’s position that the Guantánamo detainees – all foreign nationals – should be denied any opportunity to challenge the lawfulness of their detention led a US Supreme Court Justice to point out that US law at the Naval Base “even protect[s] the Cuban iguana”.<sup>97</sup>

The first detainees to be taken to Guantánamo were not told where they were, and apparently thought they were “being taken to be shot”, a situation exacerbated by the reddish colour of their jumpsuits, which “in their culture... is a sign that someone is about to be put to death”.<sup>98</sup> The camp authorities considered whether to “continue not to tell them what is going on and keep them scared. ICRC says that they are very scared”.<sup>99</sup> The authorities only agreed to consider telling the detainees where they were “after the first round of interrogations”, an early sign of a blurring between detention conditions and interrogation techniques (see Point 4.1).<sup>100</sup>

In Iraq, foreign detainees were given wristbands marked “terrorist”.<sup>101</sup> An Iraqi detainee has recalled how the US soldiers “used to beat up a prisoner who was from Syria and strip him all night. We heard him screaming all night”.<sup>102</sup> It is not known if this was the Syrian national who was kept incommunicado “in a totally darkened cell measuring about 2

<sup>95</sup> USA: *The threat of a bad example: Undermining international standards as ‘war on terror’ detentions continue*, August 2003, AI Index: AMR 51/114/2003

<http://web.amnesty.org/library/Index/ENGAMR511142003>

<sup>96</sup> *People the law forgot*. The Guardian, 3 December 2003. The first detainees to be taken to Guantánamo were not told where they were, and detainees thought they were “being taken to be shot”, a situation exacerbated by the red/orange colour of their jumpsuits, which “in their culture... is a sign that someone is about to be put to death”. The camp authorities debated whether to “continue to not to tell them what is going on and keep them scared. ICRC says that they are very scared”. The authorities only agreed to consider telling the detainees where they were “after the first round of interrogations”.

<sup>97</sup> *Rasul v. Bush*, oral arguments, 20 April 2004.

<sup>98</sup> *Initial observations from ICRC concerning treatment of detainees*. Department of Defense Memorandum from Staff Judge Advocate to Commander Joint Task Force 170, 21 January 2002.

<http://www.washingtonpost.com/wp-srv/nation/documents/GitmoMemo01-21-02.pdf>.

<sup>99</sup> *Ibid.*

<sup>100</sup> Department of Defense Memorandum: *Concerns voiced by the International Committee of the Red Cross (ICRC) on Behalf of the Detainees*. From Staff Judge Advocate, 24 January 2002.

<http://www.washingtonpost.com/wp-srv/nation/documents/GitmoMemo01-24-02.pdf>.

<sup>101</sup> According to the ICRC, this practice ended after it gave a memorandum in July 2003, based on more than 200 alleged cases of ill-treatment, to US Central Command. *Report of the ICRC*. February 2004, *supra*, note 77.

<sup>102</sup> Translation of statement given by Mustafa Jassim Mustafa to military investigators on 17 January 2004. <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/150542-1.pdf>.

meters long and less than a meter across, devoid of any window, latrine or water tap, or bedding." On the door of the cell was the inscription "the Gollum" and a picture of this character from the film *Lord of the Rings*.<sup>103</sup> Other detainees were also reportedly given names of fictional non-human characters. According to a US Army reservist at Abu Ghraib, for example, there was a detainee with a deformed hand whom the US guards called "The Claw" and another with bulging eyes who was called "Froggy".<sup>104</sup> A US military lawyer later raised his concern about the use of nicknames chalked on cell doors by military guards in Abu Ghraib. He said that he was not aware of the torture and ill-treatment going on in the prison at the time he witnessed this nicknaming and so "I didn't recognize [its] significance".<sup>105</sup>

In Iraq, the allegations of abuse have not been restricted to Abu Ghraib. For example, three Iraqi nationals working for *Reuters* news agency have alleged that they were subjected to torture and cruel, inhuman or degrading treatment by US soldiers while held in military detention near Fallujah (see also Point 6.1). The three, Salem Ureibi, Ahmad Muhammad Hussein al-Badrani and Sattar Jabar al-Badrani, say they were held for three days in January 2004 and subjected to humiliation, religious taunts, sleep deprivation, hooding, kicking and beating, stress positions, loud music, forced physical exercises, and threats of transfer to Guantánamo.<sup>106</sup>

*"He asked me to pick up a shoe, took it and beat me on the face with it. Then he made me take the shoe in my mouth. He made me put my finger in my anus, then he made me smell my hand and put it in my nose, and keep the shoe in my mouth, with my other hand in the air. He told me I looked like an elephant. Every time I mentioned God they would beat me. The interrogators said they had found RPG launchers. I said: "I swear to God, no". Then they beat me"*.<sup>107</sup>

The UN High Commissioner for Human Rights has cited reports by Iraqis that during house searches by Coalition forces in Iraq, the conduct of soldiers has been "considered humiliating, for example, when they send women outside the house in their nightgowns, or when they show disrespect for the Koran, throwing it on the floor or tearing it apart."<sup>108</sup> Local civilians have made similar complaints of cultural disrespect by US forces in Afghanistan.

Released detainees have described how, in the first weeks of the Guantánamo detentions from early January 2002, there was little official tolerance for the practice of

<sup>103</sup> Fay report, page 66, *supra*, note 15.

<sup>104</sup> *Behind the walls of Abu Ghraib*, Newsweek, 22 May 2004.

<sup>105</sup> "I had seen that the [military police] had written in chalk on some of the outside of the cell doors, kind of like nicknames for the prisoners inside, so that they would know what to call them, because they never really liked, I guess, using their Arabic names, not that I think they every really knew them". Deposition by Colonel Ralph Sabatino, 10 February 2004. One man had been given the name of a US pornographic film actor, which the Colonel said he realized was significant given what had emerged about the sexual cruelty to the detainees. <http://www.publicintegrity.org/docs/AbuGhraib/Abu16.pdf>.

<sup>106</sup> *Iraqi journalists report abuse as detainees in US hands*. Reuters, 18 May 2004.

<sup>107</sup> Interview with Sattar Jabar al-Badrani, 8 January 2004. Transcript provided by Reuters.

<sup>108</sup> E/CN.4/2005/4, 9 June 2004.

Islam.<sup>109</sup> This was apparently improved under ICRC intervention.<sup>110</sup> The first commander of the Guantánamo prison camp was Brigadier General Rick Baccus. There was said to be tension between him and intelligence officials because he was seen as “soft” on the detainees by eventually distributing copies of the Koran, adjusting meal times for Ramadan, and allowing the ICRC to put up posters on the Geneva Conventions.<sup>111</sup> He has since been quoted as saying: “I was mislabelled as someone who coddled detainees. In fact, what we were doing was our mission professionally”.<sup>112</sup> He was relieved of his post in October 2002, and Secretary Rumsfeld reportedly gave military intelligence control of the Guantánamo detainee operations, including the guards.<sup>113</sup> Major General Geoffrey Miller was appointed as commander of Guantánamo detentions and assumed command on 4 November 2002.<sup>114</sup> According to three released detainees, the regime changed around this time:

*“[A] point came at which you could notice things changing. That appeared to be after General Miller around the end of 2002. That is when short-shackling started, loud music playing in interrogation, shaving beards and hair, putting people in cells naked, taking away people’s ‘comfort’ items, the introduction of levels, moving people every two hours depriving them of sleep, the use of A/C air. Isolation was always there. ‘Intel’ blocks came in with General Miller. Before when people were put into isolation they would seem to stay for not more than a month. After he came, people would be kept there for months and months and months.”<sup>115</sup>*

Released Swedish detainee Mehdi Ghezali has described to Amnesty International the pain of “short shackling” in interrogations: “There was a ring attached to the floor. They chained your hands and feet to this ring. You had to sit chained with your arms between your legs from underneath. In this way, they could let you sit for hours”. He has described harsh interrogations, including the manipulation of air conditioning to make interrogation rooms very cold or very hot. He said that during interrogations rap and heavy metal music was played loud, or sometimes loud un-tuned radio noise, which was “very unpleasant”.<sup>116</sup> A recent report in the *New York Times*, based on interviews with people who have worked in Guantánamo, adds weight to such detainee allegations. It describes the debilitating effect on

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<sup>109</sup> Mohammed Saghir, a Pakistan national, has alleged: “In the first one-and-a-half months they wouldn’t let us speak to anyone, wouldn’t let us call for prayers or pray in the room...I tried to pray and four or five commandos came and they beat me up. If someone would try to make a call for prayer they would beat him up and gag him.” *People the law forgot*. The Guardian (UK), 3 December 2003.

<sup>110</sup> *Concerns voiced by the ICRC on Behalf of the Detainees*. 24 January 2002, supra. note 100.

<sup>111</sup> See, for example: *‘Too nice’ Guantanamo chief sacked*, BBC 16 October 2002.

<sup>112</sup> *Former Guantánamo chief clashed with army interrogators*. The Guardian (UK), 19 May 2004.

<sup>113</sup> *The roots of torture*. Newsweek, 24 May 2004.

<sup>114</sup> *Major General Miller takes command Joint Task Force GTMO*. US Southern Command News Release. JTF-GTMO Public Affairs, 4 November 2002.

<sup>115</sup> *Detention in Afghanistan and Guantanamo Bay*. Statement of Shafiq Rasul, Asif Iqbal and Ruhel Ahmed. July 2004. Available at: <http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf>.

<sup>116</sup> Interview with Amnesty International, Sweden, 27 July 2004.

detainees of the alleged use of short-shackling, stripping, loud music, strobe lighting and temperature manipulation in prolonged interrogations.<sup>117</sup>

According to the military, the ICRC had “a serious concern with the treatment of the Koran” by military guards in Guantánamo, particularly in August 2003. Twenty detainees had told the ICRC that they had been forcibly shaved as punishment for “disturbances” that followed alleged disrespect towards the Koran. Major General Miller denied that the Koran had been deliberately disrespected or that anyone had been shaved as punishment.<sup>118</sup>

After some nine months of running the detention operation in Guantánamo, Major General Miller visited Iraq from 31 August to 9 September 2003 with a team of current and former Guantánamo personnel. His remit was to make recommendations on how to run the USA’s detention operations in Iraq with a view to obtaining intelligence to counter the growing insurgency to the US-led occupation.<sup>119</sup> A central recommendation of his subsequent report was that the US authorities in Iraq should “[d]edicate and train a detention guard force subordinate to [military intelligence] that sets the conditions for the successful interrogation and exploitation of the internees/detainees” (see Point 4.1). The report asserted that “a significant improvement in actionable intelligence will be realized within thirty days”.<sup>120</sup>

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<sup>117</sup> “One regular procedure that was described by people who worked at Camp Delta, the main prison facility at the naval base in Cuba, was making uncooperative prisoners strip to their underpants, having them sit in a chair while shackled hand and foot to a bolt in the floor, and forcing them to endure strobe lights and screamingly loud rock and rap music played through two close loudspeakers, while the air conditioning was turned up to maximum levels, said one military official who witnessed the procedure. The official said that was designed to make the detainees uncomfortable as they were accustomed to high temperatures both in their native countries and their cells. Such sessions could last up to 14 hours with breaks, said the official, who described the treatment after being contacted by *The Times*. ‘It fried them,’ the official said, explaining that anger over the treatment the prisoners endured was the reason for speaking with a reporter. Another person familiar with the procedure who was contacted by *The Times* said: ‘They were very wobbly. They came back to their cells and were just completely out of it.’” *Broad use of harsh tactics is described at Cuba base*. *New York Times*, 17 October 2004.

<sup>118</sup> Memorandum for Record. *ICRC Meeting with MG Miller on 9 Oct 03*, *supra*, note 52.

<sup>119</sup> *General promised quick results if Gitmo plan used at Abu Ghraib*. *USA Today*, 25 June 2004.

Major General Miller’s mission to Iraq was made at the “encouragement” of Under-Secretary of Defense for Intelligence, Stephen Cambone, and “other senior members of the Department [of Defense]” (Under-Secretary Cambone, Senate Armed Services Committee, 11 May 2004). The Under-Secretary sent his deputy, Lieutenant General William Boykin, to Guantánamo to talk to Major General Miller and organize his trip to Iraq (*The roots of torture*. *Newsweek*, 24 May 2004). Lt. Gen. Boykin, nominated to his post by President Bush in June 2003, has caused controversy due to speeches in which he reportedly said that the “war on terror” was being fought against Satan, that God put President Bush in the White House for this purpose, and that he, Lt. Gen. Boykin, had told a Muslim in Somalia that “my God was a real God, and his was an idol”. There were calls for his removal from his Pentagon post. Under-Secretary Cambone said he received a briefing on Maj. Gen. Miller’s report from Lt. Gen. Boykin (Senate Armed Services Committee, 11 May 2004).

<sup>120</sup> *Assessment of DoD Counterterrorism Interrogation and Detention Operations in Iraq* (Miller report) <http://www.publicintegrity.org/docs/AbuGhraib/Abu3.pdf>.

Brigadier General Janis Karpinski, who was in charge of Abu Ghraib prison before being suspended from duty after the torture evidence became public, has claimed that Major General Miller told her of his intention to “Gitmo-ize the confinement operation” in Iraq:<sup>121</sup>

*“He said at Guantánamo Bay we’ve learned that the prisoners have to earn every single thing they have.... He said they are like dogs, and if you allow them to believe at any point that they’re more than a dog, then you’ve lost control of them. He said every time we remove them from a cell, there’s two MPs that accompany them, they have ankle chains on, they have wrist chains on, and they have a belly chain on, and they are never moved outside of their cell unless they are under those conditions.”<sup>122</sup>*

Soon after Major General Miller’s mission to Iraq, the ICRC found a regime in Abu Ghraib in which some detainees were being made “to earn” their right to humane treatment. The organization reported that during a visit to the prison in mid-October 2003 it witnessed the US practice of keeping detainees “completely naked in totally empty concrete cells and in total darkness”. The organization reported that it was told by a military intelligence officer that this was “part of the process” – a process which the ICRC said “appeared to be a give-and-take policy whereby persons deprived of their liberty were ‘drip-fed’ with new items (clothing, bedding, hygiene articles, lit cell, etc.) in exchange for their ‘co-operation’.”<sup>123</sup>

### **Interrogation techniques with a discriminatory resonance**

On 2 December 2002, a month after Major General Miller had begun his posting at Guantánamo Bay, Secretary Rumsfeld approved a number of interrogation techniques for use at the Naval Base, including hooding, sensory deprivation, isolation and stress positions.<sup>124</sup> Some of the techniques – such as forced shaving of facial and head hair, stripping, the use of dogs to inspire fear – although potentially humiliating, painful or frightening for anyone, can have particular resonance for Muslim detainees.<sup>125</sup>

After six weeks, Secretary Rumsfeld rescinded his authorization that such techniques could be used at the discretion of the Guantánamo authorities. In April 2003, he signed another memorandum, authorizing techniques which included isolation, environmental manipulation, and sleep adjustment. However, Secretary Rumsfeld reserved the right to authorize personally any “additional interrogation techniques”. Attached to the memorandum were guidelines formulated by the Pentagon Working Group and which included the reference, “it is important that interrogators be provided reasonable latitude to vary techniques depending on the detainee’s culture...”, a dangerous instruction if any religious intolerance, racism, or xenophobia was present within the military.

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<sup>121</sup> Brigadier General Janis Karpinski, Article 15-6 Investigation Interview with Major General Antonio Taguba, 15 February 2004, page 89, <http://www.publicintegrity.org/docs/AbuGhraid/Abu29.pdf>. The military refer to Guantánamo as GTMO or Gitmo – “to Gitmo-ize” is to make like Guantánamo.

<sup>122</sup> *On the Ropes*. BBC Radio 4, 15 June 2004.

<sup>123</sup> Report of the ICRC, February 2004, *supra*, note 77.

<sup>124</sup> <http://www.defenselink.mil/news/Jun2004/d20040622doc5.pdf>. See also, GTMO Interrogation Techniques. DOD General Counsel fax, 22 June 2004.

<sup>125</sup> Memorandum for the Commander, US Southern Command, 16 April 2003.



*Removal of religious items*

Secretary Rumsfeld approved the removal of religious items as an interrogation technique. On this question, the legal advice he received was that if these were US citizens, the removal of such materials would raise questions of constitutionality, but “such is not the case with [these] detainees”, all foreign nationals.<sup>126</sup> The USA acknowledges that the use of this interrogation technique, known as “incentive or removal”, may cause international tension because of disagreement over the USA’s labelling of detainees as “enemy combatants” unprotected by provisions of the Geneva Conventions. The military authorities note of this technique, approved again by Secretary Rumsfeld in April 2003, that: “Other nations that believe that detainees are entitled to POW protections may consider that provision and retention of religious items (e.g., the Koran) are protected under international law”.<sup>127</sup>

The US government itself criticizes such practices in other countries. For example in its human rights report on Syria in 2004, under the section on torture and other cruel, inhuman or degrading treatment, the US State Department noted: “Some former detainees reported that the Government prohibited reading materials, even the Koran, for political prisoners.”<sup>128</sup> The US Army interrogation training manual, FM 34-52, lists various examples of mental torture. It includes: “Threatening or implying that other rights guaranteed by the [Geneva Conventions] will not be provided unless cooperation is forthcoming”.

*Use of dogs*

The Fay report found that “interrogations at Abu Ghraib were also influenced by several documents that spoke of exploiting the Arab fear of dogs”.<sup>129</sup> Major General George Fay has referred to a set of photographs from the prison depicting military intelligence personnel “encouraging” military police guards to “use the dogs to soften up a particular detainee who was a high-value detainee”.<sup>130</sup>

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<sup>126</sup> Memorandum for commander, Joint Task Force 170. Subject: *Legal brief on proposed counter-resistance strategies*. Signed by Diane E. Beaver, LTC, USA. Staff Judge Advocate. 11 October 2002. <http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf>. The US has used such tactics against US citizens. Former Guantánamo Muslim Chaplain, James Yee, was arrested in September 2003, blindfolded, manacled, and on the order of Major General Miller was held in maximum security solitary confinement for 76 days in South Carolina. He was shackled and handcuffed whenever he left his cell. The guards refused to provide him with a liturgical calendar or prayer rug and refused to tell him the time of day or the direction of Mecca. Chaplain Yee was accused of espionage and was said by the military to face a possible death sentence, before all charges against him were dropped in 2004.

<sup>127</sup> Memorandum for the Commander, US Southern Command. *Counter-resistance techniques in the war on terrorism*, 16 April 2003. Article 34 of the Third Geneva Convention states: “Prisoners of war shall enjoy complete latitude in the exercise of their religious duties”. Article 93 of the Fourth Geneva Convention requires the same for civilian internees.

<sup>128</sup> Entry on Syria. *Country Reports on Human Rights Practices – 2003*. Released by the Bureau of Democracy, Human Rights, and Labor, 25 February 2004.

<sup>129</sup> Fay report, page 10, *supra*, note 15.

<sup>130</sup> Oral testimony to the Senate Armed Services Committee, 9 September 2004.

The use of dogs to “induce stress” was one of the interrogation techniques authorized by Secretary Rumsfeld in December 2002 for use in Guantánamo Bay, and their use has been alleged in Afghanistan, and later in Iraq. The Fay report found that:

*“Abusing detainees with dogs started almost immediately after the dogs arrived at Abu Ghraib on 20 November 2003. By that date, abuses of detainees was [sic] already occurring and the addition of dogs was just one more abuse device. Dog teams were brought to Abu Ghraib as a result of recommendations from MG G Miller’s assessment team from JTF-GTMO. MG G Miller recommended dogs as beneficial for detainee custody and control issues.”*

According to Colonel Thomas Pappas, who was in charge of interrogations at Abu Ghraib from 19 November 2003, Major General Miller told him that military working dogs were used at Guantánamo and that they were effective in setting the atmosphere for interrogations.<sup>131</sup> Major General Miller has denied this, claiming that he only said that dogs help to provide a controlled atmosphere in a detention facility.<sup>132</sup> What is beyond doubt is that the use of dogs “to induce stress” during interrogations in Guantánamo has been authorised by Secretary for Defence Rumsfeld. It seems that the technique may still be used if he personally authorizes it in any particular case. It is one of the techniques listed in the final report of the Pentagon Working Group, which recommended its use in “strategic interrogation facilities”, including Guantánamo (see Point 1.2).

Interviewed for the Taguba investigation, a soldier from the 229<sup>th</sup> Military Police Company deployed to Abu Ghraib prison in Iraq recalled an incident involving a military intelligence (MI) officer and a military dog (K-9) handler:

*“The MI stated to the K-9 handler to allow the dog into the cell as a method of obtaining information. The dog would go into the cell for about a minute and then MI would call them out. I saw the dog during this strike the detainee. The detainee was bound and could not move, and the K-9 handler would allow the K-9 to approach within inches his face, and one time the dog bit the detainee’s arm. When I saw the detainee later it appeared the detainee was bitten multiple times... During the time I was in the cell the detainee never resisted. The MI was calling the dog into the cell as a scare tactic to gather information.”<sup>133</sup>*

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<sup>131</sup> “[MG Miller] said that they used military working dogs [in Guantánamo], and that they were effective in setting the atmosphere for which, you know, you could get information”. Colonel Pappas, interview for Taguba investigation, 12 February 2004, page 29.

<http://www.publicintegrity.org/docs/AbuGhraib/Abu14.pdf>.

<sup>132</sup> Major General George Fay has suggested that there was “miscommunication” between the two men: “General Miller did have such a conversation with Colonel Pappas, but he was suggesting the use of dogs for security purposes, just as they used them in Guantánamo Bay. They don’t use dogs in Guantánamo Bay during the interrogation process and never did.” Testimony to Senate Armed Services Committee, 9 September 2004.

<sup>133</sup> Sworn statement of Gregory Andrew Spiker, 20 January 2004.

<http://www.publicintegrity.org/docs/AbuGhraib/Abu11.pdf>.

The Taguba report found that the “intentional abuse of detainees” in Abu Ghraib included “using military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee”. On 16 January 2004, Amin Sa’id al-Sheikh, an Abu Ghraib detainee told military investigators that sometimes guards “hang me to the door allowing the dogs to bite me”.<sup>134</sup> Another detainee, Ballendia, has said that he was taken from his cell during the night and sent into a hallway handcuffed: “They sent the dogs towards me. I was scared... The bite from the first dog caused me to have 12 stitches from the doctor of my left leg as a result I lost a lot of blood.”<sup>135</sup> Another Iraqi detainee in Abu Ghraib recalled to military investigators: “I saw also in Room #5 they brought the dogs. [Guard X] brought the dogs and they bit [the detainee] in the right and left leg. He was from Iran and they started beating him up in the main hallway of the prison”.<sup>136</sup> The Fay report found allegations of a competition between two military dog-handlers to see if they could make detainees defecate out of fear of the dogs. One of the handlers allegedly revealed that they had already made some detainees urinate, “so they appeared to be raising the competition”, according to the Fay report.

#### *Use of female interrogators*

Released Swedish detainee Mehdi Ghezali has alleged to Amnesty International that women were used to “degrade us and our faith”.<sup>137</sup> Amnesty International has received other allegations that detainees in the Naval Base have been subjected to sexual humiliation targeted at their Muslim sensitivities. For example, a non-detainee source recently told the organization that during Ramadan in 2002, female military personnel attempted to sexually arouse detainees. In one case, it is alleged, the detainee broke down in distress when he was returned to his cell and prayed for forgiveness for having had sexual feelings.<sup>138</sup> In another case, it is alleged, a Yemeni detainee was subjected to sexual insults during interrogation, including repeated and graphic questions about whether his first sexual experience had been with a male relative. According to three UK detainees released from Guantánamo:

*“We didn’t hear anybody talking about being sexually humiliated or subjected to sexual provocation before General Miller came. After that we did. Although sexual provocation, molestation did not happen to us, we are sure that it happened to others... It was clear to us that this was happening to the people who’d been brought up most strictly as Muslims. It seemed to happen most to people in Camps 2 and 3, the ‘intel’ people, i.e. the people of most interest to the interrogators”.*<sup>139</sup>

<sup>134</sup> Translated statement. <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/151362.pdf>.

<sup>135</sup> *Use of dogs to scare prisoners was authorized*. Washington Post, 11 June 2004.

<sup>136</sup> Translated statement of Mohammed Juma Juma given to military investigators on 18 January 2004. <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/152307.pdf>

<sup>137</sup> Interview with Amnesty International, Sweden, 27 July 2004.

<sup>138</sup> During Ramadan, a practising Muslim is meant to refrain from food, drinks and sexual activity from dawn to sunset.

<sup>139</sup> *Detention in Afghanistan and Guantanamo Bay*. Statement of Shafiq Rasul, Asif Iqbal and Rihel Ahmed. July 2004.

The Pentagon has acknowledged that, at least between December 2002 and January 2003, female interrogators were used in Guantánamo to “induce stress” in the male Muslim detainees.<sup>140</sup> However, according to the authorities, “the only incident of misbehaviour by an interrogator [at Guantánamo] was a female interrogator who went into the room to interrogate a detainee, took off her uniform blouse, had her T-shirt on, sat on the detainee’s lap as part of her interrogation technique, and began to run her hands through his hair... She was suspended from duties for 30 days”.<sup>141</sup>

In May 2004, in response to a question about the fact that the use of female guards can offend the religious or cultural sensitivities of male Muslim detainees, Porter Goss, then a member of the House of Representatives, reportedly responded: “My basic reaction to that was, ‘Gee, you’re breaking my heart, and maybe next time you start shooting at Americans, or blowing up Americans, you want to think about that’.” Porter Goss also reportedly claimed that there “was no calculated effort” to have female military personnel in Guantánamo, contradicting the Pentagon’s admission.<sup>142</sup> In August 2004, President Bush nominated Porter Goss to be the new Director of the CIA (following George Tenet’s resignation). The Senate confirmed the nomination, and Porter Goss was sworn in as CIA Director on 24 September 2004.

#### *Forced nudity*

Another of the interrogation techniques Secretary Rumsfeld approved in December 2002 for use in Guantánamo was “removal of clothing”. The legal advice which he received before this authorization was that stripping was permissible “so long as it is not done to punish or to cause harm, as there is a legitimate governmental objective to obtain information”.<sup>143</sup> Forced stripping for the sake of “obtaining information” clearly constitutes at least degrading treatment, which is prohibited in all circumstances under international law. The Fay report into Abu Ghraib noted that “removal of clothing for both [military intelligence] and [military police] objectives was authorized, approved, and employed in Afghanistan and GTMO.”<sup>144</sup>

While forced nudity of detainees is far from being a new technique, and can be humiliating to any detainee of any nationality or culture, it can be particularly shaming in Muslim culture. Two men who were in Bagram air base in 2002 before being transferred to Guantánamo alleged that they were forced to strip naked in the presence of female soldiers during medical examinations and showers. One of them, Parkhudin, who has alleged that his

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<sup>140</sup> *GTMO Interrogation Techniques*, dated 22 June 2004. DoD General Counsel fax.

<sup>141</sup> Department of Defense Deputy General Counsel, Press Briefing, 22 June 2004, *supra*, note 16.

<sup>142</sup> “We were very concerned that Guantanamo was being set up by the military to get the Good Housekeeping seal of approval because the International Committee of the Red Cross and the human rights people were there en masse, baying in large crowds with cameras, and making sure that these people who were trying to kill us and blow up airplanes... that these nice, friendly people would be receiving all the necessary amenities of Good Housekeeping”. *Bush’s CIA choice says interrogations are key to war on terror*. Associated Press, 2 September 2004.

<http://www.navytimes.com/story.php?f=1-292925-335277.php>

<sup>143</sup> *Legal brief on proposed counter-resistance strategies*. 11 October 2002, *supra*, note 126.

<sup>144</sup> Fay report, page 88, *supra*, note 15.

hands were chained to the ceiling for eight of the 10 days he spent in isolation in Bagram, said that the other acts of torture or ill-treatment “don’t matter, but we are very angry about this (stripping)”.<sup>145</sup> Another released prisoner said that female soldiers had watched male prisoners taking showers and undergoing intimate body searches at Bagram air base: “We don’t know if it’s medical or if they were very proud of themselves. But if it was medical, why were they taking our clothes off in front of the women? We are Afghans, not Americans.”<sup>146</sup> Another Afghan man said after his release from US custody in Afghanistan on 19 April 2004 that he was photographed nude in detention: “I’m 50 years old, and no one has ever taken my clothes. It was a very hard moment for me. It was death for me”.<sup>147</sup>

The Fay investigation found that in Abu Ghraib, “removal of clothing was employed routinely and with the belief that it was not abuse”.<sup>148</sup> It found that “male detainees were naked in the presence of female Soldiers. Many of the Soldiers who witnessed the nakedness were told that this was an accepted practice. Under the circumstances, however, the nakedness was clearly degrading and humiliating.” Military intelligence interrogators, the report said, “started directing nakedness at Abu Ghraib as early as 16 September 2003 to humiliate and break down detainees. MPs would also sometimes discipline detainees by taking away clothing and putting detainees in cells naked.”

The Taguba report notes that the abuse of prisoners was not just committed by military police guards, but also by members of military intelligence. The report referred to the specific example that “on 24 November 2003, SPC Luciana Spencer, 205<sup>th</sup> MI Brigade, sought to degrade a detainee by having him strip and returned to cell naked”. One of the women soldiers charged in the Abu Ghraib crimes has explained her role: “Because I was a female and in the Muslim culture it’s very embarrassing or humiliating to be naked in front of another female, especially if it’s an American.”<sup>149</sup> Another woman soldier has recalled that she was asked by a plainclothes US official in Abu Ghraib to be present when a male detainee was in the shower because “he’ll feel more humiliated if there’s a female present”.<sup>150</sup>

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<sup>145</sup> *Afghan deaths linked to unit at Iraq prison*. New York Times, 23 May 2004. *New charges raise questions on abuse at Afghan prisons*. New York Times, 16 September 2004.

<sup>146</sup> *Ibid.* The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment has emphasised that: “persons deprived of their liberty should only be searched by staff of the same gender and that any search which requires an inmate to undress should be conducted out of the sight of custodial staff of the opposite gender.” CPT, 10<sup>th</sup> General Report, CPT/Inf (2000).

<sup>147</sup> *Forced nudity of Iraqi prisoners is seen as a pervasive pattern, not isolated incidents*. New York Times, 8 June 2004.

<sup>148</sup> In his interview for the Taguba investigation, the warden of the military intelligence section of Abu Ghraib described his initial surprise at seeing so many detainees naked. Noting that he had “never worked in corrections before”, he said that he was told by a senior military intelligence official that nudity was “‘an interrogation method that we use’, and from that point on, I said, ‘okay’... that’s an accepted method of interrogation”. Donald Reese, 372<sup>nd</sup> Military Police Company, 10 February 2004. <http://www.publicintegrity.org/docs/AbuGhraib/Abu10.pdf>.

<sup>149</sup> Private Lynndie England. *Shamed. A Panorama Special*. BBC TV, BBC1 19 May 2004.

<sup>150</sup> *Behind the walls of Abu Ghraib*. Newsweek web exclusive, 22 May 2004.

The Fay report emphasized the link between what happened in Abu Ghraib and the operations in Afghanistan, Guantánamo and the wider “global war on terror” (GWOT):

*“The use of nudity as an interrogation technique or incentive to maintain the cooperation of detainees was not a technique developed at Abu Ghraib, but rather a technique which was imported and can be traced through Afghanistan and GTMO. As interrogation operations in Iraq began to take form, it was often the same personnel who had operated and deployed in other theaters and in support of GWOT, who were called upon to establish and conduct interrogation operations in Abu Ghraib... They simply carried forward the use of nudity into the Iraqi theater of operations. The use of clothing as an incentive (nudity) is significant in that it likely contributed to an escalating ‘de-humanization’ of the detainees and set the stage for additional and more severe abuses to occur.”<sup>151</sup>*

If the use of nudity contributed to an escalating dehumanization of detainees in Iraq, there is no reason to think that the same has not been the case elsewhere in the “war on terror”.

### **From stripping to sexual assault**

Forced nudity used to degrade and humiliate can easily be a prelude to more severe or wider torture or ill-treatment. On 17 January 2004 in Iraq, Mustafa, an Abu Ghraib detainee, told military investigators that he was stripped and kept naked for seven days, during which time the guards “were bringing a group of people to watch me naked.” He alleged that another detainee was stripped and “they put wire up his ass and they started taking pictures of him”.<sup>152</sup> On 20 January 2004, another Abu Ghraib detainee, Haidar, told investigators that he had been stripped, hooded, ordered to masturbate in front of a female US soldier, and piled up with five other naked detainees. He said that the soldiers were:

*“laughing, taking pictures, and they were stepping on our hands with their feet. And they started taking one after another and they wrote on our bodies in English. I don’t know what they wrote, but they were taking pictures after that. Then, after that they forced us to walk like dogs on our hands and knees. And we had to bark like a dog and if we didn’t do that, they start hitting us hard on our face and chest with no mercy. After that, they took us to our cells, took the mattresses out and dropped water on the floor and they made us sleep on our stomachs on the floor with the bags on our head and they took pictures of everything.”<sup>153</sup>*

Haidar was released without charge or trial in mid-April 2004. He recalled the torture and humiliation he said he had undergone. He said that when “the interpreter told us to strip. We told him: ‘You are Egyptian, and you are a Muslim. You know that as Muslims we can’t do that.’ When we refused to take off our clothes, they beat us and tore our clothes off with a blade.” The Pentagon Working Group report of April 2003 states that removal of clothing as an interrogation technique means: “Potential removal of all clothing; removal to be done by

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<sup>151</sup> Fay report, page 10, *supra*, note 15.

<sup>152</sup> Translation. <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/150542-1.pdf>

<sup>153</sup> Translated statement. <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/13077.pdf>

military police if not agreed to by the subject. Creating a feeling of helplessness and dependence".<sup>154</sup> In May 2004, Haidar said that the shame of what happened to him in custody is so deep that he felt that he could not move back to his old neighbourhood.<sup>155</sup>

The Taguba report found that the "sadistic, blatant and wanton criminal abuse" of detainees in Abu Ghraib included "forcing groups of male detainees to masturbate themselves while being photographed and videotaped; videotaping and photographing naked male and female detainees; writing 'I am a Rapist' (sic) on the leg of a detainee alleged to have forcibly raped a 15-year-old fellow detainee, and then photographing him naked; forcibly arranging detainees in various sexually explicit positions for photographing; forcing naked male detainees to wear women's underwear; a male MP guard having sex with a female detainee; and arranging naked male detainees in a pile and then jumping on them".<sup>156</sup>

The Fay report found, in Abu Ghraib, "an alleged rape committed by a US translator and observed by a female Soldier, and the alleged sexual assault of an unknown female".<sup>157</sup> An Abu Ghraib detainee has alleged that a fellow Iraqi detainee was sodomized with a phosphoric light, and that a child detainee was raped. There is reported to be a videotape, apparently made by US personnel, of Iraqi guards raping young boys.<sup>158</sup>

A male Abu Ghraib detainee made a statement on 21 January 2004 which included the following allegations:

*"And then the policeman was opening my legs, with a bag over my head, and he sat down between my legs on his knees and I was looking at him from under the bag and they wanted to do me because I saw him and he was opening his pants, so I started screaming loudly and the other police started hitting me with his feet on my neck and he put his feet on my head so I couldn't scream... And one of the police he put a part of his stick that he always carries inside my ass and I felt it going in about 2 centimetres, approximately. And I started screaming..."*<sup>159</sup>

The Schlesinger report concluded that the torture and ill-treatment depicted in the Abu Ghraib photographs were the result of "freelance activities" on the part of a few personnel on the "night shift" at the prison.<sup>160</sup> At the same time, however, both the Schlesinger Panel and the Fay investigation found more widespread abuses not caught on film, and various prisoner statements indicate that the cruelty cut across shifts. For example Abu Ghraib detainee Nori gave a sworn statement to military investigators on 17 January 2004. His (translated) allegations included the following:

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<sup>154</sup> Pentagon Working Group report, page 65, *supra*, note 56.

<sup>155</sup> *Iraqi recounts hours of abuse by US troops*. New York Times, 5 May 2004.

<sup>156</sup> Taguba report. <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html>.

<sup>157</sup> Fay report, page 70, *supra*, note 15

<sup>158</sup> *Chain of Command*. The New Yorker, 17 May 2004, quoting an NBC report.

<sup>159</sup> Translation. Name withheld. <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/10.pdf>.

<sup>160</sup> *Final Report of the Independent Panel to Review DoD Detention Operations*. August 2004; and Press conference with members of the panel, 24 August 2004.

*“And they treated us like animals, not humans. They kept doing this for a long time. No one showed us mercy. Nothing but cursing and beating. Then they started to write words on our buttocks, which we didn’t know what it means. After that they left us for the **next two days** [emphasis added] naked with no clothes, with no mattresses, as if we were dogs.”*<sup>161</sup>

Similarly, fellow detainee Thaar said that he was held in solitary confinement “for 67 days of suffering and little to eat”.<sup>162</sup> On 18 January 2004, Abu Ghraib detainee Kasim gave military investigators a statement in which he recalled that:

*“They stripped me of all my clothes, even my underwear. They gave me woman’s underwear that was rose colour with flowers in it and they put the bag over my face. One of them whispered in my ear, ‘today I am going to fuck you’, and he said this in Arabic... And they forced me to wear this underwear all the time, **for 51 days** [emphasis added]. And most of the days I was wearing nothing else.”*<sup>163</sup>

In August 2003, Secretary Rumsfeld allegedly approved the expansion of a secret operation – a “special-access program” (SAP) – originally for use against alleged *al-Qa’ida* detainees detained in the “war on terror”, to prisoners incarcerated in Iraq in the growing insurgency there. The secret tactics, it is stated, allowed for sexual humiliation and physical coercion as interrogation tactics.<sup>164</sup> The Department of Defense issued a general denial of the detailed allegations, characterizing the report in which they first appeared as “outlandish, conspiratorial, and filled with error and anonymous conjecture”.<sup>165</sup> The CIA also issued a three-sentence denial, saying that the allegations were “fundamentally wrong” and that there “was no DoD/CIA program to abuse and humiliate Iraqi prisoners”.<sup>166</sup> Seymour Hersh, who reported the allegations, is standing by them.<sup>167</sup> He has alleged that the SAP is still active.<sup>168</sup>

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<sup>161</sup> <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/7787.pdf>.

<sup>162</sup> Statement given 17 January 2004. Translation. <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/150427.pdf>.

<sup>163</sup> Translation. <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/151108.pdf>

<sup>164</sup> *The Gray Zone*, by Seymour Hersh. *The New Yorker*, 15 May 2004.

<sup>165</sup> Statement from Department of Defense spokesperson Lawrence di Rita, 15 May 2004.

<sup>166</sup> Statement by CIA spokesman Bill Harlow on *New Yorker* story. CIA press release, 18 May 2004.

<sup>167</sup> “I was initially told of the SAP’s existence by members of the intelligence community who were troubled by the program’s prima facie violation of the Geneva Conventions; their concern was that such activities, if exposed, would eviscerate the moral standing of the United States and expose American soldiers to retaliation. After my article on SAP was published, in May 2004, a ranking member of Congress confirmed its existence and further told me that President Bush had signed the mandated finding officially notifying Congress of the SAP. The legislator added that he had nonetheless been told very little about the program. Only a few members of the House and Senate leadership were authorized by statute to be informed of the program, and, even then, the legislators were provided with little more than basic budget information. It’s not clear that the Senate and House members understood that the United States was poised to enter the business of ‘disappearing’ people”. *Chain of Command: The road from 9/11 to Abu Ghraib*. Seymour M. Hersh. Allen Lane, 2004. Page 47.

<sup>168</sup> “In mid-June [2004], the former [senior intelligence] official said, the Pentagon briefly disbanded the special-access team and, in a few days, reconstituted it, with new code words and new designators.



The Fay report also concluded that “no policy, directive or doctrine directly or indirectly caused violent or sexual abuse.” However, it also found that “the existence of confusing and inconsistent interrogation technique policies”, including those for use in Afghanistan and Guantánamo, “contributed to the belief that additional interrogation techniques were condoned in order to gain intelligence”. It found that “what started as nakedness and humiliation, stress and physical training (exercise)” – stripping and stress positions, for example, were techniques approved by the administration in Afghanistan and Guantánamo – “carried over into sexual and physical assaults by a small group of morally corrupt and unsupervised Soldiers and civilians”.<sup>169</sup> Contrary to what it stated, therefore, the Fay report found at least an indirect link between policy and abuse.

Moreover, three months before Seymour Hersh’s original allegations were made, the ICRC in Iraq complained to the US authorities. According to its leaked February 2004 report:

*“In certain cases, such as in Abu Ghraib military intelligence section, methods of physical and psychological coercion used by the interrogators appeared to be part of the standard operating procedures by military personnel to obtain confessions and extract information. Several military intelligence officers confirmed to the ICRC that it was part of the military intelligence process to hold a person deprived of his liberty naked in a completely dark and empty cell for a prolonged period to use inhumane and degrading treatment, including physical and psychological coercion, against persons deprived of their liberty to secure their cooperation.”*

The ICRC wrote that detainees suspected of security offences or deemed to have an intelligence value were at “high risk of being subjected to a variety of harsh treatments ranging from insults, threats and humiliations to both physical and psychological coercion, which in some cases was tantamount to torture”. The techniques found by the ICRC included acts of physical force and sexual humiliation.<sup>170</sup> Asked whether he agreed with the ICRC’s conclusion that “coercive practices such as holding prisoners naked for extended periods of time” were used “in a systematic way as part of the military intelligence process at Abu Ghraib”, Major General Antonio Taguba replied that he did.<sup>171</sup>

In his May 2004 report, Seymour Hersh alleged that “the notion that Arabs are particularly vulnerable to sexual humiliation became a talking point among pro-war Washington conservatives in the months before the March, 2003 invasion of Iraq.”<sup>172</sup> It is

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The same rules of engagement were to be applied; suspected terrorists were fair game for the American operatives”. *Ibid.* page 65.

<sup>169</sup> Fay report, page 10, *supra* note 15.

<sup>170</sup> For example, “being paraded naked outside cells in front of other detainees, guards, sometimes hooded or with women’s underwear over the head”; “acts of humiliation such as being made to stand naked, with arms raised or with women’s underwear over the head, for prolonged periods, while being laughed at by guards, including female guards, sometimes photographed in this position”; “beatings with hard objects, slapping, punching, kicking”. ICRC February 2004 report.

<sup>171</sup> Testimony before the Senate Armed Services Committee, 11 May 2004.

<sup>172</sup> *The Gray Zone*, by Seymour Hersh. *The New Yorker*, 15 May 2004. Hersh writes: “The Patai book, an academic told me, was ‘the bible of the neocon[servative]s on Arab behaviour’.”

said that a book frequently cited in support of this notion was *The Arab Mind* by Raphael Patai, which includes a chapter on "The realm of sex".<sup>173</sup> On homosexuality in Arab culture, Patai wrote: "acceptance of the role of the passive homosexual is considered extremely degrading and shameful because it casts the man or youth into a submissive, feminine role", and on masturbation, "whoever masturbates... evinces [proves] his inability to perform the active sex act, and thus exposes himself to contempt".<sup>174</sup> A 2001 edition of the book contains a foreword by the director of Middle East Studies at the US Army John F. Kennedy Special Warfare Center and School at Fort Bragg, North Carolina, who states: "At the institution where I teach military affairs, 'The Arab Mind' forms the basis of my cultural instruction... Over the past 12 years I have also briefed hundreds of military teams being deployed to the Middle East."<sup>175</sup> The JFK Special Warfare Center is responsible for the Army's special operations training and doctrine.

### The right to be treated with humanity

Respect for human dignity and freedom from discrimination are at the heart of international human rights and humanitarian law. For example, the "fundamental guarantees" of Article 75 of Additional Protocol 1 to the Geneva Conventions, recognized by the USA as reflecting customary international law, prohibit torture, indecent assault, and humiliating or degrading treatment of any kind, discrimination of any kind, including on the basis of colour, race, nationality and religion.<sup>176</sup> Article 75 expressly applies to military or civilian agents. Article 10.1 of the International Covenant on Civil and Political Rights (ICCPR) stipulates that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". According to the Human Rights Committee, this requirement is "a fundamental and universally applicable rule" and "a norm of general international law not subject to derogation". According to the Committee:

*"Article 10, paragraph 1, imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of their liberty, and complements for them the ban on torture or cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7..., but neither may they be subjected to any hardship or*

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<sup>173</sup> *The Arab Mind*, by Raphael Patai. Charles Scribner's Sons, New York. 1973. Chapter VIII.

<sup>174</sup> *Ibid.* pages 134 and 135.

<sup>175</sup> *Misreading 'The Arab Mind'*. The Boston Globe, 30 May 2004.

<sup>176</sup> For instance, in 1977, in a report highlighting "the substantive successes of the Conference [in which Protocol I was finalised] in codifying and developing the law applicable in international armed conflict," the US delegation wrote: "We take satisfaction from the first codification of the customary rule of proportionality (Article 57), from a good definition of mercenaries which should not be open to abuse (Article 47), and from the minimum humanitarian standards (Article 75) that must be accorded to anyone not entitled to better treatment." John A. Boyd, Office of the Legal Adviser, Department of State, *Digest of United States Practice in International Law 1977* (1979), pp. 918-919. See *Restoring the rule of law: The right of Guantánamo detainees to judicial review of the lawfulness of their detention*. AI Index: AMR 51/093/2004. <http://web.amnesty.org/library/Index/ENGAMR510932004>.

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*constraint other than that resulting from the deprivation of their liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.*"<sup>177</sup>

The USA has repeatedly declared its commitment to human dignity. Indeed, the National Security Strategy mentions this phrase no less than seven times in its 31 pages, and devotes an entire chapter to promising that the USA will "stand firmly for the non-negotiable demands of human dignity". In all three of his State of the Union addresses, as well as in his inaugural speech, President Bush asserted that the USA was founded upon and is dedicated to the cause of human dignity. It was a theme of his speech to the UN General Assembly on 21 September 2004. In a statement three months earlier to mark the UN International Day in Support of Victims of Torture, the President said that the "non-negotiable demands of human dignity must be protected without reference to race, gender, creed, or nationality. Freedom from torture is an inalienable human right, and we are committed to building a world where human rights are respected and protected by the rule of law."<sup>178</sup> The USA's detention and interrogation policies in the "war on terror" have left such words ringing hollow.

### **III. Coercive interrogations and international law**

*Executive detention [may not] be justified by the naked interest in using unlawful procedures to extract information... For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.*

Four US Supreme Court Justices, 28 June 2004<sup>179</sup>

Do the interrogation techniques suggested by the administration's declassified documents, or those actually approved and practiced by the USA in Guantánamo Bay, Afghanistan, Iraq and elsewhere constitute torture or cruel, inhuman or degrading treatment (ill-treatment) under international law? In fact, it does not matter whether particular practices are described as torture on the one hand or cruel, inhuman or degrading treatment on the other. All forms of torture and ill-treatment are strictly and equally prohibited in all circumstances. For instance, the International Covenant on Civil and Political Rights (ICCPR) prohibits both torture and ill-treatment even "[i]n time of public emergency which threatens the life of the nation."<sup>180</sup>

International humanitarian law, which covers international and non-international armed conflict, similarly prohibits not only torture but also any other ill-treatment. Thus, for instance, according to the Third Geneva Convention,

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<sup>177</sup> General Comment 21, para. 3.

<sup>178</sup> President's Statement on the UN International Day in Support of Victims of Torture, *supra*, note 4.

<sup>179</sup> *Rumsfeld v. Padilla*, 28 June 2004 (Justice Stevens, dissenting, joined by Justices Souter, Ginsburg and Breyer).

<sup>180</sup> Article 4 (prohibiting derogation under any circumstances from the obligations under Article 7). Article 7 provides, *inter alia*, that "[N]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

*“[N]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”*<sup>181</sup>

The Fourth Geneva Convention, which regulates the treatment of civilians under occupation or otherwise under the power of a party to a conflict similarly provides that “No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.”<sup>182</sup>

Similarly stringent provisions apply to non-international armed conflicts. Article 3 common to all four Geneva Conventions and relating to armed conflicts not of an international character provides the following:

*“Persons taking no active part in the hostilities... shall in all circumstances be treated humanely... the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: ...Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture...Outrages upon personal dignity, in particular humiliating and degrading treatment...”*<sup>183</sup>

This prohibition exists “without distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria”. In its August 2004 report on the attacks of 11 September 2001, the bi-partisan National Commission on Terrorist Attacks Upon the United States (also known as the 9-11 Commission) recommended that:

*“The United States should engage its friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists. New principles might draw upon Article 3 of the Geneva Conventions on the law of armed conflict. That article was specifically designed for those cases in which the usual laws of war did not apply. Its minimum standards are generally accepted throughout the world as customary international law.”*<sup>184</sup>

The International Court of Justice has determined that the rules in common Article 3 “constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what

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<sup>181</sup> 1949 Geneva Convention III, Art. 17. See also 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977, Arts. 75(2)(a)(ii); 75(2)(b); 75(2)(e).

<sup>182</sup> Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (1949), Art. 31. See also Arts. 5, 27, 32, 37.

<sup>183</sup> Art. 3(1) common to all four Geneva Conventions; 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted on 8 June 1977, Arts. 4(a), 4(e), 4(h).

<sup>184</sup> 9-11 Commission report, Chapter 12, *supra*, note 18.

the Court in 1949 called 'elementary considerations of humanity'.<sup>185</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY) reiterated that determination, adding that common Article 3 is "applicable to armed conflicts *in general*" (emphasis added).<sup>186</sup>

The duty of a state – any state – regarding its treatment of detainees – any detainees – under international law may be summed up in one short sentence: "*They shall at all times be humanely treated*".<sup>187</sup> It is here that the international community has created, through treaty and custom, an obligation that states can never renounce, and a line that must never be crossed.<sup>188</sup> The ICTY has emphasized that,

*"The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is... the very raison d'être of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person."*<sup>189</sup>

Nor is "humane treatment" or its corollary, the prohibition of torture and cruel, inhuman or degrading treatment or punishment, a vague notion open to all kind of interpretations, as the US administration's legal memorandums suggest. Some elements of humane treatment are spelt out in the treaties themselves. These include conditions of detention that "shall in no case be prejudicial to their health," "minimum cubic space," proper "bedding and blankets," "conditions of food and hygiene which will be sufficient to keep them in good health," "respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs," protection "against all acts of violence or threats thereof and against insults and public curiosity", and more.

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<sup>185</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgment of 27 June 1986, ICJ Rep., para. 218. The ICJ considered that the minimum rules applicable to international and non-international conflicts were identical and that the obligation to ensure respect for them in all circumstances derived not only from the Geneva Conventions themselves, "but from the general principles of humanitarian law to which the Conventions merely give expression". *Ibid.* Para. 220.

<sup>186</sup> *Prosecutor v. Dusko Tadic*, Trial Chamber II, Opinion and Judgment of 7 May 1997, para. 559. See also paras. 607, 613-615.

<sup>187</sup> See 4<sup>th</sup> Geneva Convention, Art. 27. See similarly Art. 10(1) of the ICCPR: "All persons deprived of their liberty shall be treated with humanity."

<sup>188</sup> The Human Rights Committee has said that the prohibition on torture and cruel, inhuman or degrading treatment is a peremptory norm of international law, non-derogable and binding on all states. General Comment 29 (States of Emergency, Article 4). UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001. General Comment 20 (Article 7), 1992.

<sup>189</sup> *Prosecutor v. Furundzija*, No. IT-95-17/1-T, Judgment of 10 December 1998, para. 183.

In addition, UN bodies have adopted a series of instruments over the past half century specifying in detail the conditions under which detainees and prisoners must be held. These include the Standard Minimum Rules for the Treatment of Prisoners,<sup>190</sup> the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,<sup>191</sup> and the Basic Principles for the Treatment of Prisoners.<sup>192</sup> UN and regional human rights monitoring bodies and courts have further clarified the contents of this legal requirement.

Not a single one of these treaties, instruments, human rights monitoring bodies, regional human rights courts, commissions and other international or regional bodies has ever condoned either acts of torture or any form of cruel, inhuman or degrading treatment or punishment in any circumstances.

Some US officials may contend that some of the interrogation methods outlined in the various government memorandums, or used in practice by US agents, if applied in isolation, for a short period or in mild form, may not cause "severe pain or suffering, whether physical or mental" as provided in most international definitions of torture. However, there is no doubt that interrogation methods such as "Using detainees individual phobias (such as fear of dogs) to induce stress," "Removal of clothing" or "The use of stress positions" constitute, at the very least, cruel, inhuman or degrading treatment and violate the right to be treated with humanity and with respect for the inherent dignity of the human person. Such interrogation methods cannot in any way be construed as "humane treatment" of detainees or as the absence of "any... form of coercion" as strictly and absolutely required by international law.

Curiously, the orders by Secretary for Defense Rumsfeld approving these and similarly humiliating or painful interrogation methods (whether as a matter of policy or "only" in individual cases subject to his approval) included also the instruction to "continue the humane treatment of detainees."<sup>193</sup> This indicates that the administration's non-legal notion of "humane treatment" has little to do with the international legal requirement of humane treatment and, unlike the latter, provides little or no safeguards against physical and mental abuse of detainees. The US administration has explicitly stated that it does not consider itself bound by any international legal requirements regarding its treatment of "terrorist" suspects (see Point 5).

## **Torture and ill-treatment as international crimes**

Both torture and other forms of ill-treatment that are prohibited at all times and in all circumstances, such as "inhuman treatment" "cruel treatment" and "wilfully causing great suffering or serious injury to body or health," are "grave breaches" of the Geneva

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<sup>190</sup> Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

<sup>191</sup> Adopted by General Assembly resolution 43/173 of 9 December 1988.

<sup>192</sup> Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990.

<sup>193</sup> See, for instance, Memorandum for the Department of Defense General Counsel Ref: Detainee interrogations Dated: 15 Jan 2003; Memo for Commander, SOUTHCOM: Counter Resistance Technique in the War on Terrorism Dated: 16 Apr 2003.

Conventions, that is, universally punishable crimes.<sup>194</sup> Similarly, they have been deemed war crimes and crimes against humanity under all *ad hoc* international criminal tribunals established so far. None of these tribunals has, to date, accepted any justifications for torture or other ill-treatment in any circumstances or found that torturing or otherwise ill-treating certain persons is not a crime. Torture and other ill-treatment are also war crimes and crimes against humanity under the Rome Statute of the International Criminal Court.<sup>195</sup>

International law not only allows states to bring to justice in their own courts persons suspected of having committed international crimes such as torture and ill-treatment, but in certain, notable instances *requires* them to do so. This is true even where the suspects are neither nationals nor residents of the state concerned, and the crime did not take place in its territory. Thus each of the 192 state parties to the Geneva Conventions, including the USA, is *required* to search for persons suspected of grave breaches and do one of the following: (1) bring such persons before its own courts, (2) extradite such persons to any state party willing to do so or (3) surrender such persons to an international criminal court with jurisdiction to try persons for these crimes. A similar duty exists under the UN Convention against Torture. In addition, states may exercise this principle – universal jurisdiction – as a matter of customary international law.

International crimes apply to those physically committing them, but also to those who order that they be committed, and to the superiors – both military and civilian – of perpetrators who tolerate or fail to act reasonably to prevent or repress the criminal acts. A Trial Chamber of the ICTY held that: “[t]he criminal responsibility of commanders for the unlawful conduct of their subordinates is a very well settled norm of customary and conventional international law.”<sup>196</sup> This principle has been equally recognized in various judicial decisions since the Second World War, including cases decided by US judges, for example: in the cases of *Yamashita*,<sup>197</sup> *Von Leeb (German High Command Case)*<sup>198</sup> and *List (Hostages Case)*,<sup>199</sup> as well as by further jurisprudence of the ICTY.

Criminal liability is not limited to soldiers – any “superior” is responsible for international crimes committed during activities that were within his or her “effective responsibility and control.”<sup>200</sup> Nor does international law accept any limits as to how high the rank of civilian superiors who may be prosecuted is. The Rome Statute,

*“...shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member*

<sup>194</sup> See for instance, 3<sup>rd</sup> Geneva Convention, Art. 130, 4<sup>th</sup> Geneva Convention, Art. 147.

<sup>195</sup> Rome Statute of the International Criminal Court, adopted on 17 July 1998 (A/CONF.183/9), entered into force 1 July 2002, Arts. 7(1)(f) (torture) and 7(1)(k) (other inhumane acts – both as crimes against humanity), Art. 8(1)(ii) (“[T]orture or inhuman treatment” as war crimes).

