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PRACTICING WHAT WE PREACH: HUMANE TREATMENT FOR DETAINEES IN THE WAR ON TERROR

JENNIFER MOORE*

I. INTRODUCTION

As human beings we do not lose our legal and human personality because we are suspected of links to terrorism. We remain entitled to freedom from arbitrary detention, torture and inhuman treatment at all times and in all situations. In leading the so-called "war on terror," however, the United States is honoring these principles in the breach, as witnessed by the treatment of Jose Padilla, Yaser Hamdi, Shafiq Rasul, Mullah Habibullah, Mr. Dilawar and other terror suspects apprehended in the United States, Afghanistan and Iraq. The mistreatment of these individuals has occurred against a backdrop of repeated misstatements of law by the Bush administration that suspected terrorists may not look to the Convention Against Torture or the Geneva Conventions for protection.[1] Despite using the language of war to characterize its response to acts of terrorism, the United States has sidelined the international law of war in its treatment of suspected terrorists.

In seeking fair treatment for persons detained on suspicion of involvement in terrorism, we must clarify at the outset our use of certain essential terms. "Terrorism" and "terror," in this analysis, refer to calculated incidents of violence specifically targeting civilians.[2] The "war on terror," or the campaign against

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* Professor of Law, University of New Mexico School of Law, Director, UNM Peace Studies Program. A preliminary draft of this article was presented on April 9, 2005 at the Sutton Colloquium on "Protecting Human Rights: A Global Challenge" sponsored by the Denver University Sturm College of Law. The author thanks her UNM Law School colleagues Norman Bay and Elizabeth Rapaport, for their thoughtful insights into the rule of law in the war on terror, and Krista Allen, for her meticulous formatting of the footnotes. She is grateful for the support of Professor Ved Nanda of the University of Denver, his leadership in international human rights education, and his generous mentoring of colleagues near and far.

1. *See* Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to Alberto R. Gonzales, Counsel to the President, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340*-2340A, (Aug. 1, 2002) at pt. IIB, 20-23 [hereinafter Bybee memo], *available at.* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf; *Id.* at pt. IVA, 27-30. *See also* Memorandum from Albert R. Gonzales, White House Legal Counsel, to the President: *Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban,* (Jan. 25, 2002) at 2 [hereinafter Gonzales memo], *available at* http://msnbc.msn.com/id/4999148/site/newsweek.

2. In early 2005, U.N. Secretary General Kofi Annan called for a definition of terrorism "as [encompassing] any act 'intended to cause death or serious bodily harm to civilians or noncombatants' aimed at intimidating governments, populations or international organizations." Warren Hoge, *Annan to Offer Plans for Change in U.N. Structure,* N.Y. TIMES, March 21, 2005 at A1, 7 (citing *In Larger*

terrorism, comprises systematic responses to terrorism, both lawful and unlawful, and whether military, paramilitary or police actions. "Detainees" are individuals apprehended on suspicion of involvement in acts of terrorism, especially those who have not been accorded prisoner of war status, nor charged with specific crimes, nor accorded judicial process prior to during prolonged detention.[3]

While terrorism is often associated with non-state actors, and the war on terror most often with counter-terrorism measures that engage the military and police power of the state, neither use of force is confined to one set of actors.[4]

Freedom: Towards Development, Security and Human Rights for All (United Nations 2005)). The Secretary General then put the issue of terrorism on the agenda of the upcoming World Summit convened by the U.N. General Assembly in September 2005.

The issue of combating global terrorism figured prominently at the World Summit. Two resolutions on terrorism were adopted, one by the Security Council during the Summit, and another by the General Assembly subsequently. The Security Council "[c]ondemn[ed] in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security . . . ." UNSC Res. 1624 (2005), 14 September 2005, S/RES/1624. The General Assembly "[a]ffirm[ed] that states must ensure that any measure taken to combat terrorism complies with all their obligations under international law . . . in particular international human rights, refugee and humanitarian law" and stressed "the need to enhance the role of the United Nations . . . in combating international terrorism . . . and to . . . strengthen international cooperation to prevent and suppress effectively international terrorism in all its forms and manifestations . . . . " UNGA Res. 60/43, 6 January 2006, A/RES/60/43.

The definition of terrorism under the U.S. Code focuses on the political motivations and civilian targets of the violence. Under the U.S. Foreign Relations Act, "the term 'terrorism' means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents." *See* 22 U.S.C.A. § 2656(f)(d)(2) (2005). However, unlike S.G. Annan's definition, the U.S. definition of terrorism is limited to non-state agents. *See id. See also* 8 U.S.C.A. § 1182(a)(3)(B)(iii) (2005) (including under "terrorist activity" hijacking, assassination, use of dangerous device, etc.); 18 U.S.C.A. § 2332(a) (2005) (criminalizing use of weapon of mass destruction); Convention for the Suppression of Unlawful Seizure of Aircraft , art. 1(a), Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 (criminalizing conduct whereby "[a] person . . . on board an aircraft in flight . . . unlawfully, by force or threat thereof . . . seizes, or exercises control of, that aircraft . . . ").

Washington Post journalist Steve Coll emphasizes two aspects of terrorism, its typically spectacular means and its often nationalistic ends. He refers to modern terrorism as "theater invented largely by a stateless Palestinian diaspora whose leftist leaders sought dramatic means to attract attention to their national claims." *See* STEVE COLL, GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001 138 (Penguin Books 2004). In focusing on terrorist attacks in the mid 1980's, Cole emphasizes that "[s]ecular leftist groups carried out the most visible terrorist strikes . . . . Some of these groups advocated a nationalist cause – the Palestinian terrorists, the Irish Republican Army, the Basque separatists." *Id.* at 142.

3. The term detainee also has a much broader application to individuals whose liberty is limited for a variety of reasons and under various authorities. Examples are individuals jailed pending trial on criminal charges, who are generally referred to as "criminal defendants"; individuals imprisoned after trial and a finding of guilt, who are deemed "convicted persons"; and soldiers encamped by the military authority of another belligerent power, who are called "prisoners of war." What sets detainees in the war on terror apart from other classes of detainees is that typically they lack the legal protections associated with either military or criminal prisoners. Unlike recognized combatants, they do not enjoy POW status. And unlike criminal defendants or convicts, they enjoy no presumption of innocence, nor may they present a defense or confront their accusers in a court of law. For this reason, terrorism-related detainees are particularly vulnerable to arbitrary treatment.

4. *See generally*, Jennifer Moore, *From Nation State to Failed State: International Protection*

Nevertheless, in confronting and evaluating the treatment of detainees in the current U.S.-led war on terror, this article will be focusing on action taken by the U.S. government against individuals suspected of involvement in targeted acts of violence against civilians in the United States, Afghanistan and Iraq. The temporal context of this analysis is the period beginning on September 11, 2001, when several thousand civilians were killed in the al Qaeda bombings of the World Trade Center and the Pentagon. The counter-terrorism policies of the United Kingdom in the 1970's and Israel in the 1990's will also provide important historical comparisons.