<sup>196</sup> *Prosecutor v. Z. Delalic and others*, Case No. IT-96-21-T, Trial Chamber, Judgment of 16 November 1998, para. 734.

<sup>197</sup> *Trial of General Tomoyuki Yamashita*, 4 *Law Reports of Trial of War criminals* 35.

<sup>198</sup> *US v. von Leeb et al.* (Case 12, the High Command case), 11 *Trials of War Criminals* 462.

<sup>199</sup> *US v. Wilhelm List et al.* (Case 11, the Hostages case) *Trials of War Criminals* 1230.

<sup>200</sup> Rome Statute, Art. 28(b)(ii).

*of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.*"<sup>201</sup>

While the USA has rejected the ICC Statute (see Point 11.6), the statutes of both the ICTY and the International Criminal Tribunal for Rwanda, which the USA strongly supported, contain provisions with exactly the same effect.<sup>202</sup>

In the context of the USA's use of civilian interrogators, it is also important to note that international law provides that, in certain circumstances, even a crime committed by a single private individual – when he or she has acted as a *de facto* organ of the state – may generate individual criminal responsibility for the military commanders and those who effectively act as military commanders. The Appeals Chamber of the ICTY stated:

*"Other cases also prove that private individuals acting within the framework of, or in connection with, armed forces, or in collusion with State authorities may be regarded as de facto State organs. In these cases, it follows that the acts of such individuals are attributed to the State, as far as State responsibility is concerned, and may also generate individual criminal responsibility."*<sup>203</sup>

#### **IV. Human rights: the route to security, not the obstacle to it**

*Allegations that the United States abused prisoners in its custody make it harder to build the diplomatic, political, and military alliances the government will need.*  
9/11 Commission report, August 2004<sup>204</sup>

The USA and other countries face serious security threats, including those posed by groups determined to pursue their fight by abusing fundamental human rights without restraint. Governments have a duty to protect people's rights from such threats. In so doing, however, governments must not lose sight of other human rights and of their obligation to respect them. The UN High Commissioner for Human Rights has said:

*"Let us be clear: there is no doubt that States are obliged to protect their citizens from terrorist attacks. The most important human right is the right to life. States not only have the right, but also the duty to secure this right by putting in place effective measures to prevent and deter the commission of acts of terrorism...But counter-terrorism cannot be taken at any cost... Insisting on a human rights-based approach and a rule of law approach to countering terrorism is imperative... For even though it may be painted as an obstacle to efficient law enforcement, support for human rights and the rule of law actually works to improve human security...Ultimately, respect*

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<sup>201</sup> Rome Statute, Art. 27(1).

<sup>202</sup> Art. 27(2) of the ICTY Statute; Art. 6(2) of the ICTR Statute.

<sup>203</sup> *Prosecutor v. Dusko Tadic*, Appeals Chamber, 15 July 1999, para. 144.

<sup>204</sup> National Commission on Terrorist Attacks Upon the United States. August 2004, *supra*, note 18.



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*for the rule of law lessens the likelihood of social upheaval, creating greater stability both for a given society and its neighbours.”<sup>205</sup>*

To flout the rule of law, to torture, to humiliate, is to undermine long-term security, even if there are perceived gains along the way. The brother of then Guantánamo detainee Wazir Mohammed told Amnesty International in Kabul in July 2003 that the USA's treatment of the prisoners “makes the reputation of the US bad amongst the people of Afghanistan”. One of the alleged victims of the Abu Ghraib torture, asked after his release about the effect of his experience on his view of the occupation of Iraq, responded: “What would you do if I occupied your country, tortured people and violated all the laws of your country? Would you resist?”<sup>206</sup> In similar vein, a woman allegedly subjected to torture and cruel, inhuman and degrading treatment in US custody in Iraq has said that her ordeal has made her “hate [the Americans]”.<sup>207</sup> The USA's tactics against the insurgency in Iraq drew the following response from a young Iraqi man in Fallujah: “For Fallujans it is a *shame* to have foreigners break down their doors. It is a *shame* for them to have foreigners stop and search their women. It is a *shame* for the foreigners to put a bag over their heads, to make a man lie on the ground with your shoe on his neck. This is a great *shame*, you understand? ... The Americans provoke the people. They don't respect the people.”<sup>208</sup>

The US government itself has said that “states which demonstrate a high degree of respect for human rights are likeliest to contribute to international security and well-being”.<sup>209</sup> In his address to the UN General Assembly on 21 September 2004, President Bush said that “the security of our world is found in the advancing rights of mankind”.<sup>210</sup> The USA's National Strategy for Combating Terrorism stresses that creating a world in which principles based on human dignity, including the rule of law, “are embraced as standards, not exceptions, will be the best antidote to the spread of terrorism”.<sup>211</sup>

The USA was one of the prime movers behind the adoption in 1948 of the Universal Declaration of Human Rights (UDHR). This visionary document, from which today's body of international human rights law and standards has developed, emerged in response to a time in which “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind”. It recognizes that respect for “the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” The USA claims to remain committed to the principles of the Universal Declaration:

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<sup>205</sup> *Security under the rule of law*. Address of Louise Arbour, UN High Commissioner for Human Rights to the Biennial Conference of the International Commission of Jurists (Berlin). 27 August 2004.

<sup>206</sup> *Iraqi tells of US abuse, from ridicule to rape threat*. New York Times, 14 May 2004.

<sup>207</sup> *After Abu Ghraib*. The Guardian, 20 September 2004.

<sup>208</sup> *Torture and truth*. By Mark Danner. New York Review of Books, Vol. 51, No. 10, 10 June 2004.

<sup>209</sup> Secretary of State Colin Powell. Remarks at briefing on the State Department's 2002 Country Reports on Human Rights Practices. Washington, DC, 31 March 2003.

<sup>210</sup> *President speaks to the United Nations General Assembly*. New York. 21 September 2004.

<sup>211</sup> Page 30, National Strategy for Combating Terrorism, February 2003.

[http://www.whitehouse.gov/news/releases/2003/02/counter\\_terrorism/counter\\_terrorism\\_strategy.pdf](http://www.whitehouse.gov/news/releases/2003/02/counter_terrorism/counter_terrorism_strategy.pdf)

*“The protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years ago. Since then, a central goal of US foreign policy has been the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights. The United States understands that the existence of human rights helps secure the peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and prevent humanitarian crises.”*<sup>212</sup>

Article 5 of the UDHR states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Fifty-four years after that unequivocal statement was adopted by the international community, a memorandum was written in the US Justice Department advising on ways precisely to undermine this prohibition. The April 2003 report of the Pentagon Working Group noted that the UDHR “is not itself binding or enforceable against the United States”. A legal memorandum recommending approval of interrogation techniques that the UN Committee against Torture has said violate the prohibition on torture or cruel, inhuman or degrading treatment, noted that this prohibition is contained in the Universal Declaration but added that “although international declarations may provide evidence of customary international law (which is considered binding on all nations even without a treaty), they are not enforceable by themselves”.<sup>213</sup>

Yet, in his address to the UN General Assembly on 21 September 2004, President Bush proclaimed his country’s commitment to the UDHR, adding that the rights enshrined in it “are advancing across the world” despite the belief of “the enemies of human rights” that the Universal Declaration and “every charter of liberty ever written are lies to be burned and destroyed and forgotten”. In the past three years the US administration has itself discarded or eroded central tenets of the Universal Declaration and other international instruments.

For his own address to the UN General Assembly on 21 September 2004, the UN Secretary General chose the rule of law for his subject. Citing examples of gross human rights abuses by state and non-state actors from Uganda to Russia, from Israel to Palestine, and from Sudan to Iraq – including the torture of Iraqi prisoners by US forces – Kofi Annan said:

*“No cause, no grievance, however legitimate in itself, can begin to justify such acts. They put all of us to shame. Their prevalence reflects our collective failure to uphold the rule of law, and instil respect for it in our fellow men and women. We all have a duty to do whatever we can to restore that respect. To do so, we must start from the principle that no one is above the law, and no one should be denied its protection. Every nation that proclaims the rule of law at home must respect it abroad; and every nation that insists on it abroad must enforce it at home.”*

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<sup>212</sup> United States Department of State, <http://www.state.gov/g/drl/hr/>

<sup>213</sup> Memorandum for commander, Joint Task Force 170, 11 October 2002, *supra*, note 126.

## **Part Two: Agenda for action – Commission of inquiry and 12-Point Program**

### **An independent commission of inquiry is called for**

*I really doubt whether the Defense Department can investigate itself, because there's a possibility the Secretary himself authorized certain actions. This cries out for an outside commission to investigate.*

Retired US Army General, May 2004<sup>214</sup>

Amnesty International welcomes the official investigations and reviews that the US authorities have initiated and conducted – indeed the findings of such investigations are cited throughout this report. The information that has been made public has provided a wealth of information, insight and analysis.

Nevertheless, the organization believes that more is needed if full accountability is to be achieved and seen to be achieved – not least because none of the investigations has been comprehensive in scope and all have ultimately lacked genuine independence, most consisting of the military reviewing itself. It is clear that none has had the independence or reach necessary to adequately investigate the role of the Secretary of Defense or agencies, departments or individual office-holders outside the Pentagon, for example the Justice Department or the White House. The activities of the CIA and “other government agencies” in the “war on terror” remain shrouded in secrecy, and require a light to be shone on them by an independent inquiry.

In spite of the official reviews that have been initiated, there remain many unanswered questions about policies and practices still in operation. An investigation entirely independent of government, and with a willingness to take full cognizance of international law and standards, is needed. It must have the power to investigate the highest echelons of government. It must adopt more than just a “lessons-learned” approach, namely one that fully rejects impunity and facilitates full accountability.

The UN Special Rapporteur on torture has stated: “Independent entities are essential for investigating and prosecuting crimes committed by those responsible for law enforcement”.<sup>215</sup> The Human Rights Committee has regularly criticized states parties to the International Covenant on Civil and Political Rights for inadequate investigations and called on them to set up independent bodies to investigate complaints of torture, ill-treatment and

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<sup>214</sup> Wayne A. Dowling, quoted in: *Some seek broad, external inquiry on prisoner abuse*. Washington Post, 27 May 2004. Former Army General Dowling headed a Pentagon task force which investigated the 1996 bombing in Saudi Arabia of a US Air Force barracks.

<sup>215</sup> UN Doc. E/CN.4/2001/66, 25 January 2001, para. 1310.

other abuses committed by agents of the state.<sup>216</sup> The same is true of the Committee against Torture.<sup>217</sup>

The “review” that has particularly been promoted as “independent” by the administration was conducted by the panel of four members appointed on 7 May 2004 by Secretary of Defense Rumsfeld to provide him with advice on the Department’s detainee operations.<sup>218</sup> The Schlesinger Panel issued their report on 24 August 2004. The panel said that it had reviewed the following “completed investigations”:

- *Joint Staff External Review of Intelligence Operations at Guantanamo Bay, Cuba*. 28 September 2002. This was a report by Brigadier General John Custer, acting commander of the US Army Intelligence Center at Fort Huachuca, following a visit to Guantánamo. One outcome of his visit was a new course at Fort Huachuca to train officers assigned to Guantánamo “on how to extract intelligence from Al Qaeda detainees”.<sup>219</sup> The course began in late January 2003, more than a year after the first detainees arrived at Guantánamo. The Custer report was not made public.
- *Army Provost Marshal General assessment of detention and correction operations in Iraq* (Ryder report). This was a report, dated 5 November 2003, conducted by Major General Donald J. Ryder. Not made public, but leaked.
- *Joint Task Force Guantánamo assistance visit to Iraq to assess intelligence operations*. This was the report, dated 5 September 2003, produced by the then commander of Guantánamo Bay detentions, Major General Geoffrey Miller following his visit to Iraq in August and September 2003. Not made public, recently leaked.
- *Administrative Investigation under Army Regulation 15-6 (AR 15-6) regarding Abu Ghraib*. This is the administrative investigation of the 800<sup>th</sup> Military Police Brigade conducted by Major General Antonio Taguba, completed in late February 2004. This report was not intended for public release, but part of it was leaked to the media. The Taguba investigation did not interview any military personnel above the rank of brigade commander.
- *Army Inspector General assessment of doctrine and training for detention operations*. An “inspection” of US detainee operations in Afghanistan and Iraq, ordered on 10 February 2004, and conducted by Lieutenant General Paul Mikolashek. His report,

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<sup>216</sup> See for instance the Human Rights Committee’s concluding observations on France, UN Doc. A/52/40 vol. I (1997), para. 403; Armenia, UN Doc. A/54/40 vol. I (1999), para. 108; Kyrgyzstan, UN Doc. A/55/40 vol. I (2000), para. 390; Venezuela, UN Doc. A/56/40 vol. I (2001), para. 77(8).

<sup>217</sup> See for instance the Committee Against Torture’s conclusions and recommendations regarding Ecuador, UN Doc. A/49/44 (1994), para. 105; Switzerland, UN Doc. A/53/44 (1998), para. 90; Belarus, UN Doc. A/56/44 (2001), para. 46; Australia, UN Doc. A/56/44 (2001), para. 53.

<sup>218</sup> The four are: former Defense Secretaries James Schlesinger and Harold Brown; retired Air Force General Charles Horner; and former Republican member of US Congress, Tillie Fowler.

<sup>219</sup> *New intel course trains Al Qaeda interrogation*. Army News Service, 24 February 2003.

dated 21 July 2004, described the abuses as “aberrations” committed by “a few individuals”. Partially made public.

- *The Fay investigation of activities of military personnel at Abu Ghraib and related LTG Jones investigation under the direction of General Kern.* This review was initiated in April 2004 with Major General George Fay, deputy to the head of military intelligence, as the investigating officer. On 16 June 2004, General Paul Kern, Commanding General, US Army Materiel Command, was named as the “appointing authority” for the review, because Lieutenant General Ricardo Sanchez, head of US forces in Iraq, had excluded himself.<sup>220</sup> At General Kern’s request, Lieutenant General Anthony Jones, Deputy Commanding General, US Army Training and Doctrine Command, was assigned responsibility for completing the review, with General Fay remaining on the review team.<sup>221</sup> The Fay report was issued on 25 August 2004. Parts remain classified. It found that abuses went beyond “the few”, and implicated intelligence officials. It stressed that the “primary causes” of the “abuse” at Abu Ghraib was “misconduct (ranging from inhumane to sadistic) by a small group of morally corrupt soldiers and civilians, a lack of discipline on the part of the leaders and Soldiers of the 205<sup>th</sup> Military Intelligence Brigade, and a failure or lack of leadership by multiple echelons within CJTF-7”.
- *Naval Inspector General’s review of detention procedures at Guantanamo Bay, Cuba, and the Naval Consolidated Brig, Charleston, South Carolina.* Vice Admiral Albert Church was directed in early May 2004 by Secretary Rumsfeld to conduct this review. On 12 May, Vice Admiral Church emphasized that this was a short review and neither an inspection nor an investigation. He described the review as a “snapshot of current existing conditions” which had found “no evidence of current abuse”.<sup>222</sup> Not made public.
- *Naval Inspector General’s review of Department of Defense worldwide interrogation operations.* Again, conducted by Vice Admiral Albert Church. Not completed by 19 October 2004.
- *Special inspection of detainee operations and facilities in the Combined Forces Command-Afghanistan.* 26 June 2004. Led by Brigadier General Chuck Jacoby, described as “a top-to-bottom review of all of our detention facilities” in Afghanistan “to make sure we’re in complete compliance with our own standards”.<sup>223</sup> The Schlesinger Panel reported that the Jacoby review of Special Operations Forces detention operations “found a range of abuses and causes similar in scope and

<sup>220</sup> Army announces appointing authority for intelligence investigation. US Army News Release, 16 June 2004.

<sup>221</sup> Army announces an additional Procedure 15 investigating officer. US Army News Release, 25 June 2004.

<sup>222</sup> Media Availability with Vice Admiral Church. Department of Defense Transcript, 12 May 2004.

<sup>223</sup> Lieutenant General David Barno, Commander, Combined Forces Command, Afghanistan. Central Command briefing, 17 June 2004.

magnitude to those found among conventional forces". It has not yet been made public. On 19 October 2004, the Commander of US forces in Afghanistan said that the report was "in a review process" in Washington, DC, and that when it was released, he would provide a media briefing on "the unclassified aspects of it".<sup>224</sup>

- *Administrative investigation of alleged detainee abuse by the Combined Joint Special Operations Task Force – Arabian Peninsula.* Conducted by Brigadier General Richard Formica into allegations of detainee abuse by Special Operations Forces in Iraq. However, the Schlesinger Panel said that it had not reviewed this "assessment". By 13 October 2004, the report had not been made public, and US Central Command was unable to provide Amnesty International with a date when it would be released.
- *Army Reserve Command Inspector General assessment of training and Reserve units regarding military intelligence and military police.* Beginning in March 2004, conducted by Colonel Beverly Ertman. Due for release in December 2004.

Notably, the CIA is absent from this list. The CIA did not cooperate with either the Schlesinger or Fay investigators, stating that it was carrying out its own investigation of the agency (see Point 3.2).

Some of the Schlesinger Panel's findings have been noted in the first part of this report. However, one of the Schlesinger report's core conclusions was that:

*"the vast majority of detainees in Guantanamo, Afghanistan and Iraq were treated appropriately, and the great bulk of detention operations were conducted in compliance with US policy and directives... While any abuse is too much, we see signs that the Department of Defense is now on the path to dealing with the personal and professional failures and remedying the underlying causes of these abuses. We expect any potential future incidents of abuse will similarly be discovered and reported out of the same sense of honor and duty that characterized many of those who went out of their way to do so in most of these cases. The damage these incidents have done to US policy, to the image of the US among populations whose support we need in the Global War on Terror and to the morale of our armed forces, must not be repeated."*

The report did not refer to the suffering of the detainees who were subjected to torture or other cruel, inhuman or degrading treatment, or to the distress of their families.

The UN Principles for the investigation of torture and other cruel, inhuman or degrading treatment, adopted by the General Assembly in 2000, state that where the "established investigative procedures are inadequate because of insufficient expertise or suspected bias, or because of the apparent existence of a pattern of abuse or for other substantial reasons, States shall ensure that investigations are undertaken through an independent commission of inquiry or similar procedure. Members of such a commission

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<sup>224</sup> Lt. Gen. David Barno, Special DoD News Briefing on Operations and Mission in Afghanistan, 19 October 2004.

shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any suspected perpetrators and the institutions or agencies they may serve. The commission shall have the authority to obtain all information necessary to the inquiry...".<sup>225</sup> The UN principles covering the investigation of deaths in custody state the same thing.<sup>226</sup>

Since 19 May 2004, Amnesty International has been calling for an impartial and independent commission of inquiry to be set up by the US Congress to conduct a thorough investigation into the USA's "war on terror" detention policies and practices worldwide.<sup>227</sup> Such a commission, composed of credible experts, could be appointed by Congress, but must be independent of government. It should have the necessary powers to be able to fully investigate all US "war on terror" detention policies, practices and facilities around the world, including in relation to the CIA and other agencies, and including in relation to all secret transfers ("renditions") of detainees between countries in which the USA has been involved (see Point 12). The commission should have subpoena powers, and unrestricted access to all classified information and to all agencies and levels of government. To ensure its effectiveness and the appearance of impartiality in the eyes of the world, the inquiry should seek the advice of international experts such as the UN Special Rapporteur on torture. Its findings should be made public.

As the UN Principles require, there are numerous reasons that call for such an approach. They include:

- A perceived or actual failure of previous investigations (see Point 6);
- Allegations suggesting a pattern of torture or cruel, inhuman or degrading treatment;
- Previously secret documents suggesting that at the highest levels of government there has been an official willingness to countenance torture if "military necessity" required it, as well as to authorize interrogation techniques that violate the prohibition on torture and other cruel, inhuman or degrading treatment. The resistance of the administration to releasing all such documents;
- The highest office-holder in government is also Commander-in-Chief of the Armed Forces, a power which has been used to justify the government's detention policies, the response to the crimes of 11 September 2001 having been framed in terms of "war". A Supreme Court Justice has seen fit to offer a reminder, in the face of the executive's detention policies, that "the President is not Commander-in-Chief of the

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<sup>225</sup> UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted by General Assembly resolution 55/89 Annex, 4 December 2000, Principle 5(a).

<sup>226</sup> UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, Principle 11.

<sup>227</sup> USA: Amnesty International calls for a commission of inquiry into 'war on terror' detentions, AI Index: AMR 51/087/2004, <http://web.amnesty.org/library/Index/ENGAMR510872004>

country, only of the military".<sup>228</sup> In this context, the commission of inquiry must be independent of the Pentagon and the rest of the "war" administration;

- Government officials, including the President and Secretary of Defense, have been perceived to prejudge the outcome of military investigations already initiated. The same office-holders throughout the "war on terror" have shown a disregard for the rights of detainees, including the presumption of innocence. There is enough reason to believe that they would disregard the right of detainees to have allegations of torture or ill-treatment properly investigated and those responsible brought to justice;
- The investigation must be entirely free from the influence of party politics;<sup>229</sup>
- The military authorities have stated that "there is no agreed-upon definition of abuse among all legal, investigating and oversight agencies" in the USA;<sup>230</sup>
- Any investigation must respect and comply with international standards. As a state party to the UN Convention against Torture the US is *obliged* to conduct "prompt and *impartial* investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction" (Article 12, emphasis added). The US government in general has shown itself to be reluctant to apply international human rights law and standards to its own conduct, and remains ideologically opposed to the International Criminal Court. The members of any commission of inquiry should be prepared to apply the UN principles for the investigation of torture, and other international standards.

When the commission of inquiry concludes that conduct may have amounted to crimes under national or international law, the information gathered should be referred to the appropriate national authorities with a view to possible prosecution.

Any official who ordered, authorized, condoned or committed torture or cruel, inhuman or degrading treatment should be brought to justice as required by international law. As a matter of principle, across all countries, Amnesty International takes the position that justice is best served by prosecuting war crimes, crimes against humanity, and other grave violations of international law, such as torture, in independent and impartial civilian courts. There is a growing international consensus on this view (see Point 7).

Full accountability, covering the whole "war on terror", of persons at all levels of the chain of command, including officials in the administration, officers in the armed forces, CIA personnel and private contractors, with no hint of scapegoating of low-level soldiers and reservist officers, is crucial.

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<sup>228</sup> Justice Souter in *Hamdi v. Rumsfeld*, No. 03-6696, decision of 28 June 2004.

<sup>229</sup> In September 2004, there was an attempt in the House Judiciary Committee to kill off the provision in a bill (H.R.10) that would allow US authorities to deport certain foreign nationals even if they would face torture or other human rights violations. At that time, the provision survived with voting split along party lines. *Plan would let US deport suspects to nations that might torture them*. Washington Post, 30 September 2004. For information on H.R.10, see [www.amnesty-usa.org](http://www.amnesty-usa.org).

<sup>230</sup> Fay report (Jones, page 14), *supra*, note 15.



## Point 1 – Condemn torture

*The highest authorities of every country should demonstrate their total opposition to torture. They should condemn torture unreservedly whenever it occurs. They should make clear to all members of the police, military and other security forces that torture will never be tolerated.*

### 1.1 Words undone by deeds

*The United States is committed to the worldwide elimination of torture and we are leading this fight by example.*  
President George W. Bush, 26 June 2003<sup>231</sup>

The USA ratified the UN Convention against Torture in October 1994. Five years later, in its initial report to the Committee against Torture, the US Government stressed that:

*“Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. Every act constituting torture under the Convention constitutes a criminal offense under the law of the United States. No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture. US law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a “state of public emergency”) or on orders from a superior officer or public authority, and the protective mechanisms of an independent judiciary are not subject to suspension.”<sup>232</sup>*

In November 2001, Amnesty International reminded the US Government of this statement and warned that “any withdrawal from such a clear affirmation of US policy in this area would send a grave signal to the international community about the USA’s commitment to the respect and promotion of human rights. Any acceptance of torture in the United States risks eroding respect for the rule of law elsewhere. Furthermore, were the US Government to sanction even ‘moderate physical pressure’ on even a few detainees, it would almost inevitably lead to an expanded use, as Amnesty International has found in more than 40 years of documenting the use of torture.”<sup>233</sup>

The USA’s stated opposition to torture and ill-treatment has continued in public. On 26 June 2003, President Bush called on “all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all acts of

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<sup>231</sup> *Statement by the President. United Nations International Day in Support of Victims of Torture.*

<sup>232</sup> Committee against Torture, Initial Report of the United States of America [15 October 1999], UN Doc. CAT/C/28/Add.5, 9 February 2000, para. 6.

<sup>233</sup> USA: Memorandum to the US Attorney General, *supra*, note 79.

torture and in undertaking to prevent other cruel and unusual punishment.”<sup>234</sup> On the eve of President Bush’s proclamation against torture, the General Counsel of the Department of Defense wrote to a US Senator concerned about allegations of torture and cruel, inhuman or degrading treatment against “war on terror” detainees. The Pentagon letter said that “we can assure you that it is the policy of the United States to comply with all of its legal obligations in its treatment of detainees, and in particular with legal obligations prohibiting torture. Its obligations include conducting interrogations in a manner that is consistent with the Convention against Torture”.<sup>235</sup>

Taken at face value, these assurances might appear to meet the first point of Amnesty International’s 12-Point program – that the highest officials of a country should make clear their opposition to torture and other cruel, inhuman or degrading treatment. Words alone can never be enough, however. Officials at all levels of government must *demonstrate* their total opposition to torture by what they do as well as what they say. The struggle against torture and ill-treatment by agents of the state requires absolute commitment and constant vigilance. It requires stringent adherence to safeguards. It demands a policy of zero tolerance.

This US administration has manifestly failed in this regard. Indeed the Pentagon’s General Counsel gave his assurances just six months after Secretary of Defense Rumsfeld approved, for use at Guantánamo, a number of interrogation techniques which violated the USA’s obligations under the UN Convention against Torture, and variations of which emerged not long afterwards in Abu Ghraib prison in occupied Iraq. The techniques included stress positions, sensory deprivation, isolation, hooding, stripping and the use of dogs to inspire fear. Similarly, President Bush’s June 2003 proclamation of the USA’s commitment to the eradication of torture came a matter of weeks after a Pentagon Working Group had produced a report, classified “secret” by the Secretary Rumsfeld until 2013, contending that as Commander-in-Chief of the armed forces the President was not bound by US and international law prohibiting torture and suggesting legal defences against criminal liability for any officials accused of torture.<sup>236</sup>

In July 2004, Guantánamo detainee Moazzam Begg wrote that he had been held in solitary confinement since 8 February 2003 – by October 2004 he had been in isolation for approximately 600 days.<sup>237</sup> He has been held in a reportedly windowless cell under 24-hour video surveillance. His isolation began almost a year to the day after the White House gave assurances that, despite President Bush’s decision not to apply the Geneva Conventions to the Guantánamo detainees, they would “not be subjected to physical or mental abuse or cruel treatment”.<sup>238</sup> The US administration’s assurances must be treated with some scepticism.

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<sup>234</sup> Statement by the President. 26 June 2003, *supra*, note 231.

<sup>235</sup> Letter to Senator Patrick J. Leahy from William J. Haynes, General Counsel of the Department of Defense, 25 June 2003.

<sup>236</sup> Pentagon Working Group report, 4 April 2003, *supra*, note 56.

<sup>237</sup> Letter from Moazzam Begg, *supra*, note 74.

<sup>238</sup> *Fact Sheet. Status of detainees at Guantanamo*. The White House, 7 February 2002. <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>.

## 1.2 The condemnation is paper thin – The 'torture memos'

*There can be no doubt that the prohibition against torture and cruel, inhuman or degrading treatment or punishment is non-derogable under international law... Yet we find, remarkably, that questions continue to be raised about this clear dictate of international law, including at high levels of government.*

UN High Commissioner for Human Rights, August 2004.<sup>239</sup>

It now seems that the US administration rejected provisions of the Geneva Conventions because it believed that the USA's treaty obligations might tie the hands of its interrogators. As the Geneva Conventions do not prohibit the interrogation of detainees, it would appear that the administration envisaged treatment that would potentially violate the prohibition on torture and ill-treatment. The ICRC itself has taken issue with the Schlesinger Panel's recent assertion that "If we were to follow the ICRC's interpretations, interrogation operations would not be allowed".<sup>240</sup> The organization responded:

*"The ICRC has never stated, suggested or intimated that interrogation of any detainee is prohibited, regardless of the detainee's status or lack of status under the Geneva Conventions. The ICRC has always recognized the right of States to take measures to address their security concerns. It has never called into question the right of the US to gather intelligence and conduct interrogations in furtherance of its security interests. Neither the Geneva Conventions, nor customary humanitarian law, prohibit intelligence gathering or interrogation. They do, however, require that detainees be treated humanely and their dignity as human beings protected. More specifically, the Geneva Conventions, customary humanitarian law and the Convention against Torture prohibit the use of torture and other forms of cruel, inhuman or degrading treatment. This absolute prohibition is also reflected in other international legal instruments and in most national laws."*<sup>241</sup>

Nevertheless, two and a half years earlier, in a memorandum to President Bush, the White House Counsel advised that adherence to the Geneva Conventions would restrict the interrogation methods used by the USA in this "new kind of war" which "renders obsolete Geneva's strict limitations on questioning of enemy prisoners". The memorandum counselled that this "new type of warfare... requires a new approach to our actions towards captured terrorists".<sup>242</sup> Not applying the Geneva Conventions to certain prisoners, the memorandum said, "substantially reduces the threat of domestic criminal prosecution [of US agents] under the War Crimes Act".<sup>243</sup> He suggested that some of the language of the Geneva Conventions

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<sup>239</sup> *Security under the rule of law*. Address of Louise Arbour, UN High Commissioner for Human Rights to the Biennial Conference of the International Commission of Jurists (Berlin), 27 August 2004.

<sup>240</sup> Schlesinger report, August 2004, page 85, *supra*, note 30.

<sup>241</sup> ICRC reactions to the Schlesinger Panel Report, 8 September 2004.

<http://www.icrc.org/Web/Eng/siteeng0.nsf/html/64MHS7>

<sup>242</sup> Memorandum for the President from Alberto R. Gonzales, 25 January 2002, *supra*, note 33.

<sup>243</sup> [The War Crimes Act of 1996](#) (18 U.S.C. § 2441) makes it a criminal offence for US military personnel and US nationals to commit war crimes as specified in the 1949 Geneva Conventions.

is “undefined”, giving the example of the prohibition on “outrages upon personal dignity” and “inhuman treatment”.<sup>244</sup> Given this, the memorandum continued, “it is difficult to predict with confidence what actions might be deemed to constitute violations”.<sup>245</sup>

Although the memorandum stated that the USA would continue to treat detainees in accordance with international standards, it clearly anticipated that harsher treatment would occur. Subsequent official comments support this view. A Pentagon official tellingly said in May 2004, for example, that “it’s very different” treating detainees who are not subject to the Geneva Conventions to those who are.<sup>246</sup> Equally telling was Secretary Rumsfeld’s (incorrect), assertion that official investigations into Abu Ghraib had not found “any abuse that was related to interrogations”. He added that “The Iraq situation was always subject to the Geneva Convention. The President announced that, I announced it... Any abuse that took place was inconsistent with that.”<sup>247</sup> His comment would appear to betray a view that interrogations of prisoners not protected by the Geneva Conventions can be abusive. This is somewhat reminiscent of President Bush’s position, stated in his previously secret memorandum of 7 February 2002, suggesting that there can be detainees “who are not legally entitled to [humane] treatment”.<sup>248</sup>

The White House Counsel’s advice to President Bush was echoed by the US Attorney General, John Ashcroft. In a letter to the President, dated 1 February 2002, he wrote: “[A] Presidential determination against treaty applicability would provide the highest assurance that no court could subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees. The War Crimes Act of 1996 makes violation of parts of the Geneva Convention a crime in the United States”.<sup>249</sup>

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<sup>244</sup> The USA has given a similar reason for only agreeing to be bound by Article 16 of the Convention against Torture to the extent that its prohibition on cruel, inhuman or degrading treatment matched the USA’s constitutional ban on cruel and unusual punishments. The USA said that “it was necessary to limit United States’ undertakings under this article primarily because the term ‘degrading treatment’ is at best vague and ambiguous”. CAT/C/28/Add. 5, para. 303. In 2000, the Committee against Torture said that the USA’s “reservation lodged to article 16 in violation of the Convention, the effect of which is to limit the application of the Convention”, should be withdrawn. A/55/44, paras 175-180.

<sup>245</sup> The White House Counsel should have realised that international law is not as vague as he portrays it. For instance, in the *Akayesu* case before the International Criminal Tribunal for Rwanda, the accused was convicted, among other things, of “inhumane acts,” “outrages upon personal dignity” and “serious bodily or mental harm” – crimes originally prohibited in Article 3 common to the Geneva Conventions and Additional Protocol II – for ordering the local militia “to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd.” These acts are quite similar to those committed by US military personnel in Abu Ghraib. See *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment of 2 September 1998, paras. 688, 692-7.

<sup>246</sup> Senior Defense Official. Defense Department background briefing, 20 May 2004.

<sup>247</sup> Secretary Rumsfeld press conference in Phoenix, Arizona. Department of Defense News Transcript, 26 August 2004.

<sup>248</sup> Presidential memorandum, 7 February 2002, *supra*, note 11.

<sup>249</sup> <http://news.findlaw.com/wp/docs/torture/jash20102ltr.html>.

The theory that presidential power can be used to override treaty and national laws is a theme that runs through government communications following the attacks of 11 September 2001. A Justice Department memorandum, dated 22 January 2002 and made public by the government on 22 June 2004, concluded that “customary international law does not bind the President or the US Armed Forces in their decisions concerning the detention conditions of al Qaeda and Taliban prisoners”.<sup>250</sup> The memorandum proposed “justified deviations from the Geneva Convention requirements”. It pointed out that “some very well may argue that detention conditions [at Guantánamo] currently depart from Geneva III requirements”. However, it suggested that “some deviations would not amount to a treaty violation” because, *inter alia*, they could be justified under the self-defence argument and “no treaty can override a nation’s inherent right to self-defense”.

In fact, international humanitarian law applies exactly when “nations” are exercising their right to self-defence. Its essence is encapsulated in a provision of a 1907 treaty which now reflects customary international law: “The right of belligerents to adopt means of injuring the enemy is not unlimited.”<sup>251</sup>

Any rejection of this principle is an invitation to lawless wars. At the very least, Guantánamo detainees have been subjected to violations of their right to be treated with respect for their human dignity – transferred from Afghanistan and elsewhere in conditions of sensory deprivation and excessive restraint and held in some cases in small cells for more than two years without any legal process.

### **An influential memorandum disowned today**

Another memorandum to the White House, dated 1 August 2002, also deserves scrutiny.<sup>252</sup> Written at the Justice Department reportedly in response to a CIA request for legal protections for its agents (see Point 3), the memorandum drew, *inter alia*, the following three erroneous conclusions: (1) that interrogators could cause a great deal of pain before crossing the threshold to torture. Specifically, it suggested that torture would only occur if the pain caused rose to the level “that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions”; (2) that even though US law makes it a criminal offence for anyone in an official position to commit or attempt to commit torture against a detainee outside the USA, and even though the USA has ratified treaties prohibiting torture, the US President’s authority as Commander-in-Chief could override these laws – in other words if the President authorized torture, the agent

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<sup>250</sup> Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense. Re: *Application of treaties and laws to al Qaeda and Taliban detainees*. From Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 22 January 2002. <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf>.

<sup>251</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, Art. 22.

<sup>252</sup> Memorandum for Alberto R. Gonzales, Counsel to the President. Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A., Signed by Assistant Attorney General Jay S. Bybee, Office of Legal Counsel, US Department of Justice, 1 August 2002. (Bybee memo, 1 August 2002), <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

who carried it out could not be prosecuted by the Justice Department.<sup>253</sup> Any attempt by Congress to interfere would be unconstitutional,<sup>254</sup> and (3) that, even if interrogators were prosecuted for torture, there were defences available to them by which they could escape criminal liability. "We conclude", the memorandum said, "that, under the current circumstances, necessity or self-defense may justify interrogation methods that might [amount to torture]".<sup>255</sup>

Almost two years after the August 2002 memorandum was produced and soon after it had been leaked to the media in June 2004, the administration attempted to distance itself from its contents, saying that parts of it would be rewritten.<sup>256</sup> Yet the memorandum had reportedly been vetted by numerous officials, including lawyers at the National Security Council, the White House, the Vice-President's office, as well as the Justice Department.<sup>257</sup> In 2003, its author, Jay S. Bybee, had been confirmed by the Senate as a federal judge after being nominated by President Bush to that position.<sup>258</sup> In hearings before the Senate Judiciary Committee in February 2003, nominee Bybee had declined to discuss any legal advice he had given to the administration, citing his obligation to maintain confidentiality.

As well as distancing itself from the August 2002 memorandum, the administration claims that the declassified documents "were circulated among lawyers and some Washington

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<sup>253</sup> Page 31: "Even if an interrogation method arguably were to violate Section 2340A [ie constitute torture], the statute would be unconstitutional if it impermissibly encroached upon the President's constitutional power to conduct a military campaign. As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy... Any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional." Article 2 of the UN Convention against Torture expresses in unequivocal terms that "no exceptional circumstances whatsoever" or "an order from a superior officer or a public authority" may be invoked as a justification for torture.

<sup>254</sup> Page 39: "Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President... Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield."

<sup>255</sup> On necessity ("the lesser of two evils"), the memorandum said: "As we have made clear in other opinions involving the war against *al Qaeda*, the nation's right to self-defense has been triggered by the events of September 11. If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate Section 2340A [i.e. amount to torture], he would be doing so in order to prevent further attacks on the United States by the *al Qaeda* terrorist network. In that case, we believe that he could argue that his actions were justified by the executive branch's constitutional authority to protect the nation from attack" (page 46).

<sup>256</sup> *Justice Department rewrites prison advice*. Associated Press, 24 June 2004.

<sup>257</sup> *CIA puts harsh tactics on hold*. Washington Post, 27 June 2004. Indeed it was cited in a second memorandum from the Department of Justice to the White House, also dated 1 August 2002, signed by Deputy Assistant Attorney General John C. Yoo, and made public by the administration in June 2004.

<sup>258</sup> Jay Bybee's lifetime appointment was to the US Court of Appeals for the Ninth Circuit. At the time he authored the memorandum in 2002, he was an Assistant Attorney General in the Department of Justice's Office of Legal Counsel.

policymakers only” and “never made it to the hands of soldiers in the field, nor to the President”.<sup>259</sup> This raises several questions. Firstly, given that the US administration has repeatedly justified its detention and interrogation policies as legitimate under the President’s powers as Commander-in-Chief of the Armed Forces, the President should be expected to have known about the various memorandums written about his government’s “war” policies on these issues. Secondly, the administration’s belated distancing from the August 2002 memorandum should be set against the fact that other memorandums which have come into the public domain clearly formed the basis for government policy, for example President Bush’s decision to reject the applicability of the Geneva Conventions and the choice of Guantánamo Bay as a location to keep detainees out of the reach of the judiciary.<sup>260</sup>

Thirdly, despite being the subject of official public disdain in June 2004, much of the August 2002 memorandum is repeated in the April 2003 final report of the Pentagon’s *Working Group on Detainee Interrogations in the Global War on Terrorism*. For example, the latter states that, “[i]n order to respect the President’s inherent constitutional authority to manage a military campaign, [the US law prohibiting torture]...must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority.” Echoing the August 2002 memorandum, and its interpretation of the USA’s reservation to Article 1.1 of the UN Convention against Torture (see Points 5.2 and 11.2), the report states that:

*“...even if 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 [to be guilty of torture] 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.”*<sup>261</sup>

In a recent lecture, Professor Sir Nigel Rodley, formerly the UN Special Rapporteur on torture and currently a member of the Human Rights Committee, commented on this approach:

*“This cannot be and is not a true reading of the effect of the US reservation on the CAT. For, by this definition, no one could be guilty of the crime of torture... [the definition of torture in Article 1 of the UN Convention against Torture]<sup>262</sup> requires*

<sup>259</sup> White House Counsel, in press briefing, 22 June 2004. *supra*, note 16.

<sup>260</sup> For example: Memorandum for William J. Haynes II, General Counsel, Department of Defense. From Patrick F. Philbin, Deputy Assistant Attorney General and John C. Yoo, Deputy Assistant Attorney General. US Department of Justice, Office of Legal Counsel. Re: *Possible habeas jurisdiction over aliens held in Guantánamo Bay, Cuba*. 28 December 2001.

<sup>261</sup> Pentagon Working Group report, April 2003, page 9.

<sup>262</sup> Article 1.1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as: “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the

*that there be a purpose separate from the intention (purposes such as those of obtaining information or confessions). Since these must be the purposes, it can never be the objective simply to inflict severe pain or suffering – the severe pain or suffering can only be a means to the objective. So there can, therefore, never be the requisite specific intent. I do not for a moment believe that any other States Parties to the Convention would have accepted the understanding, had they believed this could be the effect. Indeed, such an interpretation is evidently incompatible with the international law requirement that treaties be interpreted 'in good faith'.*"<sup>263</sup>

The Pentagon Working Group report has not been disowned, and its recommendations were adopted by Secretary for Defense Rumsfeld, whose memorandum of 16 April 2003 does not rule out any interrogation method, as long as he authorizes it personally on a case-by-case basis.<sup>264</sup>

Fourthly, some of the contents of the August 2002 memorandum reflect what has happened on the ground. Noting that the UN Convention against Torture "reserves criminal penalties and the stigma attached to those penalties for torture alone", the memorandum emphasised that there is a "significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture". Citing past abuses in Northern Ireland and Israel, and taking a highly regressive view of international standards and decisions (see Point 11.4), the memorandum said that these techniques include forced sitting, crouching and standing in painful positions, hooding, excessive tightening of handcuffs, subjection to noise, sleep deprivation and deprivation of food and drink. These techniques have all been alleged in the "war on terror", including in combination.<sup>265</sup>

In its August 2004 report, the Schlesinger Panel noted the Justice Department's memorandum. One of the Panel members left whether the document had influenced events on the ground as an open question. Whether the Department's position had "further contributed to an atmosphere of permissiveness in the field", he said, was "difficult to assess".<sup>266</sup>

### **The Guantánamo memos**

Among the dozen "Category I" and "Category II" techniques Secretary Rumsfeld authorized in December 2002, "as a matter of policy" for discretionary use at Guantánamo were the use

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instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

<sup>263</sup> Nigel Rodley, "The Prohibition of Torture: Absolute Means Absolute," William Butler Lecture given at the University of Cincinnati, 23 September 2004. Amnesty International is grateful to Professor Sir Nigel Rodley for providing the organization with the text of his lecture.

<sup>264</sup> "If, in your view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee." Memo for Commander, SOUTHCOM, 16 April 2003, *supra*, note 50.

<sup>265</sup> It has also been reported that the USA employed Israeli security service experts to assist in the interrogation of detainees in Iraq. Jane's Foreign Report, 7 July 2004.

<sup>266</sup> Dr Harold Brown, written statement to Senate Armed Services Committee, 9 September 2004.



of 20-hour interrogations, stress positions, isolation, sensory deprivation, using detainees' individual phobias (such as fear of dogs), hooding, "dietary adjustment", removal of clothing, forced shaving, removal of all "comfort items", and the use of "mild, non-injurious physical contact".<sup>267</sup> He has said that these techniques "were not torture", while making no mention on whether he thought they constitute cruel, inhuman or degrading treatment and equally prohibited under international law.<sup>268</sup>

In May 2004, a month before Secretary Rumsfeld's December 2002 memorandum was declassified by the administration, two former Guantánamo detainees wrote to the Senate Armed Services Committee:

*"Our interrogations in Guantánamo, too, were conducted with us chained to the floor for hours on end in circumstances so prolonged that it was practice to have plastic chairs for the interrogators that could be easily hosed off because prisoners would be forced to urinate during the course of them and were not allowed to go to the toilet. One practice that was introduced specifically under the regime of General Miller was "short shackling" where we were forced to squat without a chair with our hands chained between our legs and chained to the floor. If we fell over, the chains would cut into our hands. We would be left in this position for hours before an interrogation, during the interrogations (which could last as long as 12 hours), and sometimes for hours while the interrogators left the room. The air conditioning was turned up so high that within minutes we would be freezing. There was strobe lighting and loud music played that was itself a form of torture. Sometimes dogs were brought in to frighten us".*<sup>269</sup>

Meanwhile, the sort of techniques authorized by Secretary Rumsfeld for use at Guantánamo were being used in Afghanistan where interrogators were "removing clothing, isolating people for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation."<sup>270</sup>

Including "mild, non-injurious physical contact", four so-called "Category III" techniques (in italics below) had been requested in October 2002 for use in Guantánamo against "the most uncooperative detainees".<sup>271</sup> The request noted that such techniques were used by "other US government agencies", a phrase usually used by the military to mean the CIA. The legal advice offered on these four Category III techniques struck a tone reminiscent of the August 2002 Justice Department memorandum:

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<sup>267</sup> Action Memo, approved 2 December 2002, *supra*, note 49.

<sup>268</sup> "[T]he procedures were not torture. And so the suggestion to the contrary, it seems to me, would be inaccurate". Secretary Rumsfeld's speech at the National Press Club, 10 September 2004.

<sup>269</sup> Shafiq Rasul and Asif Iqbal, 13 May 2004.

<sup>270</sup> Fay report, page 29, *supra*, note 15. The Fay report says that they were being used from December 2002. Amnesty International understands that such techniques were used before this.

<sup>271</sup> Memorandum for Commander, Joint Task Force 170. Subject: *Request for approval of counter-resistance strategies*. Signed by Jerald Phifer, LTC, USA. Director, J2.

- “*The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent* is not illegal [because] there is a compelling governmental interest and it is not done intentionally to cause prolonged harm. However, caution should be utilized with this technique because the torture statute specifically mentions making death threats as an example of inflicting mental pain and suffering.” No advice was offered on how this contradiction was to be resolved.
- “*Exposure to cold weather or water* is permissible with appropriate medical monitoring”.
- “*The use of a wet towel to induce the misperception of suffocation* would also be permissible if not done with the specific intent to cause prolonged mental harm, and absent medical evidence that it would. Caution should be exercised with this method, as foreign courts have already advised about the potential mental harm that this method may cause.”
- “The use of *mild non-injurious physical contact* with the detainee, such as pushing and poking, will technically constitute an assault under Article 128 [of the Uniform Code of Military Justice]”.<sup>272</sup>

Despite making these limited *caveats*, the military lawyer recommended that all four Category III techniques be approved. Major General Michael Dunlavey, commander at Guantánamo (until Major General Miller assumed command on 4 November 2002) then forwarded the request, with his recommendation also that it be approved, to General James T. Hill, Commander, US Southern Command. Commander Hill wrote to the Chairman of the Joint Chiefs of Staff asking for Pentagon and Justice Department lawyers to review the Category III techniques. The Department of Defense’s General Counsel wrote that “while all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time”.<sup>273</sup> Amnesty International is seriously concerned that the chief lawyer for the Pentagon should consider that these techniques might be legal. This once again suggests an administration either ignorant or contemptuous of international law and standards. In June 2004, the General Counsel suggested that interrogation techniques such as stress positions and prolonged isolation did not violate the USA’s international obligations *per se*, it was just a question of proper application: “Certainly, any one technique improperly applied could, you know, produce all sorts of undesirable consequences, including perhaps torture. But we – the United States is not permitted to go near that”.<sup>274</sup>

Secretary Rumsfeld himself has apparently been willing to countenance such techniques. On 15 January 2003, he rescinded his 2 December 2002 authorization, saying that any use of the techniques should be approved by him on a case-by-case basis, including any

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<sup>272</sup> Memorandum for commander, Joint Task Force 170, 11 October 2002, *supra*, note 126.

<sup>273</sup> Action memo, 27 November 2002, *supra*, note 49.

<sup>274</sup> DoD General Counsel William Haynes, Press Briefing, 22 June 2004, *supra*, note 16.

technique in either Category II or III.<sup>275</sup> He set up a working group within the Department of Defense, chaired by the General Counsel of the Department of the Air Force, Mary Walker, “to assess the legal, policy, and operational issues relating to the interrogations of detainees held by the US Armed Forces in the war on terrorism”.<sup>276</sup> The working group issued its report on 4 April 2003, and it was classified as secret for 10 years by Secretary Rumsfeld. A March 2003 draft of the report was leaked to the press after the allegations of abuse at Abu Ghraib became public, and subsequently the final version was made public by the administration at its press briefing on 22 June 2004 (see page 11).

### **The Pentagon Working Group report**

The Working Group report lists 35 interrogation techniques. It recommended that the first 26 be “approved for use with unlawful combatants outside the United States”. Eighteen of these appear in the most recent (September 1992) edition of the US Army’s Field Manual on Intelligence Interrogation (FM 34-52).<sup>277</sup> The remainder thus go beyond standard US army interrogation doctrine. One comes from the May 1987 version of FM 34-52.<sup>278</sup> The remaining seven of the first 26 techniques are:

- 20) Hooding;
- 21) Mild physical contact;
- 22) Dietary manipulation;
- 23) Environmental manipulation (e.g. adjusting temperature);

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<sup>275</sup> “Should you determine that particular techniques in either of these categories are warranted in an individual case, you should forward that request to me”. Memorandum for Commander US SOUTHCOM. Subject: Counter-Resistance Techniques. 15 January 2003.

<http://www.defenselink.mil/news/Jun2004/d20040622doc7.pdf>.

<sup>276</sup> Memorandum for the General Counsel of the Department of Defense. Subject: Detainee Interrogations, 15 January 2003; and Memorandum for the General Counsel of the Department of the Air Force, from William J. Haynes, General Counsel of the Department of Defense, 17 January 2003. <http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf>.

<sup>277</sup> The 18 are: 1. Direct; 2. Incentive or Removal; 3. Emotional Love; 4. Emotional Hate; 5. Fear Up Harsh; 6. Fear Up Mild; 7. Reduced Fear; 8. Pride and ego up; 9. Pride and Ego down; 10. Futility; 11. We Know All; 12. Establish Your Identity; 13. Repetition Approach; 14. File and Dossier; 15. Rapid Fire; 16. Silence; 17. Change of Scenery Up; 18. Change of Scenery Down. For explanations of these techniques, see Pentagon Working Group report, *supra*, note 56.

<sup>278</sup> 19. “Mutt and Jeff” approach (that is, “friend and foe”, or “good cop/bad cop” approach). The Fay report found that a possible contributing factor to abuses in Abu Ghraib was the use of the outdated 1987 training manual. It had been used at “various locations” in Iraq, where it appeared to have been used as a “primary reference” tool. The Fay report pointed to a section in the 1987 version of FM 34-52 “which could appear as a license for the interrogator to go beyond current doctrine”. The section in question stated: “The interrogator should appear to be the one who controls all aspects of the interrogation to include the lighting, heating, and configuration of the interrogation room, as well as the food, shelter, and clothing given to the source.” Fay report, page 16, *supra*, note 15.

- 24) Sleep adjustment;<sup>279</sup>
- 25) False flag (convincing the detainee that interrogators are from country other than the USA – see possible case example, Walid al-Qadasi, page 100);
- 26) Threaten to transfer to a 3<sup>rd</sup> country (where subject is likely to fear he would be tortured or killed).<sup>280</sup>

The Working Group recommends that the remaining nine of the 35 techniques it lists in the report “be approved for use with unlawful combatants outside the United States”, but with “specific limitations”. The restrictions include that the interrogations be conducted at “strategic interrogation facilities”, including Guantánamo; that the detainee is believed to have “critical intelligence”; that the detainee has been medically cleared for subjection to such techniques; and that the interrogators are specifically trained to use these methods. The nine techniques are:

- 27) Isolation;
- 28) Use of prolonged interrogations (e.g. 20 hours in a single day);
- 29) Forced grooming;
- 30) Prolonged standing;<sup>281</sup>
- 31) Sleep deprivation (not to exceed four days in succession);<sup>282</sup>
- 32) Physical training;
- 33) Face or stomach slap;
- 34) Removal of clothing;
- 35) Increasing anxiety by use of aversions (e.g. simple presence of dog).

The Pentagon Working Group also recommended that a procedure be established for requesting approval of any interrogation techniques additional to these 35.

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<sup>279</sup> The Fay report found that among the techniques brought to Iraq by the 519<sup>th</sup> MI unit was “sleep adjustment”, a technique of reversing sleep schedules from night to day, which was also used at Guantánamo. “At Abu Ghraib, however, the MPs [military police] were not trained, nor informed as to how they actually should do the sleep adjustment [see Point 9.1]. The MPs were just told to keep a detainee awake for a time specified by the interrogator. The MPs used their own judgment as to how to keep them awake. Those techniques included taking the detainees out of their cells, stripping them and giving them cold showers. [Captain] Wood [see below] stated she did not know this was going on and thought the detainees were being kept awake by the MPs banging on the cell doors, yelling, and playing loud music.” Fay report, page 28, *supra*, note 15.

<sup>280</sup> The 1992 version of FM 34-52 lists “threatening or implying physical or mental torture to the subject, his family, or others to whom he owes loyalty” as an example of mental torture.

<sup>281</sup> FM 34-52 (1992) lists “forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time” as an example of physical torture.

<sup>282</sup> FM 34-52 (1992) version of the US Army interrogation manual lists “abnormal sleep deprivation” as an example of mental torture.

On 16 April 2003, Secretary Rumsfeld authorized 24 of the techniques for use at Guantánamo Bay (1-19; 22-25; and 27 above). Additional techniques were not ruled out, but would have to be requested on a case-by-case basis. There is evidence which suggests that techniques such as stress positions and prolonged interrogations, authorized by Secretary Rumsfeld in December 2002, were continuing beyond the revocation of that authorization, and were being combined with techniques he authorized in April 2003, such as environmental manipulation. If accurate, these allegations would indicate that the Secretary of Defense was indeed approving such additional techniques on a case-by-case basis unless this authorization scheme was being bypassed.

For example, Parkhudin, an Afghan farmer who was detained at Guantánamo from February 2003 to March 2004, said that he had been shackled with a short chain during interrogation and that he had been questioned for up to 20 hours in uncomfortable positions, adding that "they made me stand in front of an air conditioner. The wind was very cold".<sup>283</sup> Released Swedish detainee Mehdi Ghezali told Amnesty International that he was subjected to sleep deprivation in April 2004, three months before he was released:

*"They kept doing it for about two weeks around 11 April 2004. The Americans took me to an interrogation that lasted 14-16 hours. Then they brought me back to my cell. Shortly thereafter, just as I was going to bed, the guards came and said that I was going to be moved to another cell. One hour later I was moved once more to another cell. I once saw how the guards treated an Australian prisoner in this way, by moving him from cell to cell and thus preventing him from getting any sleep. At the end, there was blood coming from both his nose and his ears. He was so tired."*<sup>284</sup>

A recent report in the New York Times, based on non-detainee sources, adds further evidence:

*"The people who worked at the prison also described as common another procedure in which an inmate was awakened, subjected to an interrogation in a facility known as the Gold Building, then returned to a different cell. As soon as the guards determined the inmate had fallen into a deep sleep, he was awakened again for interrogation after which he would be returned to yet a different cell. This could happen five or six times during a night, they said. This procedure was described by those who participated as part of something called 'Operation Sandman'. Much of the harsh treatment described by the sources was said to have occurred as recently as the early months of this year. After the scandal about mistreatment of prisoners at the Abu Ghraib prison in Iraq became public in April, all harsh techniques were abruptly suspended, they said."*<sup>285</sup>

A technique that is listed by the Pentagon Working Group, but was not authorized by Secretary Rumsfeld in either his December 2002 or April 2003 memorandum, is "threatening to transfer to a 3<sup>rd</sup> country that subject is likely to fear would subject him to torture and

<sup>283</sup> US said to overstate value of Guantánamo detainees. New York Times, 21 June 2004.

<sup>284</sup> Interview with Amnesty International, Sweden, 27 July 2004.