This article sets forth both principled and pragmatic arguments for the fair and humane treatment of all individuals detained in the war on terror derived from both U.S. and international law. Section II explores the human dimension of the "war on terror." Section IIA critiques the use of the metaphor of war to characterize counter-terrorism policy. Section IIB examines the experiences of several individuals apprehended by the United States on suspicion of involvement in terrorism, including the response of U.S. courts to their detention without charge as "unlawful combatants." Section III offers possible explanations for the phenomenon by which the United States and other nations denounce terror on the one hand, while engaging in torture, inhuman treatment and arbitrary detention of suspected terrorists on the other. Finally, Section IV explores and seeks to identify and define the abiding and universal norms of humane treatment, freedom from torture and due process as evidenced in the Geneva Conventions, the Convention Against Torture, contemporary social commentary, human rights advocacy and scholarly analysis. While official U.S. policy on torture has evolved closer to international standards in recent months, actual practice remains grossly violative of norms of humane treatment, and no senior government official has taken responsibility or been charged with criminal conduct in any detainee abuse case. In witnessing our collective failure to stop ongoing abuses of detainees by U.S. officials, this article ends with a call to action.

Both respect for the human dignity of individuals and enlightened self-interest on the part of governments lead us to a similar conclusion. Responses to terrorism, like the phenomenon of terrorism itself, cannot be immune from the rule of law, because in the face of catastrophic acts of violence against civilians, we have a heightened need for the protections that law and humanitarian principles provide.

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from Human Rights Abuses by Non-State Agents, 31 COLUM. HUM. RTS. L. REV. 81-121 (1999) (discussing state and non-state agents of persecution and human rights abuses). *But see* 22 U.S.C.A. § 2656f(d)(2) (2005) (limiting terrorism to violence by "subnational or clandestine groups").

When we understand that acts of terrorism can be state-sponsored as well as private, and, similarly, that non-state agents as well as governments undertake counter-terror responses, certain troubling tendencies of the war on terror are unveiled. Terror and the arbitrary use of power lead to more violence and arbitrariness, in a cycle that threatens human life and dignity as well as the rule of law, and is very difficult to control.

Steve Coll explores the linkages and ironies between state-funded and non-state-subsidized violence. COLL, *supra* note 2. He examines in particular CIA support for counter-Soviet insurgents in Afghanistan in the 1980's, and the subsequent global proliferation of terrorist groups and tactics, beginning in the 1990's and continuing to play itself out today. *See id.* at 330.

It is the framework of law that protects government actors and the citizens they represent from becoming part of the very cycle of violence and illegality that we all confront.

II. THE HUMAN DIMENSION OF THE WAR ON TERROR

A. The "War on Terror"

The "war on terror" is a misleading term, if not a misnomer, given that classically wars are fought against armed forces composed of individuals, whether affiliated with governments, factions, insurgencies or more loosely organized bands of combatants. Certainly the term "war" has historically been used metaphorically, as in the "war on poverty," the "war on hunger," and the "war on AIDS." But unlike the war on terror, those campaigns have predominantly used national social programs, private and international philanthropy, and fiscal policy to alleviate socio-economic suffering. Contrastingly, the war on terror, like more traditional wars, relies primarily on the use of force, whether by the military or by law enforcement officials. But here the military model breaks down. In most military, paramilitary and police actions, the enemy is a group of individuals, where in the war on terror, the enemy is a phenomenon.

War, it has been said, empowers combatants "to kill people and break things." Terror, or the targeted use of violence against civilians, cannot be killed or broken.[5] It is the suspected terrorists and the communities in which they reside that can be killed and broken. Thus, the war on terror is more accurately conceived as a military, paramilitary and law enforcement campaign against suspected terrorists and the states and communities believed to shelter and support them.

It is at least ironic that the U.S. government has taken the position that humanitarian law, or the law regulating the conduct of warfare, does not apply to the "war on terror." Fundamentally, if we are to affirm the humanity and legal personality of suspected terrorists, we must first acknowledge their extra-judicial treatment, and then seek to resurrect the rule of law in our campaign against terrorism.

B. The Suspected Terrorists

Official pronouncements, judicial decisions, media coverage and public discourse all influence the impact of terror and the course of counter-terrorism measures. But if we are to honestly take on the reality of terrorism and counter-terrorism, we must confront the impact that the war on terror has had on particular human beings implicated in this conflict. Cases brought on behalf of several of these individuals have given U.S. courts the opportunity to begin re-imposing the rule of law on the government of the United States.

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5. Retired U.S. Army General William Odom has stated that "[t]errorism is not any enemy. It cannot be defeated. It's a tactic. It's about as sensible to say we declare war on night attacks and suspect we're going to win that war." *See* Norman Solomon, *Terrorism, "The War on Terror" and the Message of Carnage,* TRUTHOUT PERSPECTIVE, July 9, 2005, *available at* http://www.truthout.org/docs_2005/printer_070905X.shtml.

Two individuals identified with the war on terror at home in the United States were U.S. citizens suspected of involvement in terrorism, who were detained without charge for prolonged periods. Yaser Esam Hamdi was apprehended in Afghanistan and detained without charge in the United States as a suspected Taliban fighter until the U.S. Supreme Court declared in 2004 that he was entitled to challenge his detention in court,[6] at which time U.S. authorities returned him to his native Saudi Arabia.[7] Jose Padilla, the so-called "dirty bomber," was apprehended in 2000 at O'Hare Airport in Chicago, and was detained without charge until November, 2005, despite the Second Circuit Court of Appeals' rejection of the Bush administration's authority to detain him as an "enemy combatant."[8] As of February, 2006, the Supreme Court is considering Padilla's second petition for certiorari, and the United States has recently indicted him on lesser charges.[9]

In Guantanamo Bay, Cuba, the faces of the war on terror include Shafiq Rasul and other suspected Taliban and al Qaeda operatives detained without charge until the U.S. Supreme Court declared they were entitled to hearings to determine their status as POWs, irregular combatants or civilians.[10] In Iraq, a faceless, hooded

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6. Hamdi v. Rumsfeld, 542 U.S. 507, 601 (2004) ("We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertion before a neutral decision maker.").

7. David Stout, *U.S. Agrees to Release American Caught with Taliban*, N.Y. TIMES, Sept. 22, 2004, *available at* http://www.nytimes.com/2004/09/22/politics/22CND-HAMD.html?ex=1129089600&en=cb4aa38581b80dcd&ei=5070&hp.

8. Padilla v. Rumsfeld, 352 F.3d 695, 724 (2d Cir. 2003) ("... in the domestic context, the President's inherent constitutional powers do not extend to the detention as an enemy combatant of an American seized within the country away from a zone of combat; [and] the Non-Detention Act prohibits the detention of American citizens without express Congressional authorization"). Subsequently, the Supreme Court granted certiorari and determined that the case should have been filed in South Carolina rather than New York. Rumsfeld v. Padilla, 542 U.S. 426 (2004). The U.S. District Court for the District of South Carolina agreed with the Second Circuit that there was no legal basis for Padilla's military detention. Padilla v. Hanft, 389 F. Supp. 2d 678 (D.S.C. Feb. 28, 2005). The District Court ordered that Padilla be released within 45 days unless criminal charges were brought. *Id.* at 692.