<sup>285</sup> Broad use of harsh tactics is described at Cuba base. New York Times, 17 October 2004.

death”.<sup>286</sup> Former Guantánamo detainee Tarek Dergoul, for example, has alleged that this happened to him. His testimony also brings to mind the emphasis that the Pentagon Working Group report placed on the importance of interrogators being “provided reasonable latitude to vary techniques depending on the detainee’s culture”, and its additional note that “techniques are usually used in combination”:

*“Later the American interrogators did things that upset me. They threatened to send me to Morocco and Egypt where I would be tortured. They played US music very loud during interrogations. They brought pictures of naked women and dirty magazines and put them on the floor. One of the interrogators brought a cup holder for four cups with two coffees in the cup holder. He then deliberately placed the Qur’an on top of the coffee. He put his folder on the desk and then grabbed the Qur’an with his feet up on the table and read it like he was reading a magazine. He made jokes about the Qur’an... In later interrogations, I was kept in the interrogation room, chained to a ring in the floor, for at least six and sometimes as long as ten hours with no access to sanitary facilities. The interrogators left the room for hours at a time. I had to go to the toilet on the ground...During interrogation, if you moved from a sitting position or closed your eyes, they would take the chair away and make you bend your legs to sit cross-legged. They would then tighten the chain so there was no slack and you couldn’t bend to the left or the right. This happened in very many interrogation sessions. I would get cramp and start screaming. The guards would swear at Muslims and curse Allah and the Prophet Mohammed. In interrogation sessions they used either the air conditioning unit or sometimes extreme heat to make you uncomfortable.”*<sup>287</sup>

### **The Afghanistan, Iraq and other unreleased memos**

There are an unknown number of government documents that have not been released by the authorities, as well as an unknown number of decisions not put on paper.<sup>288</sup> For example, on 24 January 2003, the Commander of Joint Task Force-180 in Afghanistan forwarded to the Pentagon Working Group a list of interrogation techniques being used in Afghanistan.<sup>289</sup> Among the techniques listed was the use of nudity against detainees. The CJTF-180 memorandum “highlighted that deprivation of clothing had not historically been included in battlefield interrogations.”<sup>290</sup> However, it went on to recommend clothing removal as an effective technique that could potentially raise objections as being degrading or inhumane, but

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<sup>286</sup> For some, this threat is alleged to have become a reality (see Point 12.1).

<sup>287</sup> Witness statement of Tarek Dergoul in the case of *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 69, 21 May 2004.

<sup>288</sup> In his authoritative account of the administration’s response to the atrocities of 11 September 2001, Washington Post journalist Bob Woodward quotes from a National Security Council meeting on the morning of 21 September 2001: CIA Director George Tenet: “The leaks will kill us, and undermine our coalition.” ... President Bush: “We’ll just have to put some of the most sensitive stuff not on paper”. *Bush at War*, page 110, Simon Schuster UK Ltd 2003.

<sup>289</sup> Schlesinger report, page 36, see *supra*, note 30.

<sup>290</sup> CJTF stands for Combined Joint Task Force.

for which no specific written legal prohibition existed.”<sup>291</sup> As already noted, the Fay report into Abu Ghraib concluded that interrogators with experience in Afghanistan and Guantánamo, redeployed to Iraq, “simply carried forward the use of nudity into the Iraqi theater of operations” and that this “likely contributed to an escalating ‘de-humanization’ of the detainees and set the stage for additional and more severe abuses to occur.”<sup>292</sup>

The Fay report’s finding that interrogation techniques were “imported” (or, in the Schlesinger Panel’s words, that they “migrated”) to Iraq from Afghanistan and Guantánamo contrast to earlier Pentagon assurances that no interrogation techniques were “exported to Iraq” from the wider “war on terror”.<sup>293</sup>

According to the Schlesinger review, the techniques listed in the CJTF-180 document of 24 January 2003 “were included in a Special Operations Forces (SOF) Standard Operating Procedures document published in February 2003”. In Iraq, interrogation guidelines were initially drafted that were “a near copy of the Standard Operating Procedure (sic) created by SOF”.<sup>294</sup> The officer who drafted these guidelines was Captain Carolyn A. Wood, officer in charge of the 519<sup>th</sup> Military Intelligence Battalion from Fort Bragg, North Carolina. The 519<sup>th</sup> military intelligence unit had served in Afghanistan and had “assisted in interrogations in support of SOF and was fully aware of their interrogation techniques”.<sup>295</sup> Prior to its deployment to Iraq in August 2003, Captain Wood’s unit “allegedly conducted the abusive interrogation practices in Bagram resulting in a Criminal Investigation Command (CID) homicide investigation.”<sup>296</sup> Two detainees had died in Bagram in December 2002, showing signs of “blunt force” injuries (see Point 6.2).

In addition to Major General Miller’s recommendations following his visit to Iraq from Guantánamo (see page 29), Colonel Marc Warren, the main US military lawyer in Iraq (Staff Judge Advocate), used the final report of the Pentagon Working Group in developing interrogation policy there. The Commander of the US forces in Iraq, Lieutenant General Ricardo Sanchez, signed a memorandum on 14 September 2003 “which contained elements of the approved Guantanamo policy and elements of the SOF policy” from Afghanistan.<sup>297</sup> It included the use of dogs, stress positions, sensory deprivation, yelling, loud music, light control, and sleep management as interrogation techniques.<sup>298</sup> The Schlesinger report pointed out that this meant that detainees in Iraq, where the US had decided to apply the Geneva Conventions, would be subject to interrogation policies developed for use against those not so protected – further evidence that the decision by President Bush to deny Geneva Conventions protection to detainees in Afghanistan and Guantánamo was taken to allow interrogators to adopt harsh techniques, as suggested by the White House Counsel’s January 2002

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<sup>291</sup> Fay report, page 88, *supra*, note 15.

<sup>292</sup> Fay report, page 10, *supra*, note 15.

<sup>293</sup> Background briefing, Department of Defense news transcript, 20 May 2004.

<sup>294</sup> Schlesinger report, page 37, *supra*, note 30.

<sup>295</sup> Schlesinger report, page 36, *supra*, note 30.

<sup>296</sup> Fay report, page 29, page 8-9, *supra*, note 15.

<sup>297</sup> Schlesinger report, page 37, *supra*, note 30.

<sup>298</sup> Fay report, page 25, *supra*, note 15.

memorandum to President Bush.<sup>299</sup> The 14 September 2003 memorandum has not been made public by the administration.

The 14 September 2003 memorandum was subsequently replaced by a memorandum signed by General Sanchez on 12 October 2003. On 16 October 2003, Captain Wood of the 519<sup>th</sup> Military Intelligence Battalion posted a list of interrogation techniques – entitled “interrogation rules of engagement” – on the wall of the Joint Interrogation and Debriefing Center at Abu Ghraib prison “as an aid for interrogators” and which “graphically portray[ed] the 12 October 2003 policy”.<sup>300</sup> Confronted with this list of interrogation techniques during questioning in May 2004 by a Senate committee, Secretary Rumsfeld indicated that the Pentagon had approved such methods.<sup>301</sup>

The 12 October 2003 policy recently came into the public domain in the form of a Memorandum for Record, dated 27 January 2004.<sup>302</sup> This lists a number of interrogation techniques with blanket approval for use against “all detainees regardless of status”.<sup>303</sup> It then lists techniques that could be used with the approval of General Sanchez. The policy stresses that this is “not an all-inclusive list”, and adds, somewhat redundantly, that “at no time will detainees be treated inhumanely nor maliciously humiliated” (see also page 44):

- Change of scenery down;
- Dietary manipulation (minimum bread and water, monitored by medics);
- Environmental manipulation (i.e. reducing [air conditioning] in summer, lower heat in winter);
- Sleep adjustment;
- Isolation (for longer than 30 days);
- Presence of working dogs;
- Sleep management (for 72-hour time period maximum; monitored by medics);

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<sup>299</sup> To emphasise: “the techniques employed in JTF-GTMO included the use of stress positions, isolation for up to thirty days, removal of clothing, and the use of detainees’ phobias (such as the use of dogs)... [I]nterrogators in Afghanistan were removing clothing, isolating people for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation.” Fay report, page 29, *supra*, note 15.

<sup>300</sup> Fay report, page 28, *supra*, note 15. The poster is available at: <http://talkleft.com/Iraqinterrogationrules1.pdf>.

<sup>301</sup> Testimony before the Senate Armed Services Committee, 12 May 2004. “Any instructions that have been issued or anything that’s been authorized by the Department have been checked by the lawyers” and “deemed to be consistent with the Geneva Conventions”.

<sup>302</sup> Memorandum for Record. Subject: CJTF Interrogation Rules of Engagement, 27 January 2004. <http://www.publicintegrity.org/docs/AbuGhraib/Abu14.pdf>.

<sup>303</sup> Direct, Emotional Love/Hate, Futility, Establish your Identity, Silence, Incentive, Fear Down, We Know All, File & Dossier, Fear up Harsh (yelling authorized), Pride & Ego Up, Repetition, Rapid Fire. Explanations of these can be found in the Pentagon Working Group report, *supra*, note 56.



- Sensory deprivation (for 72-hour time period maximum; monitored by medics);
- Stress positions (no one position for longer than 45 minutes, within a 4-hour time period).

The 12 October 2003 memorandum included text lifted from the Pentagon Working Group report, including: “interrogation approaches are designed to manipulate an internee’s emotions and weaknesses...in close cooperation with the detaining units”, and: “it is important that interrogators be provided reasonable latitude to vary approaches depending on the security internee’s cultural background”. Like the Pentagon Working Group report, the memorandum noted that interrogation techniques “are usually used in combination”.<sup>304</sup> According to the Fay report, the 12 October memorandum,

*“...left certain issues for interpretation: namely, the responsibility for clothing detainees, the use of dogs in interrogation, and applicability of techniques to detainees who were not categorized as ‘security detainees’. Furthermore, some military intelligence personnel executing their interrogation duties at Abu Ghraib had previously served as interrogators in other theaters of operation, primarily Afghanistan and GTMO. These prior interrogation experiences complicated understanding at the interrogator level. The extent of ‘word of mouth’ techniques that were passed to the interrogators in Abu Ghraib by assistance teams from Guantanamo, Fort Huachuca, or amongst themselves due to prior assignments is unclear and likely impossible to definitively determine... [T]he existence of confusing and inconsistent interrogation technique policies contributed to the belief that additional interrogation techniques were condoned in order to gain intelligence.”<sup>305</sup>*

On 30 November 2003, Colonel Pappas, commander of the 205<sup>th</sup> Military Intelligence Battalion which was handling the interrogations of detainees at Abu Ghraib, requested authorization for the harsher methods against a Syrian detainee who was proving resistant to interrogation. The Colonel’s memorandum described the interrogation plan, which would begin with “Fear up Harsh”, one of the techniques that could be used against any detainee without authorization:

*“Interrogators will at a maximum throw tables, chairs, invade his personal space and continuously yell at detainee. Interrogators will not physically touch or harm the detainee, will take all necessary precautions that all thrown objects are clear of the detainee and will not coerce the detainee in any way. If the detainee has not broken yet, interrogators will move into the segregation [isolation] phase of the approach... For the segregation phase of the approach, the MPs [military police] will put an empty sandbag onto the prisoners head before moving him out... During transportation, the Fear up Harsh approach will be continued... Upon arrival at site, MP guards will take him into custody. MP working dogs will be present and barking during this phase. Detainee will be strip searched by guards with the empty sandbag*

<sup>304</sup> Memorandum on CJTF-7 Interrogation and Counter-Resistance Policy, 12 October 2003. <http://www.publicintegrity.org/docs/AbuGhraib/Abu4.pdf>.

<sup>305</sup> Fay report (Jones, page 15), *supra*, note 15.

*over his head... Detainee will be put on the adjusted sleep schedule for 72 hours. Interrogations will be conducted continuously during this 72-hour period. The approaches which will be used during this phase will include, fear up harsh, pride and ego down, silence and loud music. Stress positions will also be used... in order to intensify the approach. The approval for this approach is essential due to the information this detainee possesses... and could potentially save countless lives of American soldiers in the future”.*<sup>306</sup>

Amnesty International understands that the Syrian detainee in question was the detainee who was kept in prolonged incommunicado in solitary confinement in appalling conditions, without access to the ICRC (see page 16), on grounds of “military necessity” invoked by Colonel Pappas and Colonel Marc Warren.<sup>307</sup>

WORDS	ACTIONS
<b>Interrogation techniques listed by Pentagon Working Group, April 2003 (not exhaustive). Notes “techniques are usually used in combination”.</b>	<b>Interrogation techniques, used “in a systematic way” against security detainees in Iraq, found by International Committee of the Red Cross and listed in report in February 2004 (not exhaustive).</b>
Hooding Prolonged interrogations Environmental manipulation	Hooding, sometimes used in conjunction with beatings. Hooding could last for periods from a few hours to up to two to four consecutive days;  Exposure while hooded to loud noise or music, prolonged exposure while hooded to the sun at the hottest time of day;
Mild physical contact Face slap / Stomach slap	Beatings with hard objects, slapping, punching, kicking;
Fear up harsh Threat of transfer	Threats (of ill-treatment, reprisals against family members, imminent execution or transfer to Guantánamo);
Removal of clothing Isolation Sleep deprivation Dietary manipulation Prolonged standing	Being stripped naked for several days while held in solitary confinement in an empty and completely dark cell;  Being held in solitary confinement, combined with threats, insufficient sleep, food or water deprivation, minimal access to showers, denial of access to open air;  Being forced to remain for prolonged periods in stress positions;  Acts of humiliation such as being made to stand naked, with arms raised or with women’s underwear over the head, for prolonged periods...

<sup>306</sup> Memorandum: Request for Exception to CJTF-7 Interrogation and Counter-Resistance Policy, 30 November 2003. <http://www.publicintegrity.org/docs/AbuGhraib/Abu7.pdf>.

<sup>307</sup> Fay report, page 66, *supra*, note 15.

Major General Miller, who in March 2004 was appointed to the post of Deputy Commander of Detainee Operations in Iraq, has stated that “the basics of the Geneva Convention – shelter, medical care, food – are never used as a manipulative tool.”<sup>308</sup> Yet, the 12 October 2003 policy signed by Lieutenant General Sanchez, authorized interrogators to assume control over the “lighting, heating and configuration of the interrogation room, as well as the food, clothing, and shelter given to the security detainee” (as in the now outdated 1987 FM 34-52, see footnote 278). The Fay report noted that abuses such as “exposure to cold and heat or denial of food and water”, including “detainees being left naked in their cells during severe cold weather without blankets”, occurred at Abu Ghraib. It found that some of these abuses were directed by military intelligence and some were committed solely by military police guards.<sup>309</sup>

The “torture memos” that have come into the public domain show that the government failed in its international obligation to “keep under systematic review interrogation rules, instructions, methods and practices” with a view to preventing any cases of torture or cruel, inhuman or degrading treatment, as Articles 11 and 16 of the UN Convention against Torture require. Instead the administration discussed how to avoid Geneva Convention protections, how to push the legal limits on torture and have its agents avoid criminal liability, and sanctioned the use of interrogation techniques which violated the international prohibition on torture and cruel, inhuman or degrading treatment. This clearly contradicted the government’s assurances that it was committed to all its legal obligations prohibiting torture. In so doing, the administration failed to meet Point 1 of Amnesty International’s 12-Point program against torture, that the highest authorities of every country should make clear to all members of the police, military and other security forces that torture and cruel, inhuman or degrading treatment will never be tolerated.

### 1.3 ‘Un-American’ activities?

*I think it’s appropriate to have as a part of the record at this point that the incidents of abuses in our prisons in the United States appear to be far greater than what we’re experiencing over there in Abu Ghraib.*  
US Senator, 9 September 2004<sup>310</sup>

From early on in the “war on terror”, the White House issued assurances that “as Americans, the way we treat people is a reflection of America’s values..., based upon the dignity of every individual.”<sup>311</sup> This has become a standard response. In 2003, asked to respond to allegations that detainees had been ill-treated in Bagram air base in Afghanistan, the military spokesman there said: “I think you would have to agree, America, and for the most part the other

<sup>308</sup> Coalition Provisional Authority briefing, 4 May 2004.

<sup>309</sup> Fay report, pages 70-71, *supra*, note 15.

<sup>310</sup> Senator James Inhofe, Senate Armed Services Committee hearing, 9 September 2004. At a hearing on 11 May 2004, Senator Inhofe stated that he was “outraged that we have so many humanitarian dogooders right now crawling all over these prisons [in Iraq] looking for human rights violations...”.

<sup>311</sup> Statement by the Press Secretary on the Geneva Convention, 7 February 2002.

countries involved in this coalition, don't have a reputation for treating individuals in an inhumane way. It's not part of our culture."<sup>312</sup> Asked about allegations of ill-treatment of Guantánamo detainees, President Bush responded: "We don't torture people in America. And people who make that claim just don't know anything about our country."<sup>313</sup> Around that time, acts of torture against Iraqi detainees were being filmed by US personnel in Abu Ghraib prison. Once the photographs were made public numerous officials claimed that what they depicted was an affront to "American values".<sup>314</sup> Secretary of Defense Rumsfeld told members of Congress that what happened in Abu Ghraib was "un-American".<sup>315</sup>

At best, such responses suggest a degree of complacency and a misunderstanding of the roots of torture. Torture is a human phenomenon, not an indigenous or cultural one. History shows that it can occur whenever safeguards against it are absent, regardless of the culture or nationality of the interrogators or jailers. In the "war on terror" the US administration has removed or lowered such safeguards, and failed to respond to evidence that torture and ill-treatment were the result.

### **Familiarity breeds contempt**

The common refrain about "un-American" conduct or conduct inconsistent with "American values" should also be set against the USA's domestic human rights record, including its resort to judicial killing; its practice of holding detainees in long-term isolation in super-maximum security facilities; its excessive and cruel use of restraints against detainees; its failure adequately to confront racism in the criminal justice system; and its selective approach to international human rights law. This reluctance towards international standards has manifested itself in numerous ways. For example:

- The UN Committee against Torture has criticized the USA's domestic use of remote-controlled electro-shock stun belts, restraint chairs and "excessively harsh" conditions in super-maximum security prisons. The US government has ignored the Committee's concerns. In the "war on terror", excessive and cruel use of restraints has been routine.<sup>316</sup> In May 2004, the US authorities opened Camp Five at

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<sup>312</sup> Colonel Rodney Davis, interviewed for *Inside Guantánamo*. BBC TV, Panorama, 5 October 2003.

<sup>313</sup> Interview of the President by Laurence Oakes, Channel 9 TV, 18 October 2003.

<sup>314</sup> President Bush, for example, has said that "the actions of those folks in Iraq do not represent the values of the United States of America" (White House, 6 May 2004) and described the torture as the "disgraceful conduct by a few American troops who... disregarded our values" (US Army War College, Pennsylvania, 24 May 2004).

<sup>315</sup> Testimony before the Senate and House Armed Services Committees, 7 May 2004.

<sup>316</sup> Former Guantánamo detainee Alif Khan told Amnesty International in July 2003 that he had been held in US custody in Bagram air base for five days in May 2002. He said that he was held in handcuffs, waist chains and leg shackles for the whole time, subjected to sleep deprivation, denied water for ablution and prayer, and repeatedly interrogated. He was transferred to Kandahar for 25 days, and kept in restraints for most of the time, subjected to daily intimate body searches and repeatedly interrogated. In an interview for Amnesty International in Afghanistan in August 2003, released Guantánamo detainee Muhammad Naim Farooq recalled that the tightness of his handcuffs during his transfer to Cuba in mid-2002 had injured his wrists. He said that many of his co-detainees were crying "because of

Guantánamo Bay. This appears to have been modelled on the super-max prisons on the US mainland. Detainees are held in solitary confinement for up to 24 hours a day in concrete cells and are under 24-hour video surveillance.

It is noteworthy, with this in mind, that among the first six soldiers charged in connection with the Abu Ghraib torture were two men who in their civilian life had been prison guards, one with the Virginia Department of Corrections, and one in a notorious maximum security prison housing Pennsylvania's death row.<sup>317</sup> The Taguba report found that the military police guards' lack of training in detentions meant that they "relied heavily on individuals... who had civilian corrections experience, including many who worked as prison guards or corrections officials in their civilian jobs". Two of the soldiers allegedly involved in abuses in June 2003 at Camp Whitehorse, a US detention facility in Iraq, were corrections officers in civilian life.<sup>318</sup> According to prosecutors at a subsequent court-martial, one of them had allegedly told other soldiers that abusive treatment maintains prisoner discipline.<sup>319</sup>

It is also noteworthy, when considering the claims of "un-American" conduct, that early on in the "war on terror" the US Secretary of Defense ascribed a normality to the clearly harsh conditions to which detainees were being subjected. Faced with concern about the conditions of detainee transfers from Afghanistan to Guantánamo and asked whether "hooding..., shaving, chaining, perhaps even tranquillizing some of these people is violating their civil rights", Secretary Rumsfeld responded that "it simply isn't... all one has to do is look at television any day of the week, and you can see that when prisoners are being moved between locations, they're frequently restrained in some way with handcuffs or some sort of restraints".<sup>320</sup>

On other occasions, Secretary Rumsfeld has displayed an attitude of disregard for international standards relating to the treatment of detainees. "To be in an eight-by-eight [feet] cell in beautiful, sunny Guantánamo Bay, Cuba", he suggested in January 2002 "is not inhumane treatment".<sup>321</sup> Three months later, detainees were transferred to smaller cells in which many of them have been held without charge or trial for more than two years. In December 2002, Secretary Rumsfeld approved additional interrogation techniques for use at Guantánamo, including isolation, sensory deprivation, use of 20-hour interrogations, hooding,

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pain". Another former Guantánamo detainee, Wazir Mohammad, told Amnesty International in February 2004 that he had been held in handcuffs and shackles for the first week of his 45-day detention in Bagram air base in Afghanistan. He said that when he was moved from Bagram to Kandahar air base by plane, his handcuffs were so tight that it cut the blood flow to his hands. Rule 34 of the UN Standard Minimum Rules for the Treatment of Prisoners states that restraints "must not be applied for any longer time than is necessary". In its February 2004 report on abuses in Iraq, the ICRC found that handcuffs were "used so tight and used for such extended periods that they caused skin lesions and long-term after-effects".

<sup>317</sup> Staff Sergeant Ivan Frederick and Specialist Charles Graner.

<sup>318</sup> Lance Corporal William Roy, a county jail guard, and Reserve Sergeant Gary Pittman, a federal prison guard. *Marine goes on trial in death of Iraqi*. Associated Press, 23 August 2004.

<sup>319</sup> *New York marine convicted of assaulting Iraqi prisoners*. New York Times, 3 September 2004.

<sup>320</sup> Department of Defense news briefing, 11 January 2002.

<sup>321</sup> Department of Defense news briefing, 22 January 2002.

removal of clothing, use of dogs to instil fear, and stress positions for a maximum of four hours. On this latter technique, he handwrote at the bottom of the memorandum, "I stand for 8-10 hours a day. Why is standing limited to 4 hours?"<sup>322</sup> He has repeated this, to his apparent amusement, in at least one media interview.<sup>323</sup> Amnesty International considers that, given his position, Secretary Rumsfeld's public comments on detentions have frequently been inappropriate and inconsistent with international human rights law and standards, the promotion of which is purportedly a central pillar of his country's foreign policy.

"Notwithstanding the isolated pockets of international hyperventilation", stated Secretary Rumsfeld soon after the first transfers to Guantánamo Bay, "we do not treat detainees in any manner other than a manner that is humane."<sup>324</sup> This is not how those at the receiving end of this treatment perceived it. Released detainees have spoken of the degrading conditions of the transfers. One detainee, Sayed Abbasin, has described it as the "worst day of my life": "I arrived tied and gagged; it was the act of an animal to treat a human being like that".<sup>325</sup> Another, Wazir Mohammed, recalled to Amnesty International how he and his fellow detainees were treated "like cargo not people". He refused to go into detail of the indignities that occurred during the 22-hour flight to Guantánamo from Afghanistan. Amnesty International has been told that detainees were forced to defecate and urinate where they sat.

### History repeats itself

The history of US practices is also informative when considering this administration's claims that what happened at Abu Ghraib was "un-American". Amnesty International's 1973 *Report on Torture* noted that a large number of the detainees brought in for interrogation in South Vietnamese detention facilities during the war in Vietnam were detained under the USA's Phoenix Program, devised in the late 1960s for "rooting out the Vietcong 'infrastructure'". Several ex-US Army intelligence operators had testified to the extensive use of torture and murder of suspects under the Program. The 1973 Amnesty International report also noted frequent reports that the USA had financed and organized anti-subversive training courses in Panama. Much more has been revealed since then. For example, the US training institution, the School of the Americas (SOA), became notorious for training and educating Latin American military personnel who went on to commit human rights violations in their own countries. In the 1980s and early 1990s, the SOA used manuals that advocated torture, extortion, kidnapping and execution. No one was ever held accountable for the development and use of these manuals.<sup>326</sup>

Amnesty International's 1973 *Report on Torture* also noted allegations that US personnel had been present at torture sessions in Latin American countries. Again, more

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<sup>322</sup> Action memo. Approved 2 December 2002, *supra*, note 49.

<sup>323</sup> "Another technique was to have people stand for four hours. You know, on the other hand, people will look at that and say, well, that's not anything terrible [chuckles]." Secretary Rumsfeld interview with Sean Hannity, ABC Radio. Department of Defense transcript, 24 June 2004.

<sup>324</sup> Department of Defense news briefing, 8 February 2002.

<sup>325</sup> BBC TV Newnight, 5 June 2003 (translation).

<sup>326</sup> See [http://www.amnestyusa.org/arms\\_trade/ustraining/schools.html](http://www.amnestyusa.org/arms_trade/ustraining/schools.html).

evidence has emerged since. Dr Juan Romagoza was detained in El Salvador in late 1980 and early 1981. He says that he was kicked and beaten, kept naked and blindfolded, hung by his hands, sexually assaulted and subjected to electric shock torture. He claims that during his torture, US advisers were present, "asking questions and laughing".<sup>327</sup> Sister Dianna Ortiz, a nun and US citizen who was abducted and tortured in Guatemala in 1989, has alleged that her torture was only stopped when a man with a North American accent, whom she believes was a US agent, was called in by her torturers and recognized her from media reports.<sup>328</sup>

The USA has also had a long reach in the "war on terror", and not only in relation to secret transfers (see Point 12). For example:

- In Saudi Arabia, agents of the Federal Bureau of Investigation are reported to have either interrogated or been present at the interrogation of Ahmed Abu 'Ali, arrested in June 2003. They are alleged to have threatened him with transfer to Guantánamo Bay or with a trial in Saudi Arabia where he would have no legal assistance, public hearing, or appeal to a higher tribunal.<sup>329</sup>
- In August 2004, UN Independent Expert on Afghanistan, Professor M. Cherif Bassiouni, raised allegations that US pressure was behind the continued illegal detention in Afghan government custody of hundreds of detainees in Pul-e-Charkhi prison in Afghanistan. He described the conditions in which the detainees were held as violating "every standard of human rights".<sup>330</sup>

Declassified CIA interrogation training manuals from the 1960s and 1980s describe "coercive techniques" that mirror the "stress and duress" techniques sanctioned in the "war on

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<sup>327</sup> See *America's Amnesia*, by Matthew Rothschild. The Progressive, July 2004.

<sup>328</sup> The Inter-American Commission on Human Rights concluded that Dianna Ortiz was a "credible witness" and that she had been abducted and tortured. The Commission wrote: "There is no evidence in the record that the military and the National Police conducted the basic investigations which would be appropriate in this case... The court with jurisdiction over the case sent out a request to the various branches of the security forces of Guatemala to list any North Americans that had worked with those agencies. But, there is no indication that either the military or the National Police conducted an independent investigation to determine whether a North American matching the description of 'Alejandro' [the alleged US agent] worked with Guatemalan security forces either covertly or overtly." Inter-American Commission on Human Rights, Report no 31/96. *Dianna Ortiz v. Guatemala*, Case 10.526, 16 October 1996, paras. 49, 96, respectively.

<sup>329</sup> *The Gulf and the Arabian Peninsula: Human rights fall victim to the "war on terror"*. AI Index: MDE 04/002/2004, June 2004. <http://web.amnesty.org/library/Index/ENGMDE040022004>

<sup>330</sup> "Every Government official I have discussed this matter with has agreed that there's no legal basis for their detention, and everyone has said that they should be released... There are allegations that the US authorities ask that they continue to be kept in detention". Professor Bassiouni noted official US denials, but said that "it is quite clear having spoken to almost every senior [Afghan] official other than the President, that all of the indications are that they want them to be released and that there's someone else who's putting the hold on them." He added: "It seems that there's a question of credibility at stake here". *Afghanistan: UN expert denounces abuses in illegal prisons*. UN News Service, 22 August 2004.

terror”.<sup>331</sup> For example, the *Human Resource Exploitation* training manual of 1983 states the subject should be “immediately blindfolded and handcuffed” upon arrest and “isolation, both physical and psychological must be maintained from the moment of apprehension”. The subject should remain blindfolded and handcuffed, the manual asserts, during “the entire processing” of the detainee after arrival at the detention facility. After this the “subject is completely stripped and told to take a shower. Blindfold remains in place while showering and guard watches throughout”. Hooding, stripping, isolation and the cruel and excessive use of handcuffs and shackles have all been used against detainees in US custody during the “war on terror”.

The 1983 CIA manual instructs that:

*“the manner and timing of arrest should be planned to achieve surprise and the maximum amount of mental discomfort. He should therefore be arrested at a moment when he least expects it and when his mental and physical resistance is at its lowest. Ideally in the early hours of the morning [the 1963 manual states that the “the next best time is in the evening”]. When arrested at this time, most subjects experience intense feelings of shock, insecurity, and psychological stress and for the most part have great difficulty adjusting to the situation.”*

The practice of shock arrests has emerged in US operations in Afghanistan and Iraq. In its February 2004 report on its concerns about abuses by Coalition forces in Iraq, the ICRC stated that it had found a “consistent pattern” of “brutality” at the time of arrest.

*“Arresting authorities entered houses usually after dark, waking up residents roughly, yelling orders, forcing family members into one room under military guard while searching the rest of the house and further breaking doors, cabinets and other property. They arrested suspects, tying their hands [behind their] back with flexi-cuffs, hooding them, and taking them away. Sometimes they arrested all adult males present in a house, including elderly, handicapped or sick people. Treatment often included pushing people around, insulting, taking aim with rifles, punching and kicking and striking with rifles. Individuals were often led away in whatever they happened to be wearing at the time of arrest – sometimes in pyjamas or underwear – and were denied the opportunity to gather a few essential belongings, such as clothing, hygiene items, medicine or eyeglasses.”*

Sheik Abdul Sattar, a 71-year-old man, was arrested on 25 April 2004. According to reports, he was watching television in the early hours of the morning when US soldiers entered his house. Sheik Abdul Sattar, a frail man, was pushed to the ground, had a bag put over his head and his hands tightly cuffed behind him, and was dragged along the ground, suffering bruises and a twisted ankle.<sup>332</sup>

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<sup>331</sup> The manuals are available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/index.htm>. In its 1973 *Report on Torture*, Amnesty International noted evidence of the torture of prisoners in a South Vietnamese interrogation centre run with the advice and support of the CIA.

<sup>332</sup> *Pervasive abuse alleged by freed detainees*, Red Cross. Los Angeles Times, 18 May 2004.



A US soldier told the Fay investigation into Abu Ghraib that he had been asked by a civilian contract interrogator for ideas to get detainees to talk. The soldier "related several stories about the use of dogs as an inducement, suggesting [the contractor] talk to the [military police guards] about the possibilities." The soldier also suggested that the contractor could photograph detainees being ill-treated so he could use the pictures to frighten other detainees. He added that detainees are most susceptible during the initial hours after capture:

*"The prisoners are captured by soldiers, taken from their familiar surroundings, blindfolded and put into a truck and brought to this place (Abu Ghraib); and then they are pushed down a hall with guards barking orders and thrown into a cell, naked; and that not knowing what was going to happen or what the guards might do caused them extreme fear."*<sup>333</sup>

"Control of the source's environment", states the CIA's *Kubark Counterintelligence Interrogation* manual of July 1963, "permits the interrogator to determine his diet, sleep pattern, and other fundamentals. Manipulating these into irregularities, so that the subject becomes disorientated, is very likely to create feelings of fear and helplessness". It concludes that "the principal coercive techniques are arrest, detention, the deprivation of sensory stimuli, threats and fear, debility, pain, heightened suggestibility and hypnosis, and drugs". The 1983 manual, drawing heavily on its 1963 predecessor, discusses "coercive techniques" under the headings of "debility (physical weakness)", "dependency" and "dread (intense fear and anxiety)".<sup>334</sup> The manual offers the interrogator a checklist, including: "Is solitary confinement to be used? Does the place of confinement permit the elimination of sensory stimuli? Are threats to be used? Are coercive techniques to be used?" These CIA manuals are officially no longer policy, but two decades on, similar questions have been answered in the affirmative during the "war on terror".

What has without doubt been authorized are the detention conditions in Guantánamo Bay. Under the heading "cell block planning", the CIA's 1983 training manual instructs that "cells should be about 3 metres long and 2 metres wide". In Camp Delta in Guantánamo Bay, where hundreds of detainees have been kept virtually incommunicado for over two years, the cells are even smaller (approximately 2 metres by 2.45 metres). The manual continues: "window should be set high in the wall with the capability of blocking out light (this allows the 'questioner' to be able to disrupt the subject's sense of time, day and night)"; "heat, air and light should be externally controlled". In Camp Echo, in Guantánamo, where detainees awaiting trial by military commission have been held in solitary confinement for months and months on end, the cells they were put into are reportedly windowless.

<sup>333</sup> Fay report, page 63, *supra*, note 15.

<sup>334</sup> In turn these categories stem from the 1950s post-Korean War research of Albert Biderman, whose 'chart of coercion' lists various interrogation methods now familiar in the "war on terror". The techniques include: isolation, darkness or bright light, barren environment, restricted movement, monotonous food, exploitation of wounds, sleep deprivation, prolonged constraint, prolonged interrogation, overexertion, threats of death, rewards for partial compliance, insults and taunts, demeaning punishments, and denial of privacy. See *Report on Torture*, Amnesty International, 1973.

In May 2004, Amnesty International raised allegations that a Chinese government delegation had visited Guantánamo in September 2002 and participated in interrogations of Chinese ethnic Uighur detainees held there. It is alleged that during this time, the detainees were subjected to intimidation and threats, and to interrogation techniques such as environmental (temperature) manipulation, forced sitting for many hours, and sleep deprivation, some of which is alleged to have been on the instruction of the Chinese delegation.<sup>335</sup> Asked about these allegations, Army General James T. Hill would only confirm that various government delegations “have come and they have talked to their detainees”, but stated that “we don’t talk about what countries come” to Guantánamo. He said that foreign government delegations talk to their nationals “following our rules and under our direct supervision”.<sup>336</sup>

Given the allegations of released detainees and the contents of government documents now in the public domain, General Hill’s response raises the question: what do US officials mean when they refer to “our rules” of interrogation?

Upon declassification, the CIA’s 1983 *Human Resource Exploitation* manual was hand-edited to alter passages on “coercive techniques”. The apparently hasty hand-editing betrays a recognition by officialdom that torture and cruel, inhuman and degrading treatment are wrong. For example, the sentence “While we do not stress the use of coercive techniques, we do want to make you aware of them and the proper way to use them”, was changed to “While we *deplore* the use of coercive techniques, we do want to make you aware of them *so that you may avoid them.*” Similarly “coercive techniques always require prior HQs approval” became “coercive techniques *constitute an impropriety and violate policy.*”

#### 1.4 Slippery slope: Undermining public morality

*Every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms.*  
Preamble, Universal Declaration of Human Rights, 1948

On 13 May 2004, at a hearing before the US Senate Armed Services Committee, the following exchange took place between Senator Jack Reed and Deputy Secretary of Defense Paul Wolfowitz:

Senator: *[T]he rules that we were shown by General Alexander and others which would allow, with his permission, to keep someone in a squatting position and presumably naked, with their arms up, for 45 minutes... Mr Secretary, do you think crouching naked for 45 minutes is humane?*

Deputy Secretary: *Not naked, absolutely not.*

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<sup>335</sup> Amnesty International Urgent Action. Further information on UA 356/03. AI Index: AMR 51/090/2004, 25 May 2004. <http://web.amnesty.org/library/Index/ENGAMR510902004>.

<sup>336</sup> Department of Defense briefing, 3 June 2004.

Senator: *So if he's dressed up, that's fine. But this also has other environmental manipulation. Let me put it this way. Seventy-two hours without regular sleep, sensory deprivation, which would be a bag over your head for 72 hours – do you think that's humane, putting a – and that's what it is, a bag over your head for 72 hours – is that humane?*

Deputy Secretary: *Let me come back to what you said the work...*

Senator: *No, no. Answer the question, Mr Secretary. Is that humane?*

Deputy Secretary: *I don't know whether it means a bag over your head for 72 hours, Senator. I don't know.*

Senator: *Mr Secretary, you're dissembling, non-responsive. Anybody would say putting a bag over someone's head for 72 hours, which is...*

Deputy Secretary: *I believe it's not humane.*

Members of an administration that has discussed how to push the boundaries of acceptable interrogation techniques and of how agents could avoid criminal liability for torture might display a reticence to call torture by its name. Official equivocation over the question of torture and ill-treatment may betray a willingness to tolerate unacceptable conduct on the spectrum of torture and other cruel, inhuman or degrading treatment.

As of October 2004, Amnesty International was not aware of President Bush or any official in his cabinet referring to what happened in Abu Ghraib as torture or a war crime, preferring the term "abuse".<sup>337</sup> In his statement on 26 June 2004 reaffirming the USA's "commitment to the worldwide elimination of torture", President Bush referred to "the abuse of detainees at Abu Ghraib".<sup>338</sup> The following day, Secretary Rumsfeld said that "everything we know thus far suggests that what was taking place in the photographs was abuse".<sup>339</sup> At a Pentagon briefing on 4 May 2004, in one of several statements apparently downplaying the allegations, he stated that his "impression is that what has been charged so far is abuse, which I believe technically is different from torture".

The reports of the various reviews and investigations into detention operations have maintained this position. On 24 August 2004, John Schlesinger, Chairperson of the Secretary Rumsfeld-appointed Independent Panel to review Department of Defense detention

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<sup>337</sup> Visiting Abu Ghraib, General Richard Myers followed a speech by the Secretary of Defense with his own comments, including: "Well, I think the Secretary covered the abuse situations, so I'm going to let that go. I think that was covered adequately." He then added to the assembled military and press: "I have great confidence that, hopefully, you haven't been *tortured* by any of the testimony [in hearings on the Abu Ghraib scandal before congressional committees] we've been involved in the last several days" (emphasis added). Department of Defence news transcript, 13 May 2004.

<sup>338</sup> President's Statement on the UN International Day in Support of Victims of Torture, 26 June 2004.

<sup>339</sup> Secretary of Defense Rumsfeld interview with David Frost (BBC TV). Department of Defense news transcript, 27 June 2004. A US army interrogator who has reportedly served in Afghanistan and Guantánamo has said that "nothing seen in the pictures constitutes the torture of a detained person." *How Expert Gets Detainees To Talk*. The Capital Times (Wisconsin), 17 August 2004.

operations, said that "there is a problem in defining torture. We did not find cases of torture, however".<sup>340</sup> The following day, Major General George Fay admitted in a press conference what had not been put in writing in his report on Abu Ghraib. Asked whether any of what the investigation had found in Abu Ghraib amounted to torture, he replied:

*"Torture is a subjective term, but in my use of the word torture, I would consider these things to be abusive in nature. Torture sometimes is used to define something in order to get information. There were very few instances where in fact you could say that was torture. It's a harsh word, and in some instances, unfortunately, I think it was appropriate here. There were a few instances when torture was being used."*<sup>341</sup>

On the question of torture, Secretary Rumsfeld has suggested that "headline writers and people dramatize things".<sup>342</sup> This is apparently standard Pentagon thinking. The final report of the *Working Group on Detainee Interrogations in the Global War on Terrorism*, completed a year before the Abu Ghraib revelations, contains the following conclusion: "Should information regarding the use of more aggressive techniques than have been used traditionally by US forces become public, it is likely to be exaggerated or distorted in the US and international media accounts". The report recommended the preparation of a "press plan" to anticipate and address potential public inquiries and misunderstandings regarding appropriate interrogation techniques."<sup>343</sup>

In June 2004, an ABC News/Washington Post opinion poll reportedly found that 35 per cent of the US population felt torture was acceptable in some circumstances.<sup>344</sup> In an opinion poll conducted in the USA in May, only a third of those polled said that they would define what happened in Abu Ghraib prison as torture.<sup>345</sup> Would they describe such treatment as torture if it was happening closer to home rather than to distant foreign nationals long demonized by US leaders, or indeed if those same leaders would describe it as such? One well-known radio commentator, Rush Limbaugh, who has an audience of over 20 million, characterized the torture at Abu Ghraib as soldiers "having a good time" and needing "to blow some steam off".<sup>346</sup> He has noted that "the closer you get to 9/11 the more everybody was willing to speak out about [the need for torture in the 'war on terror'], but now 9/11 is in the past and we're doing this in Iraq. And look, we all know what war is... and we are in a war for our way of life, and so that's why I say just keep all this in perspective".<sup>347</sup>

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<sup>340</sup> Press Conference with Schlesinger panel, 24 August 2004, *supra*, note 67.

<sup>341</sup> Special Defense Department Briefing on results of investigation of military intelligence activities at Abu Ghraib prison facility. Department of Defense News Transcript. 25 August 2004.

<sup>342</sup> Defense Department regular briefing, 17 June 2004.

<sup>343</sup> Pentagon Working Group Report. Page 69-70, *supra*, note 56.

<sup>344</sup> Cited in: *The hidden history of CIA torture: America's road to Abu Ghraib*. By Alfred W. McCoy. 2004. <http://www.tomdispatch.com/index.mhtml?pid=1975>.

<sup>345</sup> *Torture and physical abuse: what Americans will allow*. Washington Post, 27 May 2004. The report cites a new Washington Post/ABC News poll.

<sup>346</sup> Rush: MPs just 'blowing off steam'. CBS News.com, 6 May 2004.

<sup>347</sup> Liberals were for torture after 9/11. Radio Transcript, 10 May 2004.

Rush Limbaugh was referring to the public debate that there has been in the USA since 11 September 2001 on whether torture can be acceptable in the “war on terror”. A government fully and unswervingly committed to the eradication of torture would have participated directly and continuously in this debate in order to make clear that torture and cruel, inhuman or degrading treatment must never be tolerated and that the country’s military and law enforcement agencies would live by that principle at this and any other time.<sup>348</sup> Instead, while making general statements against torture, aimed mainly at an international audience, the administration was secretly discussing and authorizing interrogation techniques that were unacceptable under international standards.

A country steps on to a slippery slope when it begins to chip away at the prohibition on torture and cruel, inhuman or degrading treatment. In its first major report on torture 30 years ago, Amnesty International wrote:

*“History shows that torture is never limited to ‘just once; ‘just once’ becomes once again – becomes a practice and finally an institution. As soon as its use is permitted once, as for example in one of the extreme circumstances like a bomb, it is logical to use it on people who might plant bombs, or on people who might think of planting bombs, or on people who defend the kind of person who might think of planting bombs...”*<sup>349</sup>

The USA claims to have reserved its harsh interrogation techniques for what it calls a few “high-value” detainees – that is, those detainees considered to be in possession of immediately usable intelligence. For example, the Pentagon has claimed that Secretary Rumsfeld’s December 2002 approval for use at Guantánamo of interrogation techniques including stress positions, sensory deprivation, isolation, hooding, stripping and the use of dogs to inspire fear stemmed from the need for “additional techniques... for use against high-value detainees”, including Saudi national Mohamed al-Kahtani, suspected of being involved in the 11 September 2001 conspiracy (see page 15).<sup>350</sup> Asked about this in June 2004, Secretary Rumsfeld stated that the techniques “were not used, I’m told, on anyone one other than Kahtani. We may find out that’s not correct at some point in the future”.<sup>351</sup>

According to what released prisoners have alleged, this discovery has already occurred. Their evidence suggests that torture and ill-treatment by US personnel has not been

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<sup>348</sup> Public education is an important part of a government’s human rights responsibilities. For example, the Human Rights Committee has said that it “should be informed how States parties disseminate, to the population at large, relevant information concerning the ban on torture and the treatment prohibited by Article 7 [of the International Covenant on Civil and Political Rights]”. Human Rights Committee, CCPR General Comment No. 20. (General Comments), Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7), 10 March 1992, para. 10.

<sup>349</sup> *Report on Torture*. Amnesty International, 1973.

<sup>350</sup> Department of Defense Deputy General Counsel. Press briefing, 22 June 2004, *supra*, note 16.

<sup>351</sup> Secretary of Defense Rumsfeld interview with David Frost (BBC TV). Department of Defense news transcript, 27 June 2004.

limited to "high value" detainees.<sup>352</sup> In any event, international law prohibits torture or ill-treatment regardless of the "value" it would allegedly produce.

#### **An official version of the 'torture warrant'**

The administration's explanation that it was approving techniques in limited circumstances against a small number of detainees is reminiscent of the concept of the judicial "torture warrant" that has been promoted during the "war on terror" by Harvard law professor Alan Dershowitz. According to Professor Dershowitz, torture by US agents happens anyway, so to have it out in the open, it should be authorized by a judge when circumstances call for it: "Thus we would not be winking an eye of quiet approval at torture while publicly condemning it".<sup>353</sup> He has said that "an application for a torture warrant would have to be based on the absolute need to obtain immediate information in order to save lives coupled with probable cause that the suspect had such information and is unwilling to reveal it".<sup>354</sup> Of course, were such a policy adopted by any country, let alone one as influential as the USA, others would surely follow and the international consensus against torture would be broken.<sup>355</sup>

Amnesty International is also troubled by a letter to Congress signed by some 450 US law professors and other academics six weeks *after* publication of the Abu Ghraib photographs, suggesting that "any decision to adopt a coercive interrogation policy... should be made within the strict confines of a democratic process".<sup>356</sup> Yet the same letter states,

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<sup>352</sup> Amnesty International, for example, has spoken to two Afghan taxi drivers – Wazir Mohammed and Sayed Abbasin – whom the organization remains convinced were erroneously taken into custody in Afghanistan in 2002 and subjected to cruel, inhuman and degrading treatment before being flown out to detention without charge or trial in Guantánamo Bay. They have since been released without charge. See: USA: *The threat of a bad example: Undermining international standards as 'war on terror' detentions continue*. August 2003, *supra*, note 95.

<sup>353</sup> *Is there a torturous road to justice?* By Alan Dershowitz. Los Angeles Times, 8 November 2001. See also Dershowitz, *Why Terrorism Works: understanding the threat, responding to the challenge*, New Haven, Yale University Press, 2002, Ch. 4.

<sup>354</sup> *Let America take its cues from Israel regarding torture*. Jewish World Review, 30 January 2002.

<sup>355</sup> For some, the proposal for "torture warrants" may bring to mind the issue of death warrants, almost 1,000 of which have been carried out in the USA since 1977. This policy of judicial killing continues despite the absence of evidence that it has offered a constructive solution to violent crime and in the face of overwhelming evidence that the death selection process is marked by arbitrariness, discrimination and error. Amnesty International considers the death penalty to be the ultimate cruel, inhuman and degrading punishment. International law and standards, while being abolitionist in outlook, recognize the possibility that some countries may retain the death penalty. President Bush supports capital punishment in the stated belief that it "ultimately saves lives" (White House press briefing, 7 May 2001). The USA's "war on terror" interrogation and detention policies are driven by a similar stated belief, i.e. to deter or pre-empt future acts of criminal violence. The deterrence value that some attribute to the death penalty has generally been discredited, and there is evidence that it may even have a brutalizing or counter-deterrence effect. Amnesty International believes the USA's "war on terror" detention and interrogation policies are undermining long-term security by eroding respect for fundamental human rights.

<sup>356</sup> In the wake of the Abu Ghraib revelations, the Federal Bureau of Investigation sent a memorandum to all its divisions to remind all personnel deployed in Iraq, Afghanistan, Guantánamo, "or any other

correctly, that the Third and Fourth Geneva Conventions prohibit any “physical or moral coercion” of prisoners of war or civilian detainees to obtain information, in addition to other provisions in international human rights and humanitarian law prohibiting torture and cruel, inhuman or degrading treatment. “Democracy” should surely not be used to justify any measures that strip individuals, however few, of basic rights, or to destroy an international legal consensus, built over centuries, around such rights.

Professor Dershowitz has said of his proposal for torture warrants against security detainees: “If someone asked me to draft the statute, I would say, ‘Try buying them off, then use threats, then truth serum, and then if you came to a last recourse, non-lethal pain, a sterilized needle under the nail to produce excruciating pain’. You would need a judge signing off on that. By making it open, we wouldn’t be able to hide behind the hypocrisy”.<sup>357</sup> Hypocrisy there has been, at the highest levels of government. But rather than a judge signing off on torture, the Secretary of Defense and others have signed off on interrogation techniques that violate the prohibition on torture and other cruel, inhuman or degrading treatment (see, for example, Pappas interrogation plan, page 71).

Rather than confront the Dershowitz proposal with a clear and categorical putdown, the administration has engaged in its own version of it. For example, echoing the proposal, the Pentagon Working Group report states: “If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate criminal prohibition, he would be doing so in order to prevent further attacks on the United States by the al Qaida terrorist network.”<sup>358</sup>

### **The slippery slope of brutalization**

Amnesty International’s 1973 torture report, referring to the conflict in Vietnam, suggested that “an administration defending itself against what it or its major ally construes to be an insurrectionary movement may regrettably find it hard to resist the expedient of torture in its efforts to crush its elusive opponent”. It also stated that “the brutalizing effects of the Vietnam War have become so entrenched that some of the time the use of torture during interrogation is no longer even motivated by a desire to gather ‘intelligence’.” The slippery slope from limited authorization of torture to a wider tolerance of such methods is a part of the landscape of this human rights violation.

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foreign location” of FBI interrogation policy. The memorandum, dated 19 May 2004, reminds its recipients that “it is the policy of the FBI that no interrogation of detainees, regardless of their status, shall be conducted using methods which could be interpreted as inherently coercive”. *Treatment of prisoners and detainees*. From General Counsel, Federal Bureau of Investigation, 19 May 2004. It has been reported that the senior officials at the FBI had been so concerned about the severity of interrogation techniques used by the CIA in the “war on terror” (see Point 3.2), that they have warned their operatives to stay out of interrogations of high-level detainees interrogated by the CIA. *Harsh CIA methods cited in top Qaeda interrogations*. New York Times, 13 May 2004.

<sup>357</sup> *The psychology of torture*. Washington Post, 11 May 2004.

<sup>358</sup> Pentagon Working Group, page 31, *supra*, note 56.

A former US marine, now a military analyst with the mainstream Fox TV News Channel, has reportedly said that he tortured a Vietcong prisoner during the Vietnam War by attaching electrodes to his genitals and threatening electrocution.<sup>359</sup> Lieutenant Colonel William Cowan claimed that the torture “worked like a charm”, making the prisoner talk. Lt. Col. Cowan has also suggested that torture should be used against high-ranking *al-Qa’ida* suspects: “If it’s Abu Zubaydah, you start out being tough – physical pain and emotional pain. You’re putting him under physical duress outside the bounds of what the United Nations accepts.”<sup>360</sup> Government agents are already alleged to have done so (see Point 3.2).

Some of the torture and cruel, inhuman or degrading treatment in Abu Ghraib was apparently carried out as punishment or for the sadistic amusement of guards.<sup>361</sup> As already noted, the Fay report found that authorized techniques such as nudity and physical stress were followed by violent physical and sexual assaults by some personnel. The Schlesinger report noted that one of the soldiers involved in the Abu Ghraib torture and ill-treatment said that it had been committed “just for the fun of it”. During the Taguba investigation, a soldier assigned to Abu Ghraib stated:

*“The MPs [military police] were using the detainees as practise dummies, like they would show each other how to knock someone out by knocking the detainee out. They did this while another detainee would watch, when the other detainee would start to get scared, the MPs would calm him down and then hit him in another way.”*<sup>362</sup>

On 17 January 2004, an Abu Ghraib detainee, Abd Alwhab, gave military investigators a statement in which he alleged that he was subjected to brutal punishment:

*“One day while in the prison the guard came and found a broken toothbrush, and they said that I was going to attack the American Police. I said the toothbrush wasn’t mine. They said we are taking away your clothes and mattress for six days and we are not going to beat you. But the next day the guard came and cuffed me to the cell door for two hours, after that they took me to a closed room and more than five guards poured cold water on me, and forced me to put my head in someone’s urine that was already in that room. After that they beat me with a broom and stepped on my head with their feet while it was still in the urine. They pressed my ass with a broom and spit on it. Also a female soldier, whom I don’t know the name was standing on my legs. They used a loudspeaker to shout at me for three hours, it was cold.”*<sup>363</sup>

Punitive brutality has also been alleged in Guantánamo:

*“Soldiers told us personally of going into cells and conducting beatings with metal bars which they did not report. Soldiers told us ‘we can do anything we want.’ We*

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<sup>359</sup> *The dark art of interrogation*. Atlantic Monthly, October 2003.

<sup>360</sup> *The psychology of torture*. Washington Post, 11 May 2004.

<sup>361</sup> *Punishment and amusement: Documents indicate three photos were not staged for interrogation*. Washington Post, 24 May 2004.

<sup>362</sup> Sworn statement of Samuel Provance, 302<sup>nd</sup> Military Intelligence Battalion, 21 January 2004. <http://www.publicintegrity.org/docs/AbuGhraib/Abu11.pdf>.

<sup>363</sup> Translation. <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/150425.pdf>



*ourselves witnessed a number of brutal assaults upon prisoners. One, in April 2002, was of Jummah Al-Dousari from Bahrain, a man who had become psychiatrically disturbed, who was lying on the floor of his cage immediately near to us when a group of eight or nine guards known as the ERF Team (Extreme Reaction Force) entered his cage. We saw them severely assault him. They stamped on his neck, kicked him in the stomach even though he had metal rods there as a result of an operation, and they picked up his head and smashed his face into the floor. One female officer was ordered to go into the cell and kick him and beat him which she did, in his stomach. This is known as "ERFing". Another detainee, from Yemen, was beaten up so badly that we understand he is still in hospital eighteen months later. It was suggested that he was trying to commit suicide. This was not the case."*<sup>364</sup>

Support for such allegations has come from an unusual source. On 24 January 2003, an orange jump-suited individual was reportedly choked and beaten at Guantánamo Bay, and has suffered a brain injury as a result. His name is Sean Baker. He was not a detainee, but a US military guard who had volunteered to pose as an uncooperative detainee in a training exercise. However, the five-man team sent in to extract him from his cell was not told it was an exercise. He says that they slammed him to the floor, put him in a painful chokehold, and pounded his head at least three times against the steel floor. He was treated in a number of military hospitals, and a military evaluation referred to his "service-connected disability" and traumatic brain injury received as a result of his "playing role of detainee...during training exercise".<sup>365</sup>

### **The pursuit of intelligence at all costs**

Despite such evidence of a degree of punitive or sadistic brutality, much of the torture and cruel, inhuman or degrading treatment allegedly carried out by US forces in Afghanistan, Guantánamo and Iraq appears to have been for intelligence-gathering purposes, to "soften up" detainees prior to or during interrogation (see Point 4.1).

The authorities claim that they have obtained substantial intelligence from interrogations. For example, the Schlesinger Panel stated that the interrogation of detainees has "yielded significant amounts of actionable intelligence", adding that much of the information in the 9/11 Commission Report on the attacks of 11 September 2001 "came from interrogation of detainees at Guantanamo and elsewhere".<sup>366</sup> The Schlesinger Panel, however, failed to qualify this in the way in which the 9/11 Commission had. The latter pointed out that the information could be unreliable.<sup>367</sup> Neither the Commission nor the Schlesinger Panel,

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<sup>364</sup> Shafiq Rasul and Asif Iqbal, Letter to Senate Armed Services Committee, 13 May 2004.

<sup>365</sup> *Ex-soldier recalls beating he received in Guantánamo drill*. Los Angeles Times, 16 June 2004.

<sup>366</sup> Schlesinger report, page 18, see *supra*, note 30.

<sup>367</sup> "Assessing the truth of statements by these witnesses – sworn enemies of the United States – is challenging. Our access to them has been limited to the review of intelligence reports based on communications received from the locations where the actual interrogations take place. We submitted questions for use in the interrogations, but had no control over whether, when, or how questions of particular interest would be asked. Nor were we allowed to talk to the interrogators so that we could

however, referred to, let alone publicly protested, the fact that some of the information may have been extracted under torture or other cruel, inhuman or degrading treatment of individuals held in secret locations (see Point 3.2).