9. On November 17, 2005, days before the deadline for the government's reply to Padilla's second petition to the Supreme Court, Attorney General Gonzales announced an indictment against Padilla on charges of providing material aid to terrorists, but not with membership in al Qaeda or involvement in a plot to detonate a dirty bomb. The administration's indictment of Padilla, and attempts to transfer him from military to criminal custody, are regarded to be motivated by a desire to render moot Padilla's appeal to the Supreme Court, and to let stand the Fourth Circuit's determination that his detention without charge was constitutional. *See* Adam Liptak, *In Terror Cases, Administration Sets Own Rules*, N.Y.TIMES, November 27, 2005. On January 4, 2006, the Supreme Court granted the government's motion to transfer Padilla from military custody to the warden of a federal detention center in Florida to face criminal charges contained in the November 17, 2005 indictment. The Court indicated that Padilla's petition for certiorari remained under consideration. Hanft v. Padilla, 126 S.Ct. 978 (Mem.) (2006).

10. Rasul v. Bush, 542 U.S. 466, 563 (2004) ("[w]e therefore hold that [28 U.S.C.] § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base."); *But see* Khalid v. Bush, 355 F.Supp. 2d 311, 318-19 (D.C. Cir. 2005). (Judge Leon held that Congress, through its Authorization for Use of Military Force, authorized the President to "capture and detain those who the military determined were either

man and his fellow inmates have come to personify the war on terror, as their pictures made infamous the U.S.-run Abu Ghraib detention center. This group of prisoners suffered many forms of torture and inhuman treatment at the hands of U.S. military personnel, including sleep and food deprivation, stress positions, beatings, simulated drowning, sexual abuse and humiliation.[11] Private Charles A.

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responsible for the 9/11 attacks or posed a threat of future terrorist attacks.") *See also id.* at 321. ("[n]on-resident aliens, captured in foreign territory and held . . . outside sovereign United States territory . . . possess no cognizable constitutional rights.").

Subsequently, in January 2005, U.S. District Court Judge Joyce Hens Green found that U.S. military tribunal proceedings in Guantanamo Bay, Cuba violated both constitutional and international law. *See In re* Guantanamo Detainee Cases, 355 F.Supp.2d 443, 445 (D.C. Cir. 2005). *See* Gonzales, *supra* note 1. At trial, Judge Green denounced "shocking examples of torture used to extract confessions abroad." *See* Jonathan Turley, *A Check on Wartime Power*, NAT'L L. J., March 7, 2005; *But see* Hamdan v. Rumsfeld, 415 F.3d 33, 40-43 (D.C. Cir. 2005). ("[w]e therefore hold that the 1949 Geneva Convention [re POWs] does not confer upon Hamdan a right to enforce its provisions in court") and ("[w]e therefore see no reason why Hamdan could not assert his claim to prisoner of war status before the military commission at the time of his trial and thereby receive the judgment of a 'competent tribunal'"). The D.C. Circuit Court overruled the D.C. District Court's prior invalidation of war crimes trials by military commissions. *Id.* at 43.

In November 2005, the Supreme Court granted certiorari in *Hamdan*. Hamdan v. Rumsfeld, 126 S.Ct. 622 (Mem.), No. 05-184 (granted November 7, 2005). The Court will consider the constitutionality of the military commissions as well as Hamdan's claims under the Geneva Conventions. Hamdan's Supreme Court case is complicated by a recent amendment to the U.S. habeas corpus statute, 28 U.S.C.A. 2241, enacted through the National Defense Authorization Bill for Fiscal Year 2006, and popularly known as the Detainee Treatment Act. Pursuant to section 1405(e)(2)(A) of this Act, judicial review of the detention of enemy combatants in Guantanamo Bay, Cuba, Iraq and Afghanistan must be sought in the D.C. Circuit Court of Appeals. The D.C. Circuit's exclusive jurisdiction is limited to reviewing convictions handed down by the military commissions, and determining whether detainees have been properly designated enemy combatants by the Combatant Status Review Tribunals. *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163, § 1405, 119 Stat. 3136 (2006). The U.S. government is arguing that section 1405 moots all pending habeas actions filed by Guantanamo Bay detainees, including Mr. Hamdan. *See* Brief for Respondents on writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit at 12, Hamdan v. Rumsfeld, No. 05-184, (D.C. Cir. Feb. 23, 2006).

11. Douglas Jehl & Eric Schmitt, *Dogs and Other Harsh Tactics Linked to Military Intelligence*, N.Y. TIMES, May 22, 2004, at A1. *See also*, Seymour M. Hersch, *The Gray Zone: How a Secret Pentagon Program Came to Abu Ghraib*, THE NEW YORKER , May 24, 2004, at 38-44; Susan Sontag, *What Have We Done*, THE GUARDIAN , May 24, 2004; Neil Lewis & Eric Lichtblau, *Red Cross Says that for Months It Complained of Iraq Prison Abuses to the U.S.*, N.Y. TIMES , May 7, 2004, at A10; Jane Mayer, *The Memo: How an internal effort to ban the abuse and torture of detainees was thwarted*, THE NEW YORKER, Feb. 27, 2006 at 32-41 (relating former Navy General Counsel Alberto Mora's response to U.S. prisoner abuse and his attempts to promote U.S. interrogation policy consistent with U.S. and international law).

In May 2004, the U.S. Army released a report prepared by Major General Antonio M. Taguba on alleged abuses of prisoners by U.S. military police (MP) and military intelligence (MI) personnel in Iraq. The executive summary of the report is *available at* http://www.msnbc.msn.com/id/4894001. General Taguba concluded that "[s]everal Army soldiers have committed egregious acts and grave breaches of international law at the Abu Ghraib/BCCF and Camp Bucca, Iraq" during the August 2003 to February 2004 period, including "numerous incidents of sadistic, blatant, and wanton criminal abuses" inflicted on detainees. *See* Taguba report, Conclusion, para. 1 and Part I, Findings of Fact, para. 5. However, while General Taguba found that "key senior leaders in both the 800th MP Brigade and the 205th MI Brigade failed to comply with established regulations, policies and commend directives in preventing detainee abuse" he recommended no disciplinary action against Lieutenant

Graner, Jr., a military police officer (MP) and the declared ringleader of abusive MP's at Abu Ghraib, was convicted of criminal conduct and several other MP's have plead guilty to various charges of abuse. More recently, in July of 2005, eleven U.S. soldiers were charged with abusing detainees in Iraq, and their company has been taken off active duty pending the investigation.[12] Nevertheless, to date no senior U.S. military or civilian official has been charged in the detainee abuse scandal.[13]

Finally, in Afghanistan, among the most tragic faces of the war on terror are those of Mullah Habibullah and a 22-year-old taxi driver named Mr. Dilawar, who both died in December 2002 from beatings by U.S. military personnel at Bagram Control Point.[14] Much of what we now know about the deaths of Habibullah and Dilawar comes from a nearly 2000-page confidential Army criminal investigation file that was obtained by New York Times reporter Tim Golden.[15]

Golden's May 2005 analysis of the Army report recounts extensive testimony by Army interrogators and guards that both men were subjected to stress positions prior to and during interrogation sessions, and that Habibullah was chained to the ceiling of his cell. While interrogators admitted to beating Habibullah perhaps a dozen times, Mr. Dilawar was struck on the legs as many as 100 times, such that the Army coroner who conducted his autopsy described his legs as "pulpified." The Army found probable cause to charge 27 officers and soldiers in the death of Mr. Dilawar, fifteen of whom were also implicated in Habibullah's death. By January 2006, only fifteen soldiers and one officer had been charged in the beating deaths of Dilawar and Habibullah. In that same month, the Army dropped its case against Military Police Captain Christopher Beiring, based on the recommendation of an investigating judge.[16]

General Ricardo Sanchez, then the senior U.S. military official in Iraq. *Compare id.*, Part III, Findings of Fact, para. 22, *with id.*, Conclusion, para. 1.

12. Kirk Semple, *Suicide Bomber Ignites Tanker, Killing 59 Iraqis,* N.Y. TIMES, July 17, 2005 at A1.

13. Josh White, *Abu Ghraib Tactics Were First Used at Guantanamo,* WASH POST , July 14, 2005 at A1.

Professor Jordan Paust of the University of Houston Law Center has thoroughly analyzed the series of memoranda and policy directives prepared and promulgated by legal counsel and senior officials in the Departments of Justice, State and Defense with respect to the treatment of U.S. detainees in the war on terror. He concludes that U.S. lawyers and high-ranking governmental officials were involved in "plans to deny protections under the Geneva Conventions to persons detained during the armed conflicts in Afghanistan and Iraq." *See* Jordan Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees,* 43 COLUM. J. TRANSNAT'L L. 811, 861; *see generally id.* at 811-863.

14. *See* Douglas Jehl, *Army Details Scale of Abuse of Prisoners in an Afghan Jail,* N.Y. TIMES, March 12, 2005, at A1.

15. Tim Golden, *In U.S. Report, Brutal Details of Two Afghan Inmates' Deaths,* N.Y. TIMES , May 20, 2005, at A1.

16. *Id. See also* Tim Golden, *Abuse Inquiry Bogged Down in Afghanistan,* N.Y. TIMES , May 22, 2005, at A1, 16; Tim Golden, *Case Dropped Against U.S. Officer in Beating Deaths of Afghan Inmates,* N.Y. TIMES, Jan. 8, 2006 at 13 (indicating that in the sixteen cases involving Army personnel originally charged in the deaths of Dilawar and Habibullah, there have been three dismissals, four acquittals, six guilty pleas and one conviction of assault and related charges; one trial has been scheduled, and one

We cannot evaluate U.S. counter-terrorism policy on political, legal or moral grounds without recognizing the humanity of those persons targeted by terror and counter-terror alike. Perhaps the most troubling characteristic of the U.S. response to the September 11, 2001 terrorist attacks and the subsequent wars in Afghanistan and Iraq is the extent to which the personhood of suspected terrorists has been denied, whether their legal personality and their access to the courts or their rights to life, humane treatment and freedom from torture. While federal courts are beginning to challenge its authority, the Bush administration has both expressly and by implication, at home and abroad, declared that individuals suspected of involvement in terrorism are outside the bounds of the Geneva Conventions of 1949,[17] the 1984 Convention Against Torture,[18] and the U.S. Constitution itself. Understanding why and how the United States and other governments have taken this extra-legal approach to counter-terrorism is the first step in reconstructing the rule of law in the struggle against terror.

III. HYPOCRISY IN STATE POLICIES REGARDING THE TREATMENT OF TERROR SUSPECTS

There are two related tendencies whereby states denounce violence and terror yet violate the human rights of individuals apprehended in the war on terror. The first involves hypocrisy between ends and means, whereby states seek to justify repressive methods in service of a purportedly just cause. Thus, states decry the indiscriminate killing of civilians by non-state agents, with principled reference to criminal law, human rights law or international humanitarian law. However, they then link this denunciation of terrorism with the promotion of strong-handed interrogation tactics, if not torture itself, which they claim will result in intelligence vital to preventing future terrorist attacks. In the United States, such mixed messages helped to cultivate an extremely permissive environment which led to the torture of detainees at Abu Ghraib, Bagram and other U.S. detention centers in Iraq and Afghanistan.[19]

The second type of hypocrisy involves the classic gap between *de jure* rules and *de facto* practices relating to torture: the state denounces torture officially, but its agents practice torture or inhuman treatment with state awareness, acquiescence or encouragement, if not outright instructions on the part of the military and

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additional charge is pending).

17. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. *See also* Gonzales memorandum, *supra* note 1 (stating that Taliban and al Qaeda members are ineligible for prisoner of war status).

18. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]. *See also* Bybee memorandum, *supra* note 1, at 1 (torture defined as the infliction of "pain . . . equivalent to intensity to the pain accompanying serious . . . organ failure . . . or even death").

19. Hersch, *supra* note 11. *See also* Mayer, *supra* note 11, at 39-40.

civilian leadership. In recent years this official denial of the actual practice of torture has characterized countries as diverse as Saudi Arabia,[20] Peru[21] and the United States.[22]

These two related but distinct inconsistencies in state treatment of detainees in the war on terror will be examined in turn. With regard to the terror vs. torture divide, the focus will be on *why* states seem to justify torture, while denouncing terror. With regard to the gap between principle and practice, the focus will be on *how* states seek to rationalize the practice of torture despite laws explicitly forbidding it.

A. Why States Denounce Terror but Permit Torture

To understand why state officials can engage in the inhuman treatment and torture of individuals suspected of involvement in acts of terrorism, we should not limit our analysis to those authoritarian countries often regarded as the chief violators of civil and political rights. In fact, perhaps the more revealing cases are those of liberal democracies with strong records overall in upholding norms of due process and fair treatment, civilian control of the military and judicial review. Over the past thirty years, the United Kingdom, Israel and the United States have each experienced organized acts of terrorism linked to extremist wings of militant organizations, and have responded with counter-terrorism policies that have been challenged in the courts.

The U.K. response to Irish Republican Army attacks on civilians has had repercussions for non-violent participants in the Irish nationalist movement, both within and outside the IRA.[23] By the same token, Israel's efforts to stop Hamas and Islamic Jihad suicide bomb attacks in Israel, Gaza and the West Band have reverberated on moderate members of Palestinian nationalist organizations and apolitical Palestinians alike.[24] Finally, in the United States, discreet acts of

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20. Human Rights Watch World Report 2003: Events of 2002, (Human Rights Watch, New York, N.Y.), 2003, at 474 (documenting "torture under interrogation of political prisoners and criminal suspects [in Saudi Arabia]"), *available at* http://www.hrw.org/wr2k3/pdf/isotpa.pdf.