The most recent version (1992) of the US Army Intelligence Interrogation Field Manual (FM 34-52) is instructive in this regard. It states:

*“Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear.”*

There have also been reports that the “success” of this interrogation policy has been far more limited than the government claims. There is evidence of widespread arbitrary arrests conducted on the basis of poor intelligence. For example, the Afghanistan Independent Human Rights Commission has recently told Amnesty International that the US forces in Afghanistan appear to remain susceptible to manipulation by local tribal affiliations and interests in detaining people on the basis of false or malicious intelligence. US military intelligence officers told the ICRC that “in their estimate between 70 per cent and 90 per cent of the persons deprived of their liberty in Iraq had been arrested by mistake”.<sup>368</sup> In similar vein, “dozens of high-level military, intelligence and law-enforcement officials in the United States, Europe and the Middle East said that contrary to the repeated assertions of senior administration officials, none of the detainees at the United States Naval Base at Guantánamo Bay ranked as leaders or senior operatives of Al Qaeda”.<sup>369</sup>

Effective intelligence-gathering is a long-term task, not something that should be beaten or coerced out of a selection of people a government broadly defines as the enemy. A former intelligence officer familiar with the Guantánamo intelligence regime has said: “The quality of the screening, the quality of the interrogations and the quality of the analysis were all very poor. Efforts were made to improve things, but after decades of neglect of human intelligence skills, it can’t be fixed in a few years.”<sup>370</sup>

In the end, however, the absolute prohibition of torture and cruel, inhuman or degrading treatment in international law rests firmly on moral grounds. It is about what sort of society we aim to build. Ariel Dorfman’s country, Chile, suffered gross human rights violations on and following 11 September 1973, the day of the coup that brought Augusto Pinochet to power. Dorfman has written:

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better judge the credibility of the detainees and clarify ambiguities in the reporting. We were told that our requests might disrupt the sensitive interrogation process.” Chapter 5. 9/11 Commission report.

<sup>368</sup> ICRC report. February 2004. *supra*, note 77.

<sup>369</sup> *US said to overstate value of Guantánamo detainees*. New York Times, 21 June 2004. Similarly, an interrogator has said that “there are a large number of people at Guantánamo who shouldn’t be there”. *How expert gets detainees to talk*. The Capital Times (Wisconsin), 16 August 2004

<sup>370</sup> Lieutenant Colonel Anthony Christino III, quoted in: *US said to overstate value of Guantánamo detainees*. New York Times, 21 June 2004.

*“[T]orture is not a crime committed only against a body, but also a crime committed against the imagination. It presupposes, it requires, it craves the abrogation of our capacity to imagine someone else’s suffering, to dehumanise him or her so much that their pain is not our pain. It demands this of the torturer, placing the victim outside and beyond any form of compassion or empathy, but also demands of everyone else the same distancing, the same numbness, those who know and close their eyes, those who do not want to know and close their eyes, those who close their eyes and ears and hearts.”<sup>371</sup>*

President Bush has said that “the United States will continue to take seriously the need to question terrorists who have information that can save lives. But we will not compromise the rule of law or the values and principles that make us strong. Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere.”<sup>372</sup> Amnesty International believes that the USA has failed to live up to these words in the “war on terror”.

A government’s condemnation of torture and other cruel, inhuman and degrading treatment must mean what it says. If it genuinely opposes torture and ill-treatment, it must act accordingly. From this simple proposition, all 11 other points of Amnesty International’s *12-Point Program for the Prevention of Torture by Agents of the State* follow.

## 1.5 Recommendations under Point 1

The US authorities should:

- Provide a genuine, unequivocal and continuing public commitment to oppose torture *and* cruel, inhuman or degrading treatment under any circumstances, regardless of where it takes place, and take every possible measure to ensure that all agencies of government and US allies fully comply with this prohibition;
- Review all government policies and procedures relating to detention and interrogation to ensure that they adhere strictly to international human rights and humanitarian law and standards, and publicly disown those which do not;
- Make clear to all members of the military and all other government agencies, as well as US allies, that torture or cruel, inhuman or degrading treatment will not be tolerated under any circumstances;
- Commit to a program of public education on the international prohibition of torture and ill-treatment, including challenging any public discourse that seeks to promote tolerance of torture or cruel, inhuman or degrading treatment.

<sup>371</sup> *Are there times when we have to accept torture?* By Ariel Dorfman. The Guardian, 8 May 2004.

<sup>372</sup> President’s statement, 26 June 2004, *supra*, note 4.

## Point 2 – Ensure access to prisoners

*Torture often takes place while prisoners are held incommunicado – unable to contact people outside who could help them or find out what is happening to them. The practice of incommunicado detention should be ended. Governments should ensure that all prisoners are brought before an independent judicial authority without delay after being taken into custody. Prisoners should have access to relatives, lawyers and doctors without delay and regularly thereafter.*

### 2.1 Incommunicado detention facilitates torture

*[P]rolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment or even torture.*  
UN Commission on Human Rights, April 2004<sup>373</sup>

On 28 May 2004, Amnesty International issued an urgent appeal on behalf of Mohammad Jassem ‘Abd al-‘Issawi, a 43-year-old Iraqi civil engineer believed to be in detention in the High Security section of Abu Ghraib prison. He was reportedly kicked and punched by the US soldiers who arrested him on 17 December 2003. Since then, he had not had access to his family, to legal counsel, or to the ICRC.<sup>374</sup>

The US military has taken more than 50,000 people into custody during its military operations in Afghanistan and Iraq. In Afghanistan, the US has operated approximately 25 detention facilities, and in Iraq another 17.<sup>375</sup> It has held people in Guantánamo and in undisclosed locations. Lawyers, relatives, and human rights organizations have systematically been denied access to detainees. While the ICRC has had access to some detainees, this cannot be considered enough under the circumstances (see Point 4). For example, the ICRC has had access to detainees held in the US air base in Bagram in Afghanistan, but not immediately after their arrest.<sup>376</sup> In Afghanistan, the ICRC has only had access to Bagram and Kandahar and none of the numerous “forward collection points”, more remote US temporary holding facilities in other locations. In both Afghanistan and Iraq, detainees have been held at such facilities for far longer than the 12-24 hours allowed under army doctrine. Some detainees have been held for one or two months at “forward collection points”.<sup>377</sup> Hundreds of detainees have been held incommunicado without charge or trial between ICRC visits to Guantánamo Bay.

Because of its urgency as a safeguard against torture, Amnesty International and international law and standards hold that relatives, lawyers and independent doctors should have access to detainees without delay and regularly thereafter. Access by others such as

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<sup>373</sup> Resolution: 2004/41, para. 8, 19 April 2004.

<sup>374</sup> <http://web.amnesty.org/library/Index/ENGMDE140272004>. He is no longer held incommunicado.

<sup>375</sup> Schlesinger report, page 11, see *supra*, note 30.

<sup>376</sup> ICRC Operational update, 26 July 2004.

<sup>377</sup> Detainee Operations Inspection. Department of the Army Inspector General, 21 July 2004, page 28.

representatives of human rights organizations and (in armed conflicts and other applicable situations) the ICRC is also of great importance.

The UN Commission on Human Rights has stated that “prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment or even torture”.<sup>378</sup> The Human Rights Committee has stated that provisions should be made against the use of incommunicado detention, and the Committee against Torture has called for its elimination.<sup>379</sup> The Special Rapporteur on torture, recognizing that “torture is most frequently practised during incommunicado detention”, has also called for such detention to be made illegal.<sup>380</sup>

## 2.2 Access to legal counsel

*Allegations of torture were difficult to verify because the police and security officials frequently denied detainees timely access to lawyers.*

US State Department 2004 human rights report, entry on Jordan

One of the first prisoners of the USA in its “war on terror” overseas was John Walker Lindh, a US citizen captured in Afghanistan. His alleged treatment – stripping, blindfolding, threats, cruel use of restraints, use of humiliating photography<sup>381</sup>, and denial of access to legal counsel or relatives – echoes what would happen two years later in Iraq. Furthermore, it is alleged that the General Counsel of the Department of Defense authorized John Lindh’s interrogator to “take the gloves off” during his interrogation.<sup>382</sup>

John Lindh was taken into US custody on 1 December 2001 in Afghanistan. Interrogated repeatedly in incommunicado detention, he repeatedly asked for a lawyer.<sup>383</sup>

<sup>378</sup> Resolution: 2004/41, para. 8, 19 April 2004.

<sup>379</sup> Human Rights Committee General Comment 20, *supra*, note 188, para. 11. Committee against Torture: UN Doc. A/52/44 (1997), para. 121(d).

<sup>380</sup> UN Doc. E/CN.4/2002/76, 27 December 2001, Annex 1.

<sup>381</sup> For example, soldiers allegedly “blindfolded Mr Lindh, and took several pictures of Mr Lindh and themselves with Mr Lindh. In one, the soldiers scrawled ‘shithead’ across Mr Lindh’s blindfold and posed with him.” James J. Brosnahan (Lindh’s lawyer). Affidavit filed in *USA v. Lindh*, quoted in *Chain of Command*, by Seymour M. Hersh. *The New Yorker*, 17 May 2004.

<sup>382</sup> *Prison interrogators’ gloves came off before Abu Ghraib*. *New York Times*, 9 June 2004.

<sup>383</sup> For the first six days of US custody, his wounds untreated, Lindh was held in a room with the only window blocked, “making it difficult to discern whether it was night or day”. Interrogated, he asked for a lawyer but was told he would be provided with one later. On 7 December 2001, he was transferred to the US base at Camp Rhino, south of Kandahar. “During the flight, he was blindfolded and bound with plastic cuffs so tight they cut off the circulation to his hands. Soldiers threatened him with death and torture. Upon arrival at Camp Rhino, Mr Lindh’s clothes were cut off him, his hands and feet were again shackled, and he was bound tightly with duct tape to a stretcher. Still blindfolded and completely naked, he was then placed in a metal shipping container. Despite the extreme cold of Afghanistan nights in December, there was no heat source, lighting or insulation in the container. After some time, one blanket was placed over Mr Lindh and another was put under the stretcher.” Details of

Finally, he alleged, "to escape the torture of his current circumstances", he agreed to answer the interrogator's questions. From 3 December, a lawyer retained by John Lindh's family following news of his arrest had requested the US authorities to stop any further interrogation, "[e]specially if there is any intent to use it in any subsequent legal proceedings"<sup>384</sup> (see also Point 8.1). Moreover, communications to Lindh from his family informing him that they had retained the lawyer were allegedly not relayed to him.

On 14 December 2001, he was transferred to the *USS Peleliu*, where he received medical treatment. Lindh's parents wrote to him repeatedly following his arrest, including via the ICRC, but he was not allowed to receive any communications until approximately 6 January, more than a month after he had been transferred from Afghan to US custody. Just over seven months after being taken into US custody, John Walker Lindh agreed in US federal court to plead guilty to carrying a weapon while serving with the Taliban, and was sentenced to 20 years in prison. As part of the plea arrangement, he withdrew his allegations of torture and ill-treatment by the US military. If he breaks the terms of his plea agreement, "the United States may prosecute the defendant to the full extent of the law".

The Human Rights Committee has stated that detained persons should have "immediate access to counsel and contact with their families".<sup>385</sup> The Committee against Torture has recommended "unrestricted access to counsel immediately after arrest".<sup>386</sup> The Special Rapporteur on torture has stated: "In exceptional circumstances, under which it is contended that prompt contact with a detainee's lawyer might raise genuine security concerns and where restriction of such contact is judicially approved, it should at least be possible to allow a meeting with an independent lawyer".<sup>387</sup>

Even when access to legal counsel is arguably impractical in battlefield situations, military lawyers can still be made available to monitor interrogations as a safeguard against torture or ill-treatment. In the first Gulf War, military lawyers were reportedly present in every US detention facility, and could monitor any interrogation from behind a one-way mirror and intervene if misconduct occurred. Neither the interrogator nor the detainee knew if any particular session was to be monitored in this way.<sup>388</sup> However, according to senior military lawyers, this practice has been curtailed by the current administration.<sup>389</sup>

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Lindh's case are taken from documents filed in *USA v. Lindh*, Criminal No. 02-37-A, in the US District Court for the Eastern District of Virginia, unless otherwise stated.

<sup>384</sup> Letter from James J. Brosnahan to Colin Powell, Secretary of State; John Ashcroft, Attorney General; Donald Rumsfeld, Secretary of Defense; George Tenet, Director of the Central Intelligence Agency; Robert McNamara, General Counsel to the Central Intelligence Agency. 3 December 2001.

<sup>385</sup> A/55/40, para. 472.

<sup>386</sup> A/54/44, para. 51.

<sup>387</sup> A/56/156, para. 39(f). Principle 17 of the UN Body of Principles states: "A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it."

<sup>388</sup> *A Prison Beyond the Law*, by Joseph Margulies. Virginia Quarterly Review, July 2004.

<sup>389</sup> "[According to] senior JAG [Judge Advocate General] officers ... the prior practice of having JAG officers monitor interrogations in the field for compliance with law and regulations had been curtailed

## 2.3 Access to doctors

*The complicity of US military medical personnel during abuses of detainees in Iraq, Afghanistan, and Guantánamo Bay is of great importance to human rights, medical ethics, and military medicine... An inquiry into the behaviour of medical personnel in places such as Abu Ghraib could lead to valuable reforms within military medicine.*

UK medical journal, 21 August 2004<sup>390</sup>

Amnesty International believes that detainees should have access to independent doctors as soon as possible after arrest. Doctors must in no way participate in any torture or ill-treatment, and must expose any such treatment of which they become aware.

International standards require detainees and prisoners to be given or offered a medical examination as promptly as possible after they have been taken into custody.<sup>391</sup> They also call for medical personnel to advise on basic prison conditions, such as food, light, ventilation and hygiene.<sup>392</sup> The evolution of international standards relating to the medical care of detainees and prisoners has also been paralleled by the elaboration of ethical principles for health professionals in their relations with detainees. In particular, principles adopted by the UN General Assembly in 1982 state:

*“It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment.”*<sup>393</sup>

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at the direction of senior officials.” *Human rights standards applicable to the United States’ interrogation of detainees. Supplementary report*, 4 June 2004. Association of the Bar of the City of New York. Page 12, n. 22. The Army Inspector General “did not observe a dedicated judge advocate for interrogation operations”. *Detainee Operations Inspection*, 21 July 2004, *supra*, note 27, page 15.

<sup>390</sup> *Abu Ghraib: its legacy for military medicine*. Steven H. Miles. *The Lancet*, Vol. 364, Number 9435.

<sup>391</sup> Rule 24 of the UN Standard Minimum Rules for the Treatment of Prisoners states: “The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary”. The UN Human Rights Committee has emphasized the need to have detainees “examined by an independent doctor as soon as they are arrested [and] after each period of questioning”. UN Doc. A/52/40 (1998), para. 109, referring to Switzerland. The Special Rapporteur on torture has stated: “At the time of arrest, a person should undergo a medical inspection, and medical inspections should be repeated regularly and should be compulsory upon transfer to another place of detention.” UN Doc. E/CN.4/2002/76, 27 December 2001, Annex 1.

<sup>392</sup> Rule 26, UN Standard Minimum Rules.

<sup>393</sup> Principle 2, Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted by General Assembly resolution 37/194 of 18 December 1982. The World Medical Association (of which the American Medical Association is a member) provides for similar strictures in its Declaration of Tokyo (1975). Paragraph 1 specifies: “The doctor shall not countenance, condone or participate in the practice of torture or other forms of cruel, inhuman

The same safeguards also state that it is a contravention of medical ethics for health personnel to apply their knowledge and skills in order to assist in the interrogation of detainees "in a manner that may adversely affect" their physical or mental health. They must not certify or participate in the certification of the fitness of detainees for "any form of treatment or punishment that may adversely affect their physical or mental health". Also they must not participate in any procedure for restraining a detainee except under strictly medical criteria as being necessary for safety reasons and harmless to the detainee's physical or mental health. There "may be no derogation from the foregoing principles on any grounds whatsoever, including public emergency".<sup>394</sup>

- According to a leaked military document, the ICRC raised allegations in a meeting with the Guantánamo authorities in October 2003 that interrogators at the base had had access to the medical files of detainees, that the files were "being used by interrogators to gain information in developing an interrogation plan", and "that there is a link between the interrogation team and the medical team". Major General Miller, the camp commander, rejected the allegations.<sup>395</sup>
- The 12 October 2003 interrogation policy in Iraq listed "dietary manipulation", "sleep management", and "sensory deprivation", as techniques that could be authorized as long as they were "monitored by medics" (see page 70-71);

In the "war on terror", sleep deprivation, stress positions, hooding, stripping, and the cruel use of restraints are among the practices employed against detainees. Hakkim Shah, a 32-year-old Afghan farmer was reportedly subjected to torture and ill-treatment in the US air base in Bagram. He said that he was held naked for 16 days in an upstairs room in the facility, hooded, shackled, and forced to stand by being secured to the ceiling. After 10 days, his legs reportedly became so swollen that the shackles cut off the blood supply and he could no longer stand. According to the allegations, doctors eventually removed the shackles and he was allowed to sit.<sup>396</sup>

The final report of the Pentagon Working Group suggests the potentially institutionalized involvement of medical personnel in interrogation techniques that violate international standards: "The use of exceptional interrogation techniques should be limited to... when the detainee is medically and operationally evaluated as suitable."<sup>397</sup> Drawing on

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or degrading procedures, whatever the offence of which the victim of such procedure is suspected, accused or guilty, and whatever the victim's belief or motives, and in all situations, including armed conflict and civil strife."

<sup>394</sup> Principles 4 (a), 4(b), 5 and 6. Principles of Medical Ethics, *supra*, note 393.

<sup>395</sup> Memorandum for Record. *ICRC Meeting with MG Miller on 9 Oct 03*, *supra*, note 52. The principle of confidentiality of medical information should not be overturned when a person enters prison. The European Committee for the Prevention of Torture has repeatedly stated in relation to detainees that "the confidentiality of medical data is to be strictly observed". See e.g. Report on initial visit to the Czech Republic (1997), CPT/Inf (99), para. 32; Report to the Government of the Slovak Republic on the visit to [Slovakia](#), CPT/Inf (2001) 29 (2001), para. 35.

<sup>396</sup> *New charges raise questions on abuse in Afghan prisons*. New York Times, 16 September 2004.

<sup>397</sup> Pentagon Working Group Report, 4 April 2003, *supra*, note 56.



this, a 12 October 2003 US interrogation policy in Iraq noted that stress positions, dietary manipulation and sleep management could be used as interrogation techniques if “monitored by medics” (see page 70). The assumption that doctors will participate in torture or cruel, inhuman or degrading treatment, which defies the age-old ethical requirement that doctors act only with their patient’s health and well-being in mind, was also apparent in a military memorandum requesting approval for various interrogation techniques at Guantánamo Bay in late 2002. One of the techniques requested was “exposure to cold weather or water (*with appropriate medical monitoring*)” – [emphasis added].<sup>398</sup> The request passed various levels of authority, including the General Counsel to the Secretary of Defense who suggested that it was legally available although not warranted on a blanket basis at that time.<sup>399</sup>

The totality of the conditions at Guantánamo Bay have had a seriously adverse effect on the psychological health of many of the detainees held there, according to the ICRC, the only independent organization to have had access to the detainees. Relevant professional and ethical standards make clear that the mental health professionals at the prison camp should raise the detention conditions and their effects on prisoners with the authorities. Amnesty International is not aware that they have done so, and points out that they are not independent – instead, like the detaining force, they are employed by the military. The Department of Defense has disclosed that there have been over 30 suicide attempts among the detainees. It has been reported that a decrease in the rate of suicide attempts is the result of the military psychiatrists reclassifying such attempts as “manipulative self-injurious behaviour”, and that the total of suicide attempts under the old classification is now over 70.<sup>400</sup>

The final report of the Pentagon Working Group on “war on terror” interrogations states that US legislation criminalizing torture committed outside the USA “does not preclude any and all use of drugs”. The withholding of health care and the use of forcible injections without the detainee knowing what he is being injected with has been alleged.

- Abu Zubaydah, who had been shot in the groin during his arrest, was allegedly denied painkillers to obtain his cooperation during interrogation (see Point 3.2).
- Alif Khan told Amnesty International in July 2003 that he had been given two injections, one in each arm, for his transfer from Afghanistan to Guantánamo. He said that he did not know what they were, but referred to experiencing “a kind of unconsciousness”. Former Guantánamo detainee Mehdi Ghezali told Amnesty International in July 2004 that “even if prisoners didn’t want any injections they were forced to receive them. Certain prisoners were beaten before they were injected.”

The torture at Abu Ghraib was reported to US army investigators by a soldier, not a doctor. The Fay report found that medical personnel “may have been aware of detainee abuse at Abu Ghraib and failed to report it”. The report called for an inquiry into this specific issue. Reported incidents implicating medical personnel include:

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<sup>398</sup> Memorandum for Commander, Joint Task Force 170. Subject: Request for approval of Counter-Resistance strategies. 11 October 2002. <http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf>

<sup>399</sup> Action memo. Signed by Secretary Rumsfeld, 2 December 2002, *supra*, note 49.

<sup>400</sup> David Rose, Vanity Fair, January 2004.

- “After they brought six people and they beat them up until they dropped to the floor and one of them his nose was cut and the blood was running from his nose and he was screaming but no one was responding and all this beating from [Guard X] and [Guard Y] and another man, whom I don’t know the name. The doctor came to stitch the nose and [Guard X] asked the doctor to learn how to stitch and it’s true, the guard learned how to stitch. He took the string and needle and he sat down to finish the stitching...”<sup>401</sup>
- “One of the prisoners was bleeding from a cut he got over his eye. Then they called the doctor who came and fixed him. After that they started beating him again...”<sup>402</sup>
- A military guard at Abu Ghraib wrote home about a death in custody in November 2003. He wrote that the day after his death, “the medics came and put his body on a stretcher, placed a fake [intravenous drip] in his arm and took him away”.<sup>403</sup>

## 2.4 Access to relatives

*Police continued to hold individuals without granting access to family members or lawyers.*  
US State Department human rights report entry on China, 2004

Amnesty International issued a worldwide appeal in July 2004 for Sattam Hameed Farhan al-Ga’ood who had been arrested at his home in Baghdad by US soldiers on 19 April 2003.<sup>404</sup> He had not been seen for over a year, and although his family had received a number of messages via the ICRC to indicate that he was in detention, his whereabouts were not specified and remained unknown. His case was simply referred to as HVD, thought to mean “high-value detainee”. The US authorities would appear, however, to place a low value on his right and the right of his family to be informed of his whereabouts and the reason for his arrest.

In its February 2004 report, the ICRC described the distress that family members in Iraq have suffered due to the systematic failure of the Coalition forces to provide information on the whereabouts of detainees. The arresting authorities “rarely informed the arrestee or his family where he was being taken and for how long, resulting in the *de facto* ‘disappearance’ of the arrestee for weeks or even months until contact was finally made”. The ICRC continued:

*“In the absence of a system to notify the families of the whereabouts of their arrested relatives, many were left without news for months, often fearing that their relatives unaccounted for were dead... [H]undreds of families have had to wait anxiously for weeks and sometimes months before learning of the whereabouts of their relatives*

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<sup>401</sup> Statement provided by Shalan to military investigators, 17 January 2004.

<http://www.washingtonpost.com/wp-srv/world/iraq/abughraib/150422.pdf>.

<sup>402</sup> Statement provided by Mustafa to military investigators, 17 January 2004.

<http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/150542-1.pdf>.

<sup>403</sup> Staff Sergeant Ivan Frederick. Copy of communications on file at Amnesty International. According to the Fay report, this deception was “so as not to draw the attention of the Iraqi guards and detainees”.

<sup>404</sup> *Iraq: Detained in an unknown location*, <http://web.amnesty.org/appeals/index/irq-010704-wwa-eng>.

*and often come to learn about their whereabouts informally (through released detainees) or when the person deprived of his liberty is released and returns home."*

The suffering of relatives of the "disappeared" (see Point 3) has been found by the UN Human Rights Committee to amount to torture or cruel, inhuman and degrading treatment.<sup>405</sup> Similar cruelty is inflicted on the relatives of people held in indefinite incommunicado detention where the authorities fail to take steps to promptly inform the family of their loved one's arrest and whereabouts.

The family of Jamal Mar'i say that he left his native Yemen in 2001 to go to Pakistan to find work and pursue further studies. On 10 April 2004, his brother recalled: "Jamal set himself up in Karachi, Pakistan. While there, Jamal called and wrote to us regularly. It never felt as if he was very far away." Some time after 11 September 2001, a friend told the family that he had received a call from his son who was also in Karachi and knew Jamal. He said that he thought Jamal had been arrested in Karachi by US agents. Jamal's brother continued:

*"Some weeks later, my mother received a telephone call from the International Committee of the Red Cross from Jordan to say that Jamal was detained there... Some time after receiving the call from the ICRC, my family received a message from Jamal via the ICRC, Jordan. In this short note, Jamal said that he was held in Jordan... Then, in April 2002, we received an ICRC message from him from the ICRC in Yemen. The message had been sent from Guantánamo Bay... In November 2003, Jamal's messages stopped coming. We don't know why... We have no way of finding out how he is; whether he is healthy, even whether he is alive. My mother has taken Jamal's disappearance the worst. She has developed high blood pressure and often sinks into bouts of very deep depression. In many ways, it would be preferable if we knew Jamal was dead for at least then we would be able to grieve and eventually get over his death. It's the simply not knowing what has happened to him that affects us all the most. If only we could hear his voice, learn that he is safe and well – that would make our lives so much better. Jamal's wife is beside herself with worry. His young children don't understand what has happened to their father and constantly ask where he is, why doesn't he call and when he is coming back home."*<sup>406</sup>

The US authorities have shown little sympathy for the plight of families of detainees, spreading a level of distress and resentment in the community.<sup>407</sup>

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<sup>405</sup> *Maria del Carmen Almeida de Quinteros, on behalf of her daughter, Elena Quinteros Almeida, and on her own behalf v. Uruguay*, Communication No. 107/1981 (17 September 1981), UN GAOR Supp. No. 40 (A/38/40) at 216 (1983), para. 14.

<sup>406</sup> Affidavit of Nabil Mohamed Mar'i. 10 April 2004. Sana'a, Yemen. The suffering of relatives of detainees was clear at the conference organized by Amnesty International in Sana'a. See *The Gulf and the Arabian Peninsula: Human rights fall victim to the "War on Terror"*. AI Index: MDE 04/002/2004, June 2004. <http://web.amnesty.org/library/Index/ENGMDE040022004>

<sup>407</sup> For example, Secretary Rumsfeld was asked if relatives would ever be able to visit detainees in Guantánamo. He replied, "Oh, I would doubt it... No, I would think that would be highly unlikely". Interview with the *Sunday Times*, 21 March 2002.

## 2.5 Access to the courts

*It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad*  
US Supreme Court, 28 June 2004<sup>408</sup>

Central to the USA's "war on terror" detention policy has been to keep the detainees away from the courts. The administration chose Guantánamo precisely because it believed that "a district court cannot properly entertain an application for a writ of *habeas corpus* by an enemy alien detained at Guantánamo Bay Naval Base, Cuba," although it recognized that the issue was not "definitely resolved" in law.<sup>409</sup> It is clear that the US administration has seen its own judiciary, as well as international law, as an unwanted check on its activities.

A key safeguard against torture is for prisoners or others acting on their behalf to be able to invoke the power of the courts to challenge the legality of the detention and otherwise ensure the prisoner's safety. It can also serve as a safeguard against "disappearances" by asking the courts to locate a person who has "disappeared" (see Point 3).

In April 2004, arguing that the courts should be kept out of the administration's "war on terror" detentions, the government assured the US Supreme Court of its commitment to humane treatment. At oral arguments in the case of Yaser Esam Hamdi, a US citizen designated as an "enemy combatant" and held in indefinite incommunicado detention without charge or trial since December 2001, Justice Stevens asked: "Do you think there is anything in the law that curtails the method of interrogation that may be employed?" The government responded that "the United States is signatory to conventions that prohibit torture and that sort of thing. And the United States is going to honour its treaty obligations".<sup>410</sup> The official memorandums that have come into the public domain belie the government's assurances that it is committed to upholding international law and standards.

In the case of another US "enemy combatant", José Padilla, the four dissenting Justices made their feelings clear about unfettered executive power: "Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber".<sup>411</sup> During oral arguments in José Padilla's case, one of the four, Justice Ginsburg

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<sup>408</sup> *Hamdi v. Rumsfeld*, No. 03-6696, decision of 28 June 2004.

<sup>409</sup> Memorandum for William Haynes, General Counsel, Department of Defense. *Possible habeas jurisdiction over aliens held in Guantánamo Bay, Cuba*. From Patrick Philbin and John Yoo, Deputy Assistant Attorneys General. US Department of Justice, Office of Legal Counsel, 28 December 2001.

<sup>410</sup> *Hamdi v. Rumsfeld*, oral arguments, 28 April 2004.

<sup>411</sup> *Rumsfeld v. Padilla*, No. 03-1027, 28 June 2004 (Justice Stevens, dissenting). The Star Chamber was an English court created in 1487 by King Henry VII. The Star Chamber, comprising 20-30 judges, became notorious under Charles I's reign for handing down judgments favourable to the king and to Archbishop William Laud, who supported the persecution of the Puritans. It was abolished in 1641.

had asked the government: "So what is it that would be a check on torture? ... Suppose the executive says mild torture we think will get this information... Some systems do that to get information." The government replied: "Well, our executive doesn't..."<sup>412</sup> This answer was inaccurate. The administration has approved interrogation techniques which violate the prohibition on torture or cruel, inhuman or degrading treatment.

Finding that the US courts have jurisdiction over detainees in Guantánamo, the Supreme Court in June 2004 noted that "executive imprisonment has been considered oppressive and lawless" for almost eight centuries in English law.<sup>413</sup> The administration's response to this ruling has been inadequate, however. By mid-October 2004, more than three months after the decision, not a single Guantánamo detainee had appeared in court. Of the 68 detainees who had so far filed appeals for access to the US courts, only a small number had spoken to their lawyers.<sup>414</sup> Rather than facilitating judicial review, the administration has hastened a system of "Combatant Status Review Tribunals", administrative review bodies that determine, including on secret evidence and without legal counsel for the detainees, whether the latter are "enemy combatants" and should remain in detention.<sup>415</sup> The Pentagon has also said that it "believes the decision does not cover detainees held in other parts of the world".<sup>416</sup>

## 2.6 Recommendations under Point 2

The US authorities should:

- End the practice of incommunicado detention;
- Grant the International Committee of the Red Cross full access to all detainees according to the organization's mandate;
- Grant all detainees access to legal counsel, relatives, independent doctors, and to consular representatives, without delay and regularly thereafter;
- In battlefield situations, ensure where possible that interrogations are observed by at least one military lawyer with full knowledge of international law and standards as they pertain to the treatment of detainees;
- Grant all detainees access to the courts to be able to challenge the lawfulness of their detention. Presume detainees captured on the battlefield during international conflicts to be prisoners of war unless and until a competent tribunal determines otherwise;
- Reject any measures that narrow or curtail the effect or scope of the *Rasul v. Bush* ruling on the right to judicial review of detainees held in Guantánamo or elsewhere, and facilitate detainees' access to legal counsel for the purpose of judicial review.

<sup>412</sup> *Rumsfeld v. Padilla*, oral arguments, 28 April 2004.

<sup>413</sup> *Rasul v. Bush*, No. 03-334, decision of 28 June 2004.

<sup>414</sup> *US stymies detainee access despite ruling, lawyers say*. Washington Post, 14 October 2004.

<sup>415</sup> *USA: Administration continues to show contempt for Guantánamo detainees' rights*. AI Index: AMR 51/113/2004, 8 July 2004. <http://web.amnesty.org/library/Index/ENGAMR511132004>

<sup>416</sup> *Supreme Court affirms right to detain enemy combatants*, American Forces Information Service, news article, 29 June 2004.

### Point 3 – No secret detention

*In some countries torture takes place in secret locations, often after the victims are made to “disappear”. Governments should ensure that prisoners are held only in officially recognized places of detention and that accurate information about their arrest and whereabouts is made available immediately to relatives, lawyers and the courts. Effective judicial remedies should be available at all times to enable relatives and lawyers to find out immediately where a prisoner is held and under what authority and to ensure the prisoner’s safety.*

#### 3.1 Secrecy nurtures torture and “disappearance”

*There was a debate after 9/11 about how to make people disappear. Unidentified ‘former US intelligence official’<sup>417</sup>*

On 13 April 2004 in Yemen, Walid Muhammad Shahir Muhammad al-Qadasi spoke with Amnesty International in a cell in the Political Security Prison in Sana’a. He had recently been returned from detention in Guantánamo Bay. He recalled how he had been arrested in Iran in late 2001 and detained there for about three months before being handed over with other detained foreign nationals to the authorities in Afghanistan who in turn handed them over to the custody of the US. There they were kept in a prison in Kabul.

*“The Americans interrogated us on our first night which we coined as ‘the black night’. They cut our clothes with scissors, left us naked and took photos of us before they gave us Afghan clothes to wear. They then handcuffed our hands behind our backs, blindfolded us and started interrogating us. The interrogator was an Egyptian. He asked me about the names of all members of my family, relatives and friends. They threatened me with death, accusing me of belonging to al-Qa’ida.*

*They put us in an underground cell measuring approximately two metres by three metres. There were ten of us in the cell. We spent three months in the cell. There was no room for us to sleep so we had to alternate. The window of the cell was very small. It was too hot in the cell, despite the fact that outside the temperature was freezing (there was snow), because the cell was overcrowded. They used to open the cell from time to time to allow air in. During the three-month period in the cell we were not allowed outside into the open air. We were allowed access to toilets twice a day; the toilets were located by the cell.”*

Walid al-Qadasi said that the prisoners were only fed once a day and that loud music was used as “torture”. He said that one of his fellow detainees went insane.

Walid al-Qadasi was eventually transferred to Bagram, where he faced a month of interrogation. Then his head was shaved, he was blindfolded, made to wear ear muffs and mouth mask, handcuffed, shackled, loaded on to a plane and flown out to Guantánamo. There, he said he was held in solitary confinement for the first month of what would become a two-

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<sup>417</sup> Quoted in *Harsh CIA methods cited in top Qaeda interrogations*. New York Times, 13 May 2004.

year detention in the Naval Base. He said he was drugged for his transfer back to Yemen in April 2004.

Walid al-Qadasi's allegations depict a detention regime that violates many human rights standards – secret transfer and detention, no access to legal counsel, relatives or to a court, and cruel prison conditions and torturous treatment. As a former Commissioner of the US Immigration and Naturalization Service, James Ziglar, said in 2003: “The more secret government is, the more likely you're going to have abuses – there's no question about it”.<sup>418</sup>

In October 2003, the American Civil Liberties Union and other US organizations filed a Freedom of Information Act (FOIA) request seeking information on the treatment and interrogation of detainees in US custody, and the transfer of detainees to countries known to use torture. Eleven months later, US District Judge Alvin Hellerstein noted that the government had, “with small exception”, produced no information. He wrote that “[m]erely raising national security concerns cannot justify unlimited delay”, and that the “glacial pace” of the government's response “shows an indifference to the commands of FOIA, and fails to afford accountability of government that the act requires.” Judge Hellerstein stated: “No one is above the law: not the executive, not the Congress, and not the judiciary.” He ordered the government to produce or identify all the relevant documents by 15 October 2004.<sup>419</sup>

Secrecy surrounding detentions is dangerous for the prisoner, distressing for relatives, and detrimental to the rule of law. Secrecy has been an overarching characteristic of the US administration's detention policy in the “war on terror”. Even at acknowledged US detention locations, such as Guantánamo Bay, Bagram air base, and Abu Ghraib, the US has not made public the identities or precise numbers of people whom it has held and is holding there. This denial of information has increased the suffering of relatives and obstructed efforts to ensure the humane treatment of the detainees.

The US authorities have pursued an approach of giving only approximate numbers of detainees being held at Guantánamo.<sup>420</sup> This lack of precision raises the possibility that individual detainees could be moved to and from the Naval Base, or between different US agencies, without any public knowledge of such transfers, as they would not be reflected in the approximate numbers of detainees announced by the Pentagon.

On 24 November 2003, the Department of Defense announced that 20 unidentified detainees had been released from Guantánamo three days earlier and “approximately 20” more, also unidentified, had been transferred to the base two days after that, leaving

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<sup>418</sup> Quoted in *America's secret prisoners*, Newsweek, 18 June 2003.

<sup>419</sup> *American Civil Liberties Union, et al. v. Department of Defense, et al.* Opinion and Order 04 Civ. 4151, US District Court, Southern District of New York, 15 September 2004. The judge added that: “If the documents are more of an embarrassment than a secret, the public should know of our government's treatment of individuals captured and held abroad.”

<sup>420</sup> For example, following the transfer of 10 detainees from Afghanistan to Guantánamo in September 2004, the Pentagon reported that this left “approximately 549” detainees at the base. It added that “because of operational and security considerations, no further details can be provided”. Department of Defense News Release, 22 September 2004.

“approximately 660” detainees in custody in Guantánamo.<sup>421</sup> On 15 March 2004, the Department announced that there were “approximately 610” detainees in the base, that is, 50 fewer than four months earlier.<sup>422</sup> Between the two announcements, however, the Pentagon had disclosed the release or transfer to other countries of only 43 Guantánamo detainees – 26 Afghan and Pakistan nationals<sup>423</sup>; three child detainees (believed to be Afghan nationals)<sup>424</sup>; a Spanish national<sup>425</sup>; a Danish national<sup>426</sup>; seven Russian nationals<sup>427</sup>; and five British nationals<sup>428</sup>. In other words, “approximately” seven detainees were unaccounted for in the official announcements of releases and transfers from the base.

The UN Special Rapporteur on torture has said: “It should not be possible for persons to be handed over from one police or security agency to another police or security agency without a judicial order. Where this happens, the officials responsible for the transfers should be held accountable under the criminal law”.<sup>429</sup>

Over two and half years after detentions began in Guantánamo, a chief spokesperson for the Pentagon was unable to answer why the administration had not released the identities of those held in the Naval Base, saying “I do not know why we haven’t done more to announce names”.<sup>430</sup> A US military spokesperson suggested that the reason for continuing secrecy about detainees held in Afghanistan was to protect their right to privacy under the Geneva Conventions, another illustration of a government’s self-serving approach to international law.<sup>431</sup> In August 2004, the UN Independent Expert on Afghanistan, Professor M. Cherif Bassiouni, said that the US was holding 300 to 400 people at Kandahar and Bagram air bases.<sup>432</sup> Except for visits by the ICRC – to the extent that they have been allowed – the

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<sup>421</sup> *Transfer of Guantanamo detainees complete*. Department of Defense News Release, 24 November 2003.

<sup>422</sup> *Transfer of Afghani and Pakistani detainees complete*. Department of Defense News Release, 15 March 2004.

<sup>423</sup> *Ibid.*

<sup>424</sup> *Transfer of juvenile detainees completed*. Department of Defense News Release, 29 January 2004.

<sup>425</sup> *Transfer of detainee complete*. Department of Defense News Release, 13 February 2004.

<sup>426</sup> *Transfer of detainee complete*. Department of Defense News Release, 25 February 2004.

<sup>427</sup> *Transfer of detainees complete*. Department of Defense News Release, 1 March 2004.

<sup>428</sup> *Transfer of British detainees complete*. Department of Defense News Release, 9 March 2004.

<sup>429</sup> Report on visit to Pakistan, UN Doc. E/CN.4/1997/7/Add 2, para. 106.

<sup>430</sup> Lawrence Di Rita, Principal Deputy Assistant Secretary of Defense for Public Affairs, Defense Department operational update briefing, 8 July 2004.

<sup>431</sup> “It’s the coalition’s continued policy to treat persons under confinement in the spirit of the Geneva Conventions. Part of that spirit is to ensure that the persons under confinement are not subject to any kind of exploitation. It is the coalition’s position that allowing media into the facilities would compromise that protection”. *US military vows to keep Afghan jails secret*. Reuters, 4 June 2004.

<sup>432</sup> On Kandahar, the ICRC has written: “The ICRC visited the US detention facility in Kandahar from December 2001 when it opened until its closure in June 2002. It requested renewed access to the detention place in early June after it resumed its function as a recognised US facility to help persons deprived of freedom. The first ICRC visit to Kandahar detention facility took place in late June 2004.” Operational update, 26 July 2004. It is not known how many detainees were held at Kandahar between June 2002 and June 2004, when the ICRC was not visiting.



detainees are held incommunicado. He said: "The lack of giving an opportunity for people to go and see these facilities is a lack of transparency that raises serious concerns about the legality of detention as well as the condition of those detentions."<sup>433</sup> Since mid-2003 many detainees have been held for longer periods in Bagram than was happening earlier in the US military operations in Afghanistan. In some cases detainees have been held for more than a year.<sup>434</sup>

In a statement for the Taguba investigation, a Colonel in the Judge Advocate General's Corps (i.e. a military lawyer), was asked about the activities in Abu Ghraib prison of "other government agencies" (OGA), a phrase used by the US military usually to mean the CIA. He recalled one particular case of three Saudi nationals – medical personnel working for the Coalition – who were taken into custody by the CIA and put in Abu Ghraib under false names<sup>435</sup>:

*"The Saudi government was requesting officially through diplomatic channels for status of these three individuals and all we could say was that we didn't have them because we had no idea where they were. They weren't on any database, they weren't anywhere. It turns out that they had been held at Abu Ghraib in cellblock 1 for seven weeks and ultimately were released. We had a lot of egg on our face about that because we not only responded to the Saudi government that we didn't have them, but also to the ICRC, when in fact we did have them. When I visited Abu Ghraib in early January [2004]..., these individuals were described as ghosts. They were 11 prisoners in cellblock 1 at that time. At that point there were about 100 prisoners in cellblock 1, so approximately ten percent of their population were described as these ghosts. They were folks that didn't appear on anybody's books..."<sup>436</sup>*

The phenomenon of so-called "ghost detainees" was revealed in Major General Antonio Taguba's leaked report. He wrote that "on at least one occasion", military guards at Abu Ghraib held six to eight such detainees. The detainees were moved around the facility to hide them from the ICRC, a manoeuvre which Taguba said was "deceptive, contrary to Army Doctrine, and in violation of international law." The Fay report into Abu Ghraib found cases of eight "ghost detainees", but concluded that it could not determine the real number, or who was responsible.<sup>437</sup> On 9 September 2004, General Paul Kern, who oversaw the Fay investigation, said that the real number of "ghost detainees" was much higher than the eight

<sup>433</sup> *Afghanistan: UN expert denounces abuses in illegal prisons*. UN News Service, 22 August 2004.

<sup>434</sup> ICRC operational update, 26 July 2004.

<sup>435</sup> Fay report, page 54, *supra*, note 15.

<sup>436</sup> Deposition of Colonel Ralph Sabatino, Camp Doha, Kuwait, 10 February 2004, pages 28-29. <http://www.publicintegrity.org/docs/AbuGhraib/Abu16.pdf>. The Fay report revealed that the Saudi general in charge of the men, Ambassador Paul Bremer (the Coalition Provisional Authority's Administrator), the US Embassy in Riyadh, and the US Secretary of State had all requested a search for the three Saudis. Each was told that the three men were not known to be in US custody.

<sup>437</sup> Fay report (Jones, page 22), *supra*, note 15.

found – “the number is in the dozens, to perhaps up to 100”.<sup>438</sup> Major General George Fay also said that he believed “it’s probably in the dozens”.<sup>439</sup>

Lieutenant Colonel Stephen Jordan, formerly director of the Abu Ghraib intelligence facility, has stated that “other government agencies” hid detainees in order that they could be moved out of the prison quickly, for example to Guantánamo.<sup>440</sup> In November 2003, Secretary of Defense Rumsfeld, acting on the request of the CIA’s then director George Tenet, ordered military officials in Iraq to keep a detainee off any prison register.<sup>441</sup> In June 2004, Secretary Rumsfeld stated that “the decision was made that it would be appropriate not to [register the detainee] for a period.”<sup>442</sup> He was asked why the ICRC had not been told of the detainee, and whether there were other such prisoners being detained without the knowledge of the ICRC. Secretary Rumsfeld responded that “there are instances where that occurs”.<sup>443</sup> In June 2004, after seven months, the unidentified detainee had still not been registered with the ICRC. Secretary Rumsfeld stated that the detainee was not a “ghost detainee”. Asked how this case was different from what the Taguba report described as “ghost detainees”, Secretary Rumsfeld replied: “It is just different, that’s all.” However, he failed to explain how this case differed from those of other “ghost detainees”, who under international standards are cases of enforced disappearance of persons due to the official failure to clarify their fate and whereabouts.

Secretary Rumsfeld was not questioned by the Fay investigation about this case, which concerned a detainee sometimes known as Triple-X, and reportedly held at the Camp Cropper detention facility.<sup>444</sup> However, General Paul Kern, who oversaw the Fay inquiry, said that “there are enough unknown questions about the ‘ghost detainees’ and what agreements were made with whom” for further investigation to be required.<sup>445</sup> For example, whether all such detainees were eventually transferred to military custody is unknown. At least one

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<sup>438</sup> Oral testimony before the Senate Armed Services Committee, 9 September 2004.

<sup>439</sup> *Ibid.*

<sup>440</sup> “The deal was that they could bring detainees in, they would not put them in the regular screening process... [Be]cause once a detainee did that, you’re kind of in there three to six to eight months. The OGA [i.e. CIA] folks wanted to be able to pull somebody in 24, 48, 72 hours if they had to get ‘em to GITMO, do what have you.” Lt. Col. Jordan, AR 15-6 investigation interview, with Major General Taguba, 21 February 2004, page 132. <http://www.publicintegrity.org/docs/AbuGhraib/Abu32.pdf>.

<sup>441</sup> “With respect to the detainee you’re talking about, I’m not an expert on this, but I was requested by the Director of Central Intelligence to take custody of an Iraqi national who was believed to be a high-ranking member of *Ansar al-Islam*. And we did so. We were asked to not immediately register the individual. And we did that. It would – it was – he was brought to the attention of the Department, the senior level of the Department I think late last month. And we’re in the process of registering him with the ICRC at the present time... What I can say is that I think it’s broadly understood that people do not have to be registered in 15 minutes when they come in. What the appropriate period of time is I don’t know. It may very well be a lot less than seven months, but it may be a month or more.” Secretary Rumsfeld, Defense Department regular briefing, 17 June 2004.

<sup>442</sup> Defense Department regular briefing, 17 June 2004.

<sup>443</sup> *Ibid.*

<sup>444</sup> *Army says CIA hid more Iraqis than it claimed*. New York Times, 10 September 2004.

<sup>445</sup> Testimony to Senate Armed Services Committee, 9 September 2004.

detainee, a Syrian national, was reportedly taken out of Iraq and held on a US Navy ship before being returned to Abu Ghraib in late 2003.<sup>446</sup> However, the USA has not yet conducted and made public the further investigation recognized as necessary by General Kern.

Secret detention is prohibited under international human rights standards. Principle 6 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions states that “governments shall ensure that persons deprived of their liberty are held in officially recognized places of custody, and that accurate information on their custody and whereabouts, including transfers, is made promptly available to their relatives and lawyers or other persons of confidence.”<sup>447</sup> The Human Rights Committee, in an authoritative statement on the prohibition on torture and cruel, inhuman and degrading treatment, has stated that “to guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention... to be kept in registers readily available and accessible to those concerned, including relatives and friends”.<sup>448</sup> The UN Special Rapporteur on torture has also said that “the maintenance of secret places of detention should be abolished under law. It should be a punishable offence for any official to hold a person in a secret and/or unofficial place of detention.”<sup>449</sup> The Special Rapporteur reiterated this in August 2004.<sup>450</sup>

Amnesty International considers that the secret and unacknowledged detentions of the “ghost detainees” in Iraq, as revealed by the Taguba report, amount to “disappearances”. As described in the following section, the organization also considers that other detainees held in undisclosed locations in the “war on terror”, detained either under US control or in the custody of other countries with the USA’s knowledge and acquiescence, or under US interrogation, have effectively been made to “disappear”. The acknowledgement of their detentions has been at best limited and at worst non-existent, and their fate and whereabouts remain wholly unknown.

The UN Declaration on the Protection of All Persons from Enforced Disappearance, adopted by consensus by the community of nations, including the USA, states that “disappearances” occur when:

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<sup>446</sup> *Army says CIA hid more Iraqis than it claimed*. New York Times, 10 September 2004.

<sup>447</sup> Recommended by the UN Economic and Social Council resolution 1989/65 of 24 May 1989.

<sup>448</sup> Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.1 at 30 (1994), para. 11. Accurate and detailed registers of detainees are required under international law and standards, including the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (Third Geneva Convention), Articles 122 to 125 and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Articles 136 to 141.

<sup>449</sup> UN Doc. E/CN.4/2002/76, 27 December 2001, Annex 1.

<sup>450</sup> UN Doc. A/59/324, 23 August 2004, para. 22.

*“persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials or different branches or levels of Government, ... followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, thereby placing such persons outside the protection of the law.”*<sup>451</sup>

Article 1 of the UN Declaration states that “any act of enforced disappearance is an offence to human dignity”, which

*“places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life”.*

The UN Declaration states that: “All acts of enforced disappearance shall be offences under the criminal law punishable by appropriate penalties which shall take into account their extreme seriousness” (Article 4). Furthermore: “No order or instruction of any public authority, civilian, military or other, may be invoked to justify an enforced disappearance. Any person receiving such an order or instruction shall have the right and duty not to obey it” (Article 6). It makes clear that “disappearances” cannot be justified under any circumstances whatsoever, including “a threat of war, a state of war, internal political instability or any other public emergency” (Article 7). Article 10 states that: “Any person deprived of liberty shall be held in an officially recognized place of detention” and “be brought before a judicial authority promptly after detention”. Article 10 further states that: “Accurate information on the detention of such persons and their place or places of detention, *including transfers*, shall be made promptly available to their family members, their counsel or to any other person having a legitimate interest in the information” (emphasis added).

Enforced disappearances have been recognized as crimes under international law since the judgment of the Nuremberg Tribunal in 1946.<sup>452</sup> International instruments adopted since that date have reiterated that enforced disappearances are crimes under international law.<sup>453</sup>

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<sup>451</sup> Adopted without a vote by the UN General Assembly on 18 December 1992 in resolution 47/133.

<sup>452</sup> Field Marshal Wilhelm Keitel was convicted by the Nuremberg Tribunal for his role in implementing Adolf Hitler's *Nacht und Nebel Erlass* (Night and Fog Decree) issued on 7 December 1941 requiring that persons “‘endangering German security’ who were not to be immediately executed” were to be made to “vanish without a trace into the unknown in Germany”. Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the dissenting opinion of the Soviet Member) - Nuremberg 30th September and 1st October 1946 (Nuremberg Judgment), Cmd. 6964, Misc. No. 12 (London: H.M.S.O. 1946), p. 88.

<sup>453</sup> Inter-American Convention on the Forced Disappearance of Persons, Preamble, adopted on 9 June 1994 in Belém do Pará, Brazil, at the 24th regular session of the OAS General Assembly; International Law Commission, 1996 Draft Code of Crimes against the Peace and Security of Mankind, Article 18

### 3.2 Secret detentions and 'other government agencies'

*Notorious human rights abusers, including, among others, Burma, Cuba, North Korea, Iran, and Zimbabwe, have long sought to shield their abuses from the eyes of the world by staging elaborate deceptions and denying access to international human rights monitors. Until recently, Saddam Hussein used similar means to hide the crimes of his regime.*

President George W. Bush, 26 June 2003<sup>454</sup>

Since the 1970s, Amnesty International has documented how the use of "disappearances" in countries around the world leaves detainees vulnerable to other grave human rights violations including torture and extrajudicial execution.<sup>455</sup> A quarter of a century later, in the "war on terror", the US Central Intelligence Agency or "other government agencies" are alleged to have been responsible for holding an unknown number of "disappeared" – "ghost detainees" in US parlance – unregistered and unacknowledged prisoners hidden from the ICRC and from their relatives. Torture is alleged to have been used against detainees held in secret.

President Bush's memorandum of 7 February 2002 stating that the USA would treat detainees in the "war on terror" humanely, even "those who are not legally entitled to it", included the Director of the CIA as one of its recipients. It stated that "as a matter of policy, the United States Armed Forces shall continue to treat detainees humanely".<sup>456</sup> This assurance did not include the CIA and other agencies and it omitted any reference to persons "rendered" to states that use torture in interrogation (see Point 12.1). The CIA is an independent agency responsible to the President through its Director and accountable to the country through Congress. The President has the authority to direct the CIA to conduct covert operations.

In his account of the US administration's response to the atrocities of 11 September 2001, Bob Woodward of the *Washington Post* describes a meeting of top US officials in Camp David on the weekend of 15 and 16 September 2001.<sup>457</sup> At the meeting, the then

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(i); Rome Statute of the International Criminal Court, Article 7 (1)(i) and (2) (i); Elements of Crimes, Article 7 (1) (i). When the Elements of Crimes were adopted by the Preparatory Commission for the International Criminal Court, the US delegate, Lieutenant Colonel William Lietzau, stated that the United States was "happy to join consensus in agreeing that this elements of crimes document correctly reflects international law". Christopher Keith Hall, *The first five sessions of the UN Preparatory Commission for the International Criminal Court*, 94 Am. J. Int'l L. 773, 788 (2000).

<sup>454</sup> Statement by the President. United Nations International Day in Support of Victims of Torture.

<sup>455</sup> For instance, see Amnesty International's annual reports, or "*Disappearances*" and *political killings: Human rights crisis of the 1990s. A manual for action*. AI Index: ACT 33/01/94, February 1994. Amnesty International Dutch Section.

<sup>456</sup> Presidential memorandum, 7 February 2002. *supra*, note 11.

<sup>457</sup> Present were President George Bush, Vice President Dick Cheney, National Security Advisor Condoleezza Rice, Deputy National Security Advisor Stephen Hadley, Secretary of State Colin Powell, Deputy Secretary of State Richard Armitage, Secretary of Defense Donald Rumsfeld, Attorney General John Ashcroft, FBI Director Robert Mueller, CIA Director George Tenet, Deputy Secretary of Defense Paul Wolfowitz and Cofer Black, chief of the CIA Director's Counterterrorist Center. 9/11 Commission Report, Chapter 10, *supra*, note 18.

Director of the CIA, George Tenet, reportedly requested that “exceptional authorities” be granted to his agency: “This was a request for a broad intelligence order permitting the CIA to conduct covert operations... The CIA needed new, robust authority to operate without restraint”.<sup>458</sup> Woodward continues:

*“Tenet had brought a draft of a presidential intelligence order, called a finding, that would give the CIA power to use the full range of covert instruments, including deadly force...<sup>459</sup> The CIA chief came to a page headed ‘Heavily Subsidize Arab Liaison Services’. He explained that with the additional hundreds of millions of dollars for new covert action, the CIA would ‘buy’ key intelligence services, providing training, new equipment, money for their agent networks, whatever they might need. Several intelligence services were listed: Egypt, Jordan, Algeria. Acting as surrogates for the United States, these services could triple or quadruple the CIA’s resources, an extended mercenary force of intelligence operatives.*

*“Like much of the world of covert activity, such arrangements carried risks. It would put the United States in league with questionable intelligence services, some of them with dreadful human rights records. Some had reputations for ruthlessness and using torture to obtain confessions... Bush said he understood the risks.”<sup>460</sup>*

On the afternoon of 17 September 2001, according to Woodward’s account, President Bush signed the Memorandum of Notification authorizing all the measures that the CIA Director had proposed two days earlier at the administration’s Camp David meeting of the war cabinet.<sup>461</sup> It has since been reported that President Bush authorized the CIA to set up secret detention facilities outside the USA and to use harsh interrogation techniques.<sup>462</sup> The

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<sup>458</sup> Bob Woodward, *Bush at War*, page 76. “Another key component, [Director George Tenet] said, was to use ‘exceptional authorities to detain al Qaeda operatives worldwide’. That meant the CIA could use foreign intelligence services or other paid assets. Tenet and his senior deputies would be authorized to approve ‘snatch’ operations abroad, truly exceptional power”.

<sup>459</sup> Woodward continues here: “For more than two decades, the CIA had simply modified previous presidential findings to obtain its formal authority for counterterrorism. His new proposal, technically called a Memorandum of Notification, was presented as a modification to the worldwide counterterrorism intelligence finding signed by President Reagan in 1986. As if symbolically erasing the recent past, it superseded five such memoranda signed by President Clinton.”

<sup>460</sup> Bob Woodward, *Bush at War*, page 76-77.