21. *Id.* at 161 ("torture remained a serious problem [in Peru]. . . . A law introduced in 1998 explicitly outlawing torture made little impact").

22. *See generally*, Human Rights Watch, Getting Away With Torture? Command Responsibility For the U.S. Abuse of Detainees (Human Rights Watch, New York, N.Y.), April, 2005, *available at* http://www.hrw.org/reports/2005/us0405/. *See also* Maggie Farley, *Report: U.S. Is Abusing Captives*, L.A. TIMES, Feb. 13, 2006 at A1 (White House spokesman Scott McClellan responded to a 2006 report by five U.N.-appointed independent experts that torture of detainees is occurring in Guantanamo Bay: "the President has made it very clear that we do not condone torture and we do not engage in torture").

23. *See* RICHARD B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 693 (Little, Brown & Co. 1995) (This passage synopsizes the U.K. response to IRA terrorism in the 1970's, including internment without trial of IRA suspects beginning in 1971, and direct rule by the U.K. from 1972. The authors introduce the *Ireland v. United Kingdom* case, 2 Eur. Ct. H.R. 25 (1980), [decided by the European Court of Human Rights in 1977], in which the government of Ireland charged U.K. Army and constabulary officials with arbitrary arrest and torture of detainees).

24. *See* Human Rights Watch, *supra* note 19, at 459. ("Civilians increasingly paid the price for repeated, egregious violations of international humanitarian law by the Israel Defense Force [IDP] and Palestinian armed groups.")

violence linked to the al Qaeda organization in the 1990's and 2001 have had a negative impact on the treatment of Moslem and Arab citizens and residents of the United States and other countries.[25]

In the case of the U.K. and Israel, military and paramilitary forces linked to the governments have also carried out violent acts resulting in the deaths of civilians. Moreover, militant groups in both the U.K./Northern Ireland and Israel/Palestine are radical offshoots of much broader nationalist movements that include groups and individuals that denounce violence in all forms.

It may be illuminating to focus on the situations facing the United Kingdom in the 1970's, Israel in the 1990's and the United States since 2001, as examples of the responses of liberal democratic governments to both the reality of terrorist attacks and the politics of terrorism and counter-terrorism. In the 1970's, the United Kingdom experienced an intense period of non-violent and violent opposition to British rule in Northern Ireland, including a series of IRA bombings that led to many civilian deaths. UK authorities responded by arresting large numbers of suspected IRA operatives and their family members. Suspects in custody were subjected to detention without trial and the so-called "five techniques," which included wall standing, hooding, subjection to noise, sleep deprivation and deprivation of food and drink.[26] The Royal Ulster Constabulary (RUC), UK police responsible for Northern Ireland, attempted to justify these techniques as necessary to derive evidence regarding planned terrorist attacks and to stop such operations.

The five techniques subsequently became the subject of public condemnation, internal review within the RUC and legal challenges, finally resulting in an action brought by the Republic of Ireland against the U.K. in the European Court of Human Rights. In 1978, the European Court found that the five techniques, while not amounting to torture, did constitute violations of the non-derogable norm of humane treatment, and therefore the U.K. was deemed in violation of Article 3 of the European Convention on Human Rights and Fundamental Freedoms.[27] The Court clarified that inhuman treatment is never justified, even in time of national emergency.[28]

In Israel in the 1990's, suspected Palestinian militants in custody were subjected to detention without trial and coercive interrogation measures, including shaking, binding and hooding ("Shabach"), the "Frog Crouch," excessive tightening of handcuffs, and sleep deprivation.[29] As in the earlier case of Northern Ireland, these measures were offered as purportedly legitimate means of

25. *See* Human Rights Watch, *supra* note 22.

26. *See* Ireland v. United Kingdom, 2 Eur. Ct. H.R. 25 at 59 (1978).

27. *Id.* at 80 (citing, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 222).

28. *Id.*

29. *See Judgments of the Israel Supreme Court: Fighting Terrorism Within the Law* (citing HCJ 5100/94, Pub. Comm. Against Torture in Israel v. Israel, 53(4) P.D. 817, ¶ 9-13 [hereinafter Pub. Comm. v. Israel), *available at* http://www.jewishvirtuallibrary.org/jsource/Politics/sctterror.html.

responding to "ticking time bombs,"[30] and hence necessary to stop the deaths of civilians. In 1999, the Israeli Supreme Court denied the government's authority to engage in such acts, and clarified that torture is illegal under Israeli law.[31]

Justice Barak, the President of the Israel Supreme Court, authored the opinion in *Public Committee Against Torture in Israel v. The State of Israel.* His decision rejected the charge that using lawful means might handicap the state in its fight against terror. "A democracy," he wrote, "must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties."[32]

The United States, unlike the U.K. or Israel, has not experienced sustained insurgency or the occupation of contiguous territory for over 100 years. Thus when several thousand civilians were killed in the 2001 al Qaeda attacks on the World Trade Center and the Pentagon, these attacks were perceived in part as a wake-up call to the ongoing threat of terrorist violence in the United States. Other observers view terrorism as a criminal expression of opposition to U.S. economic, foreign and military policy abroad,[33] pointing in particular to the gap between U.S. democratic values and our nation's support for non-democratic regimes in the Middle East and South Asia or to our ongoing military occupation of Iraq itself.

Robert Pape's research on terrorist violence over a twenty-three year period reveals that the majority of such violent attacks against civilians are carried out not by religious fundamentalists, but by secular organizations opposed to military and economic domination by liberal democratic governments.[34] Whether fundamentalist or secular in nature, these organizations share opposition to foreign intervention and occupation. Consistent with Pape's analysis, and focusing on the phenomenon of increasing terrorist attacks in Iraq, retired General Gregory Neubold has stated, "[w]e have to understand that the fundamental reason for insurgency, the thing that ties all the various groups together, is their view that we are an occupying power."[35]

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30. Pub. Comm. v. Israel, *supra* note 29, at ¶ 34.

31. *Id.* at ¶¶ 9-13; id. at ¶,23 (". . . a reasonable investigation is necessarily one free of torture [and] free of cruel, inhuman treatment . . . This conclusion is in perfect accord with (various) International Law treaties – to which Israel is a signatory – which prohibit the use of torture, 'cruel, inhuman treatment' and 'degrading treatment' . . . .)

32. *Id.* at ¶ 39.

33. In a recent report on reform of the United Nations system, Kofi Annan states that "[w] must convince all those who may be tempted to support terrorism that it is neither an acceptable nor an effective way to advance their cause." *See* Hoge, *supra* note 2 (citing *In Larger Freedom: Towards Development, Security and Human Rights for All* (United Nations March 2005)).