<sup>461</sup> *Ibid.* Page 101. Chapter 10 of the 9/11 Commission Report notes that at the Camp David meeting of the “war council”, “Bush and his advisers discussed new legal authorities for covert action in Afghanistan, including the administration’s first Memorandum of Notification on Bin Laden. Shortly thereafter, President Bush authorized broad new authorities for the CIA.” The 9/11 Commission Report cites a National Security Council memorandum, dated 16 September, from “Rice to Cheney, Powell, O’Neill (Paul, Secretary of the Treasury), Rumsfeld, Ashcroft, Gonzales (Alberto, White House Counsel), Card (Andrew, White House Chief of Staff), Tenet, and Shelton (Hugh, Chairman of the Joint Chiefs of Staff)”.

<sup>462</sup> *The roots of torture*. Newsweek, 24 May 2004. The White House Counsel has said that “the only formal, written directive from the President regarding the treatment of detainees” was his 7 February

US government then reportedly negotiated “status of forces agreements” with foreign governments to give immunity to US agents and private contractors in the secret facilities.<sup>463</sup> Another report quotes a former US intelligence official as saying that “there was a debate after 9/11 about how to make people disappear”, with the reported result being secret agreements allowing the CIA to use facilities outside the USA unhindered by external scrutiny.<sup>464</sup>

A year after the Camp David meeting, one of its attendees, the former chief of the CIA’s Counterterrorist Center, Cofer Black, conjured the spectre of torture and ill-treatment when the only detail he would give of the “very highly classified area” of “operational flexibility” was that “there was before 9/11 and after 9/11” and that “after 9/11 the gloves come off.”<sup>465</sup> Three months after that statement, evidence emerged that the CIA was employing interrogation methods – so-called “stress and duress” techniques – which violated the prohibition on torture and ill-treatment, in secret detention facilities, and transferring detainees to the custody of countries with poor human rights records (see Point 12.1). A *Washington Post* report at this time alleged that the CIA was using hooding, sleep deprivation and forcing detainees to stand or kneel for hours in a secret facility in Bagram air base to which the ICRC had not had access.<sup>466</sup> The report quoted an official who had supervised the capture and transfer of detainees: “If you don’t violate someone’s human rights some of the time, you probably aren’t doing your job. I don’t think we want to be promoting a view of zero tolerance on this. That was the whole problem for a long time with the CIA.”

In June 2003, the CIA’s General Counsel, Scott Muller, gave assurances that although the CIA “does not comment on operational activities or practices..., in its various activities around the world the CIA remains subject to the requirements of US law.”<sup>467</sup> As already noted, however, the interpretation of US law by administration lawyers in the wake of 11 September 2001 is a matter for serious concern. Scott Muller’s assurances must now be viewed in the light of these memorandums. Indeed, the Fay report into Abu Ghraib found that the CIA operated outside the rule of law and encouraged military personnel to do the same (see below).

A CIA request for legal protections for its interrogators reportedly lay behind the now notorious memorandum on torture, dated 1 August 2002, written in the Justice Department

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2002 memorandum, *supra*, note 11. Press briefing by White House Counsel, 22 June 2004, *supra*, note 16.

<sup>463</sup> *Ibid.* A UN expert has raised concern about the apparent absence of any status of forces agreement (SOFA) between the USA and Afghanistan, “which raises another serious legal concern”. In other words, what is the status of the US forces in Afghanistan? *Afghanistan: UN expert denounces abuses in illegal prisons*. UN News Service, 22 August 2004.

<sup>464</sup> *Harsh CIA methods cited in top Qaeda interrogations*. New York Times, 13 May 2004.

<sup>465</sup> Hearing before the Senate and House Intelligence Committees, 26 September 2002.

<sup>466</sup> *US decries abuse but defends interrogations*. Washington Post, 26 December 2002.

<sup>467</sup> Letter to Miles Fischer and Scott Horton, Association of the Bar of the City of New York, 23 June 2003. The letter states: “Pursuant to Executive Order 12333, any allegations of unlawful behavior are reported by the CIA to the Department of Justice, and may be investigated both by that Department and by the Agency’s own Presidentially appointed, Senate confirmed Inspector General”. Executive Order 12333 is available at <http://www.cia.gov/cia/information/eo12333.html#1.2>

and sent to the White House.<sup>468</sup> It was reportedly written following discussions within the government about the legality of methods used by the CIA to interrogate Abu Zubaydah, an alleged leading member of *al-Qa'ida* arrested in Pakistan on 28 March 2002 and taken into US custody. He was reported to have been taken to a secret CIA interrogation facility in Thailand.<sup>469</sup> He had been shot in the groin during his arrest, and it is alleged that painkillers were used "selectively" to obtain his cooperation during interrogation.<sup>470</sup> The August 2002 memorandum includes the suggestion that the US prohibition on torture "does not preclude any and all use of drugs", a line repeated in the final report of the Pentagon Working Group in April 2003. As already noted, the memorandum concluded that interrogators could cause a great deal of pain before crossing the threshold to torture; that in any case the US President's authority as Commander-in-Chief could override the prohibition on torture; and that even if interrogators were prosecuted for torture, there were defences available to them by which they could escape criminal liability.

Allegations of torture and other cruel, inhuman or degrading treatment that were made before this and other government memorandums came to light today take on a new resonance. For example, in March 2003, the *New York Times* quoted a "Western intelligence official" as describing the treatment in Bagram air base of Omar al-Faruq, an alleged senior *al-Qa'ida* operative, as "not quite torture, but about as close as you can get". The official reported that over a three-month period, Omar al-Faruq was "fed very little, while being subjected to sleep and light deprivation, prolonged isolation and room temperatures that varied from 100 degrees [38 degrees centigrade] to 10 degrees [minus 12 degrees centigrade]".<sup>471</sup> It is not known where Omar al-Faruq, a Kuwaiti national, is now held.

Detainees kept in secret locations are those considered to have high intelligence value. In this respect "high value" also suggests "high risk" – of torture or ill-treatment made possible by the secrecy of the detention (itself a form of ill-treatment). Other "high value" *al-Qa'ida* suspects have been taken into US custody since the capture of Abu Zubaydah and, like him, reportedly held under CIA control in secret locations outside US territory. Their whereabouts are so secret that President Bush is said to have informed the CIA that he did not want to know where the detainees are being held.<sup>472</sup>

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<sup>468</sup> Bybee memo, 1 August 2002, *supra*, note 252.

<sup>469</sup> *Uncertainty about interrogation rules seen as slowing the hunt for information on terrorists*. *New York Times*, 28 June 2004. At the alleged time of the capture, Secretary of Defense Rumsfeld said that media reports suggesting that Abu Zubaydah might be transferred to a third country where torture could be used during interrogation were "irresponsible and wrong". However, he had refused to issue a categorical denial when asked if such a transfer could occur even if the prisoner remained under the control of the USA. Department of Defense news briefing, 3 April 2002. Amnesty International raised concern on this case with the government in its April 2002 Memorandum, *supra*, note 13. The whereabouts of Abu Zubaydah remain unknown two-and-a-half years after his capture, and he appears to have been "disappeared".

<sup>470</sup> *US decries abuse but defends interrogations*. *Washington Post*, 26 December 2002.

<sup>471</sup> *Questioning terror suspects in a dark and surreal world*. *New York Times*, 9 March 2003.

<sup>472</sup> *Harsh CIA methods cited in top Qaeda interrogations*. *New York Times*, 13 May 2004.



There have been reports that secret US facilities are located in Jordan, Diego Garcia, Pakistan, Egypt, Thailand, and Afghanistan. For example, there is reported to be a CIA facility in Kabul in the former Ariana hotel, and one known as "The Pit", also in Kabul. Khaled El Masri recently told Amnesty International that he was detained in Kabul in early 2004 (see also Point 12.1). He alleged that other detainees told him of a nearby detention facility in which there were around 200 detainees, most of whom "belonged" to the Afghan authorities, but about 10 of whom "belonged" to the US and would be moved whenever the ICRC visited. Such reports of secret detention facilities are by definition not yet confirmed and the allegations have been denied or ignored by the authorities.<sup>473</sup> At the time of writing, Amnesty International had not received a response to a letter it wrote in August 2004 to the Acting Director of the CIA raising Khaled El Masri's allegations.<sup>474</sup> The organization is concerned that, if these allegations are correct, the detainees have been "disappeared".

Citing "international intelligence sources", an Israeli newspaper has alleged that at least 11 of the most senior alleged members of *al-Qa'ida* in custody, including Abu Zubaydah, Riduan Isamuddin (see page 184), Khalid Sheikh Mohammed (see below) and Ramzi bin al-Shibh, are being held in a secret CIA facility in Jordan.<sup>475</sup> There, the newspaper states, CIA interrogators can apply interrogation methods banned under US law in a country whose close relationship with the USA makes leaked information about the detainees less likely. The government of Jordan has "categorically denied" the allegations, as it has done previously.<sup>476</sup> There is evidence that Maher Arar, a Canadian/Syrian national who was deported from the USA in October 2002, may have been held in a CIA facility in Jordan before being transferred to Syria where he was allegedly subjected to severe torture (see Point 12.1).<sup>477</sup>

#### "Disappearances"

Some individuals allegedly held in unknown locations may have been held for as long as three years. It is not known whether they are alive or dead, whether they are held in a US facility in Afghanistan, in Guantánamo, or in a facility in another country, under US or non-

<sup>473</sup> For example, a UK parliamentary committee noted in 2004 that, in response to questions about the Diego Garcia reports, Prime Minister Tony Blair had "replied that the US authorities and the British Representative on Diego Garcia had confirmed that there were not, and never had been, any terrorist detainees held on the island nor on any of the vessels anchored there". Intelligence and Security Committee, Annual Report 2003-2004. At a Department of Defense briefing on 14 July 2004, a Pentagon spokesman, asked whether there were any detainees at Diego Garcia, replied: "I don't know. I simply don't know".

<sup>474</sup> Letter from AI Secretary General Irene Khan to CIA Acting Director John McLaughlin, dated 20 August 2004. Copied to President Bush, Secretary of Defense Rumsfeld, and Secretary of State Powell.

<sup>475</sup> *CIA holding Al-Qaida suspects in secret Jordanian lockup*. Haaretz, 13 October 2004. This report followed a report by Human Rights Watch. *The United States' "Disappeared": The CIA's Long-Term "Ghost Detainees"*. October 2004. <http://www.hrw.org/backgrounder/usa/us1004/us1004.pdf>.

<sup>476</sup> *Jordanian official denies reports of CIA detention facility*. Haaretz, 14 October 2004. *Jordan denies it has US prisons on its territory*. AFP in Jordan Times, 21 June 2004.

<sup>477</sup> *Arar recalls turmoil of his arrival in Jordan*. Toronto Star, 15 October 2004. An earlier report suggested that Maher Arar had been held in a CIA debriefing facility before being handed over to Syria. *Ottawa stumped by Syria tipoff*. National Post (Canada), 30 July 2003.

US control, or on a ship off Diego Garcia or elsewhere. This refusal or failure to acknowledge in whose custody they are currently detained or clarify the whereabouts of the detainees, leaving them outside the protection of the law for a prolonged period, places them squarely within the scope of the UN Declaration on the Protection of All Persons from Enforced Disappearance (see page 106).<sup>478</sup>

The 9/11 Commission Report on the 11 September 2001 attacks revealed that it had been “authorized to identify by name only ten detainees whose custody has been confirmed officially by the US government.”<sup>479</sup> It did not say when this confirmation occurred, or whether the detainees were or had been in direct US custody or where they were or had been held. Nor did it say whether any of the detainees had at any point been transferred between the USA and other countries.

For example, of one of the 10 detainees, Abd al Rahim al Nashiri, the 9/11 Commission Report states only that “Nashiri’s November 2002 capture in the United Arab Emirates finally ended his career as a terrorist”. The Commission explained that its access to information on the detainees had been “limited to the review of intelligence reports based on communications received from the locations where the actual interrogations take place”.<sup>480</sup> It was allowed no further input or access on the grounds that it would “disrupt the sensitive interrogation process”. These minimal details clearly do not suffice to establish:

- whether the 10 prisoners were held by the US authorities (rather than by other countries) and, if so, under which authorities they were held, and when they were first in US custody;
- whether they are still in US custody and, if so, where they are held and under what conditions; if not, what happened to them after they ceased to be in US custody.

Concerned persons, including relatives and human rights monitors, are left in the dark about the whereabouts, fate, and well-being of the detainees.

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<sup>478</sup> In addition, Article II of the Inter-American Convention on Forced Disappearance of Persons, adopted in 1994, states: “For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.” The USA has not ratified the Convention.

<sup>479</sup> The 10 are: Khalid Sheikh Mohammed, Abu Zubaydah, Riduan Isamuddin (also known as Hambali), Abd al Rahim al Nashiri, Tawfiq bin Attash (also known as Khallad), Ramzi Binalshibh, Mohamed al Kahtani, Ahmad Khalil Ibrahim Samir al Ani, Ali Abd al Rahman al Faqasi al Ghamdi (also known as Abu Bakr al Azdi), and Hassan Ghul. Of these 10 men, Amnesty International understands that at least at some point Mohamed al Kahtani was held in Guantánamo, but it is not known if he is still held there.

<sup>480</sup> In its extensive footnotes, the 9/11 Commission cites “interrogation reports” of the detainee in question, naming the detainee if it is one of the 10. If it is not one of the 10, the Commission Report simply refers to “interrogation of detainee”. There are numerous examples of the latter, with interrogation reports dated from late-2001 to mid-2004.

As in the case of the “disappeared” in US custody in Iraq, the ICRC has been denied access to or information about detainees kept in undisclosed locations. Indeed, the organization has not even been told where such locations are. In January 2004 it issued a press release in which it stated:

*“Beyond Bagram and Guantánamo Bay, the ICRC is increasingly concerned about the fate of an unknown number of people captured as part of the so-called global war on terror and held in undisclosed locations. For the ICRC, obtaining information on these detainees and access to them is an important humanitarian priority and a logical continuation of its current detention work in Bagram and Guantánamo Bay.”*<sup>481</sup>

In May 2004, the ICRC revealed that it has “repeatedly appealed to the American authorities for access to people detained in undisclosed locations”.<sup>482</sup> By late July 2004, the US authorities were continuing to deny access to the ICRC.<sup>483</sup> This remained the case as of 19 October 2004.

Those not included in the 9/11 Commission’s list of 10 detainees, but who are believed to be or to have been in US custody at unknown locations include: Ibn al-Shaikh al-Libi, a Libyan national taken into custody in Afghanistan in January 2002; Omar al-Faruq, arrested in Indonesia on 5 June 2002 (see above); Sayf al-Islam al-Masri, arrested in early October 2002 in Georgia; and Muhammad Mansur Jabara, dual national of Kuwait and Canada, arrested in Oman in March 2002 and reportedly transferred to the USA, possibly via Canada. In December 2002, Amnesty International wrote to the US government for clarification on the whereabouts and legal status of these individuals.<sup>484</sup> The organization has never had a reply. It has also never had a reply to its request for clarification on the whereabouts of Yemeni national Jamil Qasim Saeed Mohammed, reportedly transferred from Pakistan custody to US custody three years ago (see Point 12.1).

Other detainees whose whereabouts are unknown include Adil Al-Jazeera, an Algerian national, who was reportedly handed over by Pakistan to US authorities in July 2003 after being held incommunicado for a month and allegedly subjected to “tough questioning”. He was flown out of Peshawar to an undisclosed location, possibly Bagram, for US interrogation.<sup>485</sup> Amnesty International has had no clarification from the authorities as a result of its urgent appeal on the case.<sup>486</sup>

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<sup>481</sup> *United States: ICRC President urges progress on detention-related issues*, 16 January 2004.

<sup>482</sup> *US detention related to the events of 11 September 2001 and its aftermath – the role of the ICRC*. Operational update, 14 May 2004.

<sup>483</sup> ICRC operational update, 26 July 2004.

<sup>484</sup> *USA: Beyond the Law: Update to Amnesty International’s April Memorandum to the US Government on the rights of detainees held in US custody in Guantánamo Bay and other locations*. AI Index: AMR 51/184/2002, <http://web.amnesty.org/library/Index/ENGAMR511842002>

<sup>485</sup> *Terror suspect flown out of Pakistan*. Associated Press, 14 July 2003.

<sup>486</sup> <http://web.amnesty.org/library/Index/ENGAMR511032003>.

Abu Zubair al-Haili, a Saudi national, was arrested in Morocco in June 2002 by the authorities there. A US official was reported as saying that Zubair al-Haili had "a wealth of information", to which the USA would have access.<sup>487</sup> It is not clear if al-Haili has ever been transferred to US custody. Another detainee, Saudi national Mustafa al-Hawsawi, was reportedly arrested in Pakistan on 1 March 2003 and subsequently flown to an undisclosed location in US custody.

#### *Torture alleged*

One of the 10 detainees whose detention has been "confirmed" via the 9/11 Commission Report is Khalid Sheikh Mohammed, arrested in Pakistan along with Mustafa al-Hawsawi. At that time, asked about how Khalid Sheikh Mohammed would be treated during interrogation, the White House spokesman replied that "the standard for any type of interrogation of somebody in American custody is to be humane and to follow all international laws and accords dealing with this type subject. That is precisely what has been happening, and exactly what will happen."<sup>488</sup> Since then, it has been alleged that the CIA subjected Khalid Sheikh Mohammed to a torture technique known as "water boarding" in which the prisoner is forcibly pushed under water to the point that he believes he will drown.<sup>489</sup> According to current and former counterterrorism officials, this and other techniques were reportedly authorized under a set of secret rules for the interrogation of high-level *al-Qa'ida* detainees endorsed by the Justice Department and the CIA early in the "war on terror".<sup>490</sup>

A Pentagon spokesperson has said of the alleged use of "water boarding" that "it is not a technique that's part of this approval, and based upon everything I know, that is an absolute false report."<sup>491</sup> Nevertheless, "asphyxiations" of detainees by US soldiers have been alleged in Iraq,<sup>492</sup> and the technique of "water-boarding" is similar to an interrogation method that was requested for use at Guantánamo in late 2002. A memorandum, dated 11 October 2002, requested approval of four "Category III" techniques for use against "the most uncooperative detainees" held in Guantánamo.<sup>493</sup> One of the techniques requested was "use of

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<sup>487</sup> *Top al Qaeda leader in custody*. CNN.com, 18 June 2002.

<sup>488</sup> Ari Fleischer, Press Briefing, 3 March 2003.

<sup>489</sup> *Harsh CIA methods cited in top Qaeda interrogations*. New York Times, 13 May 2004. Citing statements by counterterrorism officials, this article alleges that "detainees have also been sent to third countries, where they are convinced that they might be executed, or tricked into believing they were being sent to such places. Some have been hooded, soaked with water and deprived of food, light and medications."

<sup>490</sup> *Ibid.*

<sup>491</sup> Press briefing, 22 June 2004, *supra*, note 16.

<sup>492</sup> Members of the 223<sup>rd</sup> Military Intelligence Battalion reportedly abused detainees in a detention facility in Samarra, north of Baghdad, in 2003, including by forcing "into asphyxiations numerous detainees in an attempt to obtain information". *Abuse of captives more widespread, says army survey*. New York Times, 26 May 2004.

<sup>493</sup> Memorandum for Commander, Joint Task Force 170. Subject: *Request for approval of counter-resistance strategies*. Signed by Jerald Phifer, LTC, USA. Director, J2.  
<http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf>

wet towel and dripping water to induce the misperception of suffocation". The request noted that such techniques were used by "other US government agencies" (e.g. the CIA).

In late June 2004, it was reported that the CIA had suspended the use of its "enhanced interrogation techniques", such as feigning suffocation, stress positions, light and noise bombardment, and sleep deprivation. One former CIA official was quoted as saying: "The whole thing has stopped until we sort out whether we are sure we're on legal ground".<sup>494</sup> It is shocking that any such legal review is considered necessary for techniques that so flagrantly flout international law and standards prohibiting torture and ill-treatment.

### **Shrouded in secrecy**

The CIA's activities in the "war on terror" remain shrouded in secrecy. In June 2004, the White House Counsel refused to "get into questions related to the CIA".<sup>495</sup> Two months later, the Schlesinger review into Pentagon detention policies found that:

*"CIA personnel conducted interrogations in [Department of Defense] detention facilities. In some facilities these interrogations were conducted in conjunction with military personnel, but at Abu Ghraib the CIA was allowed to conduct its interrogations separately."*<sup>496</sup>

The Schlesinger Panel revealed that it had not had "full access to information involving the role of the Central Intelligence Agency in detention operations; this is an area the Panel believes needs further investigation and review." The Panel's chairman, John Schlesinger, acknowledged at the press conference to release the report on 24 August 2004 that his investigators had only "had partial access to the CIA... We did not have a sharing".

The following day, the Fay report into Abu Ghraib was released. It reserved particular criticism for the CIA, noting that the agency's "detention and interrogation practices led to a loss of accountability, abuse, reduced interagency cooperation, and an unhealthy mystique that further poisoned the atmosphere at Abu Ghraib".<sup>497</sup> It found that the CIA had held a number of "ghost detainees". At least one of them – Manadel al-Jamadi (see Point 6) – had died in custody. It found that CIA personnel had used aliases, and detained people under false names. It found that the CIA officers had generally operated outside the military's rules and procedures, citing an instance where a CIA officer had loaded his gun during an interrogation. General Fay told the Senate Armed Services Committee that the CIA had refused to provide the information he requested for his investigation.<sup>498</sup>

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<sup>494</sup> *CIA puts harsh tactics on hold.* Washington Post, 27 June 2004.

<sup>495</sup> Department of Defense Deputy General Counsel, Press briefing, 22 June 2004, *supra*, note 16.

<sup>496</sup> Schlesinger report, page 70, see *supra*, note 30.

<sup>497</sup> Fay report, page 52-53, *supra*, note 15.

<sup>498</sup> "I made the request to CIA chief of station through General Fast. She received no response and I followed up a number of times and still received no response. Then when I came back to the United States and continued my investigation here, still getting no response from CIA after making additional inquiries, I eventually made an appointment with the inspector general of the CIA... I was informed that CIA was doing its own investigation and that...they would not provide me with the information

### 3.3 Recommendations under Point 3

The US authorities should:

- Clarify the fate and whereabouts of those detainees reported to be or to have been in US custody or under US interrogation in the custody of other countries, to whom no outside body including the International Committee of the Red Cross are known to have access, and provide assurances of their well-being. These detainees include but are not limited to those named in the 9/11 Commission Report and in this Amnesty International report as having been in custody at some time in undisclosed locations;
- End immediately the practice of secret detention wherever it is occurring, and under whichever agency. Hold detainees only in officially recognized places of detention;
- Not collude with other governments in the practice of “disappearances” or secret detentions, and expose such abuses where the USA becomes aware of them;
- Maintain an accurate and detailed register of all detainees at every detention facility operated by the US, in accordance with international law and standards. This register should be updated on a daily basis, and made available for inspection by, at a minimum, the International Committee of the Red Cross, and the detainees’ relatives and lawyers or other persons of confidence;
- Make public and regularly update the precise numbers of detainees in US custody specifying the agency under which each person is held, their identity, their nationality and arrest date, and place of detention;
- Either charge and bring to trial, in full accordance with international law and standards and without recourse to the death penalty, all detainees held in US custody in undisclosed locations, or else release them;
- Comply without delay with Freedom of Information Act requests, and related court orders, aimed at clarifying the fate and whereabouts of such detainees;
- Make public and revoke any measures or directives that have been authorized by the President or any other official that could be interpreted as authorizing “disappearances”, torture or cruel, inhuman or degrading treatment, or extrajudicial executions.

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that I requested.” Major General Fay, oral testimony to the Senate Armed Services Committee, 9 September 2004.

## **Point 4 – Provide safeguards during detention and interrogation**

*All prisoners should be immediately informed of their rights. These include the right to lodge complaints about their treatment and to have a judge rule without delay on the lawfulness of their detention. Judges should investigate any evidence of torture and order release if the detention is unlawful. A lawyer should be present during interrogations. Governments should ensure that conditions of detention conform to international standards for the treatment of prisoners and take into account the needs of members of particularly vulnerable groups. The authorities responsible for detention should be separate from those in charge of interrogation. There should be regular, independent, unannounced and unrestricted visits of inspection to all places of detention*

### **4.1 Keeping powers of interrogation and detention apart**

*It is essential that the guard force be actively engaged in setting the conditions for successful exploitation of the internees.*

Major General Geoffrey Miller, commander of Guantánamo<sup>499</sup>

After receiving a briefing on the report produced by his appointees on the Schlesinger Panel, Secretary of Defense Rumsfeld said: “I think the interesting thing about the Schlesinger Panel is their conclusion that, in fact, the abuses seem not to have anything to do with interrogation at all...”.<sup>500</sup> In fact, the Schlesinger report’s first paragraph contains the sentence: “[W]e do know that some of the egregious abuses at Abu Ghraib which were not photographed did occur during interrogation sessions and that abuses during interrogation sessions occurred elsewhere.” The day after the Fay report into Abu Ghraib was issued, Secretary Rumsfeld said that: “I have seen nothing yet that suggests that there was any abuse that was related to interrogations. So all of the press and all of the television, thus far, that tries to link the abuse that took place to interrogation techniques in Iraq has not yet been demonstrated – quite the contrary.” Later in the same press conference, Secretary Rumsfeld said that he had been advised that the Fay report had found “two or three instances where a detainee in Iraq... who should not have been abused during an interrogation process, but was abused”.<sup>501</sup>

An administration that has adopted a selective disregard for the Geneva Conventions and international human rights law in order to give free rein to its interrogators, and authorized interrogation techniques that flout international standards, is likely to want to downplay any evidence that its policies have led to torture. Secretary Rumsfeld appears to have taken a selective view of the investigations so far conducted, promoting evidence that

<sup>499</sup> Miller report, *supra*, note 120.

<sup>500</sup> Secretary Rumsfeld interview with KTAR “Real Life with David Leibowitz”. 26 August 2004. Secretary Rumsfeld was briefed by the Schlesinger Panel on 24 August. Department of Defense News Release, 24 August 2004.

<sup>501</sup> Secretary Rumsfeld Press Conference in Phoenix, Arizona. Department of Defense News Transcript, 26 August 2004.

fitted the administration's earlier claims that this was a problem restricted to a few aberrant soldiers, and ignoring evidence to the contrary.

There is much evidence that what happened in Abu Ghraib and elsewhere has been intelligence-driven. While the Fay report claims that the worst of the sexual and physical torture depicted in the Abu Ghraib photographs were the actions of a "small group of morally corrupt and unsupervised soldiers and civilians", it also points to wider abuses and suggests that even the abuses depicted in the photographs could be linked to a climate set by the pursuit of intelligence. It is this pursuit that has driven the USA's "war on terror" detention policies as a whole, from Afghanistan to Guantánamo to undisclosed locations. The lifting of a basic safeguard – the separation of the powers of interrogation and detention – is a thread that runs from Afghanistan to Abu Ghraib.

In letters and emails written before he was charged in the Abu Ghraib abuses, Staff Sergeant Ivan Frederick wrote:

*"I questioned some of the things that I saw... Such things as leaving inmates in their cell with no clothes or in female's underpants, handcuffing them to the door of their cell. I questioned this and the answer I got was this is how Military Intelligence (MI) wants it done... CJTF [Combined Joint Task Force] has witnessed how the prisoners are handled such as handcuffed to the door of their cell, placed in isolation room with no clothes, lights, ventilation, window, water or to use the toilet. MI has been present and witnessed such activity. MI has encouraged and told us great job that they were now getting positive results and information."*<sup>502</sup>

The Taguba report cited numerous examples of how guards were allegedly used to soften up detainees. One guard recalled "how her job was to keep detainees awake". She said that Military Intelligence [MI] "wanted to get them to talk. It is [the guards'] job to do things for MI and OGA [other government agencies, e.g. CIA] to get these people to talk." Another guard recalled that intelligence officials had said things like "loosen this guy up for us"; "make sure he has a bad night"; "make sure he gets the treatment". Asked how interrogators broke new detainees, a military police guard replied: "detainees were brought in subjected to sleep deprivation, cold showers every 30 minutes, cuffed and forced to stand for long periods of time and PT [physical training], i.e. push-ups, side straddle hops, etc."<sup>503</sup> A military intelligence soldier told the Taguba investigation:

*"The MPs [military police] did prepare prisoners prior to interrogations by having them do physical exercises and yelling at them. The interrogators would verbally discuss, with a MP, a detainee and his cooperativeness and various methods to deal*

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<sup>502</sup> Copy on file at Amnesty International.

<sup>503</sup> Sworn statement of Keith Comer, 372<sup>nd</sup> Military Police Company, 9 February 2004.  
<http://www.publicintegrity.org/docs/AbuGhraib/Abu15.pdf>.



*with a detainee such as physical exercise at random hours of the night and yelling.*<sup>504</sup>

The Fay report found that “although self-serving”, the claims of military guards that they were acting at the direction of intelligence officials “do have some basis in fact... The climate created at Abu Ghraib provided the opportunity for such abuse to occur.” Part of this climate was that “the delineation of responsibilities seems to have been blurred when military police soldiers, untrained in interrogation operations, were used to enable interrogations. Problems arose in the following areas: use of dogs in interrogations, sleep deprivation as an interrogation technique and use of isolation as an interrogation technique.”<sup>505</sup>

Far from the “two or three cases” referred to by Secretary Rumsfeld in his 26 August press conference, the Fay report found 16 incidents in which abuse by guards “was, or was alleged to have been, requested, encouraged, condoned, or solicited” by military intelligence personnel. This included the use of isolation with sensory deprivation, removal of clothing and humiliation, the use of dogs to instil fear, and physical abuse. In 11 cases, military intelligence officers were found to have actually directed the torture or ill-treatment. In addition, the report found that military intelligence personnel “were also found not to have fully comported with established interrogation procedures and applicable laws and regulations”. Poorly defined and shifting interrogation policies were also a problem, and “as a result, interrogation activities sometimes crossed into abusive activity”.<sup>506</sup>

In Iraq, the blurring between intelligence and detention roles appears not to have been restricted to Abu Ghraib. In its February 2004 report, the ICRC noted that ill-treatment, sometimes “tantamount to torture”, was systematic when the detainee was suspected of involvement in a security offence or deemed to have “intelligence” value and held in detention supervised by military intelligence. Guards from Camp Whitehorse near Nasiriya testified at a military hearing in May 2004 that they had been instructed by intelligence officials to use a technique known as 50/10, in which detainees were required to stand for 50 minutes out of every hour until the arrival of interrogators as much as eight hours later. A military investigator concluded that someone from military intelligence “must have directed or strongly suggested” that guards use the tactic.<sup>507</sup> An interrogator in the case also reportedly made pre-trial statements saying that sleep deprivation was useful in maintaining the “shock of capture”.<sup>508</sup> This echoes the language of a memorandum, signed by the commanding officer in Iraq, Lieutenant General Sanchez, on 14 September 2003 (see Point 1.2). Sent to interrogators, this document reportedly sanctioned the use of isolation, and “sleep

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<sup>504</sup> Sworn statement of Luciana Spencer, 66<sup>th</sup> Military Intelligence Group, 21 January 2004. <http://www.publicintegrity.org/docs/AbuGhraib/Abu11.pdf>.

<sup>505</sup> Fay report (Jones, page 13), *supra*, note 15.

<sup>506</sup> Fay report, page 7, *supra*, note 15.

<sup>507</sup> *Report cites marines in Iraqi's death at a camp*. Los Angeles Times, 24 May 2004.

<sup>508</sup> *Reservists' testimony details sleep deprivation at US facility in Iraq*. LA Times, 28 August 2004.

management', as well as "yelling, loud music, and light control... to create fear, disorient detainees and capture shock".<sup>509</sup>

In Afghanistan, the USA adopted a "template whereby military police actively set the favourable conditions for subsequent interviews" – presumably meaning that guards in some way were meant to "soften up" detainees prior to their interrogation.<sup>510</sup> The Fay report referred to the US practice in Afghanistan of "removing clothing, isolating people for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation."<sup>511</sup>

There are numerous examples from Afghanistan. In May 2003 in Kabul, former detainee Sayed Abbasin recalled to Amnesty International how in the US air base at Bagram he had been held in handcuffs and shackles for the first week, kept under 24-hour lighting and woken by guards when trying to sleep, not given enough food, not allowed to talk to or look at other detainees, and forced to stand and kneel for hours. During this time he was interrogated six or seven times. He recalled his transfer to Kandahar air base – blindfolded, a black bag over his head and taped around his neck, his hands and legs tied. He said the handling was so rough, he would not have been surprised if someone would have died. In Kandahar, again the detainees were not allowed to look at the soldiers' faces. If they did, they were made to kneel for an hour. If they looked twice, they were made to kneel for two hours. He says he was interrogated five or six times in Kandahar, before being transferred to Guantánamo Bay.

In late 2002, at the time that Major General Geoffrey Miller took over as commander of Guantánamo, Secretary of Defense Donald Rumsfeld reportedly gave military intelligence control of the detainee operations at the base, including the guards.<sup>512</sup> In August and September 2003, Major General Miller went to Iraq to advise on how to obtain better intelligence from US detentions there. His report stated that it was "essential that the guard force be actively engaged in setting the conditions for successful exploitation of the internees". He made a number of recommendations to this end, "the vast majority of which were implemented following the visit".<sup>513</sup> His recommendations were based on his experience in Guantánamo, a detention regime of which he has said "we're enormously proud... to be able to set that kind of environment where we were focussed on gaining the maximum amount of intelligence".<sup>514</sup>

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<sup>509</sup> *Documents helped sow abuse, army report finds*. Washington Post. 30 August 2004.

<sup>510</sup> *Report on Detention and Corrections Operations in Iraq*. Office of the Provost Marshal General of the Army, page 27. 5 November 2003. <http://www.publicintegrity.org/docs/AbuGhraib/Abu5.pdf>.

<sup>511</sup> Fay report, page 29, *supra* note 15.

<sup>512</sup> *The roots of torture*. Newsweek, 24 May 2004.

<sup>513</sup> Major General Miller, Coalition Provisional Authority Briefing. Department of Defense News Transcript, 4 May 2004. His report recommended that the US military in Iraq dedicate and train a detention guard force subordinate to military intelligence that "sets the conditions for the successful interrogation and exploitation of internees/detainees." Miller report, *supra*, note 120.

<sup>514</sup> Coalition Provisional Authority Briefing, 4 May 2004.

For its part, Amnesty International believes that the totality of the detention conditions – harsh, isolating and indefinite – faced by the majority of detainees held there has amounted to cruel, inhuman or degrading treatment in violation of international law. Between January 2002 and June 2004, when the US Supreme Court moved to begin to restore the rule of law to Guantánamo, hundreds of detainees were held virtually incommunicado in small cells with limited opportunity to exercise, no access to television, radio, or newspapers, no access to the courts, their families or lawyers, subjected to repeated interrogations, with no indication of when, if ever, they would be released or made subject to some form of legal process. The ICRC has long since said that it has witnessed a serious deterioration in the mental health of a large number of the detainees because of the indefinite nature of their detention. It has apparently driven numerous inmates to the point of suicide. Shah Mohammed, a 20-year-old Pakistani man who spent more than a year in Guantánamo, recalled how he had attempted suicide more than once: “I tried four times, because I was disgusted with my life. It is against Islam to commit suicide, but it was very difficult to live there. A lot of people did it.”<sup>515</sup>

On 14 June 2004, Secretary Rumsfeld said that “a person being held in, for the sake of argument, Guantánamo, who does not know how long they will be held, some people would characterize that as the uncertainty of not knowing when they might be tried or released as a form of mental torture. Therefore, that word gets used by some people in a way that is fair from their standpoint, but doesn’t fit a dictionary definition of the word that one would normally accept.”<sup>516</sup> He did not explain what he would consider the “dictionary definition” of cruel, inhuman or degrading treatment to encapsulate. According to international standards, this term “should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental.”<sup>517</sup> Regarding administrative detention of Palestinians by the Israeli army (under six-month orders, renewable indefinitely), the UN Committee against Torture stated that “the Committee continues to be concerned that

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<sup>515</sup> *Tales of despair from Guantánamo*. New York Times, 17 June 2003. Military records reportedly show that there was an increase in suicide attempts three months after Major General Miller took over command of the detention facility. *Flurry of suicide attempts at Guantánamo*. AP, 22 June 2004. An Abu Ghraib detainee, Hussein, has also said that his treatment in US custody – stripping, isolation, beating, hooding, and sexual humiliation – drove him to consider suicide. On 18 January 2004, military investigators asked him “How did you feel when the guards were treating you this way?” He replied: “I was trying to kill myself but I didn’t have any way of doing it.” <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/19446.pdf>.

<sup>516</sup> Department of Defense News Transcript, 14 June 2004. A Justice Department memorandum on torture, dated 1 August 2002, gave some suggestions on when the threshold for “severe mental pain or suffering” amounting to torture under US law might be met. The memorandum, which attempted to create an unacceptably narrow definition of torture, nevertheless said that “we think that pushing someone to the brink of suicide, particularly when the person comes from a culture with strong taboos against suicide, and it is evidenced by acts of self-mutilation, would be a sufficient disruption of the personality” to meet this requirement (emphasis added). Bybee memorandum, 1 August 2002, *supra*, note 252.

<sup>517</sup> Note to Principle 6, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by UN General Assembly resolution 43/173 of 9 December 1988.

administrative detention does not conform with article 16 of the Convention [prohibiting cruel, inhuman or degrading treatment].<sup>518</sup>

The separation of the authorities responsible for detention and those responsible for interrogation is an important safeguard against torture or cruel, inhuman or degrading treatment. The UN Committee against Torture has said that it “expects that the detention and interrogation functions will be separated.”<sup>519</sup> The UN Special Rapporteur on torture has stated that the period that detainees are held “in facilities under the control of their interrogators or investigators... should not exceed a period of 48 hours. They should accordingly be transferred to a pre-trial facility under a different authority at once, after which no further unsupervised contact with the interrogators or investigators should be permitted.”<sup>520</sup>

## 4.2 Isolation as an interrogation technique

*Without question, the isolation of a prisoner from the general population for an indefinite period of time raises Eighth Amendment issues, and due process concerns.*  
US federal judge, 27 August 2004<sup>521</sup>

In occupied Iraq, the ICRC reported the USA’s systematic resort to keeping detainees “completely naked in totally empty concrete cells and in total darkness, allegedly for several consecutive days.” A US military intelligence official told the ICRC delegates that this practice was “part of the process” – a process which the ICRC said “appeared to be a give-and-take policy whereby persons deprived of their liberty were ‘drip-fed’ with new items (clothing, bedding, hygiene articles, lit cell, etc.) in exchange for their ‘co-operation’.”<sup>522</sup> The Fay report on Abu Ghraib found indications of “the routine use of total isolation and light deprivation.”

Isolation is one of the interrogation techniques authorized by Secretary of Defense Rumsfeld in his December 2002 and April 2003 memorandums.<sup>523</sup> According to leaked Department of Defense documents, one of the concerns that the ICRC raised with the US authorities at Guantánamo was the “excessive isolation” of detainees in punishment cells for refusing to provide information in interrogations. According to the Department’s leaked notes of a meeting between the ICRC and the Guantánamo authorities in October 2003, the ICRC was concerned that there had been no improvement on this issue. The official notes of the meeting state:

*“The ICRC focused on the effects that the interrogations were having on the mental health of the detainees. The ICRC feels that interrogators have too much control over*

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<sup>518</sup> Report of the Committee against Torture, UN Doc. A/57/44 (2001-2002), para. 52(e).

<sup>519</sup> UN Doc. A /50/44 (1995), para. 176, referring to Jordan.

<sup>520</sup> UN Doc. E/CN.4/2002/76, 27 December 2001, Annex 1.

<sup>521</sup> *Hamdi v. Rumsfeld*, In the US District Court for the Eastern District of Virginia. The Eighth Amendment of the US Constitution prohibits, among other things, “cruel and unusual punishment”.

<sup>522</sup> ICRC report, February 2004, *supra*, note 77.

<sup>523</sup> Action memo, *supra*, note 49. Memorandum for the Commander, SOUTHCOM, *supra*, note 50.

*the basic needs of detainees. That the interrogators attempt to control the detainees through the use of isolation in which the detainees were kept; the level of comfort items detainees can receive; and also the access of basic needs to the detainees”.*<sup>524</sup>

According to the official record of the meeting, Major General Miller, the Guantánamo Commander, responded that the detainees “are enemy combatants picked up on the field of battle in Afghanistan. There is no issue with interrogation methods. The focus of ICRC should be the level of humane detention being upheld not the interrogation methods. JTF GTMO [Joint Task Force Guantánamo] treats all detainees humanely.”<sup>525</sup>

Sayed Abbasin recalled to Amnesty International in May 2003 being put in an isolation cell without blankets for five days as punishment for exercising in his cell.<sup>526</sup> In an interview for Amnesty International in August 2003, former Guantánamo detainee Muhammad Naim Farooq said that he had witnessed two cases of suicide attempts, one by a fellow Afghan detainee, and one by an Iranian. He said that both were “punished with solitary confinement, without any clothes. I could not see for how long”. Released Swedish detainee Mehdi Ghezali has said that after six months of cooperating in interrogations, he decided to remain silent: “I was punished with isolation and was brought to a special block where prisoners were kept solely to be isolated... There was a very strong light in these cells, too. In these cells there were small windows, but you couldn’t see anything through them”.<sup>527</sup> He says that the first time he was put in isolation, it was for five weeks, but that some detainees were isolated for up to four months.

Solitary confinement can be cruel, unnecessary and damaging to the physical and mental health of a prisoner. International standards increasingly favour its restriction or elimination.<sup>528</sup> In his August 2004 report to the UN General Assembly, the UN Special

<sup>524</sup> Memorandum for Record. *ICRC Meeting with MG Miller on 9 Oct 03*, *supra*, note 52.

<sup>525</sup> *Ibid.*

<sup>526</sup> *Report of the ICRC*, February 2004, *supra*, note 77.

<sup>527</sup> Interview with Amnesty International, Sweden, 27 July 2004.

<sup>528</sup> Article 7 of the UN Basic Principles for the Treatment of Prisoners states: “Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.” The Human Rights Committee has stated that “prolonged solitary confinement... may amount to acts prohibited by article 7 [of the ICCPR]”. General Comment on Article 7, *supra*, note 177, para. 6. The Inter-American Court of Human Rights has held that “prolonged isolation and deprivation of communication” amounts to cruel and inhuman treatment. *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988), para. 187. The European Committee for the Prevention of Torture has stated that “a solitary confinement-type regime... can have very harmful consequences for the person concerned. Solitary confinement can, in certain circumstances, amount to inhuman and degrading treatment; in any event, all forms of solitary confinement should be as short as possible.” See e.g. 2nd General Report on the CPT’s activities covering the period 1 January to 31 December 1991, CPT/Inf (92) 3 [EN], 13 April 1992, para. 56. The Special Rapporteur on torture has stated: “Judges should not have the power to order solitary confinement, other than as a measure in cases of breach of institutional discipline, for more than two days.” Report on a visit to Chile, UN Doc. E/CN.4/1996/35/Add.2, 4 December 1996, para. 76(c).

Rapporteur on torture reiterated that solitary confinement can in itself “constitute a violation of the right to be free from torture”.<sup>529</sup>

In July 2004, Guantánamo detainee Moazzam Begg wrote that he had been held in solitary confinement since 8 February 2003, which means that by October 2004 he had been in isolation for approximately 600 days.<sup>530</sup> In July 2003, he was one of six foreign nationals made subject to the Military Order that President Bush signed on 13 November 2001.<sup>531</sup> Under the Order, the six could be held in indefinite detention without charge or trial, but at the same time they became eligible for trial by military commission. They were subsequently removed to a separate part of the detention facility in Guantánamo Bay known as Camp Echo, where they were held in solitary confinement in reportedly windowless cells, with 24-hour video surveillance. According to a leaked Pentagon document, in a meeting with the Guantánamo authorities in October 2003, the ICRC expressed shock “to see that Camp Echo had expanded”, and belief that the facility was “extremely harsh and has very strict interrogations”.<sup>532</sup>

Another of the six men named under the Military Order in July 2003, Salim Ahmed Hamdan, a Yemeni national, was moved to Camp Echo in December 2003, and was reportedly still there in October 2004. Dr Daryl Matthews, a forensic psychiatrist, testified in late March 2004 that:

*“Mr Hamdan has described his moods during this period of solitary confinement as deteriorating, and as encompassing frustration, rage (although he has not been violent), loneliness, despair, depression, anxiety, and emotional outbursts. He asserted that he has considered confessing falsely to ameliorate his situation. [His military lawyer] has described Mr Hamdan’s condition to me, as observed during their meetings, as initially agitated and withdrawn, with a brightening mood as the visit proceeds, but ending with Mr Hamdan begging him not to leave... It is my opinion, to a reasonable medical certainty, that Mr Hamdan’s current conditions of confinement place him at significant risk for future psychiatric deterioration, possibly including the development of irreversible psychiatric symptoms.”*<sup>533</sup>

Deliberate treatment having these effects on a detainee clearly violates international law. If Dr Matthews’ prognosis were to materialise, Salim Ahmed Hamdan’s treatment could qualify as torture even under the narrow definition suggested in the August 2002 Justice Department memorandum. The latter suggests that to qualify as torture, “the acts giving rise to the harm must cause some lasting, though not necessarily permanent, damage...[T]he development of a mental disorder such as post-traumatic stress disorder, which can last

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<sup>529</sup> UN Doc. A/59/324, para. 20.

<sup>530</sup> Letter from Moazzam Begg, *supra*, note 74.

<sup>531</sup> *President determines enemy combatants subject to his Military Order*. Department of Defense News Release, 3 July 2003.

<sup>532</sup> Memorandum for Record. *ICRC Meeting with MG Miller on 9 Oct 03*, *supra*, note 52.

<sup>533</sup> *Swift v. Rumsfeld*. US District Court, Western District of Washington. Declaration of Daryl Matthews, 31 March 2004.

months or even years, or even chronic depression, which also can last for a considerable period of time if untreated, might satisfy the prolonged harm requirement [to constitute torture under US law]". To be criminally liable for torture, the memorandum suggests, the perpetrator must "specifically intend to cause prolonged mental harm". Dr Matthews' declaration was signed in March 2004. The ICRC had, even before Salim Hamdan was put isolation, made clear its concern about psychological deterioration among the Guantánamo detainees. The authorities cannot claim ignorance.

In July 2004, released Guantánamo detainee Mehdi Ghezali told Amnesty International that he was moved to Camp Echo for the last week of his detention. He said that he was watched over all the time by a camera, in a cell that was permanently lit.<sup>534</sup> He said that he was not allowed to leave the cell once for the entire week. He was interrogated during the week and told to sign a document which he refused. On the day of his release, he was again ordered by the US to sign the document – and Swedish diplomats advised him to do so or he would not be released. The document stated that he agreed never to join *al-Qa'ida* or the Taliban. He felt that by signing it he had been coerced into an admission of such an association.

In its leaked February 2004 report on Coalition abuses in Iraq, the ICRC stated:

*"Since June 2003, over a hundred 'high-value detainees' have been held for nearly 23 hours a day in strict solitary confinement in small concrete cells devoid of daylight. This regime of complete isolation strictly prohibited any contact with other persons deprived of their liberty, guards, family members (except through Red Cross Messages) and the rest of the outside world. Even spouses and members of the same family were subject to this regime... Most had been subject to this regime for the past five months."*

The ICRC pointed out that such use of solitary confinement contravened the Third and Fourth Geneva Conventions and recommended that the authorities "set up an internment regime which ensures respect for the psychological integrity and human dignity of the persons deprived of their liberty".

In 2000, the UN Committee against Torture criticized the "excessively harsh regime of the 'super-maximum' prisons" in the USA.<sup>535</sup> Four years later, in May 2004, the US authorities opened "Camp Five" at Guantánamo Bay. This appears to have been modelled on the "super-maximum" security prisons on the US mainland. Detainees are held in solitary confinement for up to 24 hours a day in concrete cells and are under 24-hour video surveillance. Camp Five is reported to have a capacity for a detainee population of 100.

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<sup>534</sup> Interview with Amnesty International, Sweden, 27 July 2004. He said: "There was a little green book in the cell, on which it said 'Record'. The guards constantly came into the cell and wrote down what he did and what time it was. They wrote down completely meaningless things, such as 'prisoner stands up, prisoner sits down, prisoner walks around the cell'".

<sup>535</sup> UN Doc. A/55/44 (1999-2000), para. 179(f).

### 4.3 Specific protection for women and child detainees

*The US continues to detain two juveniles i.e. detainees under 18 years of age at Guantánamo Bay. The ICRC does not consider Guantánamo Bay an appropriate place to detain juveniles. International Committee of the Red Cross, May 2004.*<sup>536</sup>

Children, women and men are all alleged to have been subjected to torture or other cruel, inhuman or degrading treatment by US agents in the "war on terror". International legal standards contain specific provisions for the case of women and children taken into custody.

#### Child detainees

Children should be separated from adult detainees unless it is considered not in the child's best interest to do so.<sup>537</sup> In October 2002, an adult detainee Abdullah recalled to Amnesty International his arrest and alleged ill-treatment by US forces in Afghanistan the previous March when he was held for four days. He says that when he was taken to Kandahar air base, he was put in a cage, under a tent, with about 14 others, including a boy of about 15 years old. The Taguba report into the torture and ill-treatment in Abu Ghraib refers to the alleged rape of a 15-year-old detainee by an adult detainee in the prison.

The conditions of detention and treatment of children have caused serious concern. Seventeen-year-old Akhtar Mohammed, for example, stated that US soldiers kept him in solitary confinement in a shipping container for eight days following his arrest with others in Uruzgan province in Afghanistan in January 2002.<sup>538</sup> Mohammed Ismail Agha was aged 13 when he was taken into US custody in Afghanistan in late 2002 and held in Bagram air base for six weeks. He was nevertheless considered to be a "threat to US security" and was subsequently held in US custody without charge or trial for more than a year, including at Guantánamo Bay. He has alleged that he was held in solitary confinement in Bagram and subjected to sleep deprivation and stress positions: "They were interrogating me every day and in the first three or four days giving just a little food, and giving punishment". He said he was forced to sit on his haunches for three or four hours at a time, even when he wanted to sleep.<sup>539</sup> He said:

*"It was a very bad place. Whenever I started to fall asleep, they would kick on my door and yell at me to wake up. When they were trying to get me to confess, they made me stand partway, with my knees bent, for one or two hours. Sometimes I couldn't bear it anymore and I fell down, but they made me stand that way some more."*<sup>540</sup>

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<sup>536</sup> Operational update, 14 May 2004.

<sup>537</sup> Article 37(c), UN Convention on the Rights of the Child.

<sup>538</sup> *Villagers released by American troops say they were beaten, kept in 'cage'*. Washington Post, 11 February 2002. *Released Afghans tell of beatings*. New York Times, 11 February 2002.

<sup>539</sup> *Afghan boy talks about Guantánamo*. Associated Press, 7 February 2004.

<sup>540</sup> *An Afghan boy's life in US custody*. Washington Post, 12 February 2004.



Mohammed Ismail Agha was released back to Afghanistan from Guantánamo in late January 2004 with two other child detainees. Article 3 of the Convention on the Rights of the Child states: “In all actions concerning children... the best interests of the child shall be a primary consideration”. Alongside Somalia (which has not functioned as a state for over a decade), the USA is the only country in the world not to have joined this Convention. As a signatory, however, it is bound to respect its provisions.<sup>541</sup> The Pentagon made clear that the decision for the releases was not concerned with the best interests of the children but only with the perceived best interests of the USA. The releases came about after determination that “the juvenile detainees no longer posed a threat to our nation, that they have no further intelligence value and that they are not going to be tried by the US government for any crimes.”<sup>542</sup> The Pentagon did not, however, offer an explanation about how three children between the ages of 13 and 15 had been considered to be such a threat to the USA that it felt justified in violating international safeguards on the treatment of children.<sup>543</sup>

In July 2004, the ICRC reported that it “believes that the US continues to detain two juveniles i.e. detainees under 18 years of age at Guantánamo Bay”.<sup>544</sup> The ICRC has stated that it “does not consider Guantánamo Bay an appropriate place to detain juveniles.” Amnesty International agrees and has repeatedly written to the authorities on this matter, urging their release or fair trial in accordance with international standards.

International law and standards recognize the particular vulnerability of children and require, among other things, that children should be detained only as a last resort and for the shortest time possible. The definition of a “child”, according to most international legal standards, is anyone under the age of 18. In communications with Amnesty International on the subject of child detainees in Guantánamo, the USA has only referred to those children under 16 years old.

Canadian national Omar Khadr, who was reported to be 15 years old at the time of his arrest in Afghanistan and was transferred in late 2002 from there to Guantánamo, was still held in Camp Delta without access to legal counsel or his family two and a half years later.<sup>545</sup>

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<sup>541</sup> Under Article 18 of the Vienna Convention on the Law of Treaties, a country that has signed a treaty must do nothing to defeat its object and purpose pending ratification.

<sup>542</sup> *Transfer of juvenile detainees completed*. US Department of Defense news release, 29 January 2004.

<sup>543</sup> After April 2003, the military authorities had evidently recognized that children have special needs and vulnerabilities, and segregated the three youngest children from the adult detainees and provided them with educational and recreational opportunities as well as specialist care. Nevertheless, a year of military detention in Bagram air base in Afghanistan and Guantánamo Bay, even in the less harsh environs of Camp Iguana in the latter location, is not an appropriate course for the US Government to have taken in order to meet its obligations on the treatment of child detainees.

<sup>544</sup> Operational update, 26 July 2004.

<sup>545</sup> International law prohibits the use of the death penalty against child offenders, people who were under 18 at the time of the crime. The USA is the only country in the world which openly executes child offenders in its normal criminal justice system and claims for itself the right to do so. Under US constitutional law, 16 is the minimum age (at the time of the crime) for a defendant to be eligible for the death penalty. However, Omar Khadr has been feared to be at risk of a death sentence if tried by a US military commission outside the USA despite being 15 at the time of his capture and alleged role in

Article 40 of the Convention on the Rights of the Child states that “every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action”. Article 37(b) of the Convention stresses that “the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a last resort and for the shortest appropriate period of time”. Amnesty International is therefore disturbed by the Pentagon’s position that: “Age is not a determining factor in detention”.<sup>546</sup>

There have also been allegations of torture or ill-treatment of children taken into US custody in Iraq.<sup>547</sup> The Fay report found that on 19 September 2003, a 17-year-old Syrian detainee was interrogated in Abu Ghraib. He was naked, and was covering his genital area with an empty food bag. He was ordered to raise his hands, causing him to drop the bag and exposing himself to the interrogation team, including two females. The Fay investigation considered that this act of humiliation violated the Geneva Conventions. It found that the interrogators had used the teenager’s nudity as an interrogation technique – with the incentive of having his clothing returned if he cooperated – as well as using stress positions.<sup>548</sup>

On 18 January 2004, an Abu Ghraib detainee, Kasim, told military investigators that he saw a guard raping “a kid, his age would be about 15-18 years. The kid was hurting very bad... And the female soldier was taking pictures”.<sup>549</sup> Another Abu Ghraib detainee, Thaar, gave military investigators a statement, in which he said:

*“I saw lots of people getting naked for a few days getting punished in the first days of Ramadan. They came with two boys naked and they were cuffed together face to face and [the guard] was beating them and a group of guards were watching and taking pictures from top and bottom and there was three female soldiers laughing at the prisoners.”*<sup>550</sup>

Dogs have been used against children. The Fay report found that on or around 8 January 2004, a leashed but unmuzzled dog was allowed into a cell holding two juvenile detainees “and ‘go nuts on the kids’, barking and scaring them. The juveniles were screaming and the smaller one tried to hide behind [the other]. [The soldier] allowed the dog to get within about one foot [0.3m] of the juveniles.”<sup>551</sup> Huda Hafez Ahmad has alleged that when

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the shooting death of a US soldier. In the ‘war on terror’, the administration has taken the position that the US Constitution does not protect foreign nationals held outside sovereign US territory.

<sup>546</sup> *Transfer of juvenile detainees completed*. US Department of Defense news release, 29 January 2004.

<sup>547</sup> There were 162 juvenile detainees in Coalition facilities around November 2003. Report on Detention and Correction Operations in Iraq. Office of the Provost Marshal General of the Army, 5 November 2003. <http://www.publicintegrity.org/docs/AbuGhraib/Abu5.pdf>.

<sup>548</sup> Fay report, page 89, *supra*, note 15.