34. Robert Pape, *Blowing Up an Assumption*, N.Y. TIMES, May 18, 2005 at A23. ("What nearly all suicide terrorist attacks actually have in common is a specific secular and strategic goal: to compel modern democracies to withdraw military forces from territory that the terrorists consider to be their homeland.") *See generally*, ROBERT PAPE, DYING TO WIN: THE STRATEGIC LOGIC OF SUICIDE TERRORISM (University of Chicago Press 2005).

35. Senator Barbara Boxer, *Iraq: Credibility, Responsibility, Accountability,* Remarks at the

Since 2001, over 1200 people have been arrested and detained in the United States on suspicion of connection to the events of September 11, and over 82,000 young men from 25 Middle Eastern and South Asian countries have been subjected to a Special Registration program.[36] Since January 11, 2002, approximately 750 suspected al Qaeda or Taliban members have been detained without charge at Guantanamo Bay, Cuba,[37] and selected individuals have been detained without charge as "unlawful" or "enemy combatants" in U.S. jails and military brigs. Unknown numbers of terror suspects have been detained and mistreated in dozens of U.S. detention centers around the world, including Abu Ghraib and Bagram. In Iraq alone, approximately 10,000 long-term detainees are being held in Abu Ghraib prison and Camp Bucca as of April 2005.[38]

In the few years since 2001, the U.S. treatment of suspected "unlawful combatants" in the war on terror has also led to internal debate and criticism by the public and the courts, analogous in many ways to earlier political and judicial developments in the United Kingdom and Israel. In the *Hamdi*, *Padilla* and *Rasul* cases, U.S. courts, notably the Supreme Court in *Hamdi* and *Rasul*, have denied the government's authority to detain suspected terrorists outside the bounds of the Constitution and federal court review.[39] However, more recently, in the *Hamdan* case, a U.S. circuit court upheld the legality of military commissions to determine

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Commonwealth Club (July 6, 2005), *available at* http://www.truthout.org/docs_2005/printer_071005A.shtml.

36. Michael Posner, *National Security After September 11: A Rights Perspective*, Remarks Presented to the American Bar Foundation (Feb. 7, 2004). *See also*, Muzaffar A. Chishti et al., *America's Challenge: Domestic Security, Civil Liberties, and National Unity After September 11* (Migration Policy Institute, Washington, D.C.), 2003, at 9, 12.

37. *Timeline of Legal and Judicial Events Related to Guantanamo Bay*, MIAMI HERALD, April 7, 2005, *available at* http://www.miami.com/mld/miamiherald/news/special_packages/archive/11276706.htm?template=contentModules/printstory.jsp.

Gradually, the U.S. government has released significant numbers of the Guantanamo detainees, conceding they had limited "intelligence value," such that by February 2004, only 650 remained in Cuba. Posner, *supra* note 36, at 4. As of March 29, 2005, the International Committee of the Red Cross estimates that 540 detainees remain in Guantanamo, from around 40 countries. *U.S. Detention Related to the Events of 11 September 2001 and its Aftermath – the Role of the ICRC* (ICRC, Geneva, Switzerland), 2004, *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/html/6CPK3V?OpenDocument.

38. Human Rights Watch, *supra* note 22, at 13 (documenting cases of torture and torture-related trauma and deaths of security-related detainees in U.S. custody around the world). *See* Doug Smith & Raheem Salman, *The Conflict in Iraq; Long Jailings Anger Iraqis*, L.A. TIMES, May 29, 2005, at A1. (Camp Bucca is located outside of Basra in southern Iraq). Smith and Salman report that there were only 5500 Iraqis in U.S. custody in August 2004. Yet during the August 2004 to April 2005 period, the U.S.-Iraqi military board, established to evaluate detainee cases for possible criminal prosecution, reviewed 9400 cases and released 5300 for insufficient evidence. Another 1600 were turned over for to the Iraqis for prosecution in Iraqi courts. Thus new arrests of Iraqis by U.S. forces in this nine-month period have approached 11,500. *See id.*

39. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003); Rasul v. Bush, 542 U.S. 466 (2004); *but see* Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005).

the status of suspected terrorists and to try unlawful combatants for war crimes, and this case is currently pending in the U.S. Supreme Court on a writ of certiorari.[40]

In all three countries, a proffered rationalization for the extra-judicial treatment of suspected terrorists has been that administrative detention, inhuman treatment and even torture are necessary to prevent future terrorist attacks. The high courts of all three countries ultimately have rejected the most wide-sweeping security-based justifications for arbitrary treatment. However, unlike its U.K. and Israeli counterparts, the U.S. Supreme Court has limited its analysis to the issue of judicial review of detention without charge. The Court has yet to take on the charge of torture and inhuman treatment by U.S. officials in the war on terror,[41] as well as the question of whether military commissions are competent tribunals to try suspected war criminals under U.S. and international law.[42] Moral outrage and vocal activism on the part of the press, human rights advocates and the public are essential if the practice of inhuman treatment is to end in the U.S.-led war on terror.

At the core of understanding and challenging arbitrary and inhuman treatment by states in response to terrorism is the need to question the unfounded popular

40. *See* Hamdan v. Rumsfeld 415 F.3d 33 (D.C. Cir. 2005). The Supreme Court has granted certiorari in *Hamdan*, 126 S.Ct. 622 (Mem.) (2005).

41. On March 1, 2005, the American Civil Liberties Union (ACLU) and the New York-based Human Rights First (formerly the Lawyers' Committee for Human Rights) filed a lawsuit in U.S. District Court for the Northern District of Illinois suing U.S. Defense Secretary Donald Rumsfeld on behalf of torture victims. *See* Matthew Rothschild, *Stripping Rumsfeld and Bush of Impunity*, THE PROGRESSIVE, July, 2005, *available at* http://progressive.org/mag_impunity?PHPSESSID=f978da2c302f31e2466378bc230e43b3.

In October 2003, the ACLU had filed a lawsuit seeking information regarding the treatment of detainees in U.S. custody and renditions to third countries. On May 4, 2005, the U.S. District Court for the Southern District of New York ordered the United States to produce additional photographs depicting the abuse of prisoners in Abu Ghraib. *See* Larry Neumeister, *Judge: Public Have Right to See Abuse Photos*, THE ASSOCIATED PRESS, May 26, 2005. Recently the ACLU received 300 new documents from the Federal Bureau of Investigation. Previously, the FBI had released 30,000 documents in the ACLU lawsuit. Neil A. Lewis, *Documents Say Detainees Cited Abuse of Koran*, N.Y. TIMES, May 26, 2005, at A1.

Moreover, the U.S. District Court for the District of Columbia did take on a habeas challenge to the Guantanamo Bay inmates' conditions of detention in Khalid v. Bush, 355 F.Supp.2d 311 (D.D.C. 2005). Judge Leon held that while the habeas statute, 28 U.S.C.A. § 2241, may provide a mechanism to challenge the legality of their detention, it does not provide a basis for challenging the conditions of their detention. *Id.* at 324-25. Judge Leon went on to find that habeas relief is similarly unavailable for claims of violations against the Convention Against Torture and other treaties prohibiting torture. *Id.* at 327. *See also* CAT, *supra* note 18. Subsequent legal challenges filed by Guantanamo Bay detainees will be affected by new amendments to the habeas statute enacted in January 2006 through Public Law 109-163. *See supra* note 10.

42. *Compare In re* Guantanamo Detainee Cases, 355 F.Supp. 2d 443 (D.C. Cir. 2005), *with* Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005). The Supreme Court has granted certiorari in *Hamdan*, 126 S.Ct. 622 (Mem.) (2005).

wisdom that torture stops terror. Defeating the logic that targeted instances of "strong arming" or brutality will somehow prevent greater acts of brutality is one place to start.

It is illuminating to recognize that even as individual public officials, members of the public, judges, and advocates denounce the inhuman treatment of detainees on constitutional and human rights grounds, paired with this principled rejection of state lawlessness has been the pragmatic realization that such lawlessness does not serve the ends it seeks. Military intelligence experts have recognized that torture – including subjecting individuals under questioning to "stress," beatings, and humiliation – may perversely result in bad intelligence given to bring an end to painful interrogation sessions.[43]

If we understand that torture is unlikely to prevent future acts of terrorism – because of the unreliable nature of torture-induced confessions, we must also consider the possibility that torture will engender future acts of terrorism. In his investigation of the role of torture in Egyptian prisons in socializing violent extremists, journalist Owen Bowcott interviewed an Egyptian psychiatrist who treated victims of violence. Dr. Fayad concluded that "[t]orturing radical Islamists makes them more violent . . . . It's torture that makes them more violent."[44] This tendency of torture to fuel more terror must be considered in the context of contemporary Iraq, where the level of suicide attacks has steadily increased since the beginning of the U.S.-led war and occupation. In May 2005 alone car bombings outstripped such attacks in all of 2004.[45]

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43. Army Colonel Stuart Herrington, a U.S. interrogator in the Vietnam War and Desert Storm in Iraq, was interviewed by Anne Applebaum of *The Washington Post* in Jan. of 2005: "Aside from its immorality and its illegality, says Herrington, torture is simply 'not a good way to get information.' . . . [N]ine out of 10 people can be persuaded to talk with no 'stress methods' at all." Asked about those who are beaten to encourage the sharing of information, Herrington asserted: "They'll just tell you anything to get you to stop." Anne Applebaum, *The Torture Myth*, WASH POST , Jan. 12, 2005, at A21. *See also* James Glanz, *Torture is Often a Temptation and Almost Never Works*, N.Y. TIMES, May 9, 2004, at 5. (quoting Michael Baker, 16-year CIA veteran and chief executive of Diligence Middle East, a private security company working in Iraq: "once the prisoner is being tortured, how do you rely on what he's saying, because people will do anything to make the torture go away"). *See also* Mayer, *supra* note 11 at 34 (in an interview, David Brant, former head of the Naval Criminal Investigative Service, stated he "doubted the reliability of forced confessions"). *But see* Alan Dershowitz, WHY TERRORISM WORKS 137-39 (Yale University Press 2002) (arguing that torture is sometimes effective in preventing major acts of terrorism and therefore must remain "on the agenda").

As early as 1936, the U.S. Supreme Court invalidated coerced confessions as inherently unreliable as well as violative of due process. *See Brown v. Mississippi*, 297 U.S. 278, 283 (in a case challenging confessions made after brutal beatings, the Supreme Court held that "[t]here was thus enough before the court when these confessions were first offered to make known . . . that they were not . . . free and voluntary . . . ."). *Id.* at 285-86 ([t]he rack and the torture chamber may not be substituted for the witness stand . . . the use of the confessions thus obtained was a clear denial of due process.").

44. Owen Bowcott, *Torture Trail to September 11*, THE GUARDIAN, Jan. 24, 2003, at 19.

45. In Iraq close to 700 people were killed in car bombings, shootings and beheadings during the month of May 2005. *See* Jeffrey Fleishman, *Risk of Civil War Spreads Fear Across Nation*, L.A. TIMES, May 29, 2005, at A8. While Iraqis experienced 25 car bombings in all of 2004, there were 21 car bombings in Iraq between May 1 and May 19, 2005 alone. *See* John F. Burns & Eric Schmitt, *Generals Offer a Sober Outlook on Iraqi War*, N.Y. TIMES, May 19, 2005, at A1.

If states engage in torture as a purported means of preventing terror, irony aside, revealing the misplaced utilitarian justifications for such conduct is an essential component of both understanding and challenging the arbitrary treatment and mistreatment of detainees in the war on terror.[46] Similarly, understanding the rationale for torture in the name of counter-terror enables us to more fully analyze the different ways in which states practice torture, while officially recognizing its prohibition.

B. How States Honor the Norm Against Torture in the Breach

Three principal ways in which states denounce torture but practice it nevertheless are: (1) straight denial that torture occurs;[47] (2) the scape-goating of so-called "bad apples" who are deemed to practice torture outside their official capacity and authority;[48] and (3) narrowing the definition of torture such that acts of torture are deemed not to constitute torture. It is the third avoidance mechanism that this article will delve into most fully. Narrowing the internationally recognized definition of torture was the official approach taken by the U.S. government from 2002 until December 2004. This strategy is reflected in a

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46. We should also consider that inhuman treatment and torture may be calculated to instill fear in the detainee population and their communities on the outside, and as such, this arbitrary treatment may be tragically effective. If this rationale is central to the practice of torture, then truly we have a phenomenon of terrorization in the name of counter-terrorism. Yet regardless of intent, the fear and anger instilled by such torture and counter-terror seem to be fueling increasing levels of violence against civilians. *See* Bowcott, *supra* note 44.

As food for further thought and analysis, it might be suggested that torture and inhuman treatment, whether institutionalized or practiced in more isolated instances, are more than all-too-common tools of repressive or authoritarian states. Torture is also an inherent dimension of armed conflict itself, planned or not, and whether carried out by governments, insurgents or non-state agents. As the brutal treatment of detainees in Abu Ghraib, Iraq and Bagram, Afghanistan attests, brutality and torture are the symptoms and poisonous fruit of misbegotten wars of insurgency, counter-insurgency and occupation.