<sup>549</sup> Translation. <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/151108.pdf>

<sup>550</sup> Translation. <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/150427.pdf>

<sup>551</sup> Fay report, page 85, *supra*, note 15.

she was held in Abu Ghraib she “saw one of the guards allow his dog to bite a 14-year-old boy on the leg. The boy’s name was Adil”.<sup>552</sup>

### **Women detainees**

Huda Hafez Ahmad, a 39-year old woman, was taken into US custody when she went to look for her sister, Nahla, who had been detained. The two women were not seen by a lawyer for more than six months.<sup>553</sup> Huda Ahmad has made serious allegations that she was subjected to torture and ill-treatment. She has said that in late 2003 she was arrested when she went to the US base in the al-A’dhamiya neighbourhood of Baghdad. She said that she was handcuffed and blindfolded after her arrest and left in a cold room with only a wooden chair where she was left overnight. She alleged that she was hit in the face, and was made to stand for 12 hours with her face against a wall. She alleged that she was put in a minibus in the military compound with 18 other detainees and subjected to loud music and sleep deprivation for the next three days. On 4 January 2004, she was transferred to Abu Ghraib, where she said she was held in a cell on her own for several months. She said that on 24 February 2004, she was put into a one-metre-square cell and doused in cold water as punishment for giving an elderly woman detainee some food.<sup>554</sup>

Huda Alazawi said that neither she nor the other women detainees held at that time at Abu Ghraib were sexually assaulted by US personnel. Allegations of ill-treatment or torture of women detainees have been published in the media and by human rights organizations. Some women detainees in Iraq have spoken after their release to Amnesty International under condition of anonymity. Their accounts included being beaten, threatened with rape, humiliating treatment and long periods of solitary confinement.

There have been reports of sexual abuse, possibly including rape. Among the “intentional abuse of detainees by military police [MP] personnel” found by the Taguba report was “a male MP guard having sex with a female detainee”, as well as “videotaping and photographing naked male and female detainees”. Military investigators found that “the female detainees were made to pose for soldiers taking pictures and on one occasion one female was instructed to expose her breasts for a soldier to take her picture”.<sup>555</sup>

Female prisoners should be separated from male prisoners and should only be attended and supervised by female guards.<sup>556</sup> There should be no contact between male guards and female prisoners without the presence of a female guard. Three US military personnel received non-judicial punishment for their role in the assault of a female detainee on 7 October 2003. The Fay report on Abu Ghraib relates that:

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<sup>552</sup> *After Abu Ghraib*. The Guardian, 20 September 2004. This report uses the name Huda Alazawi.

<sup>553</sup> Amnesty International appeal, *Bring justice to thousands still illegally detained in Iraq*, <http://web.amnesty.org/pages/irq-110504-action-eng>.

<sup>554</sup> *After Abu Ghraib*, *op cit*.

<sup>555</sup> Criminal Investigation Division report, 28 January 2004. <http://www.publicintegrity.org/docs/AbuGhraib/Abu11.pdf>.

<sup>556</sup> Rule 8 and 53. UN Standard Minimum Rules for the Treatment of Prisoners.

*“First the group took her out of her cell and escorted her down the cellblock to an empty cell. One unidentified soldier stayed outside the cell; while another held her hands behind her back, and the other forcibly kissed her. She was escorted downstairs to another cell where she was shown a naked male detainee and told the same would happen to her if she did not cooperate. She was then taken back to her cell, forced to kneel and raise her arms while one of the soldiers removed her shirt. She began to cry, and her shirt was given back as the soldier cursed at her and said they would be back each night.”<sup>557</sup>*

Amnesty International believes that the rape of a prisoner by a prison, security or military official always constitutes torture. Other sexual abuse of prisoners by such officials always constitutes torture or ill-treatment.<sup>558</sup> Such torture or inhumane treatment would also constitute war crimes. This was born out in the *ad hoc* Tribunals for former Yugoslavia and Rwanda. In the cases of *Akayesu*<sup>559</sup> and *Celebici*,<sup>560</sup> rape was identified specifically as an act of torture when it takes place at the instigation of a public official, and in the case of *Furundzija*,<sup>561</sup> when it takes place during interrogation. In the case of *Kunarac, Kovac and Vukovic*,<sup>562</sup> the defendants were convicted of rape as a crime against humanity and rape as a crime under international customary law. The Tribunals convicted men of acts such as sexual enslavement, forced nudity and sexual humiliation – in addition to rape and sexual assault – thus recognizing such acts as serious international crimes.

Inter-prisoner sexual violence may also constitute torture or ill-treatment if the authorities have failed to ensure compliance with rules such as those requiring the separation of male or female prisoners or otherwise failed to take appropriate action.

#### **4.4 Independent inspection: ICRC, UN and human rights monitors**

*“[T]he International Committee of the Red Cross (ICRC) and other humanitarian organizations conduct visits to prisons and other places of detention in an effort to prevent or remedy torture.”*

The United States' Commitment to Fight Torture, US State Department<sup>563</sup>

The vast majority of the USA's "war on terror" detainees have been held incommunicado except for visits by the ICRC. The ICRC has been visiting people detained in connection with armed conflicts since 1915 during World War I. The organization's practice of visiting

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<sup>557</sup> Fay report, page 72, *supra*, note 15.

<sup>558</sup> See *Combating torture: a manual for action*, 2003. AI Index: ACT 40/001/2003, pages 74-76.

<sup>559</sup> *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment of 2 September 1998

<sup>560</sup> *Prosecutor v. Zejnil Delalic et al.* ("Celali case"), Case No. IT-96-21, ICTY Trial Chamber II, Judgment of 16 November 1998

<sup>561</sup> *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, ICTY Trial Chamber II, Judgment of 10 December 1998.

<sup>562</sup> *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 and IT-96-23/1, Trial Chamber II, Judgment of 22 February 2001.

<sup>563</sup> Bureau of International Organization Affairs, 4 November 2002.

prisoners of war was codified in the Geneva Conventions of 1949. When refusing permission for Amnesty International to visit the detainees, the US authorities have emphasised that they have granted the ICRC such access. The ICRC does not normally publish its findings, but makes confidential recommendations to the government in question.

The ICRC does not have a permanent presence at the US detention facilities to which it has access. For example, it visited the Guantánamo prison camp 18 times in the first 29 months of detentions there (to June 2004). Detainees are thus held entirely incommunicado between ICRC visits. If ICRC delegates visit a detention facility, for example, every two weeks, and even if they were to meet all detainees, a detainee could be held for up to this length of time and released without having had any contact with the outside world.

From late 2001 to mid-2003, many detainees were held in the US air base in Bagram in Afghanistan for relatively short periods prior to their transfer to Guantánamo Bay or release. In any case, the ICRC does not have access to the detainees immediately after arrest.<sup>564</sup> The ICRC had access to the detention facility at the Kandahar air base from December 2001 until its closure in June 2002. The organization requested and was granted renewed access to the facility in June 2004 after discovering that detentions had resumed there.<sup>565</sup> It is not known how many detainees were held at Kandahar between June 2002 and June 2004, when the ICRC was not visiting. Afghan national Syed Nabi Siddiqi has alleged that he was ill-treated at the base at that time (see page 25). The ICRC has not had access to some 20 other US holding facilities in Afghanistan, including at Gardez where Syed Nabi Siddiqi says he was initially held, and where eight Afghan soldiers were allegedly tortured by US Army Special Forces during their two-week detention in March 2003. The alleged torture included beatings, immersion in cold water, and electric shocks. One of the detainees, 18-year-old Jamal Naseer, died in custody (see Point 6.2).<sup>566</sup>

Two Afghan men, Dilawar and Mullah Habibullah, died in Bagram air base in December 2002. Both had been held entirely incommunicado. Neither had been seen by the ICRC. Afghan national Wazir Mohammed told Amnesty International in Kabul in February 2004 that during his nearly two months in US custody in Bagram and Kandahar air bases in mid-2002, he never saw anyone from the ICRC. He has alleged that he was subjected to sleep deprivation as well as being forced to crawl on his knees from his cell to his interrogation. He was then held for 18 months in Guantánamo Bay. He said that during that time he saw an ICRC delegate once – on his first day in detention in Cuba.

As already noted, US personnel have hidden detainees from the ICRC, or refused the organization access to detainees on the grounds of “military necessity” in highly questionable circumstances (see pages 14-16). There are other examples of a disturbing attitude to the ICRC on the part of the US authorities:

- A senior US Army officer reportedly said that military officials responded to a November 2003 ICRC report on abuses in Abu Ghraib by proposing that its

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<sup>564</sup> ICRC operational update, 26 July 2004.

<sup>565</sup> *Ibid.*

<sup>566</sup> *US probing alleged abuse of Afghans*. Los Angeles Times, 21 September 2004.

inspectors should make appointments before visiting, in order that they did not interrupt interrogations.<sup>567</sup> Brigadier General Janis Karpinski, formerly in charge of Abu Ghraib prison, told the Taguba investigation that a military intelligence official had told her: "The reason we don't want the ICRC to go in there anymore is because it interrupts the isolation process", and techniques including sleep deprivation.<sup>568</sup>

- Saddam Salah Abood Al-Rawi has alleged that he was held in solitary confinement for three months in Abu Ghraib to late March 2004, after being tortured and ill-treated during an 18-day interrogation prior to that. According to what he told the Office of the UN High Commissioner for Human Rights: "At the time of a Red Cross visit to the Abu Ghraib prison in January 2004, he was warned that if he said anything to the Red Cross visitor which the prison guards did not like, he would not live to regret it. He stated that when he was interviewed by the Red Cross visitor, he did not dare to say anything about the treatment he had suffered."<sup>569</sup>
- The ICRC itself has raised the case of an Iraqi detainee interrogated in the vicinity of Camp Cropper, who "alleged he had been hooded and cuffed with flexi-cuffs, threatened to be tortured or killed, urinated on, kicked in the head, lower back and groin, force-fed a baseball which was tied into the mouth using a scarf and deprived of sleep for four consecutive days. Interrogators would allegedly take turns ill-treating him. When he said he would complain to the ICRC he was allegedly beaten more."<sup>570</sup>

In addition to the ICRC, other independent experts should be granted access to detainees. On 25 June 2004, a meeting of United Nations experts issued a joint statement in light of "a number of recent developments that have seriously alarmed the international community with regard to the status, conditions of detention and treatment of prisoners in specific places of detention". They expressed their "unanimous desire" that the Special Rapporteur on the Independence of Judges and Lawyers, the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, "visit, together, and at the earliest possible date, those persons arrested, detained or tried on grounds of alleged terrorism or other violations, in Iraq, Afghanistan, the Guantánamo Bay military base and elsewhere, with a view to ascertain... that international

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<sup>567</sup> *Officer says army tried to curb Red Cross visits to prison in Iraq*. New York Times, 18 May 2004.

<sup>568</sup> Article 15-6 investigation interview with Major General Taguba, 15 February 2004.

[http://www.publicintegrity.org/docs/AbuGhraib/Taguba\\_Report.pdf](http://www.publicintegrity.org/docs/AbuGhraib/Taguba_Report.pdf).

<sup>569</sup> Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human rights: The present situation of human rights in Iraq, UN Doc. E/CN.4/2005/4, 9 June 2004, paras. 56-57. He said that he was subjected to sleep deprivation, kicking, beating, and threatened with rape and transfer to Guantánamo Bay if he did not "confess".

<sup>570</sup> ICRC February 2004 report, *supra*, note 77.

human rights standards are properly upheld with regard to these persons".<sup>571</sup> More than three months later, the US government had not authorized the visits.

#### 4.5 Recommendations under Point 4

The US authorities should:

- Immediately inform anyone taken into US custody of his or her rights, including the right not to be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment; their right to challenge the lawfulness of their detention in a court of law; their right to access to relatives and legal counsel, and their consular rights if a foreign national;
- Ensure at all times a clear delineation between powers of detention and interrogation;
- Keep under systematic review interrogation rules, instructions, methods and practices, as well as arrangements for the custody and treatment of anyone in US custody, with a view to preventing any cases of torture or cruel, inhuman or degrading treatment;
- Ensure that conditions of detention strictly comply with international law and standards;
- Prohibit the use of isolation, hooding, stripping, dogs, stress positions, sensory deprivation, feigned suffocation, death threats, use of cold water or weather, sleep deprivation and any other forms of torture, or cruel, inhuman or degrading treatment as interrogation techniques;
- Bring to trial in accordance with international fair trial standards all detainees held in Guantánamo, or release them;
- Ensure compliance with all aspects of international law and standards relating to child detainees;
- Ensure compliance with all international law and standards relating to women detainees;
- Invite all relevant human rights monitoring mechanisms, especially the UN Special Rapporteur on Torture, the Committee against Torture, the Working Group on Enforced or Involuntary Disappearances (1980) and the Working Group on Arbitrary detention to visit all places of detention, and grant them unlimited access to these places and to detainees;
- In addition to the ICRC, grant access to national and international human rights organizations, including Amnesty International, to all places of detention and all detainees, regardless of where they are held.

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<sup>571</sup> *Protection of human rights and fundamental freedoms in the context of anti-terrorism measures.* Joint statements by special rapporteurs of UN human rights commission. United Nations Press Release, 25 June 2004.

## Point 5 – Prohibit torture in law

*Governments should adopt laws for the prohibition and prevention of torture incorporating the main elements of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) and other relevant international standards. All judicial and administrative corporal punishments should be abolished. The prohibition of torture and the essential safeguards for its prevention must not be suspended under any circumstances, including states of war or other public emergency.*

### 5.1 Putting the President above the law, detainees below the law

*Customary international law does not provide legally-enforceable restrictions on the interrogation of unlawful combatants under DOD control outside the United States... The United States Constitution does not protect those individuals... Defenses relating to Commander-in-Chief authority, necessity and self-defense or defense of others may be available to individuals whose actions would otherwise constitute [torture]...*

Pentagon Working Group conclusions, April 2003<sup>572</sup>

Any person detained by states anywhere in the world should be protected by the following layers of law:

- **Domestic law:** This should include provisions reflecting the state's international legal obligations to respect rules of human rights and humanitarian law treaties to which it is party. In the case in point, US laws should reflect the absolute prohibition on torture and other ill-treatment extant in both these strands of law.
- **International treaties:** In the case of the USA, these treaties include the ICCPR, the UN Convention against Torture and the four Geneva Conventions, all of which, as noted, prohibit torture and ill-treatment absolutely.
- **Relevant rules of customary international law:** These rules comprise international rules derived from state practice and regarded as legal obligations (*opinio juris*). Such rules are generally binding on all states, regardless of whether or not they are party to treaties codifying these rules. It is universally agreed that the prohibition on torture and other ill-treatment is, indeed, part of customary international law. The widespread ratification of treaty provisions containing these prohibitions, together with the nearly universal prohibition in constitutions and national laws around the world, is evidence of such a customary international law rule.<sup>573</sup>

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<sup>572</sup> Pentagon Working Group Report, 4 April 2003, *supra*, note 56 (DOD = Department of Defense).

<sup>573</sup> See for instance, *Restatement (Third) of Foreign Relations Law* § 702: Customary International Law Of Human Rights (1987), clause d. In a famous case, *Filaritiga v. Peña-Irala*, 630 F.2d 876, a US Circuit Court determined that torture is prohibited under customary international law. In doing so, it relied in part on state practice at the international level, on the Universal Declaration of Human Rights,



In addition, the prohibition is recognized as a peremptory norm of international law (*jus cogens*), for example by the UN Human Rights Committee<sup>574</sup>, the ICTY<sup>575</sup>, and the American Law Institute.<sup>576</sup>

As outlined below, in the “war on terror”, the US administration has sought to strip “terrorist” suspects detained by its forces abroad of every single one of these protections, placing detainees in effect beyond the reach, or protection, of the law, with the exception of military law which the President may in effect also ignore.

**Domestic law:** The Pentagon Working Group report of April 2003 makes the administration’s position clear that “the United States Constitution does not protect those individuals who are not United States citizens and who are outside the sovereign territory of the United States.” Keeping foreign detainees held abroad from the protection of the US judiciary has been a central tenet of the administration’s “war on terror” policy. This was only rejected on 28 June 2004 by the US Supreme Court’s *Rasul v. Bush* decision finding that the US courts had jurisdiction over the Guantánamo detainees. Even then, the administration has sought to curtail the impact of the ruling (see page 99).

The Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, signed by President Bush on 13 November 2001, expressly states that anyone named under it will not be able to “seek any remedy” in any court in the USA or anywhere else in the world, thereby ruling out access to judicial redress for any human rights violation that may have occurred during arrest, detention, interrogation or prosecution. It also makes anyone named under it eligible for trial under the “exclusive jurisdiction” of military commissions.

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the UN Declaration on the Protection of All Persons from Being Subjected to Torture and regional human rights treaties, all of which prohibit torture *and* cruel, inhuman or degrading treatment.

<sup>574</sup> “The proclamation of certain provisions of the [ICCPR] as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7).” Human Rights Committee, General comment no. 29: States of emergency (article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11.

<sup>575</sup> A Trial Chamber of the International Criminal Tribunal for the former Yugoslavia recently stated: “. . . at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States’ universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime.” *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1-T (Trial Chamber, 10 December 1998), para. 156.

<sup>576</sup> See *Restatement (Third) of Foreign Relations Law* § 702: Customary International Law Of Human Rights (1987), comment n.

**International treaty law:** In his central policy memorandum of 7 February 2002 President Bush set out his country's view of the status of "al Qaeda and Taliban" detainees. The President determined, *inter alia*, the following:

- That "none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world";
- That "common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees";
- That, "because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war".<sup>577</sup>

To this may be added the administration's consistent position that human rights treaties do not apply to detainees outside US territory. As it claimed in the *Rasul* case, "by its own terms, the ICCPR is inapplicable to conduct by the United States outside its sovereign territory."<sup>578</sup>

**Customary international law:** In a remarkable rejection of a long history of US jurisprudence confirming that international law is part of the law of the USA<sup>579</sup>, a Department of Justice memorandum, submitted to the White House in preparation for the President's February 2002 memorandum, and which the latter seems to accept in its entirety, concludes, *inter alia*, that, "customary international law has no binding legal effect on either the President or the military".<sup>580</sup>

With both national and international legal protections discarded, would "terrorist" detainees enjoy, in the USA's view, *any* legal protection, international or otherwise? In this regard, the President's memorandum of February 2002 is instructive:

*"Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."*

By this statement, it is clear that:

- There are detainees who in the USA's view "are not legally entitled" to be treated humanely.
- The USA would nevertheless assert that it would treat those detainees "humanely."

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<sup>577</sup> Presidential memorandum, *supra*, note 11.

<sup>578</sup> *Rasul et al v. Bush*, Brief for the Respondents, March 2004, p. 49 (emphasis in original).

<sup>579</sup> See, for example, *The Paquete Habana*, 175 U.S. 677 (1900)

<sup>580</sup> Memorandum Re: *Application of treaties and laws to al Qaeda and Taliban detainees*, 22 January 2002, *supra*, note 250. See also Pentagon Working Group April 2003 report, *supra*, note 56, page 6.

However, three crucial problems arise here:

- The “humane” treatment would be pursued “as a matter of policy” rather than as a matter of the state’s international legal obligations.<sup>581</sup>
- The USA’s pledge to treat those detainees “in a manner consistent with the principles of Geneva,” would only be “to the extent appropriate and consistent with military necessity.” Although the Geneva Conventions in particular, and international humanitarian law in general, permit military necessity to play a role in deciding whether certain acts (such as destruction or appropriation of property) are legal, it prohibits other acts, such as targeting civilians and ill-treating detainees and prisoners, in all circumstances, regardless of whether or not they could be, or are perceived as being, militarily beneficial. The USA thus downgraded the right to be free from torture and ill-treatment from a fundamental, absolute right to one subjugated to considerations of military advantage.
- The Geneva Conventions certainly contain a “principle” of humane treatment, but the President ordered that the “Geneva principles” only be applied subject to “military necessity.” The USA would provide its own version of “humane treatment”, replacing a well-defined, binding legal rule with a vague, ill-defined, non-legal notion subject to the whims of military commanders and politicians.

This position has not remained on the level of hypothetical statements. It was followed by an official policy combining a declaratory commitment to “humane treatment” with actual interrogation methods which are patently inhumane. Thus in his memorandum of January 2003,<sup>582</sup> Secretary of Defense Rumsfeld ordered that “[I]n all interrogations, you should continue the humane treatment of detainees, regardless of the type of interrogation technique employed.” Among such “humane” techniques, which had been approved by Secretary Rumsfeld previously, and under the present memorandum may still be used, albeit “only” with Secretary Rumsfeld’s prior approval, are:<sup>583</sup>

- “The use of stress positions (like standing) for a maximum of four hours”;
- “Use of the isolation facility for up to 30 days”;
- “Deprivation of light and auditory stimuli”;
- Use of “a hood placed over his head during transportation and questioning”;

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<sup>581</sup> It should be noted that this position was officially reiterated by the USA, see for instance “letter dated 2 April 2003 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights”. UN Doc. E/CN.4/2003/G/73, 7 April 2003, p. 4. See also the Secretary of Defense Memo for Commander, SOUTHCOM: *Counter-Resistance Technique in the War on Terrorism*, 16 April 2003.

<sup>582</sup> Secretary for Defense Memorandum for the Department of Defense General Counsel Ref: Detainee interrogations, Dated: 15 January 2003.

<sup>583</sup> As detailed in Memo for Commander Joint Task Force 170, Dated: 11 October 2002.

<http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf>

- “Removal of clothing”;
- “Using detainees individual phobias (such as fear of dogs) to induce stress”;
- “Use of mild, non-injurious physical contact such as grabbing, poking in the chest with a finger and light pushing”.

There is no explicit limitation on combining some or all of these methods.

### **Green light for torture: Under US law a wartime President can order torture**

At the heart of this disregard for international law lies the notion, explained and justified in detail by the 1 August 2002 Justice Department memorandum to the White House and the Pentagon Working Group report of April 2003, that,

*In order to respect the President’s inherent constitutional authority to manage a military campaign, 18 U.S. C. § 2340A [the US law prohibiting torture by US agents abroad] as well as any other potentially applicable statute must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority.*<sup>584</sup>

Having argued in flagrant contradiction to international law, that torture is limited to acts that would cause pain “associated with... death, organ failure, or serious impairment of body functions”; that for death threats to be torturous the threat must be of “imminent death”;<sup>585</sup> that cruel, inhuman or degrading treatment or punishment should be viewed as applying to only punishments; and that certain (in effect all) human rights and humanitarian law treaties do not apply to the “war on terror” generally and to “terrorist” detainees in particular, the memorandum and the Pentagon Working Group report claim, in effect, that none of this matters: the President is authorized by the US Constitution to order absolutely anything he wishes in his capacity as Commander-in-Chief of the armed forces, as no laws, either international or national, can touch him.<sup>586</sup>

This is reflected in the Secretary for Defense’s instructions regarding “interrogation techniques.” While later memorandums have limited the scope of “techniques” which military interrogators may use routinely, the Secretary for Defense has left an opening for unspecified and unlimited “additional interrogation techniques”. In a memorandum to the Commander of US Southern Command, Secretary Rumsfeld wrote:

*“If, in your view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee.”*<sup>587</sup>

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<sup>584</sup> Pentagon Working Group report, page 21, *supra*, note 56. See similarly Bybee memorandum, 1 August 2002, page 2, *supra*, note 252.

<sup>585</sup> Pentagon Working Group report, page 18, *supra*, note 56.

<sup>586</sup> *Ibid.*, pages 20-24.

<sup>587</sup> Memo for Commander, SOUTHCOM, 16 April 2003, *supra*, note 50.

Throughout the “war on terror”, the US administration has repeatedly stated that it is committed to the rule of law as one of the “non-negotiable demands of human dignity”. This is clearly far from the case if it believes that there is no legal limit to what the President can instruct the armed forces to do, including blatant violations of international law.

## **5.2 Domestic legislation to comply with international law**

*Domestic law cannot be invoked as a justification for the failure to comply with international treaty obligations and customary international law.*

United Nations Special Rapporteur on torture, August 2004<sup>588</sup>

On 15 May 2000, the Committee against Torture issued its findings on the Initial Report of the USA on its implementation of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Committee was concerned by the failure of the USA “to enact a federal crime of torture in terms consistent with article 1 of the Convention”. It recommended that the USA should enact such a law as well as withdraw its reservations, interpretations and understandings relating to the Convention (see Point 11).

Article 4 of the UN Convention against Torture states: “Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.” Article 5 requires the USA to ensure that its laws cover crimes committed by its nationals wherever committed or by anyone present in US territory whom the USA does not extradite.

The US government has not made torture a distinct crime under federal law, except with regard to acts committed outside US territory. This latter law, 18 U.S.C. § 2340, makes it a criminal offence for any person acting in an official capacity “outside the United States” to commit or attempt to commit torture. The law was enacted in 1994 in order to meet the requirements of Article 5 of the UN Convention against Torture. The statute defines torture “in a manner compatible with the United States reservations to the Convention”,<sup>589</sup> that is, arguably narrower than the definition contained in Article 1 of the Convention (see Point 11.2).<sup>590</sup> It was the potential narrowness of this definition which the August 2002

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<sup>588</sup> UN Doc. A/59/324, para. 15.

<sup>589</sup> USA’s report to the Committee against Torture, CAT/C/28/Add.5, para. 188, 9 February 2000.

<sup>590</sup> In line with the USA’s ratification of the UN Convention against Torture, 18 U.S.C. § 2340 states: (1) “torture” means an act committed by a person acting under the color 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; (2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from - (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 disrupt profoundly 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 of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

memorandum from the Justice Department attempted to accentuate when advising that US agents could use harsh interrogation methods without fear of being prosecuted for torture. For example:

*"We conclude that torture as defined in and proscribed by Sections 2340-2340A, covers only extreme acts... Because the acts inflicting torture are extreme, there is a significant range of acts that though they might constitute cruel, inhuman or degrading treatment or punishment fail to rise to the level of torture. Further we conclude that under the circumstances of the current war against al Qaeda and its allies, application of Section 2340A to interrogations undertaken pursuant to the President's Commander-in-Chief powers may be unconstitutional. Finally, even if an interrogation method might violate Section 2340A, necessity or self-defense could provide justifications that would eliminate any criminal liability."*<sup>591</sup>

The UN Special Rapporteur on torture has taken issue with this. In his August 2004 report he stressed that "the definition contained in the Convention cannot be altered by events or in accordance with the will or interest of States." He additionally stressed that "the prohibition applies equally to torture and to cruel, inhuman or degrading treatment or punishment".<sup>592</sup>

The Schlesinger Panel also took an apparently narrow definition of torture. Releasing the panel's report on 24 August 2004, Chairman John Schlesinger said that "there is a problem in defining torture. We did not find cases of torture, however".<sup>593</sup> In the actual report, the panel suggested a definition of torture as "any treatment that causes permanent harm". This reflects the language in the USA's reservation to the UN Convention against Torture and in 18 U.S.C. § 2340 which refers to "prolonged mental harm". Indeed, the Schlesinger report appears to take an even narrower view than the August 2002 Justice Department memorandum. The latter pointed to the "prolonged mental harm" clause, in arguing that the "acts giving rise to the harm must cause some lasting, though not necessarily permanent, damage". As already noted, the Pentagon Working Group report of April 2003 adopted a narrow interpretation of torture, advising that even if the agent accused of torture knew that severe pain would result from his actions, "if causing such harm [was] not his objective, he lacks the requisite specific intent [to be guilty of torture]."

The Working Group also advised that 18 U.S.C. § 2340 "does not apply to the conduct of US personnel at GTMO [Guantánamo]". To keep the detainees away from the judiciary, the administration for two years argued that the Naval Base was outside the jurisdiction of the US courts because Cuba had ultimate sovereignty over the territory. Now the Working Group report was holding that as far as the Torture Statute was concerned, the Guantánamo Naval Base fell within the USA and therefore members of the US military, civilian employees or contractor employees could not be prosecuted under 18 U.S.C. § 2340.

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<sup>591</sup> Bybee memorandum, 1 August 2002, *supra*, note 252.

<sup>592</sup> UN Doc. A/59/324, para. 16.

<sup>593</sup> Press Conference with members of the Independent Panel to Review Department of Defense Detention Operations. Department of Defense News Transcript, 24 August 2004.

The USA PATRIOT Act extended US criminal jurisdiction over certain crimes committed at US facilities abroad, thereby excluding them from the reach of 18 U.S.C. § 2340 (by reducing the area defined as “outside the United States” under that law). This appears recently to have been at least partially remedied (see Point 7.1).

The USA must ensure that its criminalization of torture covers all the conduct prohibited by the USA’s international obligations and is applicable to all its detention centres wherever they are. Furthermore, given the argument presented in various US government memorandums that the President’s Commander-in-Chief powers could override the prohibition on torture, in order to be consistent with the UN Convention against Torture, the USA must ensure that its law must not allow any exceptional circumstances whatsoever to be invoked as justification for torture (Article 2.2).

It follows from this that any special measures giving any state agents immunity from prosecution for torture must be revoked. The law must also not allow an order from a superior officer or a public authority to be invoked as a justification for torture (Article 2.3).

### **5.3 Recommendations under Point 5**

The US authorities should:

- Enact a federal crime of torture, as called for by the Committee against Torture, that also defines the infliction of cruel, inhuman or degrading treatment as a crime, wherever it occurs;
- Amend the Uniform Code of Military Justice to criminalize expressly the crime of torture, as well as a crime of infliction of cruel, inhuman or degrading treatment or punishment, wherever it occurs, in line with the Convention against Torture and other international standards;
- Ensure that all legislation criminalizing torture defines torture at least as broadly as the UN Convention against Torture;
- Ensure that legislation criminalizing torture and the infliction of cruel, inhuman or degrading treatment covers all persons, regardless of official status or nationality, wherever this conduct occurred, and that it does not allow any exceptional circumstances whatsoever to be invoked as justification for such conduct, or allow the authorization of torture or ill-treatment by any superior officer or public official, including the President.

## Point 6 – Investigate

*All complaints and reports of torture should be promptly, impartially and effectively investigated by a body independent of the alleged perpetrators. The methods and findings of such investigations should be made public. Officials suspected of committing torture should be suspended from active duty during the investigation. Complainants, witnesses and others at risk should be protected from intimidation and reprisals.*

### 6.1 Investigative record does not inspire confidence

*In order to ensure impartiality, it is necessary to avoid entrusting the investigation to persons who have close personal or professional links with the persons suspected of having committed such acts, or who may have an interest in protecting these persons or the particular unit to which they belong.*

Commentary on Article 12 of the UN Convention against Torture<sup>594</sup>

As a State Party to the UN Convention against Torture, the USA “must ensure that its competent authorities proceed to a prompt and impartial investigation”, wherever there is “reasonable ground to believe” that an act of torture or cruel, inhuman or degrading treatment has been committed “in any territory under its jurisdiction” (Articles 12 and 16). In addition, anyone who alleges that he or she has been subjected to torture or cruel, inhuman or degrading treatment or punishment “has the right to complain to, and to have his case promptly and impartially examined by, [the State party’s] competent authorities” (Articles 13 and 16). According to the Committee against Torture, such an investigation must be made “whatever the origin of the suspicion”, which can include information provided by non-governmental organizations.<sup>595</sup> Similarly, the Geneva Conventions require that allegations of torture or inhuman treatment be investigated and those responsible brought to justice.<sup>596</sup>

Early in the “war on terror”, on the night of 23/24 January 2002, US Special Forces in Uruzgan province in Afghanistan took 27 villagers into custody. All 27 were released on 6 February 2002 after two weeks in detention once it was determined that they were villagers mistakenly identified by US forces as Taliban or *al-Qa’ida* members. It is alleged that at the scene of the raid the villagers had their hands and feet tied, were blindfolded and hooded, and flown to the US base at Kandahar. Having arrived at the base the prisoners were allegedly beaten, kicked and punched by soldiers, made to lie on their stomachs with their hands tied behind their backs and their legs chained, whereupon soldiers walked across their backs.

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<sup>594</sup> Burgers, J. Herman and Hans Danelius, 1988, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dordrecht, The Netherlands, Martinus Nijhoff, ISBN 90-247-3609-9. Page 145.

<sup>595</sup> *Blanco Abad v. Spain*, Communication No. 59/1996, Views of the Committee against Torture, UN Doc. CAT/C/20/D/59/1996 14 May 1998, para. 8.2. and *Khaled Ben M’Barek v. Tunisia*, Communication No. 60/1996, Views of the Committee against Torture, UN Doc. CAT/C/23/D/60/1996, 10 November 1999, para. 11.9.

<sup>596</sup> Article 129 Third Geneva Convention and Article 146 Fourth Geneva Convention.



US Central Command's executive summary of the investigation into the case said that "none of the detainees were mistreated or unnecessarily abused." Secretary Rumsfeld asserted that "investigation" was not the right term to describe what was being conducted into the Uruzgan raid – as it implied "more formality or a disciplinary action" – but suggested it was aimed more at "what kind of lessons might be learned".<sup>597</sup> His assertion should be assessed against international principles which state that the purposes of effective investigation and documentation of torture and other cruel, inhuman or degrading treatment includes: (a) clarification of the facts and establishment and acknowledgement of individual and State responsibility for victims and their families; (b) identification of measures needed to prevent recurrence; and (c) facilitation of prosecution and/or, as appropriate disciplinary sanctions.<sup>598</sup>

Asked to clarify whether he meant that there would be no disciplinary action against any military personnel involved in the raid and its aftermath, the Secretary of Defence replied: "Why would there be? I can't imagine why there would be any." This was despite stating that he did not know if the Central Command investigation had been completed. In April 2002, Amnesty International raised its concerns with the US authorities about this case and the inadequacy of the official investigation into it.<sup>599</sup> It has never received a reply or a copy of the full investigation report as requested. Similarly, Amnesty International received no reply on the case of alleged ill-treatment of 34 Afghans taken into custody during a raid on a compound near Kandahar in the early hours of 18 March 2002 (see page 23).

Since then, there have been allegations of torture or ill-treatment used against detainees in US custody in Afghanistan, Guantánamo Bay, Iraq, and undisclosed locations.<sup>600</sup> There have been further indications of inadequate investigations.

After a US helicopter was shot down in Iraq in early January 2004, the US military said that "enemy personnel posing as media" had been taken into custody and "were now being questioned".<sup>601</sup> Four days later, a military spokesperson said that "we determined through questioning these individuals that they were probably at the wrong place at the wrong time".<sup>602</sup> *Reuters* news agency took testimony from three of its employees, Salem Ureibi,

<sup>597</sup> Department of Defense news briefing, 21 February 2002.

<sup>598</sup> UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted by General Assembly resolution 55/89, 4 December 2000.

<sup>599</sup> *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay*, *supra*, note 13. AI was also concerned by statements from senior military officials which seemed to prejudice the findings of the investigation. According to Central Command in March 2002, "this incident is closed". *Status of investigations during Operation Enduring Freedom*, US Central Command, 29 March 2002.

<sup>600</sup> For example, another detainee alleged that he had been beaten by US guards in Kandahar air base before being transported to Guantánamo Bay in February 2002. According to the military authorities, the detainee "had signs of physical injury", but that they had been caused when the detainee had "struggled and fought" with his guards. It considered that case also now closed. *Status of investigations during Operation Enduring Freedom*. US Central Command, 29 March 2002.

<sup>601</sup> Brigadier General Mark Kimmitt. Coalition Provisional Authority Briefing, 2 January 2004.

<sup>602</sup> 82nd Airborne Division Commanding General's Briefing from Iraq, 6 January 2004.

Ahmad Muhammad Hussein al-Badrani and Sattar Jabar al-Badrani, who alleged that they had been beaten and subjected to sleep deprivation, stress positions, hooding, and sexual and religious humiliation in US military custody near Fallujah.

*“Around 11 they took me for interrogation. It was in a metal container, a caravan, with chairs. [Ahmad demonstrates how he was forced to kneel, with his feet in the air and his arms raised in the air.] If my hands or feet went down they would hit me. The interrogation lasted three or four hours. They put tissue in my mouth. I could hardly breathe. They said that we had fired at the helicopter. I said: ‘I swear to God it wasn’t me.’ They said: ‘If you swear to God again, we’ll break you into a thousand pieces’ ...There was a shoe on the ground and they told me to chew it and to lick it... They made me lie on the ground with my backside in the air. They were taking photographs...They had music played very loud on huge speakers and they made us dance. It was played straight into our ears. There was abuse throughout the night. We were beaten on the ground. They placed tape on our mouths, and bags on our heads...”<sup>603</sup>*

*Reuters* called for a full investigation into its employees’ allegations. On 27 January 2004, the company wrote to the US authorities noting that three weeks had passed since the detentions and repeated its call for a full investigation. The letter states: “It has become clear that the military either does not yet appreciate the significance of the matters we have raised or – even worse – fully understands their seriousness but is deliberately attempting to downplay them or ignore them”. On 29 January, *Reuters* received an unclassified executive summary of the military investigation, which stated that the “detainees were purposefully and carefully put under stress, to include sleep deprivation, in order to facilitate interrogation; they were not tortured”. The news agency described the investigation as “woefully inadequate” and demanded a more thorough inquiry, noting that the military had relied only on the accounts of soldiers and had not interviewed the detainees themselves. Following the revelations in late April 2004 of the torture and ill-treatment of detainees in Abu Ghraib, *Reuters* called for their employees’ allegations to be “reviewed thoroughly, objectively and with a new view towards their veracity”. The company was provided with a letter, dated 5 March 2004, from the commander of US forces in Iraq, Lieutenant General Ricardo Sanchez, stating that the investigation, clearing military personnel of any misconduct, was thorough and objective and its conclusions sound. The three men, who had not been interviewed by the military as part of its investigation, decided to make their allegations public in mid-May 2004.<sup>604</sup> In mid-October 2004, the Pentagon revealed that it was reviewing whether to re-open the case.<sup>605</sup>

Broader reviews initiated in 2004 have raised further questions about the adequacy of the official response to the allegations of torture and ill-treatment of detainees. One such

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<sup>603</sup> Interview with Ahmad Mohammad Hussein al-Badrani, 8 January 2004. Transcript provided by Reuters.

<sup>604</sup> Information as provided to Amnesty International by Reuters, 19 July 2004.

<sup>605</sup> *US considers reopening inquiry into possible abuse before Iraq prison scandal*. New York Times, 13 October 2004.

review was conducted by the Army Inspector General, Lieutenant General Paul Mikolashek, initiated in February 2004. It was “not an investigation of any specific incidents or units, but rather a comprehensive review of how the Army conducts detainee operations in Afghanistan and Iraq”.<sup>606</sup> It did not include operations at Guantánamo Bay, or of the Defense Intelligence Agency or the CIA. During a Senate Armed Services Committee hearing on 19 May 2004, two months before completion of the report, Army General John Abizaid, the top commander at US Central Command, testified that “I specifically asked the IG of the Army, did he believe that there was a pattern of abuse of prisoners in the Central Command area of operation, and he looked at both Afghanistan and Iraq, and he said no”. Referring to Abu Ghraib, General Abizaid added that “I believe that we have isolated incidents that have taken place”. This mirrored the position taken by senior members of the administration, including President Bush and Defense Secretary Rumsfeld, following broadcast of the Abu Ghraib torture photographs. On 21 July 2004, Lieutenant General Mikolashek issued his report which maintained the focus of blame on a small number of low-ranking personnel.<sup>607</sup>

The Department of Defense has insisted that the Abu Ghraib torture came to light as a sign of effective self-policing by the military.<sup>608</sup> The Department and the wider administration had failed, however, adequately to investigate earlier evidence of torture and ill-treatment in Afghanistan, Guantánamo and Iraq, raised by organizations including the ICRC and Amnesty International. In late April 2004, *CBS News* broadcast the now infamous Abu Ghraib photographs and the *New Yorker* magazine published *Torture at Abu Ghraib* by journalist Seymour Hersh. After Hersh published a book on the subject in September 2004, the Pentagon responded that “detainee operations in Afghanistan, Iraq, and elsewhere have been examined extensively – both within the Department of Defense and by an independent panel led by former Secretary of Defense Jim Schlesinger. The US military itself – not Mr Hersh or any other reporter – first publicized the facts of the abuses at Abu Ghraib in January 2004, four months before Mr Hersh ‘broke’ the story”.<sup>609</sup>

The Pentagon’s claim that the military “first publicized the facts” is a reference to a four-line press release issued on 16 January 2004 by US Central Command in Florida which

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<sup>606</sup> Executive summary. *Detainee Operations Inspection*. Department of the Army: The Inspector General, 21 July 2004.

<sup>607</sup> The report found that the “abuses that have occurred in both Afghanistan and Iraq... were unauthorized actions taken by a few individuals, coupled with the failure of a few leaders to provide adequate monitoring, supervision, and leadership over those Soldiers. These abuses, while regrettable, are aberrations when compared to their comrades in arms who are serving with distinction.” *Detainee Operations Inspection*. Army Inspector General, 21 July 2004.

<sup>608</sup> The investigation was initiated after a soldier gave a compact disc containing photos of the torture and ill-treatment of detainees to military investigators on 13 January 2004. Amnesty International had raised allegations of torture and ill-treatment by US forces in Iraq with the authorities in July 2003. Recently, the Pentagon said: “The US military – not journalists – first publicized the facts of the abuses at Abu Ghraib in January. It was the military’s subsequent investigations that unearthed almost all of the disturbing details and photographs used by critics to castigate this department”. *Where Abu Ghraib abuses began*. Lawrence Di Rita, Pentagon Spokesman, New York Times, 20 October 2004.

<sup>609</sup> Department of Defense statement on Seymour Hersh book. DoD news release. 10 September 2004.

stated that an “investigation has been initiated into reported incidents of detainee abuse at a Coalition Forces detention facility.” It gave no more detail, suggesting that “release of specific information concerning the incidents could hinder the investigation”.<sup>610</sup> However, it was only after some of the Abu Ghraib photographs, the ICRC’s February 2004 confidential report into abuses by Coalition forces, and details of the administrative investigation of Major General Antonio Taguba (the Taguba report) were leaked to the press that the authorities began to display an increased responsiveness and initiated a number of wider policy reviews, including the Schlesinger inquiry.

## 6.2 Investigating deaths in custody

*The deaths reveal much about the true nature of the still-emerging prisoner scandal. First, only a minority of them occurred at Abu Ghraib prison... Second, the administration has done its best to cover up the killings: They have been reported only after news of them leaked to the media, and details about most of them are still undisclosed... Investigations have been shoddy and secretive.*

Editorial, *Washington Post*, 28 May 2004<sup>611</sup>

Among the abuses committed by US personnel in Abu Ghraib found by the Taguba investigation were incidents of military police “taking photographs of dead Iraqi detainees”. Also in Iraq, the ICRC’s February 2004 report on abuses by Coalition forces said that the organization had collected “allegations of deaths as a result of harsh internment conditions, ill-treatment, lack of medical attention, or the combination thereof...”

As with the allegations of torture and ill-treatment by US agents in general, this issue is not limited to Abu Ghraib or to Iraq. An Afghan detainee reportedly died of hypothermia in a CIA facility in Kabul in 2002 after Afghan guards soaked him in water and left him overnight shackled to a wall. Abdul Wahid, an Afghan civilian, died on 6 November 2003 in a US Forward Operating Base at Gereshk in Helmand Province as a result of “multiple blunt force injuries”. He had been in custody for 48 hours before his death. His body was reportedly given back to his family two months after his death. Other detainees have died in US custody in Afghanistan (see below).

On 21 May 2004, the Department of Defense revealed that the Army Criminal Investigation Command was currently conducting 33 investigations of death in custody cases, 30 of which involved deaths inside facilities.<sup>612</sup> Nine of these 30 cases were the subject of ongoing military investigations of military personnel. Eight of these nine cases involve deaths

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<sup>610</sup> *Detainee treatment investigation*. US Central Command, 16 January 2004. There is also an American Services News Article, *Military Accuses Six of Abusing Detainees in Iraq*, dated 20 March 2004.

<sup>611</sup> *The homicide cases*. *Washington Post*, 28 May 2004.

<sup>612</sup> At the 21 May briefing, after questioning, the official thought the 33 cases involved 37 deaths. According to the official, two of the four cases categorized as “justifiable homicide” involved more than one victim. The incidents in question occurred at Abu Ghraib in November 2003 (four victims) and at Abu Ghraib again in April 2004 (two victims).

“classified by medical authorities as homicides, which involve suspected assaults of detainees either before or during interrogation sessions that may have led to the detainee’s death”.<sup>613</sup> Of these nine cases, three were in Afghanistan and six in Iraq (including two in Abu Ghraib). A 10<sup>th</sup> case categorized as a homicide had been closed by the military and “turned over to another government agency”.

The recently discovered death of an 18-year-old Afghan army recruit in the US base in Gardez in Afghanistan in March 2003 has raised additional concern about whether all deaths in custody have been revealed. Local Afghan officials were allegedly pressured to cover up the death, which has only come to light as a result of a non-governmental investigation.<sup>614</sup> Jamal Naseer’s body, said to be covered in bruises, was allegedly turned over to local police with no documentation of his death and no autopsy conducted. A US investigation was not initiated until 18 months later. Jamal Naseer had reportedly been arrested with seven other Afghan soldiers on 1 March 2003 by US Special Forces (see page 24).

At its 21 May 2004 briefing, the Department of Defense released 23 death certificates – three of prisoners who had died in US custody in Afghanistan, and 20 who had died in Iraq. There appears to have been a sudden haste in the completion of these certificates. Twenty of them had only been completed, with the required second signature, in the 10 days before the Pentagon released them. Some of the victims had been dead for months.

In Iraq, Dilar Dababa died in a classified interrogation facility in Baghdad on 13 June 2003, and his death certificate was signed on 14 May 2004. He died of “closed head injury with a cortical brain contusion and subdural hematoma.” According to Pentagon documents obtained by the *Denver Post*, while in custody he “was subjected to both physical and psychological stress”. He was handcuffed to a chair and the chair secured to a pipe in the room because he was allegedly combative and an escape risk.<sup>615</sup>

Also in Iraq, Abdul Jaleel died in US custody in the Forward Operating Rifles Base in Al Asad on 9 January 2004, five days after being taken into custody. His death certificate, which found cause of death to be “blunt force injuries and asphyxia”, was signed on 13 May 2004. Internal Pentagon documents reveal that in the initial part of his detention he had been put in isolation and shackled to a pipe that ran along the ceiling. During questioning he was allegedly beaten and kicked in the stomach and ribs. Later, because he was allegedly uncooperative and disruptive, his hands were shackled to the top of his cell door, and he was gagged. He died in this position.<sup>616</sup>

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<sup>613</sup> Senior Military Official. Defense Department Background Briefing, 21 May 2004. The ninth case “is what we believe to be a natural death and we’re pending an autopsy”.

<sup>614</sup> For full details of this case, see: *A torture killing by US forces in Afghanistan*. Crimes of War Project, [www.crimesofwar.org](http://www.crimesofwar.org), and *US probing alleged abuse of Afghans*. Los Angeles Times, 21 September 2004.

<sup>615</sup> *Brutal interrogation in Iraq*. The Denver Post, 19 May 2004.

<sup>616</sup> *Ibid.*

Three of the death certificates released by the Pentagon were of deaths of Afghan nationals in US custody in Afghanistan. One was of Dilawar, who died in the US air base in Bagram on 10 December 2002 from "blunt force injuries to lower extremities complicating coronary artery disease". His death certificate was signed on 20 May 2004. He was one of two Afghan men – the other being Mullah Habibullah (named on the death certificate as "Ullah, Habib" – to have died from blunt force injuries in Bagram in December 2002. Mullah Habibullah was allegedly beaten by a US soldier while in restraints. Dilawar was allegedly subjected to prolonged forced standing, while shackled and with his hands chained above his shoulders. Both men were beaten by "multiple soldiers", mainly on the legs possibly so that fewer wounds would be visible.<sup>617</sup>

Manadel al-Jamadi died in Abu Ghraib on 4 November 2003 from "blunt force injuries complicated by compromised respiration". His death certificate was signed on 13 May 2004. According to the Fay report, Manadel al-Jamadi had resisted arrest, and was struck on the head with a gun-butt by a member of a Navy Seal unit "to subdue him". He was brought into Abu Ghraib by CIA officers without being registered. His head was covered with an empty sandbag and guards were ordered not to remove it when they took him to a shower room that was being used for interrogation. Less than an hour later, he collapsed and died. An autopsy revealed that he had died of a blood clot in the head, likely as a result of injuries sustained upon arrest.

The death of Major General 'Abd Hamad Mawhoush in US custody in Al Qaim detention facility in northwest Baghdad illustrates possible shortcomings of military investigations into deaths in custody.

- According to the death certificate 'Abd Hamad Mawhoush died on 26 November 2003. The cause of death was given as "asphyxia due to smothering and chest compression". The "mode of death" was recorded as "homicide". The death certificate was finally signed on 12 May 2004 and made public on 21 May 2004.
- On 27 November 2003, the military issued a press release saying that 'Abd Mawhoush had "died this morning during an interview with US forces". Already, therefore, there was a discrepancy in the date of death.
- There was a greater discrepancy in the cause of death. The military news release was titled: "*Iraqi General Dies of Natural Causes*". It claimed that the prisoner had "said he didn't feel well and subsequently lost consciousness" and died despite efforts to resuscitate him. The military said that the death is "currently under investigation".
- Amnesty International wrote to the US authorities on 3 December 2003 calling for the investigation to be prompt, thorough, impartial and independent, and for its findings to be made public. To this date, the organization has never had a reply to its letter.

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<sup>617</sup> US Army inquiry implicates 28 soldiers in deaths of 2 Afghan detainees. New York Times, 15 October 2004.

- According to Department of Defense documents obtained by the *Denver Post* newspaper, 'Abd Hamad Mawhoush had turned himself in to the US authorities in November. After two weeks in custody, "two soldiers with the 66<sup>th</sup> Military Intelligence Company slid a sleeping bag over his body, except for his feet, and began questioning him as they rolled him repeatedly from his back to his stomach... Then one of the soldiers, an interrogator, sat on Mawhoush's chest and placed his hands over the prisoner's mouth". It was during this interrogation that the prisoner "became non-responsive". According to the Pentagon documents, the two soldiers received reprimands and were barred from further interrogations.<sup>618</sup>
- On 21 May 2004, a Pentagon spokesperson said that the military investigation into 'Abd Mawhoush's death was one of the nine that was "ongoing". Four soldiers were subsequently reported to have been charged with murder and were facing possible courts-martial at the time of writing.<sup>619</sup>

Another of the death certificates released by the Pentagon on 21 May 2004 concerned 52-year-old Nagem Sadun Hatab who was detained at Camp Whitehorse detention facility near Nasiriya. He died on 6 June 2003, three days after his arrest, as a result of "strangulation". The death certificate added that he had been "found unresponsive in outside isolation". According to the report of a military investigation, obtained by the *Los Angeles Times*, on 4 June Nagem Hatab had been hit and kicked in the chest by US soldiers. On 5 June, the prisoner was reported to be lethargic, not eating and drinking very little, and possibly having difficulty breathing. He had diarrhoea and was covered in faeces. The camp commander ordered that he be stripped and taken outside the cellblock. According to the military investigation, he was left "naked outside in the sun and heat for the rest of the day and into the night. Shortly after midnight, Mr Hatab was found dead." An autopsy found that he had suffered seven broken or cracked ribs and a broken hyoid bone (the bone at the base of the tongue). However, the military investigator found that no tests could be carried out on Nagem Hatab's bodily fluids because they were mishandled and destroyed.<sup>620</sup> This meant that no murder or manslaughter charges could be brought as the exact cause of death could not be determined.<sup>621</sup>

There remain many questions around such cases, including those of at least 14 people whose death certificates were not released by the Pentagon on 21 May 2004. One such case is that of Mohammed Munim al-Izmerly, a prominent Iraqi scientist taken into US custody on 25 April 2003. He was taken, handcuffed and hooded, to an unknown location. He was held for the next nine months, possibly at the "high value detainees" section at Baghdad International Airport where the ICRC's February 2004 report found conditions of solitary confinement that violated the Geneva Conventions. On 11 January 2004, Dr al-Izmerly's family was allowed to visit him for the first time, having been taken there blindfolded and

<sup>618</sup> *Brutal interrogation in Iraq*. Denver Post, 19 May 2004.

<sup>619</sup> *Four US soldiers charged with murder*, Associated Press, 5 October 2004.

<sup>620</sup> *Report cites marines in Iraqi's death at a camp*. Los Angeles Times, 24 May 2004.

<sup>621</sup> In September 2004, the court-martial of Major Clarke Paulus was delayed so that prosecutors could search for missing evidence.

driven around in loops so that they would not know his location. On his wrist they saw a plastic band with the now well-known photograph of Saddam Hussein at the point of his capture. On 17 February 2004, the family received the news from the ICRC that 65-year-old Mohammed al-Izmerly was dead. He had died over two weeks earlier on 31 January 2004. The family commissioned their own autopsy which concluded that he had died from blunt force injury to the back of the head.<sup>622</sup>

Abdul Wali died in a US base near Asadabad in Kunar Province in Afghanistan on 21 June 2003. On 17 June 2004, the Justice Department announced the charging of a CIA contractor with assaulting Abdul Wali during interrogations on 19 and 20 June 2003 (see Point 7). Justice Department officials reportedly stated that he had been charged with assault rather than murder because no autopsy had been performed on Abdul Wali to establish the cause of death.

The absence of autopsies of people who have died in custody has been a cause for serious concern. At its 21 May 2004 briefing, when the Department of Defense revealed that the Army Criminal Investigation Command was investigating 33 investigations of death in custody cases, it reported that 15 of the cases involved people who were found to have died from "natural" or "undetermined" causes. In five of these 15 cases, autopsies had not been conducted. According to internal Pentagon documents obtained by the *Denver Post*, the five include an Abu Ghraib detainee who was taken to medical personnel "gasping for air" and a detainee in a detention facility in Mosul who was found "unresponsive by guards conducting routine wake-up calls." In both cases, the documents state that the "investigation was closed".<sup>623</sup> In such circumstances, it cannot be said that a proper investigation has occurred. Indeed the Pentagon official admitted at the briefing that "a case-by-case determination would need to be performed as to whether the proper judgment was applied" in not conducting an autopsy.

The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions state that investigations of deaths in custody must include an adequate autopsy, conducted by experts able to function impartially and independently from anyone or any agency associated with a possible perpetrator.

In June 2004, after the *Denver Post* had obtained the internal Pentagon documents showing that autopsies had not been conducted in all cases, the Department of Defense issued new guidance on the procedures for investigation into deaths in military custody. The Pentagon stated that the new procedures were "part of a series of efforts to strengthen policies and eliminate procedural weaknesses that have come to light as a result of the deplorable events at Abu Ghraib".<sup>624</sup> The procedures leave the decision as to whether an autopsy will be performed to the Office of the Armed Forces Medical Examiner (AFME), although "it is presumed that an autopsy shall be performed, unless an alternative determination is made by

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<sup>622</sup> *Suspicion surrounds death of Iraqi scientist in US custody*. Los Angeles Times, 28 May 2004 and "I will always hate you people". The Guardian (UK), 24 May 2004.

<sup>623</sup> *Skipped autopsies in Iraq revealed*. Denver Post, 21 May 2004.

<sup>624</sup> *DoD issues death investigation procedures*. Department of Defense news release, 10 June 2004.



the [AFME]”.<sup>625</sup> The new procedures do not cover other government agencies such as the CIA.

International standards require that all deaths in custody be investigated by a judicial or other competent authority to determine the cause of death.<sup>626</sup> The purpose of the investigation “shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death”.<sup>627</sup> Governments shall ensure that anyone identified by the investigation as having participated in the death is brought to justice. International humanitarian law similarly obliges states to investigate into all suspicious cases of death.<sup>628</sup>

The UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment requires states parties, of which the USA is one, to investigate all allegations of torture and cruel, inhuman or degrading treatment or punishment. Article 12 states: “Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.” Article 14 states that “in the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.”

The Geneva Conventions prohibit torture and ill-treatment. Article 147 of the Fourth Geneva Convention and Article 130 of the Third Geneva Convention list the following acts as grave breaches, that is, war crimes, if committed against persons protected by the respective Convention: wilful killing, torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health. Article 146 of the Fourth Geneva Convention and Article 129 of the Third Geneva Convention require each state party “to search for persons alleged to

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<sup>625</sup> *Procedures for Investigation into Deaths of Detainees in the Custody of the Armed Forces of the United States*. Memorandum signed by Secretary of Defense Donald Rumsfeld, dated 9 June 2004.

<sup>626</sup> Principle 34 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states: “Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case... The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.”

<sup>627</sup> Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

<sup>628</sup> Article 131 of the Fourth Geneva Convention provides that “Every death or serious injury of an internee, caused or suspected to have been caused by a sentry, another internee or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power. A communication on this subject shall be sent immediately to the Protecting Power. The evidence of any witnesses shall be taken, and a report including such evidence shall be prepared and forwarded to the said Protecting Power. If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all necessary steps to ensure the prosecution of the person or persons responsible.” See similarly the Third Geneva Convention, Art. 121.

have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts”.

The cases of deaths in US custody during the “war on terror” provide more evidence of a widespread problem of torture and ill-treatment, including denial of medical care. Investigations have been slow, autopsies and documentation have been less than stringently applied and officials have been quick to suggest natural causes. Progress in investigations and prosecutions appears to have been more a result of an increased responsiveness following the Abu Ghraib scandal than an inherent willingness to bring swift, transparent and firm action to bear in such cases. The US government has been accused of not taking seriously the killing of civilians in the wider war – for example, by not keeping a count of such deaths. This attitude appears to have infected the official approach to deaths in custody as well.

### **6.3 Recommendations under Point 6**

US Congress should:

- Establish an independent commission of inquiry into all aspects of the USA’s “war on terror” detention and interrogation policies and practices. Such a commission should consist of credible independent experts, have international expert input, and have subpoena powers and access to all levels of government, all agencies, and all documents whether classified or unclassified (see page 49).

The US authorities should:

- Ensure that all allegations of torture or cruel, inhuman or degrading treatment involving US personnel, whether members of the armed forces, other government agencies, medical personnel, private contractors or interpreters, are subject to prompt, thorough, independent and impartial civilian investigation in strict conformity with international law and standards concerning investigations of human rights violations;
- Ensure that such investigations include cases in which the USA previously had custody of the detainee, but transferred him or her to the custody of another country, or to other forces within the same country, subsequent to which allegations of torture or ill-treatment were made;
- Ensure that the investigative approach at a minimum complies with the UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Ensure that the investigation of deaths in custody at a minimum comply with the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, including the provision for adequate autopsies in all such cases;
- In view of evidence that certain persons held in US custody have been subjected to “disappearance”, the US authorities should initiate prompt, thorough and impartial investigations into the allegations by a competent and independent state authority, as provided under Article 13 of the UN Declaration on the Protection of All Persons from Enforced Disappearance.

## Point 7 – Prosecute

*Those responsible for torture must be brought to justice. This principle should apply wherever alleged torturers happen to be, whatever their nationality or position, regardless of where the crime was committed and the nationality of the victims, and no matter how much time has elapsed since the commission of the crime. Governments must exercise universal jurisdiction over alleged torturers or extradite them, and cooperate with each other in such criminal proceedings. Trials must be fair. An order from a superior officer must never be accepted as a justification for torture.*

### 7.1 No impunity: from contractors to commander-in-chief

*States must honour their obligations, including that to vigorously combat the impunity of perpetrators of torture. Those who conceive of or authorize any form of torture and other cruel, inhuman or degrading treatment, and those who commit such acts, should not go unpunished. Independent bodies must prosecute those responsible, and the punishment must reflect the seriousness of the offence.*

United Nations Secretary-General Kofi Annan, 17 June 2004<sup>629</sup>

One of the shocking aspects of the Abu Ghraib torture photographs is the apparent sense of impunity being enjoyed by military guards who appear in them. Such was this sense of impunity that a photo of naked detainees piled up together was reportedly being used as a screen saver on one of the computers at the prison.<sup>630</sup> Impunity allows torture and ill-treatment to flourish.

As already noted in Point 1.2, a discussion of impunity is a theme that appears in various government memorandums that have come into the public domain. For example, the August 2002 memorandum to the White House from the Justice Department suggested possible defences for agents accused of torture and took the position that there was a wide array of interrogation techniques that while qualifying as cruel, inhuman or degrading treatment would not rise to the level of torture and thus not qualify for prosecution under the US torture law 18 U.S.C. § 2340 (see below). The administration must publicly disown these documents and reject the notion that there can be any justification or impunity at any level, be it military or civilian, for torture or other cruel, inhuman or degrading treatment.

#### Need for civilian investigations and prosecutions

On 10 September 2004, seeking to demonstrate the adequacy of the official investigative and prosecutorial response to allegations of abuse by US forces, of which the Schlesinger Panel stated that there had been about 300 cases, the Pentagon reported that 45 military personnel had been referred to courts-martial, 23 soldiers had been administratively separated (a non-

<sup>629</sup> United Nations Press Release. UN Doc. SG/SM/9373. OBV/428.

<sup>630</sup> "I saw a screen saver for a computer that was up in the isolation area. The screen saver had detainees naked in a pyramid". Sworn statement, Luciana Spencer, *supra*, note 504

punitive release from service), and 12 had been referred for General Officer Letters of Reprimand (a type of written warning).<sup>631</sup>

As a matter of principle, across all countries, Amnesty International takes the position that justice is best served by prosecuting war crimes, crimes against humanity, and other grave violations of international law, such as torture, in independent and impartial civilian courts. Although a military justice system may be well-suited for trying armed forces personnel for purely military offences, such as insubordination or being drunk on duty, this is not the case for serious human rights violations.

In his July 2002 report to the Sub-Commission on the Promotion and Protection of Human Rights, the UN Special Rapporteur on the administration of justice through military tribunals noted a “growing consensus on the need to exclude serious human rights violations committed by members of the armed forces (or the police) from the jurisdiction of military tribunals”.<sup>632</sup> He added that more and more countries are adopting legislation to this end.

The UN Special Rapporteur on the independence of judges and lawyers has noted that, “in regard to the use of military tribunals to try civilians, international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice”.<sup>633</sup> The Working Group on Arbitrary Detention has said that insofar as military justice continues, it should not try civilians or military personnel whose victims include civilians.<sup>634</sup>

The Inter-American Commission on Human Rights has taken the position that military personnel accused of human rights violations be tried in ordinary civilian courts.<sup>635</sup> The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has expressed concern about “trials of members of the security forces before military courts where, it is alleged, they evade punishment because of an ill-conceived *esprit de corps*, which generally results in impunity”.<sup>636</sup> International law and standards specifically prohibit trials in military

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<sup>631</sup> Department of Defense statement on Seymour Hersh book. 10 September 2004.

<sup>632</sup> Issue of the administration of justice through military tribunals. Report submitted by Mr Louis Joinet pursuant to Sub-Commission decision 2001/103. UN Doc. E/CN.4/Sub.2/2002/4, 9 July 2002, para. 22.

<sup>633</sup> UN Doc. E/CN.4/1998/39/Add.1, 19 February 1998, para. 78. The Special Rapporteur pointed out that the Human Rights Committee has reached a similar conclusion, and noted that: “In the light of its General Comment No. 13, the Committee considered that the trial of civilians by military tribunals was irreconcilable with the administration of fair, impartial and independent justice”. UN Doc. E/CN.4/Sub.2/2002/4, para. 12.

<sup>634</sup> UN Doc. E/CN.4/1999/63, 18 December 1998, para. 80.

<sup>635</sup> In its Report on Terrorism and Human Rights, the Inter-American Commission on Human Rights states: “A state’s military courts may prosecute members of its own military for crimes relating to the functions that the law assigns to military forces and, during international armed conflicts, may try privileged and unprivileged combatants, provided that the minimum requirements of due process are guaranteed. Military courts may not, however, prosecute human rights violations or other crimes unrelated to military functions, which must be tried by civilian tribunals.” OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, para. 261(b).

<sup>636</sup> UN Doc. A/51/457, at para. 125, 7 October 1996, para. 125.

or special courts of members of the security forces or other officials accused of participating in "disappearances".<sup>637</sup>

In a June 2004 report, the current Special Rapporteur on the administration of justice through military tribunals laid out a set of principles on this issue. Principle 3 states:

*"In all circumstances, the jurisdiction of military courts should be abolished in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations, such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes."*

The Rapporteur explained:

*"Contrary to the functional concept of the jurisdiction of military tribunals, there is today a growing tendency to consider that persons accused of serious human rights violations cannot be tried by military tribunals insofar as such acts would, by their very nature, not fall within the scope of the duties performed by such persons. Moreover, the military authorities might be tempted to cover up such incidents. It is therefore important that civilian courts be able, from the very beginning, to conduct an inquiry and prosecute and try persons charged with such violations. The ex officio initiation of the preliminary inquiry by a civilian judge is a decisive step for avoiding all forms of impunity. The competence of the civilian judge should also make it possible to take the rights of the victims fully into account, at all stages of the proceedings... [T]he best guide should be the requirement of ensuring a fair trial before an independent and impartial tribunal and to guarantee fully the rights of the victims: even when an isolated act is involved, one may question the willingness of the military hierarchy to shed full light on an incident that is likely to damage the army's reputation and esprit de corps."<sup>638</sup>*

### **A military commander's ability to prevent prosecutions**

The Army Criminal Investigation Command, responsible for investigations into abuses by the military, is described by the Pentagon as an "independent investigative agency" whose agents "do not work for commanders in the field".<sup>639</sup> However, it is the commanders in the field who decide whether to pursue judicial or disciplinary action, or to do nothing. For example, military investigations have implicated 28 soldiers in the deaths of two Afghan detainees, Dilawar and Mullah Habibullah, in Bagram air base in December 2002 (see Point 6.2). Army investigators recently submitted a report of their findings, and from that point the decision on what action to pursue rested with the soldiers' commanders.<sup>640</sup> By 19 October 2004, charges

<sup>637</sup> Article 16 of the UN Declaration on the Protection of All Persons from Enforced Disappearance: "Persons alleged to have committed any of the acts of [enforced disappearance] shall be... tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts." See also Article IX of The Inter-American Convention on Forced Disappearance of Persons.

<sup>638</sup> UN Doc: E/CN.4/Sub.2/2004/7, 14 June 2004, paras. 17 and 19.

<sup>639</sup> Defense Department Background Briefing, 21 May 2004.

<sup>640</sup> CID Public Affairs Office, telephone interview with Amnesty International, 19 October 2004. The spokesperson said that the time taken to complete the investigation reflected the complexity of the case.

had only been brought against a reserve soldier, Sergeant James Boland, of the 377<sup>th</sup> Military Police Company. He was charged with assault, maltreatment and dereliction of duty.

Cases in which commanders decided not to order a criminal judicial action include:

- An Iraqi detainee died at the Packhorse US forward operating base on 11 September 2003 when he was shot for throwing rocks. The US soldier faced a court-martial for using excessive force, but reportedly asked, and was allowed by his commander, to leave the army with demotion.<sup>641</sup>
- Lieutenant Colonel Allen West was facing the possibility of a court-martial and 11 years in prison for allegedly watching four of the soldiers under his command beat information out of Iraqi detainee Yahya Hamudy in August 2003 at a US military base in Taji, north of Baghdad. Lt. Col. West then allegedly threatened to kill the detainee, taking him outside, putting him on the ground, and firing his gun. His commanding officer chose administrative action rather than a court-martial and Lt. Col. West was fined.<sup>642</sup>

### Prosecutions under the Uniform Code of Military Justice

The USA's Uniform Code of Military Justice (UCMJ) is applicable to US troops worldwide, and can also be used to prosecute certain civilians "in time of war... serving with or accompanying an armed force in the field".<sup>643</sup> However, this will not cover civilian contractors who have no military status in peacetime.<sup>644</sup> It may also not cover CIA personnel even if they are accompanying the armed forces.<sup>645</sup> The fact that a person is eligible for trial by court-martial (a military criminal trial court) under the UCMJ does not make him or her ineligible for trial in the ordinary US courts.

While the UCMJ does not expressly criminalize "torture", there are several offences recognized under it which can be used to punish acts of torture or ill-treatment.<sup>646</sup> They include "cruelty", "maltreatment", "assault", as well as manslaughter or murder in cases in which the alleged ill-treatment resulted in death. Thus, Staff Sergeant Ivan Frederick, accused

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<sup>641</sup> *Few details emerge from inquiry of Iraqi, Afghan prisoner deaths*. AP, 8 May 2004.

<sup>642</sup> *US officer fined for harsh interrogation tactics*. CNN.com, 13 December 2003.

<sup>643</sup> 10 U.S.C. § 802(a)(10).

<sup>644</sup> "The broad statutory application of the UCMJ to civilians associated in various ways with the armed forces has been judicially limited in deference to the requirements of Article III, Section II, of the Constitution and the Fifth and Sixth Amendments protecting the right to trial by jury. As so limited, the UCMJ does not apply to civilians who have no military status in peacetime, even if they are accompanying United States forces overseas as employees or dependents." *Human rights standards applicable to the United States' interrogation of detainees*. Association of the Bar of the City of New York, <http://www.abcny.org/pdf/HUMANRIGHTS.pdf>.

<sup>645</sup> *Ibid.* "No cases directly address whether CIA operatives conducting para-military operations with the regular armed forces or interrogations within a military base are considered civilians for purposes of UCMJ application".

<sup>646</sup> However, it might be possible to prosecute military personnel for torture in courts-martial, via the torture statute 18 U.S.C. § 2340. *Ibid.*

of subjecting detainees in Abu Ghraib to sexual humiliation, jumping and stomping on detainees, and making a hooded detainee stand on a box with wires attached to his hands and to believe that he would be electrocuted if he fell off the box, was and could not be charged with "torture" under the UCMJ. At the time of writing, he was reported to be planning to plead guilty to four counts of assault, maltreating a detainee, committing an indecent act and dereliction of duty in a plea bargain in which eight other counts would be dropped.<sup>647</sup>

Amnesty International believes that greater protection would exist were the UCMJ to be amended expressly to outlaw torture. This would send a clear message at all levels that acts falling within the definition of Article 1 of the UN Convention against Torture will not be tolerated or prosecuted under the guise of a lesser offence, and would serve to strengthen the deterrence as well as the punishment of such crimes.

### **The appearance of leniency**

Article 4(2) of the UN Convention against Torture requires states to make torture, attempted torture, and complicity or participation in torture "punishable by appropriate penalties which take into account their grave nature". In light of this, concerns can be raised about a number of cases of torture and other violations where punishments do not appear to have been commensurate to the offence.

- In August 2004, Private Edward Richmond was sentenced to three years in prison, convicted by a court-martial of the voluntary manslaughter of Muhamad Husain Kadir, an Iraqi civilian, on 28 February 2004. The soldier reportedly shot the unarmed detainee, who was handcuffed, in the back of the head. It was alleged that Private Richmond had earlier said that he wanted to kill an Iraqi. He was charged with premeditated murder, which carries a potential life sentence, but the court-martial panel of military soldiers and officers reduced the charge to voluntary manslaughter, which carries a maximum prison term of 15 years. The court-martial returned a sentence of three years, and the defendant was awarded 47 days of time served, even though he was not held in confinement before the trial.<sup>648</sup> His alleged response to the sentence was "I was going to be in the army for three more years anyway".<sup>649</sup>
- In contrast, in a court-martial in Iraq in September 2003, Sergeant Oscar Nelson was sentenced to seven years in prison for the involuntary manslaughter of a fellow US soldier in May 2003. Nelson was accused of driving recklessly in a military vehicle when it overturned, killing Specialist Nathaniel Caldwell.<sup>650</sup>
- In mid-2003, two sergeants with the 84<sup>th</sup> Engineering Company reportedly ordered soldiers to subject electric shocks to Iraqi "intruders" accused of trespassing at the military camp. According to an investigative report obtained by the *Denver Post*, the

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<sup>647</sup> *Soldier to plead guilty in Iraq abuse case*. Associated Press, 20 October 2004.

<sup>648</sup> *Soldier gets 3-year term in shooting*. Honolulu Star-Bulletin, 6 August 2004.

<sup>649</sup> *Schofield soldier convicted*. Honolulu Advertiser, 6 August 2004.

<sup>650</sup> *Army sergeant sentenced to seven years in prison for Humvee crash in Iraq that killed soldier*. Associated Press, 3 September 2003.

detainees were stripped, beaten and shocked with a “blasting device”. After a court-martial in February 2004 one of the sergeants was fined two thirds of one month’s pay and banned from going to the internet café for 30 days. The other sergeant received a fine and rank reduction.<sup>651</sup>

- In another case, a sergeant told his subordinates to “rough up” two Iraqi detainees. He had apparently given similar orders before. The Sergeant received a reduction in rank and a punitive censure. Two of his subordinates received terms of confinement of 30 days and 45 days respectively.<sup>652</sup>
- Privates Andrew Sting and Jeremiah Trefney pleaded guilty to charges of, *inter alia*, assault, cruelty and maltreatment in a case in which an Iraqi detainee was subjected to electric shocks for being disruptive on 13 April 2004 in a US temporary detention facility in Mahmudiya, south of Baghdad. They were sentenced to one year in prison and eight months in prison respectively, reduction in rank and a bad conduct discharge.<sup>653</sup>
- In contrast, on 3 June 2004 a court-martial sentenced Sergeant Abdullah William Webster to 14 months in prison for refusing to participate in the war on Iraq on the basis of his religious beliefs.<sup>654</sup>

### **Provisions permitting Justice Department prosecutions**

The US Justice Department can prosecute civilian contractors, CIA agents or military personnel for certain war crimes and torture committed outside the USA.<sup>655</sup> The various laws under which US soldiers and officials could be tried may require amendment to bring them into line with the UN Convention against Torture, and to ensure that they criminalize torture fully and wherever it occurs (see Point 5 and its recommendations). They include:

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<sup>651</sup> *Wider Iraqi abuse shown*. Denver Post, 26 May 2004.

<sup>652</sup> *Detainee Operations Inspection*. Department of the Army Inspector General. 21 July 2004, page 20.

<sup>653</sup> *Marine Sergeant to face court-martial in abuse*. Washington Post, 12 June 2004. In e-mails to the *Washington Post*, another of the soldiers charged in the incident, Sergeant Matthew Travis, wrote how at the facility, “We would punish a detainee for talking or misbehaving by making him stand for about 45 min[utes] or put[ting] him in a cage outside by himself.”

<sup>654</sup> Amnesty International considers him to be a prisoner of conscience. See Urgent Action 267/04, 17 September 2004, <http://web.amnesty.org/library/Index/ENGAMR511372004>.

<sup>655</sup> In regard to allegations of torture or ill-treatment by private contractors, the UN Special Rapporteur on torture has recalled the Human Rights Committee’s position that, “the positive obligations on States parties to ensure [International] Covenant [on Civil and Political] rights will only be fully discharged if individuals are protected by the State, not just against violation of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights insofar as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities”. UN Doc. A/59/324, 23 August 2004, para. 19, quoting HRC General Comment No. 31 (2004), para. 8.



- The War Crimes Act. This law, 18 U.S.C. § 2441, criminalizes certain war crimes committed inside or outside the USA by anyone who is a member of the armed forces or is a US national. Under the Act, a war crime includes conduct defined as a grave breach of the Geneva Conventions, or constituting a violation of common Article 3 of the Conventions. The latter prohibits, *inter alia*, cruel treatment, torture, and outrages upon personal dignity, in particular humiliating and degrading treatment.
- The Torture Statute. This law, 18 U.S.C. § 2340, makes it a criminal offence for any US national acting in an official capacity “outside the United States” to commit or attempt to commit torture. The law was enacted in 1994. Anyone who conspires to commit the acts prohibited under the statute can be subject to the same penalties as the actual perpetrator. This law, however, defines torture in an arguably narrower way than the UN Convention against Torture (see Point 5).<sup>656</sup>
- The Military Extraterritorial Jurisdiction Act (MEJA) of 2000. This law, 18 U.S.C. § 3261 criminalizes conduct committed by “members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States” that would be punishable by more than one year’s imprisonment if engaged in within the USA. The text of MEJA (18 U.S.C. § 3267(1)(A)) was recently amended to define the term “employed by the Armed Forces outside the United States” to include civilian employees, contractors, or employees of contractors, not only of the Department of Defense, but also of “any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas”. MEJA remains largely untested as by mid-September 2004, four years after it was enacted, the “implementing regulations” required to fully implement the law had not been passed.

### **Justice Department initiates prosecution**

In June 2004, the US Justice Department charged a civilian contractor with assaulting an Afghan detainee, 28-year-old Abdul Wali, in a US military base near Asadabad in Kunar Province in Afghanistan a year earlier. Abdul Wali had handed himself into the US military voluntarily. It is alleged that David Passaro, a contractor working with the CIA, assisted in the interrogation. According to the indictment, David Passaro “beat Abdul Wali, using his hands and feet, and a large flashlight”, during interrogations on 19 and 20 June 2003.<sup>657</sup> Abdul Wali died in custody on 21 June 2003. It is not clear why it took a year to bring charges in the case, and it seems that no murder charges were brought because an autopsy was not conducted. Amnesty International never received a reply to a letter it wrote on 23 June 2003 calling for a full investigation into the case and for anyone found responsible to be brought to justice.

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<sup>656</sup> Also, its reach was narrowed by the PATRIOT Act, which extended US criminal jurisdiction over certain crimes committed abroad (and thereby reduced the area of what is defined as falling “outside the United States” under 18 U.S.C. § 2340). However, legislation was recently passed that may have rectified this problem, defining the “United States” as “the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States”.

<sup>657</sup> *U.S. v. Passaro*. No: 5:04-CR-211-1, (E.D.N.C West Div.17 June 2004).

The Justice Department said that it could prosecute David Passaro thanks to the USA PATRIOT Act, Section 804 of which provides jurisdiction over crimes committed by US nationals in military facilities in other countries.<sup>658</sup> In announcing the charges against David Passaro on 17 June 2004, Attorney General John Ashcroft said that it “would have been more difficult to investigate and prosecute” the case without the PATRIOT Act. However, the PATRIOT Act meant that at that time Passaro could not be charged with torture under 18 U.S.C. § 2340 (see note 656), and the remainder of federal law does not expressly criminalize torture (see Point 5). The Justice Department refused to provide further clarification, sought by Amnesty International in repeated requests, on why prosecution was not pursued under the War Crimes Act. In February 2002, Attorney General Ashcroft had advised President Bush that not applying the Geneva Conventions to the Afghanistan situation would “provide the highest assurance” against future prosecutions under the War Crimes Act of “American military officers, intelligence officials, or law enforcement officials” (see page 58).

In order to prevent arbitrariness – with, for example, civilian contractors charged with similar or the same crimes as military personnel, but tried in different jurisdictions – and to avoid any perception of inappropriate military justice leniency or lack of impartiality, Amnesty International believes that all those personnel, civilian or military, of low rank or high, should be tried in the ordinary civilian courts. Any trials must conform fully to international standards for fair trial, and the death penalty – which could be available under the UCMJ, the War Crimes Act and the Torture Statute in cases of torture or ill-treatment resulting in death – must not be imposed.

## 7.2 Recommendations under Point 7

The US authorities should:

- Publicly reject all arguments, including those contained in classified or unclassified government documents, promoting impunity for anyone suspected of torture and cruel, inhuman or degrading treatment, including the ordering of such acts;
- Bring to trial all individuals – whether they be members of the administration, the armed forces, intelligence services and other government agencies, medical personnel, private contractors or interpreters – against whom there is evidence of having authorized, condoned or committed torture or other cruel, inhuman or degrading treatment;
- Any person alleged to have perpetrated an act of “disappearance” should, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities for prosecution and trial, in accordance with Article 14 of the UN Declaration on the Protection of All Persons from Enforced Disappearance;
- Ensure that all trials for alleged perpetrators comply with international fair trial standards, and do not result in imposition of the death penalty.

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<sup>658</sup> USA PATRIOT Act, 6 § 804, 18 U.S.C. § 7 (9).

## Point 8 – No use of statements extracted under torture

*Governments should ensure that statements and other evidence obtained through torture may not be invoked in any proceedings, except against a person accused of torture.*

### 8.1 The fruit of a poisonous tree

*[B]y using torture, or even by adopting the fruits of torture, a democratic state is weakening its case against terrorists, by adopting their methods, thereby losing the moral high ground an open democratic society enjoys.*  
Senior United Kingdom Judge, August 2004<sup>659</sup>

Under Article 15 of the UN Convention against Torture, any statement made as a result of torture is inadmissible in evidence in “any proceedings”, except in proceedings against the alleged perpetrator of the torture. Other international standards exclude not only any statements extracted under torture, but also those elicited as a result of other cruel, inhuman or degrading treatment or punishment.<sup>660</sup> The Committee against Torture has stated that “the existence, in procedural legislation, of detailed provisions on the inadmissibility of unlawfully obtained confessions and other tainted evidence” is one of the essential means in preventing torture.<sup>661</sup> The Human Rights Committee, in its interpretation of the International Covenant on Civil and Political Rights (ICCPR), has stated that the “law must prohibit the use or admissibility in judicial proceeding of statements or confessions obtained through torture or other prohibited treatment”, i.e., including the cruel, inhuman or degrading treatment prohibited by Article 7 of the ICCPR.<sup>662</sup> This applies not only to statements made by the accused, but also to statements made by any witness. Prosecutors must reject any evidence that they believe has been coerced.<sup>663</sup> The UN Special Rapporteur on torture has recommended that, on the question of the admissibility of statements or confessions, “the

<sup>659</sup> *A and others v Secretary of State for the Home Department*, Court of Appeal (Civil Division), on appeal from the Special Immigration Appeals Commission. [2004] EWCA Civ 1123, 11 August 2004, Lord Justice Neuberger, dissenting.

<sup>660</sup> Article 12, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 69(7) of the Rome Statute of the International Criminal Court; Principle 27, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

<sup>661</sup> UN Doc. A/54/44 (1999), para. 45.

<sup>662</sup> CCPR General comment 20, para. 12, 10 March 1992, *supra*, note 188.

<sup>663</sup> Guideline 16 of the UN Guidelines on the Role of Prosecutors (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, September 1990) states: “When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect’s human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.”

burden of proof should be on the State to demonstrate the absence of coercion.”<sup>664</sup> The Geneva Conventions also prohibit the use of confessions or other information extracted by “moral or physical coercion”.<sup>665</sup>

The Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, which President Bush signed on 13 November 2001, allows for foreign detainees named under it to be brought to trial by military commissions, executive bodies, not impartial or independent courts.<sup>666</sup> The rules for the military commissions do not expressly exclude statements extracted under torture or other coercive methods.

By October 2004, 15 foreign nationals had been made subject to the Military Order and four had been charged in preparation for trial by military commission. The first six were moved to solitary confinement in Camp Echo some time after they were made subject to the Order in July 2003. Held in windowless cells for months, there has been serious concern for their well being and susceptibility to making coerced statements. Moazzam Begg, one of the first six named under the Military Order, has said that he has been held in solitary confinement in Guantánamo Bay, including in Camp Echo, since February 2003, following a year in US custody in Bagram air base in Afghanistan. He has said that “any documents presented to me by US law enforcement agents were signed and initialled under duress”.<sup>667</sup>

Amnesty International is concerned that any guilty pleas or detainee testimony brought before the military commissions could be the result of the coercive nature of the conditions in which detainees have long been held without any legal process, whether in US custody in Afghanistan or Guantánamo generally, Camp Echo or Camp Five (see Point 4) specifically, or in undisclosed locations elsewhere in the world, as well as unlawful interrogation techniques used against them. According to a declaration by Dr Daryl Matthews, a forensic psychiatrist who visited Guantánamo in 2003 at the invitation of the Pentagon, Salim Ahmed Hamdan, isolated for months in Camp Echo, said that he “considered confessing falsely to ameliorate his situation”.<sup>668</sup>

The military commissions, designed to secure convictions on lower standards of evidence, will have the power to admit coerced evidence. A February 2002 memorandum from the Justice Department to the Pentagon, made public by the administration on 22 June

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<sup>664</sup> Report on Turkey. UN Doc. E/CN.4/1999/61/Add.1, para113 (e).

<sup>665</sup> Article 99 of the Third Geneva Convention provides: “No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused”. Article 31 of the Fourth Geneva Convention: “No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties”.

<sup>666</sup> USA: A deepening stain on US justice, AI Index: AMR 51/130/2004, 19 August 2004.

<http://web.amnesty.org/library/Index/ENGAMR511302004>

<sup>667</sup> Letter from Guantánamo, dated 12 July, *supra*, note 74.

<sup>668</sup> *Swift v. Rumsfeld*. US District Court, Western District of Washington. Declaration of Daryl Matthews, 31 March 2004. International standards state that: “It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person”. UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 21.

2004, states that “incriminating statements may be admitted in proceedings before military commissions even if the interrogating officers do not abide by the requirements of *Miranda*<sup>669</sup> [the US Supreme Court decision stipulating the rights of suspects and conduct of interrogators]”.<sup>670</sup> The memorandum describes the military commissions as “entirely creatures of the President’s authority as Commander in Chief... and are part and parcel of the conduct of a military campaign”.

US nationals cannot be made subject to the Military Order. Thus John Walker Lindh, a US citizen captured in Afghanistan, was not brought under its provisions but before the ordinary civilian courts (see Point 2.2). In the event, he reached a plea arrangement, as part of which he dropped his allegations of torture and ill-treatment. However, it is clear that the administration believed that its incommunicado interrogation of Lindh would not necessarily have jeopardized the admissibility of any statements extracted from him. The February 2002 Justice Department memorandum to the Pentagon advised that it was not unethical for John Walker Lindh to have been interrogated incommunicado by Department of Defense lawyers even if they knew he was represented by another attorney. It suggested that an executive order from the President allowing such interrogations would, in any event, fall under the “President’s authority as Commander in Chief to take necessary and appropriate measures to acquire information about enemy forces”. The memorandum asserted that even if the government had acted unethically in questioning Lindh in the way that it had, “it would not follow that the evidence obtained in that questioning would be inadmissible at trial”.

The memorandum concluded that statements extracted from interrogations conducted for intelligence-gathering, rather than prosecutorial purposes, would “likely be admissible” in trial in a normal US court even if the person interrogated had not been advised of his or her rights before questioning. Interrogations under these circumstances that were conducted for a mixture of intelligence-gathering and prosecutorial purposes, the memorandum suggested, might be admissible depending on the facts of the specific case in question.

Two former Guantánamo detainees wrote in May 2004 recalling: “After three months in solitary confinement under harsh conditions and repeated interrogations, we finally agreed to confess [to being present at a meeting with Osama bin Laden]. Last September an agent from MI5 [British secret service] came to Guantánamo with documentary evidence that proved we could not have been in Afghanistan at the time... In the end we could prove our alibis, but we worry about people from countries where records are not as available.”<sup>671</sup>

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<sup>669</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>670</sup> Memorandum for William J. Haynes, II, General Counsel, Department of Defense. *Re: Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan*. Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 26 February 2002. <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.26.pdf>.

<sup>671</sup> Letter to US Senate Armed Services Committee from Shafiq Rasul and Asif Iqbal, 13 May 2004. <http://www.ccr-ny.org/v2/reports/docs/ltr%20to%20Sentate%2012may04v2.pdf>

## 8.2 Recommendations under Point 8

The US authorities should:

- Ensure that no statement coerced as a result of torture or other cruel, inhuman or degrading treatment, including long-term indefinite detention without charge or trial, or any other information or evidence obtained directly or indirectly as the result of torture or cruel, inhuman or degrading treatment, regardless of who was responsible for such acts, is admitted as evidence against any defendant, except the perpetrator of the human rights violation in question;
- Revoke the Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, and abandon trials by military commission;
- Expose and reject any use of coerced evidence obtained by other governments from people held in their own or US custody;
- Refrain from transferring any coerced evidence for the use of other governments.

### **Point 9 – Provide effective training**

*It should be made clear during the training of all officials involved in the custody, interrogation or medical care of prisoners that torture is a criminal act. Officials should be instructed that they have the right and duty to refuse to obey any order to torture.*

## 9.1 Training has been found wanting

*[G]enerally training was inadequate. The [Military Police] detention units did not receive detention-specific training during their mobilization period, which was a critical deficiency.*  
Schlesinger report, August 2004

Article 7 of the International Covenant on Civil and Political Rights prohibits torture or other cruel, inhuman or degrading treatment or punishment. In its general comment on this Article, the Human Rights Committee has stated that: “Enforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment must receive appropriate instruction and training.”<sup>672</sup> Articles 10 and 16 of the UN Convention against Torture similarly require states to ensure that education and information regarding the prohibition of torture and cruel, inhuman or degrading treatment are “fully included” in the training of any state agent who may be involved in the custody, interrogation or treatment of any detainee or prisoner.

There have been numerous indications of inadequacies in the training of US personnel involved with detainees. There were shortcomings identified in training in

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<sup>672</sup> General Comment 20, 1992, para. 10, *supra*, note 188.

interrogation and detention policies and procedures, as well as in cultural awareness (see page 22). Despite the Army Inspector General's finding in July 2004 that abuses by US personnel in Afghanistan and Iraq were "aberrations", the issue of training was a prominent feature in his report, with the word "training" appearing 589 times.<sup>673</sup> Among his findings were:

- "Interrogations were conducted...in some forward locations, by leaders and Soldiers with no training in military interrogation tactics, techniques and procedures";
- "To satisfy the need to acquire intelligence as soon as possible following capture, some officers and non-commissioned officers (NCOs) with no training in interrogation techniques began conducting their own interrogation sessions...";
- "The medical personnel interviewed stated that they did not receive any specific training in detainee operations";
- "To offset the shortage of interrogators, contractors were employed, however, 35% (11 of 31) of contract interrogators lacked formal training in military interrogation policies and techniques".

In November 2003, the Army Provost Marshal General's report on US detention operations in Iraq found that: "The 800<sup>th</sup> MP (I/R) [Internment/Resettlement] Brigade units did not receive corrections specific training during their mobilization period".<sup>674</sup> Major General Taguba repeatedly cited inadequate training in his report on US detentions in Iraq. Among his findings were:

- "Soldiers were poorly prepared and untrained to conduct I/R operations...throughout their mission";
- "Several interviewees insisted that the MP and MI Soldiers at Abu Ghraib (BCCF) received regular training on the basics of detainee operations; however, they have been unable to produce any verifying documentation, sign-in rosters, or soldiers who can recall the content of this training";

One of four US Marines charged in the abuse of an Iraqi prisoner on 13 April 2004 in a temporary facility in Mahmudiya, south of Baghdad, has said that his unit was unprepared for detention duties: "We didn't get good training".<sup>675</sup> Similarly, the running of another temporary facility in Iraq, Camp Whitehorse, near Nasiriya, was assigned to a reserve Marine unit whose personnel were not trained in detentions. A military investigation into abuses in the facility noted that the Major assigned to run the facility in late May 2003, who was subsequently charged in the death of a detainee, had received no training in the handling of prisoners, the management of a detention facility or the Geneva Conventions.<sup>676</sup> A US Army Reserve Specialist assigned to Abu Ghraib prison is reported to have said that in two years

<sup>673</sup> *Detainee Operations Inspection*. Department of the Army: The Inspector General, 21 July 2004.

<sup>674</sup> Ryder report, *supra*, page 19, note 510.

<sup>675</sup> *Marine Sergeant to face court-martial in abuse*. Washington Post, 12 June 2004.

<sup>676</sup> *Report cites marines in Iraqi's death at a camp*. Los Angeles Times, 24 May 2004.

with the reserves, "she never heard the words 'Geneva Conventions', nor did she receive more than a few days of training on how to guard enemy prisoners of war".<sup>677</sup>

The Fay report into the torture and ill-treatment in Abu Ghraib found shortcomings in military training – mentioning the word 193 times in its 143 pages. It noted evidence that "little, if any, training on Geneva Conventions was presented to contractor employees". It suggested that "prior to deployment, all contractor linguists or interrogators should receive training in the Geneva Conventions standards for the treatment of detainees/prisoners." Amnesty International welcomes this recommendation, as such training is necessary, but it must be coupled with official respect at all levels of government for the Geneva Conventions. As has already been noted, the administration's decision to reject the applicability of the Geneva Conventions to the "war on terror" detainees ended up causing confusion among interrogators in Iraq and contributing to the torture and ill-treatment.

The Fay report suggests that part of the problem was that "army training at [Fort Huachuca army intelligence center] never included training on interrogation techniques using sleep adjustment, isolation, segregation, environmental adjustment, dietary manipulation, the use of military working dogs, or the removal of clothing." Nor should it. Such practices should be prohibited, not built into training programs.

## 9.2 Recommendations under Point 9

The US authorities should:

- Ensure that all personnel involved in detention and interrogation, including all members of the armed forces or other government agencies, private contractors, medical personnel and interpreters, receive full training, with input from international experts, on the international prohibition of torture and other cruel, inhuman or degrading treatment or punishment, and their obligation to expose it;
- Ensure that all members of the armed forces and members of other government agencies, including the CIA, private contractors, medical personnel and interpreters, receive full training in the scope and meaning of the Geneva Conventions and their Additional Protocols, as well as international human rights law and standards, with input from international experts;
- Ensure that full training be similarly provided on international human rights law and standards regarding the treatment of persons deprived of their liberty, including the prohibition on "disappearances", with input from international experts;
- Ensure that all military and other agency personnel, as well as medical personnel and private contractors, receive cultural awareness training appropriate to whatever theatre of operation they may be deployed into.

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<sup>677</sup> *Behind the walls of Abu Ghraib*. Newsweek, 22 May 2004.



## Point 10 – Provide reparation

*Victims of torture and their dependants should be entitled to obtain prompt reparation from the state including restitution, fair and adequate financial compensation and appropriate medical care and rehabilitation.*

### 10.1 Reparation means more than just money

*We contribute to the UN Fund for the Victims of Torture... We also provide protection, counselling, and where necessary and possible, relocation in the United States. We stand with the victims to seek their healing and recovery, and urge all nations to join us in these efforts to restore the dignity of every person affected by torture.*

President George W. Bush, 26 June 2004<sup>678</sup>

Article 14 of the UN Convention against Torture states: “Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.” Similarly, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly in 1975, states that: “Where it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation in accordance with national law”.<sup>679</sup>

The Alien Tort Claims Act allows non-US nationals to file lawsuits for civil damages for acts of torture occurring outside the USA.<sup>680</sup> The Torture Victims Protection Act allows both foreign nationals and US citizens to claim damages against any individual who engages in torture or extrajudicial killing under “actual or apparent authority” of any government.

The UN Special Rapporteur on torture has emphasized that

*“a combination of medical assistance, financial support, social re-adaptation, legal redress and, in some cases, public acknowledgement is, in the Special Rapporteur’s opinion, crucial. Only interdisciplinary assistance that integrates these various*

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<sup>678</sup> President’s statement on the UN International Day in Support of Victims of Torture. The Committee against Torture has welcomed the USA’s contributions to the UN Voluntary Fund for Victims of Torture, established in 1981.

<sup>679</sup> The Committee against Torture has told states in general terms that they should provide compensation to victims of torture, and on one occasion has recommended the establishment of a national compensation fund for that purpose. Committee against Torture, conclusions and recommendations regarding Cuba, UN Doc. A/53/44 (1998), para 118(h); See also regarding, for instance, Bolivia, UN Doc. A/56/44 (2000-2001), para. 96; Ukraine, UN Doc. A/57/44 (2001-2002), para. 58(o).

<sup>680</sup> 28 U.S.C. § 1350.

*aspects can ensure adequate, effective and prompt reparation commensurate to the gravity of the violation and the harm suffered.”*<sup>681</sup>

As emphasized by the draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, the issue of reparation should focus not only on monetary compensation, but consider restitution, satisfaction, guarantees of non-repetition, and rehabilitation.<sup>682</sup> Restitution might include restoration of liberty, legal rights, social status, family life and citizenship, return to one's place of residence, restoration of employment and return of property. A contributor to satisfaction, for example, may be an official apology and acceptance of responsibility.

Rehabilitation is an important form of reparation. The development of techniques and facilities for the care and treatment of torture survivors has been an important achievement of recent decades. There are undoubtedly people who have suffered physical and psychological sequelae as a result of their time in US custody during the “war on terror”. Some, as noted, have died. In its February 2004 report on Iraq, the ICRC described the case of a detainee who had been kept in isolation and “was unresponsive to verbal and painful stimuli. His heart rate was 120 beats per minute and his respiratory rate 18 per minute. He was diagnosed as suffering from somatoform (mental) disorder, specifically a conversion disorder, most likely due to the ill-treatment he was subjected to during interrogation.” The ICRC also reported that its medical personnel had examined detainees “presenting signs of concentration difficulties, memory problems, verbal expression difficulties, incoherent speech, acute anxiety reactions, abnormal behaviour and suicidal tendencies. These symptoms appeared to have been caused by the methods and duration of interrogation.” An ICRC medical examination of another detainee alleged to have been subjected to torture and ill-treatment “revealed haematoma in the lower back, blood in urine, sensory loss in the right hand due to tight handcuffing with flexi-cuffs, and a broken rib.”

Amnesty International has spoken to former Guantánamo detainees who have said that they suffer physical and psychological after-effects of their time in US custody. In February 2004, nearly a year after he was released from Guantánamo, Afghan national Sayed Abbasin was still suffering from eyesight and knee problems that he said were the result of his time in custody. He had told Amnesty International that he had been forced to kneel for hours and was subjected to sleep deprivation in US custody in Afghanistan. In May 2003, another released Afghan, Mohammad Taher, told Amnesty International that he had suffered mentally from his detention and that he was having difficulty remembering things. More than two months after his release from Guantánamo, UK national Tarek Dergoul said that he was suffering from “nightmares, flashbacks, migraines, depression and memory loss”.<sup>683</sup> Swedish national Mehdi Ghezali, a former Guantánamo detainee, told Amnesty International in July

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<sup>681</sup> UN Doc. A/59/324, para. 58.

<sup>682</sup> E/CN.4/2000/62, Annex. As prepared by the UN Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms.

<sup>683</sup> Witness statement of Tarek Dergoul in the case of *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 69, 21 May 2004.

2004 that parts of his right foot are completely “dead” as a result of tight shackling. He said that he was suffering nightmares after his two and a half years in captivity.

Those who have been subjected to arbitrary arrest also have a right to compensation. Article 9.5 of the International Covenant on Civil and Political Rights, which the USA ratified in 1992, states: “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”. There are undoubtedly many people who have been subjected to unlawful arrest by the USA in the “war on terror”.

## 10.2 Recommendations under Point 10

The US authorities should:

- Ensure that anyone who has suffered torture or ill-treatment while in US custody has access to, and the means to obtain, full reparation including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, wherever they may reside;
- Ensure that all those who have been subject to unlawful arrest by the USA receive full compensation.

## **Point 11 – Ratify international treaties**

*All governments should ratify without reservations international treaties containing safeguards against torture, including the UN Convention against Torture with declarations providing for individual and inter-state complaints. Governments should comply with the recommendations of international bodies and experts on the prevention of torture.*

## 11.1 Playing fast and loose with international law

*President Bush regards the defense and advancement of human rights as America’s special calling, and he has made the promotion of human rights an integral and active part of his foreign policy agenda.*

Secretary of State Colin Powell, 25 February 2004<sup>684</sup>

Amnesty International has long been critical of the USA’s pick-and-choose approach to international law and standards. This is a country that has been slow to commit itself to human rights treaties and has attached unprecedented conditions to those it has ratified.

This approach has been evident in the “war on terror”. In the various government communications that have come into the public domain, a clear picture emerges of an administration that views international law and standards as obstacles to be overcome rather than obligations to be met. The worst that can happen, these documents suggest, is some diplomatic tension. Thus, for example, the Pentagon Working Group Report on Detainee

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<sup>684</sup> Remarks on The Country Reports on Human Rights Practices for 2003. Washington, DC.

Interrogations in the Global War on Terrorism provides a “discussion of international law that, although not binding on the United States, could be cited to [sic] by other countries to support the proposition that the interrogation techniques used by the US contravene international legal standards”.<sup>685</sup> Similarly, an August 2002 memorandum from the Justice Department to the White House noted that “although decisions by foreign or international bodies are in no way binding authority on the United States, they provide guidance about how other nations will likely react to our interpretation [of the Convention against Torture]”.<sup>686</sup>

When any state, let alone a country as powerful as the USA, insists on its right to adopt a selective approach to international law and standards, their integrity is eroded. Why should any other state not then claim for itself the prerogative to adhere to only those portions of international law which suit its purposes?

## 11.2 UN Convention against Torture

*The US played a leading role in developing and drafting the Convention against Torture, signing it in 1992. In October 1994, the U.S. ratified the Convention, which entered into force on November 20th, 1994.*

US Assistant Secretary of State, 1999<sup>687</sup>

The USA's 1994 ratification of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment came with various “reservations, declarations and understandings” attached. The effect of these conditions was to limit the application of the treaty by ensuring that it offered no greater protection than already existed under US law. In 2000, having considered the USA's initial report, the Committee against Torture, the expert body established by the treaty to oversee its implementation, called on the USA to “withdraw its reservations, interpretations and understandings relating to the Convention”.<sup>688</sup> Four years later, the USA has not taken this action. Instead, government officials have cited those same ratification conditions to advise that harsh interrogation techniques could be authorized with impunity.

In May 2004, the Committee against Torture revealed that it had written to the USA to ask it to present its second now long overdue periodic report by 1 October 2004.<sup>689</sup> The Committee's letter drew the US government's attention “in particular to article 2.1 of the Convention [against Torture], according to which each State party should take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”. The Committee stated that the report should include updated information concerning the situation of places of detention in Iraq up to the time of the

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<sup>685</sup> Pentagon Working Group, *supra*, note 56.

<sup>686</sup> Bybee Memorandum, *supra*, note 252.

<sup>687</sup> On-the-Record Briefing on the *Initial Report of the United States of America to the UN Committee Against Torture*. As released by the Office of the Spokesman, Washington, DC, October 15, 1999.

<sup>688</sup> UN Doc. A/55/44 (1999-2000), para. 180(a).

<sup>689</sup> In May 2000 the Committee had asked the USA to present its second report by 19 November 2001.

submission of the report.<sup>690</sup> The USA has not responded to the request and no report has been filed. The USA's second periodic report to the Human Rights Committee under the ICCPR was due on 7 September 1998, and its third report was due on 7 September 2003. The USA has filed neither.

The USA attached an understanding of what is meant by torture to its ratification of the UN Convention against Torture.<sup>691</sup> It is a definition that is arguably narrower than that contained in Article 1.1 of the Convention.<sup>692</sup>

A memorandum from the US Justice Department to the Pentagon, dated 1 August 2002, emphasised the narrowness of the US definition of torture in advising that there was broad scope for US agents to engage in harsh interrogation tactics in the "war on terror". It pointed out that both the Reagan and first Bush administrations, in their moves to ratify the Convention, "consistently emphasise[d] the extraordinary or extreme acts required to constitute torture".<sup>693</sup> The same approach was indicated in a letter from the Justice Department to the White House, also dated 1 August 2002. The letter stated that the US "understanding" on torture "accomplished two things":

*"First, it made crystal clear that the intent requirement for torture was specific intent. By its terms, the Torture Convention might be read to require only general intent... Second, it added form and substance to the otherwise amorphous concept of mental pain or suffering. In so doing, this understanding ensured that mental torture would rise to a severity comparable to that required in the context of physical torture".*<sup>694</sup>

The USA also lodged a condition to Article 16 of the UN Convention against Torture. Article 16 states: "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

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<sup>690</sup> *Committee against Torture concludes thirty-second session*. UN Press Release, 21 May 2004.

<sup>691</sup> "The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."

<sup>692</sup> The Government of the Netherlands entered an objection on 26 February 1996 objecting, among other things, to the US understanding on the grounds that "it appears to restrict the scope of the definition of torture under Article 1 of the Convention."

<sup>693</sup> Bybee Memorandum, 1 August 2002, *supra*, note 252.

<sup>694</sup> Letter to Alberto Gonzales, Counsel to the President from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002.

To this Article, the USA attached the following "understanding": "the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment', only in so far as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."

The August 2002 Justice Department memorandum emphasized that the USA's ratification history in relation to the Convention "confirm[s] our view that the treaty... prohibits only the worst forms of cruel, inhuman or degrading treatment or punishment". In October 2002, a military lawyer recommended the approval of interrogation techniques, requested for use at Guantánamo, including stress positions, isolation, sensory deprivation, hooding, 20-hour interrogations, stripping, forced grooming, use of dogs to inspire fear, exposure to cold water or weather, death threats and use of wet towel and dripping water to induce the misperception of suffocation. In doing so, she noted the USA's reservation to Article 16 of the UN Convention against Torture, and concluded: "The United States is only prohibited from committing those acts that would otherwise be prohibited under the United States Constitutional Amendment against cruel and unusual punishment." She added that the "United States ratified the treaty with the understanding that the convention would not be self-executing, that is, that it would not create a private cause of action in US Courts."<sup>695</sup>

This memorandum was written two years after the Committee against Torture urged the USA to withdraw all its conditions to the ratification of the treaty, including the reservation to Article 16, which it stated was "in violation of the Convention [and] the effect of which is to limit the application of the Convention".<sup>696</sup>

Article 16 also states that: "In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment." Thus, under Article 10, the state must ensure that all its agents are educated and informed about the prohibition on cruel, inhuman or degrading treatment. Article 11 requires the state to keep under systematic review interrogation rules, instructions, methods and practices with a view to preventing any cases of cruel, inhuman or degrading treatment. Under Article 12, the state must ensure prompt and impartial investigation of all allegations of cruel, inhuman or degrading treatment of detainees in any territory under its jurisdiction.

It is quite clear from the various communications that have come into the public domain that far from meeting this obligation, the US administration actively undermined it.

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<sup>695</sup> Memorandum for commander, Joint Task Force 170, 11 October 2002, *supra*, note 126.

<sup>696</sup> UN Doc. A/55/44 (199-2000), para. 179(b). The USA attached an identical reservation to its 1992 ratification of the International Covenant on Civil and Political Rights, Article 7 of which also prohibits cruel, inhuman or degrading treatment or punishment. The Human Rights Committee has firmly stated that the US reservation is "contrary to the object and purpose of the treaty" and urged that it be withdrawn. Concluding Observations of the Human Rights Committee, UN Doc. CCPR/C/79/Add.50 (1995), para. 14.

### 11.3 Geneva Conventions

*We expect them to be treated humanely, just like we'll treat any prisoners of theirs that we capture humanely... If not, the people who mistreat the prisoners will be treated as war criminals.*

President Bush, after US soldiers captured by Iraqi forces<sup>697</sup>

The US administration's selective approach to the Geneva Conventions has been part of a policy which has sown confusion about interrogation rules among the US armed forces, and given a green light to torture and other cruel, inhuman or degrading treatment or punishment (see pages 9-14). Official investigations have concluded that versions of interrogation techniques developed for use against detainees in Afghanistan and Guantánamo, who by presidential decree became unprotected by the Geneva Conventions, later emerged in Iraq, where the conventions were held by the US government to apply.

Former Secretary of Defense Harold Brown, one of the four members of the Schlesinger Panel, has said that "the underlying context for abuses [in Iraq] was framed by two judgments that were made before combat operations began".<sup>698</sup> One was a failure to plan for detention operations as the possibility of a major insurgency was not foreseen. The second was the decision to reject the Geneva Conventions for those held in Afghanistan and Guantánamo, "which allowed interrogation methods beyond those long customary under Army Field Manual 34-52". Following Secretary Rumsfeld's approval of beyond-doctrine interrogation techniques for use in Guantánamo, "various versions of expanded lists migrated unauthorized to Afghanistan, and to Iraq where the Geneva Conventions continued to apply. That migration of rules (and of personnel) led to confusion about what interrogation practices were authorized and to several changes in directions to interrogators. I believe that was a contributing factor in the abuse of detainees."<sup>699</sup> The Schlesinger Panel as a whole concluded that the "existence of confusing and inconsistent interrogation techniques contributed to the belief that additional interrogation techniques were condoned".

The USA ratified the four Geneva Conventions in 1955. It has signed, but did not ratify, Additional Protocol I to the Geneva Conventions. The USA has recognized the "fundamental guarantees" of Article 75 of Additional Protocol I as reflecting customary international law.<sup>700</sup> In a 22 January 2002 memorandum, the Justice Department advised the White House and the Pentagon that the Geneva Conventions would not apply to "the

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<sup>697</sup> President Bush discusses military operation. White House, 23 March 2003.

<sup>698</sup> Dr Harold Brown, written testimony to the Senate Armed Services Committee, 9 September 2004.

<sup>699</sup> *Ibid.*

<sup>700</sup> See USA: *Restoring the rule of law: The right of Guantánamo detainees to judicial review of the lawfulness of their detention*. AI Index: AMR 51/093/2004, June 2004.

<http://web.amnesty.org/library/Index/ENGAMR510932004>

detention conditions of al Qaeda prisoners... We also conclude that customary international law has no binding legal effect on either the President or the military...<sup>701</sup>

The White House Counsel advised that the President should reject the notion that the USA's selective approach to the Geneva Conventions would put US soldiers at risk, adding that "we can still bring war crimes charges against anyone who mistreats US personnel". Alberto Gonzales has also said that the President's decision "is not controversial within the Executive Branch".<sup>702</sup> There had been controversy, however. The Legal Adviser at the Department of State wrote to the White House Counsel:

*"The President should know that a decision that the Conventions do apply is consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years. It is consistent with the advice of [Department of State] lawyers and, as far as is known, the position of every other party to the Conventions. It is consistent with UN Security Council Resolution 1193 affirming that 'All parties to the conflict (in Afghanistan) are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions'... A decision that the Conventions apply...demonstrates that the United States bases its conduct not just on its policy preferences but on its international legal obligations... A decision that the Conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged deprives our troops there of any claim to the protection of the Convention in the event they are captured and weakens the protections afforded by the Conventions to our troops in future conflicts."*<sup>703</sup>

Indeed, the Schlesinger report noted that the Legal Advisor to the Chairman of the Joint Chiefs of Staff and "many service lawyers" were among those who had been concerned that rejecting provisions of the Geneva Conventions would "undermine the United States military culture which is based on a strict adherence to the law of war".<sup>704</sup>

The approach to the Geneva Conventions taken by the US administration in the "war on terror" has flown in the face of, for example, Department of Defense [DoD] directive No. 5100.77 of 9 December 1998.<sup>705</sup> This states that: "It is DoD policy to ensure that: The law of war obligations of the United States are observed and enforced by the DoD Components."<sup>706</sup>

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<sup>701</sup> Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense. Re: *Application of treaties and laws to al Qaeda and Taliban detainees*. From Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 22 January 2002.

<sup>702</sup> Press briefing by White House Counsel Judge Alberto Gonzales. 22 June 2004, *supra*, note 16.

<sup>703</sup> Memorandum to Counsel to the President. Subject: Comments on your paper on the Geneva Conventions. From: William H. Taft, IV. 2 February 2002.

<sup>704</sup> Final Report of the Independent Panel to Review DoD Detention Operations. August 2004, page 34.

<sup>705</sup> [http://www.dtic.mil/whs/directives/corres/pdf/d510077\\_120998/d510077p.pdf](http://www.dtic.mil/whs/directives/corres/pdf/d510077_120998/d510077p.pdf)

<sup>706</sup> The directive defines the law of war as: "That part of international law that regulates the conduct of armed hostilities. It is often called the law of armed conflict. The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens,



An effective program to prevent violations of the law of war is implemented by the DoD Components. All reportable incidents committed by or against US or enemy persons are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action."<sup>707</sup>

#### 11.4 Ignoring or misusing international expert opinion

*In fact, these [international] decisions have found various aggressive interrogation methods to, at worst, constitute cruel, inhuman, and degrading treatment, but not torture.*  
Justice Department advice to the White House on interrogations<sup>708</sup>

Many of what the August 2002 Justice Department memorandum described as “the wide array of acts that constitute cruel, inhuman or degrading treatment or punishment, but do not amount to torture” – if one were to adopt “an aggressive interpretation of what amounts to torture, leaving that label to be applied only to where extreme circumstances exist” – are listed in the April 2003 final report of the Pentagon Working Group, and have been alleged in Afghanistan, Guantánamo and Iraq.

The August 2002 memorandum cited two court decisions outside the USA to support its apparent endorsement of interrogation techniques since used in the “war on terror”. One was a 1978 decision by the European Court of Human Rights finding that although five techniques applied together during the interrogation of prisoners held under emergency legislation in Northern Ireland “undoubtedly amounted to inhuman or degrading treatment... they did not occasion suffering of the particular intensity and cruelty implied by the word torture”.<sup>709</sup> The Justice Department’s memorandum failed to note that the European Commission on Human Rights had earlier found that the techniques had amounted to torture.<sup>710</sup> The memorandum also ignored that in a subsequent decision, 20 years later, the European Court of Human Rights stated that “certain acts which were classified in the past as ‘inhuman and degrading treatment’ as opposed to ‘torture’ could be classified differently in future... the increasingly high standard being required in the area of the protection of human

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including treaties and international agreements to which the United States is a party, and applicable customary international law.”

<sup>707</sup> It defines ‘reportable incident’ as any “possible, suspected, or alleged violation of the law of war.”

<sup>708</sup> Bybee Memorandum, 1 August 2002, *supra*, note 252.

<sup>709</sup> *Ireland v. UK*, 18 January 1978, para. 167. The five techniques involved being hooded, forced to stand leaning with only the fingers touching the wall, subjected to continuous noise and deprived of sleep, food and drink.

<sup>710</sup> *Ireland v. UK*, Report of the Commission, 25 January 1976, Yearbook, p.792. The memorandum also ignored criticism of the European Court’s decision by a leading authority on torture who said that the decision involved “unsatisfactory reasoning from an authoritative judicial body”. Rodley, Nigel S., 1999, *The treatment of prisoners under international law*, 2<sup>nd</sup> edition, Oxford, UK, Clarendon Press, page 92. Amnesty International had also criticized the Court’s decision at the time.

rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.”<sup>711</sup>

The second decision cited by the Justice Department memorandum in support of techniques which it said fell short of torture was one handed down by the Supreme Court of Israel in 1999.<sup>712</sup> The case involved interrogation techniques used by that country's General Security Service and included shaking, being forced to sit or stand in a painful position, being forced to squat on the tips of the toes; excessive tightening of handcuffs; hooding; and the playing of extremely loud music; and sleep deprivation. The US Justice Department memorandum said that “while the Israeli Supreme Court concluded that these acts amounted to cruel and inhuman treatment, the court did not expressly find that they amounted to torture”. The memorandum is misleading. The Israel court had avoided the question altogether, neither concluding that the techniques amount to torture nor that they did not, nor yet that they did or did not constitute “cruel and inhuman treatment.” The Court said that “a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever... Human dignity includes the dignity of the suspect being interrogated.” Nevertheless, the Supreme Court of Israel allowed in effect for torture and cruel, inhuman and degrading treatment to be used in “ticking bomb” cases, and determined that the “defence of necessity” would be available to torturers in such cases, a theme which some of the US memorandums picked up, but which both the Committee against Torture<sup>713</sup> and the Human Rights Committee<sup>714</sup> firmly rejected.

The Justice Department memorandum also failed to note that the Committee against Torture has given its opinion on the interrogation techniques used in Israel. The Committee said that the techniques included: “(1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill, and are, in the Committee's view, breaches of article 16 and also constitute torture as defined in article 1 of the Convention. This conclusion is particularly evident where such methods of interrogation are used in combination, which appears to be the standard case”.<sup>715</sup> The Pentagon Working Group report on interrogations in the “war on terror” also noted that “techniques are usually used in combination”.

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<sup>711</sup> *Selmouni v. France*, 28 July 1999, para. 101. An *amicus curiae* brief signed by 175 British parliamentarians in support of justice for the Guantánamo detainees recalled how the UK's response to the Northern Ireland situation was found by the European Court to be disproportionate. The parliamentarians suggested that “such examples stand out as ‘a caution that in times of distress the shield of military necessity and national security must not be used to protect government institutions from close scrutiny and accountability’”.

<sup>712</sup> *The Public Committee Against Torture in Israel v. The Government of Israel et al.*, *Taq-El (3)*, ruling of 6 September 1999.

<sup>713</sup> UN Doc. A/57/44 (2001-2002), para. 53(i).

<sup>714</sup> Concluding observations of the Human Rights Committee: Israel. UN Doc. CCPR/CO/78/ISR, 5 August 2003, para. 18.

<sup>715</sup> UN Doc. A/52/44, paras 253-260, 9 May 1997.

The thinking shown in the August 2002 memorandum was displayed two months later when a military lawyer recommended approval of interrogation techniques requested for use at Guantánamo. She noted that the “British authorities developed practices of interrogation such as forcing detainees to stand for long hours, placing black hoods over their heads, holding the detainees prior to interrogation in a room with continuing loud music, and depriving them of sleep, food and water”. She noted that the European Court had found that such techniques had not amounted to torture, and herself went on to recommend approval of techniques including stress positions, stripping, hooding, isolation, sensory deprivation, use of dogs to inspire fear, “the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family”, “exposure to cold weather or water”, and the “use of a wet towel and dripping water to induce the misperception of suffocation”.<sup>716</sup>

### *Hooding*

The US authorities have chosen to ignore various decisions and recommendations of international bodies and experts. For example, the USA has routinely used hooding or blindfolding of detainees, both during transportation and interrogation. Secretary of Defense Rumsfeld authorized hooding as an interrogation technique in Guantánamo. Yet the UN Committee against Torture has said that blindfolding during interrogation “should be expressly prohibited”.<sup>717</sup> The UN Special Rapporteur on torture has stated: “The practice of blindfolding and hooding often makes the prosecution of torture virtually impossible, as victims are rendered incapable of identifying their torturers. Thus, blindfolding or hooding should be forbidden.”<sup>718</sup> An Iraqi detainee in Abu Ghraib, Kasim, said on 18 January 2004 to investigators: “The transfer from Camp B to the Isolation was full of beatings, but the bags were over our heads, so we couldn’t see their faces”. Another Abu Ghraib detainee told investigators that a US soldier “started beating me, him, and five other American police. I could see their feet only, from under the bag”.<sup>719</sup>

In its February 2004 report, the ICRC found allegations of systematic abuses, some of them “tantamount to torture”. It noted that the USA’s practice of hooding was “used to prevent people from seeing and to disorient them, and also to prevent them from breathing freely. One or sometimes two bags, sometimes with an elastic blindfold over the eyes which, when slipped down, further impeded proper breathing. Hooding was sometimes used in conjunction with beatings thus increasing anxiety as to when blows would come. The practice of hooding also allowed the interrogators to remain anonymous and thus to act with impunity.” In Camp Umm Qasr and its predecessor Camp Bucca, the ICRC found that hooding was “part of standard intimidation techniques used by military intelligence personnel to frighten inmates into cooperating”.

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<sup>716</sup> Memorandum for commander, Joint Task Force 170, 11 October 2002, *supra*, note 126.

<sup>717</sup> UN Doc. A/48/44/Add. 1 para. 48(a). (Report on Turkey).

<sup>718</sup> UN Doc. E/CN.4/2002/76, 27 December 2001, Annex 1.

<sup>719</sup> Translations of sworn statements given to military investigators.

<http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/151108.pdf> and  
<http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/10.pdf>

The UK authorities – the government whose past practices the US administration's memorandums cited in justifying, *inter alia*, the use of hooding – have suggested that hooding during interrogation violates the Geneva Conventions: "Interviews of detainees conducted or observed by UK intelligence personnel have, with the following exception, been conducted in a manner consistent with the principles laid down in the Geneva Convention. In June 2003, two [censored] interviewed an Iraqi detainee [censored] at [censored]. The detainee was brought in hooded and shackled by the US military, and remained so during the one-hour interview. The [censored] understood these measures to be for security purposes, and did not report it at the time since they were not then aware that hooding was unacceptable."<sup>720</sup> In addition, the UK authorities have also told Amnesty International that:

*"It is UK policy that interviews are carried out well within the terms of the Geneva Conventions. UK Military Interrogators are trained to a high standard in methods of questioning. The Joint Service Intelligence Organisation's Training Documentation states that the following techniques are expressly and explicitly forbidden:*

- *Physical punishment of any sort (beatings etc.);*
- *The use of stress privation;*
- *Intentional sleep deprivation;*
- *Withdrawal of food, water or medical help;*
- *Degrading treatment (sexual embarrassment, religious taunting, etc.);*
- *The use of 'white noise';*
- *Torture methods such as thumb screws etc"*.<sup>721</sup>

Except for the latter technique, all these methods have allegedly been used by US agents during the "war on terror".

## 11.5 Optional Protocol to the UN Convention against Torture

*The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.*

Article 1, Optional Protocol to the UN Convention against Torture

In 2002, the USA attempted to block the adoption of the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Protocol will establish a system of both regular visits to places of detention by an

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<sup>720</sup> Intelligence and Security Committee, Annual Report 2003-2004, para. 78, page 23.

<http://www.cabinetoffice.gov.uk/publications/reports/intelligence/annualir0304.pdf>.

<sup>721</sup> Iraq: UK Ministry of Defence Response to Amnesty International, 30 June 2004. Attachment to a letter to AI Secretary-General Irene Khan from The Rt Hon Adam Ingram MP, 1 July 2004.

international body of experts, and sustained regular visits conducted by national visiting bodies.

The vast majority of states from Africa, Asia, Europe and Latin America, gave their support to the Optional Protocol. It was adopted by 104 votes in favour and only eight against. A proposal by the USA that would have effectively denied many developing countries the opportunity to join this initiative was defeated. The USA and Japan had sought to make states which ratify the Optional Protocol solely responsible for the costs of the instrument, rendering effective torture prevention a privilege only for wealthy states. The proposal was contrary to the long-standing practice of funding all human rights mechanisms from the UN regular budget.

The Optional Protocol was formally adopted at the UN General Assembly on 18 December 2002. It was opened for signature from 4 February 2003. As of 1 October 2004, 29 states had signed the Protocol and four had become states parties.<sup>722</sup> The USA has neither signed nor acceded to the Protocol. It should do so, and show its commitment to eradicating torture and cruel, inhuman or degrading treatment or punishment from any facilities under its jurisdiction and control, as well as facilitate the operation of mechanisms which the international community believes would be effecting in bringing about such eradication.

## 11.6 International Criminal Court

*The Rome Statute established the International Criminal Court and criminalized inhumane treatment, unlawful deportation and imprisonment. The United States not only failed to ratify the Rome Statute, but also later withdrew from it.*

Legal advice to Pentagon recommending approval of harsh interrogation techniques<sup>723</sup>

The USA is opposed to the International Criminal Court. Although President Clinton signed the Rome Statute of the ICC just before he left office, the Bush administration has made it clear that it will not ratify it and therefore does not consider itself bound under international law not to undermine its object and purpose.<sup>724</sup>

The US Justice Department reminded the White House in August 2002 that “[a]lthough President Clinton signed the Rome Statute, the United States has withdrawn its signature from the agreement... effectively terminating it. The United States, therefore, cannot be bound by the provisions of the ICC Treaty nor can US nationals be subject to ICC prosecution.” The memorandum advised that, even if the ICC “could in some way act upon the United States and its citizens, interrogation of an al Qaeda operative could not constitute a crime under the Rome Statute.” The memorandum argued that “[e]ven if certain interrogation methods being contemplated amounted to torture”, the ICC would not have jurisdiction

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<sup>722</sup> Albania, Denmark, Liberia, Malta, UK.

<sup>723</sup> Memorandum for commander, Joint Task Force 170, 11 October 2002, *supra*, note 126.

<sup>724</sup> In May 2002, the USA wrote to the UN Secretary-General that it “does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000”. The only other government to take this approach is that of Israel which also signed the Rome Statute on 31 December 2000, but has since stated its intention not to ratify it.

because the crimes would not amount to crimes against humanity and would not constitute war crimes because President Bush “has appropriately determined that al Qaeda members are... not entitled to the protections of any of the Geneva Conventions.” The memorandum concluded that although the USA’s “war on terror” interrogations “cannot fall within the jurisdiction of the ICC... it would be impossible to control the actions of a rogue prosecutor or judge... We cannot predict the political actions of international institutions”.<sup>725</sup>

Even as the USA has waged its “war on terror”, it has been pressurizing governments around the world to enter into impunity agreements which commit them not to surrender to the ICC any US nationals accused of genocide, crimes against humanity or war crimes. The April 2003 final report of the Pentagon Working Group on Detainee Interrogations in the Global War on Terrorism advises that some states with whom the USA has not entered into such agreements may “perceive certain interrogation techniques to constitute torture or inhuman treatment”. Such states, the Working Group says, “may attempt to use the Rome Statute to prosecute individuals found in their territory responsible for such interrogations. In such cases, the US Government will reject as illegitimate any attempt by the ICC, or a state on its behalf, to assert the jurisdiction of the Rome Statute over US nationals without the prior express consent of the United States”.<sup>726</sup>

## 11.7 Recommendations under Point 11

The US authorities should:

- Make a public commitment to fully adhere to international human rights and humanitarian law and standards – treaties, other instruments, and customary law – and respect the decisions and recommendations of international and regional human rights bodies;
- Make a public commitment to fully adhere to the Geneva Conventions, and to respecting the advice and recommendations of the International Committee of the Red Cross;
- Ratify Additional Protocols I and II to the Geneva Conventions;
- Withdraw all conditions attached to the USA’s ratification of the UN Convention against Torture;
- Provide the USA’s overdue second report to the Committee against Torture, as requested by the Committee;
- Withdraw all limiting conditions attached to the USA’s ratification of the International Covenant on Civil and Political Rights;
- Provide the USA’s overdue reports to the Human Rights Committee;

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<sup>725</sup> Letter to Alberto Gonzales, Counsel to the President from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002.

<sup>726</sup> Pentagon Working Group report, *supra*, note 56.

- Ratify the Optional Protocol to the UN Convention against Torture;
- Ratify the UN Convention on the Rights of the Child;
- Ratify the American Convention on Human Rights;
- Ratify the Inter-American Convention on Forced Disappearance of Persons without any reservations and implement it by making enforced disappearances a crime under US law over which US courts have jurisdiction wherever committed by anyone.
- Ratify the Rome Statute of the International Criminal Court.

### **Point 12 – Exercise international responsibility**

*Governments should use all available channels to intercede with the governments of countries where torture is reported. They should ensure that transfers of training and equipment for military, security or police use do not facilitate torture. Governments must not forcibly return a person to a country where he or she risks being tortured.*

#### **12.1 International security cooperation or outsourcing torture?**

*Under the name 'extraordinary rendition', the CIA reportedly sends terrorism suspects, sometimes on the flimsiest of evidence, to foreign countries that are known to employ torture in prisoner interrogation... Extraordinary rendition is outsourcing torture, and it is morally repugnant to allow such a practice to continue.*

Edward Markey, Member of US Congress, 24 June 2004<sup>727</sup>

Governments have a duty to protect the safety of the public, to investigate crime and to bring those responsible to justice. Amnesty International recognizes that governments will need to cooperate to this end where the threats or crimes in question cross national boundaries. Human rights and respect for international law must be at the centre of the search for justice and security, however.

Recent evidence that the USA is not exercising its international human rights responsibilities to oppose and expose torture came from the former UK ambassador to Uzbekistan. The ambassador had protested to the UK Foreign Office about torture in Uzbekistan and that information obtained under torture was being passed by the Uzbek authorities to the USA, specifically the Central Intelligence Agency, and thence to the UK. In a leaked UK Foreign Office report, Ambassador Craig Murray reportedly stated: "Tortured dupes are forced to sign confessions showing what the Uzbek government wants the US and UK to believe – that they and we are fighting the same war against terror... This is morally, legally and practically wrong".<sup>728</sup> The ambassador was subsequently dismissed from his post.

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<sup>727</sup> Markey introduces legislation to prevent the US from transferring prisoners to nations known to practice torture. News release (from Ed Markey's congressional office), 23 June 2004.

<sup>728</sup> Intelligence from tortured Uzbeks attacked. Financial Times (UK), 11 October 2004.

Also of deep concern is that the USA has instigated or involved itself in transfers of detainees between itself and other countries that bypass human rights protections and the rule of law. The USA refers to these transfers as “renditions”.<sup>729</sup> The UN Special Rapporteur on torture has recently expressed serious concern about such transfers.<sup>730</sup>

Article 3 of the UN Convention against Torture states that no State Party shall expel, return 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”. The USA conditioned its ratification of the Convention on the understanding that, under Article 3, the phrase “substantial grounds” means “if it is more likely than not” that someone would be tortured. This unilateral interpretation of Article 3 places a higher burden of proof on the individual seeking protection than is intended under the treaty. This is clear from the general comment by the Committee against Torture which states that, in assessing whether a claim meets the test under Article 3, the risk of torture must go “beyond mere theory or suspicion” but “*does not have to meet the test of being highly probable*” (emphasis added).<sup>731</sup>

Three years after the Committee against Torture asked the US government to remove all its conditions to its ratification of the Convention, in June 2003, the government made it clear that it was maintaining its position on Article 3. Faced with concern over transfers of detainees to other countries, the authorities gave assurances that:

*“the United States does not ‘expel, return (refouler) or extradite’ individuals to other countries where the US believes it is ‘more likely than not’ that they will be tortured. Should an individual be transferred to another country to be held on behalf of the United States, or should we otherwise deem it appropriate, the United States policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country. We can assure you that the United States*

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<sup>729</sup> The USA has built on a pre-existing policy of “renditions” in its “war on terror”. In 1990, for example, Mexican national Humberto Álvarez-Machain, wanted in the USA for his alleged involvement in the murder of a federal agent, was abducted from Mexico by agents working for the US. In 1993, the UN Working Group on Arbitrary Detention concluded that the abduction had been an arbitrary detention – a violation of international law. Yet, in 1997, Mir Aimal Kasi, a Pakistan national, was abducted from a hotel room in Pakistan by FBI agents, and taken off in handcuffs, shackled, hooded and gagged. Within 48 hours he was on a plane to the USA with the FBI, who turned him over to the authorities in Virginia, where he was wanted for the murder of a CIA employee. Mir Kasi was sentenced to death by an all-white jury and executed in 2002.

<sup>730</sup> “The Special Rapporteur is seriously concerned about an increase in practices that undermine this principle [of *non-refoulement* where there is a risk of torture]. One such practice is for the police authorities of one country to hand over persons to their counterparts in other countries without the intervention of a judicial authority and without any possibility for the persons concerned to contact their families or their lawyers. The Committee against Torture, while recognizing the need for close cooperation between States in the fight against crime and for effective measures to be agreed upon for that purpose, found that practice to be in violation of article 3 of the Convention as well as of the right to due process.” A/59/324, para. 29.

<sup>731</sup> *M.R.P. v. Switzerland*, Communication no. 122/1998, Views of the Committee against Torture, UN Doc. CAT/C/25/D/122/1998, 24 November 2000, para. 6.4.



would take steps to investigate credible allegations of torture and take appropriate action if there were reason to believe that those assurances were not being honoured".<sup>732</sup>

As with the guarantees given by this administration about its commitment to the humane treatment of detainees in the "war on terror", even this qualified assurance must be treated with some scepticism. For there is mounting evidence of US involvement in numerous transfers between itself and other countries which raise serious human rights concerns relating to the prohibition on arbitrary detention, the right to a fair trial, and the right to be protected from torture and cruel, inhuman or degrading treatment. From early in the "war on terror" there have been allegations of secret transfers of detainees. In March 2002, for example, it was alleged that "dozens of people" had been transferred by the USA to countries where they could be interrogated. In some cases, it was alleged that US intelligence agents remained closely involved in the interrogation.<sup>733</sup> In April 2002, it was reported that "Egyptian and Jordanian jails recently received scores of Arab prisoners affiliated with the *al-Qa'ida* organization after the United States had decided to transfer them from Afghanistan".<sup>734</sup>

Cases involving secret transfers of detainees to or from US custody include:

- Maher Arar, a Canadian/Syrian national, was transferred from US custody to Syria via Jordan in October 2002. He was allegedly subjected to severe torture in Syria and held for months in cruel, inhuman and degrading conditions.<sup>735</sup>
- Yemeni national Jamil Qasim Saeed Mohammed was reportedly handed over to US custody by Pakistan agents on 26 October 2001 and flown out of Karachi International Airport in secret aboard a US Gulfstream jet. He was reportedly taken to Jordan. His current whereabouts are unknown. Amnesty International has never received a response to its requests to the US authorities for information on the case.<sup>736</sup>
- Moazzam Begg was seized by Pakistan and US agents from his flat in Islamabad in Pakistan on 31 January 2002 and taken away in the boot of a car. Despite a *habeas corpus* appeal pending in a Pakistan court, he was transferred to US custody in Bagram air base in Afghanistan, and from there to Guantánamo Bay where he remains. In a letter sent from Guantánamo, dated 12 July 2004 and copied to Amnesty

<sup>732</sup> Letter to US Senator Patrick J. Leahy from William J. Haynes, General Counsel of the Department of Defense, 25 June 2003.

<sup>733</sup> *US behind secret transfer of terror suspects*. Washington Post, 11 March 2002.

<sup>734</sup> *Scores of al-Qa'ida Arab prisoners reportedly flown to Egypt, Jordan*. BBC, citing text of a report carried in Jordanian weekly, Al-Majd on 1 April 2002.

<sup>735</sup> Page 31, *USA: The threat of a bad example*, supra, note 95.

<sup>736</sup> Amnesty International has raised this case with the USA in its *Memorandum to the US Attorney General – Amnesty International's concerns relating to the post 11 September investigations*, AI Index: AMR 51/170/2001, November 2001, <http://web.amnesty.org/library/Index/ENGAMR511702001>; and its April 2002 *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay*, AMR 51/053/2002, <http://web.amnesty.org/library/Index/ENGAMR510532002>.

International, Moazzam Begg alleges that in Afghanistan he was “physically abused, and degradingly stripped by force, then paraded in front of several cameras toted by US personnel”. He writes that he was denied natural light and fresh food for a year in Bagram before being transferred to Guantánamo where he was subsequently held in indefinite solitary confinement.<sup>737</sup>

- In June 2003, five men – Turkish nationals Ibrahim Habaci and Arif Ulusam, Saudi national Faha al Bahli, Sudanese national Mahmud Sardar Issa, and Khalifa Abdi Hassan of Kenya – were arrested and held incommunicado at an undisclosed location in Malawi. Shortly after a court ordered that they should be brought before it, they were secretly transferred out of the country. Although the USA denied involvement in the arrests, an official of the Malawian government wrote to Amnesty International that “the arrests were not done by the Malawi Police but by the National Intelligence Bureau and the USA Secret Agents who controlled the whole operation. From the time the arrests were made, the welfare of the detainees, their abode and itinerary for departure were no longer in the hands of the Malawian authorities... In Malawi we do not know where these people are but they are in hands of the Americans who took them out of the country using a chartered aircraft. They should now be going through investigations at a location only known by the USA.” At the end of July, it was reported that the five had been taken to Zimbabwe and held there for a month before being sent to Sudan where they were released, apparently after no evidence was found linking them to *al-Qa'ida*.<sup>738</sup>
- Riduan Isamuddin, also known as Hambali, an Indonesian national, was arrested on 11 August 2003 in Thailand. The US authorities subsequently confirmed that he was in their custody, but refused to say where.<sup>739</sup> Amnesty International has received no clarification from the US authorities on the case following the organization's urgent appeal.<sup>740</sup> President Bush referred to the detainee as a “known killer” and a “lethal terrorist”, but Hambali remains detained incommunicado without charge in an undisclosed location.<sup>741</sup>
- In January 2002 Muhammad Saad Iqbal Madni, an Egyptian/Pakistan national, was reportedly arrested in Indonesia at the behest of the CIA. Two days later, without having had access to a lawyer or to the courts, he was reportedly put aboard a US-registered Gulfstream jet and flown to Egypt.<sup>742</sup>
- Mohammed Haydar Zammar, a Syrian-born German national, was arrested in Morocco in November 2001 and secretly transferred to Syria two weeks later where he was allegedly tortured. US agents allegedly took part in his interrogation in

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<sup>737</sup> Letter from Moazzam Begg, *supra*, note 74.

<sup>738</sup> Page 29-30, *USA: Threat of a bad example*, *supra*, note 95.

<sup>739</sup> *Press Gaggle by Scott McClellan and a Senior Administration Official*, 14 August 2003.

<sup>740</sup> <http://web.amnesty.org/library/Index/ENGAMR511192003>.

<sup>741</sup> *Global message*. President's remarks on 18 August 2004. White House.

<sup>742</sup> *US behind secret transfer of terror suspects*. Washington Post, 11 March 2002.

Morocco and allegedly knew that he would be transferred to Syria.<sup>743</sup> Three years later, he was still held in incommunicado solitary confinement in appalling conditions in a tiny cell in a Syrian military intelligence facility. Amnesty International was very concerned for his health and well-being.<sup>744</sup>

- Jamal Mar'i, a Yemen national, was reportedly arrested in Pakistan by US agents and held in Jordan for several weeks or months before transfer to Guantánamo.<sup>745</sup>
- Bisher Al-Rawi, an Iraqi national legally resident in the UK, and Jamil Al-Banna, a Jordanian national with refugee status in the UK, were arrested in the Gambia in November 2002. US agents took part in their interrogation during which time they were allegedly threatened. After two months in incommunicado detention they were secretly transferred to Bagram, and later to Guantánamo Bay where they remain.<sup>746</sup>
- Bansayah Belkacem, Lahmar Saber, Mustafa Ait Idir, Hadj Boudellaa, Lakhdar Boumediene and Mohamed Nechle are Algerian nationals who were seized by US officials in Bosnia-Herzegovina on 18 January 2002 in violation of an order by the Human Rights Chamber for Bosnia and Herzegovina. The representative in Bosnia-Herzegovina for the UN High Commissioner for Human Rights characterized the case as one of "extrajudicial removal from sovereign territory". The detainees were subsequently transferred to Guantánamo Bay where they remain.<sup>747</sup> President Bush referred to the case in uncritical fashion in his State of the Union address on 29 January 2002, displaying a disturbing lack of respect for the presumption of innocence: "Our soldiers...seized terrorists who were plotting to bomb our embassy". The six detainees remain detained without charge or trial after more than 30 months.
- Mamdouh Habib, an Australian detainee, arrested in Pakistan, was transferred to Guantánamo via Egypt and Afghanistan.<sup>748</sup> He was allegedly subjected to torture in Egypt.<sup>749</sup> At the time of writing, he was still held without charge or trial in Guantánamo Bay.
- Numerous detainees, including five Kuwaitis, were transferred out of custody in Pakistan into US custody in late 2001 and flown to the US air base in Kandahar. This was despite a *habeas corpus* petition pending in the Peshawar High Court.<sup>750</sup>

<sup>743</sup> *Al Qaeda recruiter reportedly tortured*. Washington Post, 31 January 2003.

<sup>744</sup> *Syrian-born German held three years without charge in rat-infested Syrian 'tomb'*. AI Index: MDE 24/066/2004, 8 October 2004. <http://web.amnesty.org/library/Index/ENGMDE240662004>

<sup>745</sup> Affidavit of Nabil Mohamed Mar'i, 10 April 2004, Sana'a, Yemen, *supra*, note 406.

<sup>746</sup> Page 33, USA: *The threat of a bad example*, *supra*, note 95.

<sup>747</sup> Page 35, USA: *The threat of a bad example*, *supra*, note 95.

<sup>748</sup> *Habib v. Bush*, Brief for Appellants (consolidated cases). United States Court of Appeals for the District of Columbia Court. Appeals from the United States District Court for the District of Columbia, 24 September 2002.

<sup>749</sup> For example, *Downer rejects medic call on US detainees*. The (Melbourne) Age, 24 May 2004.

<sup>750</sup> See *Pakistan: Transfers to US custody without human rights guarantees*, AI Index: ASA 33/014/2002, June 2002. <http://web.amnesty.org/library/Index/ENGASA330142002>.

- Egyptian asylum-seekers, Ahmed Hussein Mustafa Kamil 'Agiza and Muhammad Muhammad Suleiman Ibrahim El-Zari were forcibly deported from Sweden to Egypt on board a US government-leased Gulfstream jet in the custody of about six masked security agents.<sup>751</sup> Before putting them on the plane, the latter had reportedly cut off the two men's clothes with scissors, changed them into red overalls and handcuffed and shackled them. They "were very quiet" according to a Swedish police officer, who was unable to distinguish their nationality. "When they gave orders to each other, they kept their voices down. It seemed like they had done this before."<sup>752</sup>
- German national of Lebanese origin Khalid El Masri alleges that he was detained in Macedonia on 31 December 2003 and held incommunicado by unidentified individuals before being taken, blindfolded and handcuffed, to a location where he could hear aeroplanes. He says that he was stripped of his clothing by having them cut from his body. When his blindfold was removed he says he saw six masked men in black, and that he was given a diaper and blue track suit to wear, handcuffed and shackled, and taken to a plane. He was flown to custody in Afghanistan, he believes, where he was interrogated, including by people he believes were US agents, while held incommunicado detention at an unknown location. He says that he was held until late May 2004 before being flown back to Europe and to Germany. In August 2004, Amnesty International wrote to the US authorities asking for information on this case. By early October 2004, the organization had not received a reply.
- Pakistan national Saifullah Paracha had been scheduled to fly to Thailand for a business meeting on 5 July 2003. He rang his daughter from Karachi airport just before boarding his flight but he never arrived at the meeting. For the next month his family had no idea of his whereabouts. His wife's inquiries with the Thai and Pakistan authorities met with no success. Then after a month the family heard on NBC News that Saifullah Paracha had been detained by US authorities. Subsequently his wife received a letter via the International Committee of the Red Cross explaining that her husband was in US custody at Bagram air base in Afghanistan.<sup>753</sup>

In July 2004, an article by US law professor John Yoo was published in which he wrote that the UN Convention against Torture "is generally inapplicable to transfers effected in the context of the current armed conflict because it has no extraterritorial effect (except in the case of extradition) and, hence, cannot apply to al Qaeda and Taliban prisoners detained outside of US territory at Guantanamo Bay or in Afghanistan."<sup>754</sup> In 2002, then a Deputy Assistant Attorney General in the US Justice Department, John Yoo co-authored more than one of the government memorandums that have come to light since the revelations of torture

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<sup>751</sup> See *Sweden: Concerns over the treatment of deported Egyptians*. AI Index: AMR 51/42/001/2004, 28 May 2004, <http://web.amnesty.org/library/Index/ENGEUR420012004>

<sup>752</sup> *A secret deportation of terror suspects*. Washington Post, 25 July 2004. The Gulfstream jet, which was allegedly involved in another rendition from Pakistan, was reported to be registered to a Massachusetts company owning two aircraft with permits to land at US military bases around the world.

<sup>753</sup> AI Worldwide Appeal. <http://web.amnesty.org/appeals/index/afg-010704-wwa-eng>

<sup>754</sup> John Yoo, *Transferring terrorists*. 79 Notre Dame Law Review, 1183, 1229 (2004).

and ill-treatment against detainees in Abu Ghraib.<sup>755</sup> There are reported to be government memorandums advising that US authorities could benefit with impunity from information extracted under torture in other countries if it could be shown that the detainees in question were not formally in US custody.<sup>756</sup> The Senate Judiciary Committee has requested to be provided with a copy of one such document, but by 13 October 2004, the administration had not done so.<sup>757</sup>

## 12.2 Double standards – setting a bad example

*Because the promotion of human rights is an important national interest, the United States seeks to hold governments accountable to their obligations under universal human rights norms and international human rights instruments...*  
US State Department<sup>758</sup>

Each year the US State Department issues reports on human rights practices in other countries. Under each entry there is a section on “torture and other cruel, inhuman or degrading treatment or punishment”. These entries show that the USA has been practicing what it condemns in other countries. Examples from the latest report<sup>759</sup> include:

- China: “prolonged periods of solitary confinement, incommunicado detention, beatings, shackles, and other forms of abuse.”
- Egypt: “Principal methods of torture reportedly employed by the police and the SSIS included victims being: stripped and blindfolded...”
- Indonesia: “psychological torture cases reportedly included food and sleep deprivation, sexual humiliation”.
- Iran: “Some prisoners were held in solitary confinement or denied adequate food or medical care to force confessions.”
- Jordan: “The most frequently reported methods of torture included beatings; sleep deprivation, extended solitary confinement, and physical suspension.”

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<sup>755</sup> For example: “[W]e concluded that neither the federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions in Guantanamo Bay, Cuba, or to trial by military commission of al Qaeda or Taliban prisoners. We also conclude that customary international law has no binding legal effect on either the President or the military...”. John Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel. *Application of Treaties and Laws to al Qaeda and Taliban Detainees*. Memorandum for William J. Haynes II, General Counsel, Department of Defense. 9 January 2002.

<sup>756</sup> *Harsh CIA methods cited in top Qaeda interrogations*. New York Times, 13 May 2004.

<sup>757</sup> Described as: Memorandum from the Department of Justice, *Re: Liability of interrogators under the Convention against Torture and the Anti-Torture Act when a prisoner is not in US custody*.

<sup>758</sup> <http://www.state.gov/g/drl/hr/>

<sup>759</sup> Country Reports on Human Rights Practices – 2003. Released by the Bureau of Democracy, Human Rights, and Labor, 25 February 2004. <http://www.state.gov/g/drl/rls/hrrpt/2003/index.htm>

- Burma (Myanmar): "They routinely subjected detainees to harsh interrogation techniques designed to intimidate and disorient. There were reports in past years that prisoners were forced to squat or assume stressful, uncomfortable, or painful positions for lengthy periods."
- Pakistan: "sexual assault; prolonged isolation...denial of food or sleep...public humiliation."
- Turkey: "Human rights observers said that, because of reduced detention periods, security officials mostly used torture methods that did not leave physical traces, including repeated slapping; exposure to cold; stripping and blindfolding; food and sleep deprivation; threats to detainees or family members..."

Some of the entries reveal a breathtaking level of hypocrisy. The State Department's entry on Cuba, for example, includes:

*Prisoners sometimes were held in "punishment cells", which usually were located in the basement of a prison, were semi-dark all the time, had no water available in the cell, and had a hole for a toilet. No reading materials were allowed, and family visits were reduced to 10 minutes from 1 or 2 hours. There was no access to lawyers while in the punishment cell.*

In the US Naval Base in Guantánamo Bay in Cuba during the same year, 2003, hundreds of men were held without access to lawyers or to families. At least six detainees have been held in isolation for many months in windowless cells of Camp Echo (see Point 4.2). Many detainees are reported to have been placed in isolation in punishment cells and had their "comfort items" removed. One detainee, for example, has recalled:

*"During my time in Guantanamo Bay I did about a year and three months in the isolation block. I was sent there for various reasons. One was that I would refuse to give them back the food after they did not give me enough time to eat it. They would give you food and then try to collect it five minutes later. The absolute maximum you were allowed to have the food was thirty minutes. I would be eating at my pace and wouldn't give it back to them and then because of this refusal they put me in isolation. Other things for which I was punished also included speaking in isolation since you were able to speak to the person next to you. I was also punished for translating for other people who were complaining from Arabic to English since my Arabic became quite good."*<sup>760</sup>

The State Department's entry on Iraq, referring to the period before the US-led invasion in March 2003, listed "extended solitary confinement in dark and extremely small compartments" among the torture techniques. The latter was one of the torture techniques used in Iraq that the US government cited in its build up to the invasion of that country.<sup>761</sup>

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<sup>760</sup> Witness statement of Tarek Dergoul in the case of *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 69, 21 May 2004.

<sup>761</sup> *A Decade of Deception and Defiance*, *supra*, note 12.

The State Department did not mention that in the second half of 2003, the occupying US forces were doing the same. In its February 2004 report, the ICRC stated that:

*Several military intelligence officers confirmed to the ICRC that it was part of the military intelligence process to hold a person deprived of his liberty naked in a completely dark and empty cell for a prolonged period to use inhumane and degrading treatment, including physical and psychological coercion, against persons deprived of their liberty to secure their cooperation...*

*Since June 2003, over a hundred 'high value detainees' have been held for nearly 23 hours a day in strict solitary confinement in small concrete cells devoid of daylight... Most had been subject to this regime for the past five months.*

Concern about such unlawful treatment of these detainees is heightened by the fact that many were reported to be "in poor physical health, and more advanced in age than the typical detainee population".<sup>762</sup>

A July 2002 report sponsored by the non-partisan US think tank, the Council on Foreign Relations, concluded that the US government was failing to counter the fact that "around the world, from Western Europe to the Far East, many see the United States as arrogant, hypocritical, self-absorbed, self-indulgent, and contemptuous of others".<sup>763</sup> On the day of publication, the White House responded that it would set up an Office of Global Communications to play a coordinating role in countering such perceptions. As the President's spokesman put it, "better coordination of international communications will help America to explain what we do and why we do it around the world."<sup>764</sup> Amnesty International pointed out that "in the area of human rights, at least, the USA will need to move beyond public relations and into substantive change if it wishes to improve its reputation abroad".<sup>765</sup>

### 12.3 Recommendations under Point 12

The US authorities should:

- Withdraw the USA's understanding to Article 3 of the UN Convention against Torture, and publicly state the USA's commitment to the principle of *non-refoulement*, and ensure that no legislation undermines this protection in any way;
- Cease the practice of "renditions" that bypass human rights protections; ensure that all transfers of detainees between the USA and other countries fully comply with international human rights law.

<sup>762</sup> Ryder report, page 26, *supra*, note 510.

<sup>763</sup> *Public diplomacy: A strategy for reform*. A report of an Independent Task Force on Public Diplomacy sponsored by the Council on Foreign Relations. 30 July 2002.

<sup>764</sup> Ari Fleischer, White House press briefing, 30 July 2002.

<sup>765</sup> *USA: Human rights v. public relations*. AI Index: AMR 51/140/2002, 24 August 2002. <http://web.amnesty.org/library/Index/ENGAMR511402002>.

## Conclusion

*The United States condemns unequivocally the despicable practice of torture. We have fought to eliminate it around the world. Political will is critical. The United States has led international efforts to put pressure on governments to publicly condemn torture; enact legislation; investigate and prosecute abusive officials; train law enforcement officers and medical personnel, and provide compensation and rehabilitation for victims.*  
US State Department, November 2002<sup>766</sup>

Less than a month after the US State Department issued the above “fact sheet”, the Secretary of Defense authorized interrogation techniques for use in Guantánamo that flew in the face of the USA’s claims to be leading the global struggle against torture. A few months later, variations on those techniques emerged in combination in Abu Ghraib prison in Iraq. Such methods have also been used by US personnel in Afghanistan. Yet the US administration still claimed that what happened at Abu Ghraib was an aberration. Although subsequent military investigations have shown that alleged US abuses have not been confined either to Abu Ghraib or to a few soldiers, there remains a need for a full commission of inquiry that takes a genuinely comprehensive and independent look at the USA’s “war on terror” detention and interrogation policies and procedures, and examines the activities of all government agencies and all levels of government. Full accountability is crucial.

Amnesty International regrets that the US administration has failed to put human rights at the heart of its response to the crime against humanity that occurred in the USA on 11 September 2001. Notably, among the recommendations of the 9/11 Commission into the attacks were that the United States must in future “offer an example of moral leadership in the world”, be “committed to treat people humanely”, and “abide by the rule of law”.

The atrocities of 11 September 2001 have been compared to the Japanese attack on the US fleet in Pearl Harbour in Hawaii 60 years earlier. Within weeks of that attack, the Attorney General of California, Earl Warren, had become a strong supporter of internment of Japanese Americans. Earl Warren later became Governor of California, and was the Republican Party’s vice-presidential nominee in 1948. In 1953 he was appointed by President Eisenhower to the post of Chief Justice of the US Supreme Court, a position he held until 1969. In his autobiography, Earl Warren recalled with regret his role in the removal of Japanese Americans to internment camps, an episode now widely viewed as a stain on US history. He wrote: “I have since deeply regretted the removal order and my own testimony advocating it... It was wrong to react so impulsively without positive evidence of disloyalty, even though we felt we had a good motive in the security of our state. It demonstrates the cruelty of war when fear, get tough military psychology, propaganda, and racial antagonism combine with one’s responsibility for public security to produce such acts”.<sup>767</sup>

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<sup>766</sup> *The United States' Commitment To Fight Torture*. US State Department, 4 November 2002.

<sup>767</sup> *The Memoirs of Earl Warren* (1977). Quoted in *A Prison Beyond the Law*, by Joseph Margulies. Virginia Quarterly Review, July 2004. Joe Margulies was lead counsel for the plaintiff in *Rasul v. Bush*.



Judge Richard Goldstone, a justice on the Constitutional Court of South Africa, and former chief prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, has said that he believes "that a future American President will have to apologise for Guantánamo." He also said that detention and interrogation techniques allegedly used by the USA in Afghanistan, and since elsewhere, would constitute torture under the UN Convention against Torture.<sup>768</sup> On 6 May 2004, President Bush offered an apology for the humiliation suffered by Iraqi prisoners in Abu Ghraib and their families, but his administration continued to pursue its unlawful detention policies in Guantánamo and elsewhere, to the distress of those held and their relatives, and to the detriment of the rule of law.

A detainee's right to appear before a court is a fundamental safeguard against arbitrary arrest, "disappearance" and torture. Yet after the US Supreme Court's landmark *Rasul v. Bush* decision in June 2004 that the US courts have jurisdiction over the Guantánamo detainees, the administration has sought to curtail the impact of that decision, even as allegations of torture and ill-treatment in Guantánamo have continued to emerge. In similar vein, even after all the post-Abu Ghraib investigations, it is not clear what interrogation policies are being applied where. What is known, however, is that practices including incommunicado and secret detention are still in place. In *Rasul*, the Supreme Court said that indefinite executive detention without access to counsel was "unquestionably" illegal.<sup>769</sup> So, too, are torture and cruel, inhuman or degrading treatment, which such policies facilitate.

Thirty years ago, Amnesty International wrote, and writes again now:

*"Cancer is an apt metaphor for torture and its spread through the social organism. The act of torture cannot be separated from the rest of society; it has its consequences, it degrades those who use it, those who benefit from it, and it is the most flagrant contradiction of justice, the very ideal on which the state wishes to base its authority... Just as states that say to give in to terrorism is to invite the loss of many more lives, so to give in to the use of torture is to invite its spread and the eventual debasement of the whole society. Torture is never justified. The absolute prohibition on torture is the only acceptable policy. The system that uses it only mocks any noble ends it might profess... Torture is the ultimate human corruption."*<sup>770</sup>

In his November 2003 speech on the Guantánamo detentions cited at the beginning of this report, senior UK judge Lord Steyn advised that "in order to understand and to hold governments to account we do well to take into account the circles of history".<sup>771</sup>

By learning the lessons of history we make it less likely that we will repeat our mistakes. To authorize, commit or turn a blind eye to torture or cruel, inhuman or degrading treatment is always a mistake.

<sup>768</sup> *Inside Guantánamo*. BBC TV, Panorama, 5 October 2003.

<sup>769</sup> *Rasul et al. v. Bush et al.*, No. 03-334, decided 28 June 2004. Footnote 15.

<sup>770</sup> *Report on Torture*, Amnesty International, 1973.

<sup>771</sup> Guantánamo Bay: The legal black hole. Johan Steyn, 27<sup>th</sup> F.A. Mann Lecture, 25 November 2003.

## **Compilation of recommendations under 12-Point Program**

Amnesty International continues to call for a commission of inquiry, fully independent of government, into all aspects of the USA's "war on terror" detentions, with a view to achieving full accountability for any human rights violations that have occurred. Meanwhile, in order to prevent further such abuses, Amnesty International urges the government to consider the organization's 12-point program against torture and to put in place policies and practices which reflect the absolute prohibition on torture and cruel, inhuman or degrading treatment or punishment.

### **Amnesty International's recommendations to the US authorities based on the organization's 12-Point Program for the Prevention of Torture by Agents of the State**

#### **1. Condemn torture**

The highest authorities of every country should demonstrate their total opposition to torture. They should condemn torture unreservedly whenever it occurs. They should make clear to all members of the police, military and other security forces that torture will never be tolerated.

The US authorities should:

- Provide a genuine, unequivocal and continuing public commitment to oppose torture *and* cruel, inhuman or degrading treatment under any circumstances, regardless of where it takes place, and take every possible measure to ensure that all agencies of government and US allies fully comply with this prohibition;
- Review all government policies and procedures relating to detention and interrogation to ensure that they adhere strictly to international human rights and humanitarian law and standards, and publicly disown those which do not;
- Make clear to all members of the military and all other government agencies, as well as US allies, that torture or cruel, inhuman or degrading treatment will not be tolerated under any circumstances;
- Commit to a program of public education on the international prohibition of torture and ill-treatment, including challenging any public discourse that seeks to promote tolerance of torture or cruel, inhuman or degrading treatment.

## 2. Ensure access to prisoners

Torture often takes place while prisoners are held incommunicado — unable to contact people outside who could help them or find out what is happening to them. The practice of incommunicado detention should be ended. Governments should ensure that all prisoners are brought before an independent judicial authority without delay after being taken into custody. Prisoners should have access to relatives, lawyers and doctors without delay and regularly thereafter.

The US authorities should:

- End the practice of incommunicado detention;
- Grant the International Committee of the Red Cross full access to all detainees according to the organization's mandate;
- Grant all detainees access to legal counsel, relatives, independent doctors, and to consular representatives, without delay and regularly thereafter;
- In battlefield situations, ensure where possible that interrogations are observed by at least one military lawyer with full knowledge of international law and standards as they pertain to the treatment of detainees;
- Grant all detainees access to the courts to be able to challenge the lawfulness of their detention. Presume detainees captured on the battlefield during international conflicts to be prisoners of war unless and until a competent tribunal determines otherwise;
- Reject any measures that narrow or curtail the effect or scope of the *Rasul v. Bush* ruling on the right to judicial review of detainees held in Guantánamo or elsewhere, and facilitate detainees' access to legal counsel for the purpose of judicial review.

## 3. No secret detention

In some countries torture takes place in secret locations, often after the victims are made to "disappear". Governments should ensure that prisoners are held only in officially recognized places of detention and that accurate information about their arrest and whereabouts is made available immediately to relatives, lawyers and the courts. Effective judicial remedies should be available at all times to enable relatives and lawyers to find out immediately where a prisoner is held and under what authority and to ensure the prisoner's safety.

The US authorities should:

- Clarify the fate and whereabouts of those detainees reported to be or to have been in US custody or under US interrogation in the custody of other countries, to whom no outside body including the International Committee of the Red Cross are known to have access, and provide assurances of their well-being. These detainees include but are not limited to those named in the 9/11 Commission Report and in this Amnesty International report as having been in custody at some time in undisclosed locations;

- End immediately the practice of secret detention wherever it is occurring, and under whichever agency. Hold detainees only in officially recognized places of detention;
- Not collude with other governments in the practice of “disappearances” or secret detentions, and expose such abuses where the USA becomes aware of them;
- Maintain an accurate and detailed register of all detainees at every detention facility operated by the US, in accordance with international law and standards. This register should be updated on a daily basis, and made available for inspection by, at a minimum, the International Committee of the Red Cross, and the detainees’ relatives and lawyers or other persons of confidence;
- Make public and regularly update the precise numbers of detainees in US custody specifying the agency under which each person is held, their identity, their nationality and arrest date, and place of detention;
- Either charge and bring to trial, in full accordance with international law and standards and without recourse to the death penalty, all detainees held in US custody in undisclosed locations, or else release them;
- Comply without delay with Freedom of Information Act requests, and related court orders, aimed at clarifying the fate and whereabouts of such detainees;
- Make public and revoke any measures or directives that have been authorized by the President or any other official that could be interpreted as authorizing “disappearances”, torture or cruel, inhuman or degrading treatment, or extrajudicial executions.

#### **4. Provide safeguards during detention and interrogation**

All prisoners should be immediately informed of their rights. These include the right to lodge complaints about their treatment and to have a judge rule without delay on the lawfulness of their detention. Judges should investigate any evidence of torture and order release if the detention is unlawful. A lawyer should be present during interrogations. Governments should ensure that conditions of detention conform to international standards for the treatment of prisoners and take into account the needs of members of particularly vulnerable groups. The authorities responsible for detention should be separate from those in charge of interrogation. There should be regular, independent, unannounced and unrestricted visits of inspection to all places of detention.

The US authorities should:

- Immediately inform anyone taken into US custody of his or her rights, including the right not to be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment; their right to challenge the lawfulness of their detention in a court of law; their right to access to relatives and legal counsel, and their consular rights if a foreign national;

- Ensure at all times a clear delineation between powers of detention and interrogation;
- Keep under systematic review interrogation rules, instructions, methods and practices, as well as arrangements for the custody and treatment of anyone in US custody, with a view to preventing any cases of torture or cruel, inhuman or degrading treatment;
- Ensure that conditions of detention strictly comply with international law and standards;
- Prohibit the use of isolation, hooding, stripping, dogs, stress positions, sensory deprivation, feigned suffocation, death threats, use of cold water or weather, sleep deprivation and any other forms of torture, or cruel, inhuman or degrading treatment as interrogation techniques;
- Bring to trial in accordance with international fair trial standards all detainees held in Guantánamo, or release them;
- Ensure compliance with all aspects of international law and standards relating to child detainees;
- Ensure compliance with all international law and standards relating to women detainees;
- Invite all relevant human rights monitoring mechanisms, especially the UN Special Rapporteur on Torture, the Committee against Torture, the Working Group on Enforced or Involuntary Disappearances (1980) and the Working Group on Arbitrary detention to visit all places of detention, and grant them unlimited access to these places and to detainees;
- Grant access to national and international human rights organizations, including Amnesty International, to all places of detention and all detainees, regardless of where they are held.

## **5. Prohibit torture in law**

Governments should adopt laws for the prohibition and prevention of torture incorporating the main elements of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) and other relevant international standards. All judicial and administrative corporal punishments should be abolished. The prohibition of torture and the essential safeguards for its prevention must not be suspended under any circumstances, including states of war or other public emergency.

The US authorities should:

- Enact a federal crime of torture, as called for by the Committee against Torture, that also defines the infliction of cruel, inhuman or degrading treatment as a crime, wherever it occurs;

- Amend the Uniform Code of Military Justice to criminalize expressly the crime of torture, as well as a crime of infliction of cruel, inhuman or degrading treatment or punishment, wherever it occurs, in line with the Convention against Torture and other international standards;
- Ensure that all legislation criminalizing torture defines torture at least as broadly as the UN Convention against Torture;
- Ensure that legislation criminalizing torture and the infliction of cruel, inhuman or degrading treatment covers all persons, regardless of official status or nationality, wherever this conduct occurred, and that it does not allow any exceptional circumstances whatsoever to be invoked as justification for such conduct, or allow the authorization of torture or ill-treatment by any superior officer or public official, including the President.

## 6. Investigate

All complaints and reports of torture should be promptly, impartially and effectively investigated by a body independent of the alleged perpetrators. The methods and findings of such investigations should be made public. Officials suspected of committing torture should be suspended from active duty during the investigation. Complainants, witnesses and others at risk should be protected from intimidation and reprisals.

US Congress should:

- Establish an independent commission of inquiry into all aspects of the USA's "war on terror" detention and interrogation policies and practices. Such a commission should consist of credible independent experts, have international expert input, and have subpoena powers and access to all levels of government, all agencies, and all documents whether classified or unclassified.

The US authorities should:

- Ensure that all allegations of torture or cruel, inhuman or degrading treatment involving US personnel, whether members of the armed forces, other government agencies, medical personnel, private contractors or interpreters, are subject to prompt, thorough, independent and impartial civilian investigation in strict conformity with international law and standards concerning investigations of human rights violations;
- Ensure that such investigations include cases in which the USA previously had custody of the detainee, but transferred him or her to the custody of another country, or to other forces within the same country, subsequent to which allegations of torture or ill-treatment were made;
- Ensure that the investigative approach at a minimum complies with the UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

- Ensure that the investigation of deaths in custody at a minimum comply with the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, including the provision for adequate autopsies in all such cases;
- In view of evidence that certain persons held in US custody have been subjected to “disappearance”, the US authorities should initiate prompt, thorough and impartial investigations into the allegations by a competent and independent state authority, as provided under Article 13 of the UN Declaration on the Protection of All Persons from Enforced Disappearance.

## 7. Prosecute

Those responsible for torture must be brought to justice. This principle should apply wherever alleged torturers happen to be, whatever their nationality or position, regardless of where the crime was committed and the nationality of the victims, and no matter how much time has elapsed since the commission of the crime. Governments must exercise universal jurisdiction over alleged torturers or extradite them, and cooperate with each other in such criminal proceedings. Trials must be fair. An order from a superior officer must never be accepted as a justification for torture.

The US authorities should:

- Publicly reject all arguments, including those contained in classified or unclassified government documents, promoting impunity for anyone suspected of torture and cruel, inhuman or degrading treatment, including the ordering of such acts;
- Bring to trial all individuals – whether they be members of the administration, the armed forces, intelligence services and other government agencies, medical personnel, private contractors or interpreters – against whom there is evidence of having authorized, condoned or committed torture or other cruel, inhuman or degrading treatment;
- Any person alleged to have perpetrated an act of “disappearance” should, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities for prosecution and trial, in accordance with Article 14 of the UN Declaration on the Protection of All Persons from Enforced Disappearance;
- Ensure that all trials for alleged perpetrators comply with international fair trial standards, and do not result in imposition of the death penalty.

## 8. No use of statements extracted under torture

Governments should ensure that statements and other evidence obtained through torture may not be invoked in any proceedings, except against a person accused of torture.

The US authorities should:

- Ensure that no statement coerced as a result of torture or other cruel, inhuman or degrading treatment, including long-term indefinite detention without charge or trial, or any other information or evidence obtained directly or indirectly as the result of torture or cruel, inhuman or degrading treatment, regardless of who was responsible for such acts, is admitted as evidence against any defendant, except the perpetrator of the human rights violation in question;
- Revoke the Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, and abandon trials by military commission;
- Expose and reject any use of coerced evidence obtained by other governments from people held in their own or US custody;
- Refrain from transferring any coerced evidence for the use of other governments.

## **9. Provide effective training**

It should be made clear during the training of all officials involved in the custody, interrogation or medical care of prisoners that torture is a criminal act. Officials should be instructed that they have the right and duty to refuse to obey any order to torture.

The US authorities should:

- Ensure that all personnel involved in detention and interrogation, including all members of the armed forces or other government agencies, private contractors, medical personnel and interpreters, receive full training, with input from international experts, on the international prohibition of torture and other cruel, inhuman or degrading treatment or punishment, and their obligation to expose it;
- Ensure that all members of the armed forces and members of other government agencies, including the CIA, private contractors, medical personnel and interpreters, receive full training in the scope and meaning of the Geneva Conventions and their Additional Protocols, as well as international human rights law and standards, with input from international experts;
- Ensure that full training be similarly provided on international human rights law and standards regarding the treatment of persons deprived of their liberty, including the prohibition on “disappearances”, with input from international experts;
- Ensure that all military and other agency personnel, as well as medical personnel and private contractors, receive cultural awareness training appropriate to whatever theatre of operation they may be deployed into.

## **10. Provide reparation**



Victims of torture and their dependants should be entitled to obtain prompt reparation from the state including restitution, fair and adequate financial compensation and appropriate medical care and rehabilitation.

The US authorities should:

- Ensure that anyone who has suffered torture or ill-treatment while in US custody has access to, and the means to obtain, full reparation including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, wherever they may reside;
- Ensure that all those who have been subject to unlawful arrest by the USA receive full compensation.

## **11. Ratify international treaties**

All governments should ratify without reservations international treaties containing safeguards against torture, including the UN Convention against Torture with declarations providing for individual and inter-state complaints. Governments should comply with the recommendations of international bodies and experts on the prevention of torture.

The US authorities should:

- Make a public commitment to fully adhere to international human rights and humanitarian law and standards – treaties, other instruments, and customary law – and respect the decisions and recommendations of international and regional human rights bodies;
- Make a public commitment to fully adhere to the Geneva Conventions, and to respecting the advice and recommendations of the International Committee of the Red Cross;
- Ratify Additional Protocols I and II to the Geneva Conventions;
- Withdraw all conditions attached to the USA's ratification of the UN Convention against Torture;
- Provide the USA's overdue second report to the Committee against Torture, as requested by the Committee;
- Withdraw all limiting conditions attached to the USA's ratification of the International Covenant on Civil and Political Rights;
- Provide the USA's overdue reports to the Human Rights Committee;
- Ratify the Optional Protocol to the UN Convention against Torture;
- Ratify the UN Convention on the Rights of the Child;
- Ratify the American Convention on Human Rights;

- Ratify the Inter-American Convention on Forced Disappearance of Persons without any reservations and implement it by making enforced disappearances a crime under US law over which US courts have jurisdiction wherever committed by anyone.
- Ratify the Rome Statute of the International Criminal Court.

## **12. Exercise international responsibility**

Governments should use all available channels to intercede with the governments of countries where torture is reported. They should ensure that transfers of training and equipment for military, security or police use do not facilitate torture. Governments must not forcibly return a person to a country where he or she risks being tortured.

The US authorities should:

- Withdraw the USA's understanding to Article 3 of the UN Convention against Torture, and publicly state the USA's commitment to the principle of *non-refoulement*, and ensure that no legislation undermines this protection in any way;
- Cease the practice of "renditions" that bypass human rights protections; ensure that all transfers of detainees between the USA and other countries fully comply with international human rights law.