47. Saudi Arabia, Peru and Egypt are examples of states that officially deny the practice of torture, despite documentation by human rights monitors that it occurs. *See* Human Rights Watch, *supra* notes 19 and 20 (regarding Saudi Arabia and Peru). *See also* Bowcott, *supra* note 43. ("[l]ast November [2002], Egypt was again condemned by the UN's influential [C]ommittee [A]gainst [T]orture in Geneva. The [C]ommittee concluded that there was 'widespread evidence of torture and ill-treatment in administrative premises' under control of the SSI [State Security Investigative Unit] . . . [t]he Egyptian government denies that torture takes place systematically in its detention centres and prisons"). *Id.*

48. The U.S. response to early allegations of abuse of prisoners in Abu Ghraib detention center, Iraq, fits the pattern of acknowledging individual instances of torture, but characterizing them as exceptional and occurring without authorization by supervisors in the chain of command. *See* Thom Shanker & Dexter Filkens, *Army Punishes Seven with Reprimands for Prison Abuse*, N.Y. TIMES,, May 4, 2004, at A1, 6 (" . . . President Bush . . . telephoned Defense Secretary Donald H. Rumsfeld 'to make sure that appropriate action was being taken against those responsible for these shameful, appalling acts,' said Scott McClellan, the White House spokesman. . . . But military officers have said there was no excuse for the behavior documented in photographs now circling the globe. All Army personnel . . . receive courses on the laws of armed conflict that include clear instructions against such abuse and torture, and these officers say that common human decency should have prevented the soldiers from such actions.").

Human Rights Watch has criticized the United States for the climate of impunity in responding to evidence of torture in U.S. facilities around the world. *See* Human Rights Watch, *supra* note 21 at 1 (stating that in the face of widespread evidence of torture in U.S. facilities overseas, "the only wrongdoers being brought to justice are those at the bottom of the chain-of-command").

Department of Justice memorandum issued on August 1, 2002, which will be analyzed in light of the definition of torture under international law.

1. Torture and Inhuman Treatment Defined under International Law

As provided in Article 1 of the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT),[49] torture is severe pain or suffering, physical or psychological in nature, which is inflicted upon an individual for such purposes as obtaining a confession, punishing him or her, influencing third parties, or for discriminatory reasons.[50] There is no specific intent requirement in the Convention Torture that the torturer intended to cause such suffering.[51] The intent required is the purpose to derive intelligence, otherwise influence behavior of the victim or others, or to discriminate.[52] Moreover, under the CAT, the norm against torture is absolute, as is clarified in the second clause of Article 2, which holds that "[n]o exception circumstance whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification of torture.[53]

Inhuman treatment is not specifically defined in the CAT, although it is referenced specifically in Article 16, which requires that parties to the treaty "undertake to prevent . . . other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture."[54] Nearly twenty years prior to the adoption of the CAT, the International Convention on Civil and Political Rights (ICCPR) codified the absolute prohibition against torture and inhuman treatment in 1966.[55] However, the distinction between torture and inhuman treatment is not clearly made, either in the text of the CAT or in the ICCPR.

Alberto Mora, former General Counsel for the U.S. Navy, argues that torture and inhuman treatment are equally abhorrent. He concludes that "the right to be free of cruelty . . . applies to all human beings . . . even those designated as 'unlawful enemy combatants.'"[56]

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49. *See* CAT, *supra* note 18.

50. *See id.* at art. 1(1).

51. *See id.*

52. *See id.*

53. *Id.* at art. 2(2).

54. *Id.* at art. 16(1). Article 16 also states: "[t]he provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment . . . ." One of these instruments is the International Convention on Civil and Political Rights, which provides in Article 7 that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 7, 999 U.N.T.S 171, 175 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

55. *See* ICCPR, *supra* note 54, at art. 4, 7. Article 4 of the ICCPR provides that Article 7 (the norm against torture and inhuman treatment) is non-derogable, even in time of national emergency. *Id.*, art. 4.

56. *See* Mayer, *supra* note 11, at 35 (Mora stated that there is "no moral or practical distinction" between torture and cruel or inhuman treatment. "If cruelty is no longer unlawful . . . it alters the fundamental relationship of man to government"). From 2002-03, Navy General Counsel Mora sought to quash military policies permitting the use of aggressive interrogation techniques. His struggle to impose legal limits on U.S. policy and practice is explored in Mayer's account. *Id.* at 32-41.

Scholars need to flesh out the relationship between torture and inhuman treatment, so that the lack of clarity does not lead to a watering down of protection against all forms of inhuman treatment. To begin with, we must reject the idea that torture is a kind of "aggravated inhuman treatment." Inhuman treatment is already "aggravated" behavior, reflected in its absolute prohibition.[57] What makes torture a distinct subset of inhuman treatment is not the degree of suffering on the part of the victim but the purpose for which the torturer imposes the suffering: to get information from or to punish the victim, or to otherwise coerce certain behavior.[58] Unlike torture in this respect, inhuman treatment need not be goal-oriented – it is the imposition of suffering without regard for deriving information or a confession or other purpose. Nevertheless, the suffering it causes may be of the same magnitude as torture, and hence it is equally forbidden.[59]

2. U.S. Policy on Torture in 2002

On August 1, 2002, based on a request by then White House Counsel, now U.S. Attorney General Alberto Gonzales, the Office of Legal Counsel of the Department of Justice (DOJ) issued a memorandum on "Standards of Conduct for Interrogation," to define the scope of detainee interrogations in the war on terror. The 2002 DOJ document departed from the language and spirit of the CAT in three regards. To begin with, DOJ narrowed the definition of torture, by limiting it to the infliction of "pain that is difficult to endure, equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[60] As demonstrated in the previous section, and contrary to the 2002 DOJ memorandum, torture under international law entails severe pain or suffering, whether physical or psychological.[61] Torture cannot be limited to the degree of suffering associated with organ failure, given that psychic pain or mental suffering is explicitly within the definition. Moreover, given the intelligence-driven element of the CAT definition, it would be irrational to exclude psychological torture. Torture is defined as abuse that seeks to influence behavior, and psychic abuse is a powerful motivator. [62]

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57. *See* ICCPR, at arts. 4 and 7, *supra* note 54.; *see* CAT, *supra* note 18, at art. 16. *See also* European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 222, (*entered into force* Sept. 3, 1953) (prohibition against torture and inhuman or degrading treatment); American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673, (entered into force July 18, 1978) (prohibition against torture and cruel, inhuman or degrading punishment or treatment); Organization of African Unity: Banjul Charter on Human and Peoples' Rights, June 27, 1981, art. 5, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (entered into force Oct. 21, 1986) (prohibition against slavery, torture and cruel, inhuman or degrading punishment and treatment).

58. *See* CAT, *supra* note 18, at art. 1(1).

59. *See* CAT, *supra* note 18, at art. 16; *See* ICCPR, *supra* note 54, at art. 4, 7.

60. Bybee, *supra* note 1, at 1.

In analyzing U.S. obligations under the U.S. Anti-Torture Statute, Mr. Bybee concluded that "the statute, taken as a whole, makes plain that it prohibits only extreme acts." *Id.*

61. *See* CAT, *supra* note 18, at art. 1(1).

62. *See id.* ("pain or suffering . . . inflicted for such purposes as obtaining . . . information or a confession . . . .").

Second, the DOJ memo held that to violate U.S. law, "severe pain and suffering must be inflicted with specific intent," and further that such "specific intent to inflict severe pain...must be the defendant's precise objective."[63] The specific intent requirement is also a corruption of our modern understanding of torture under international law. The CAT recognizes that torturers may or may not intend their victims to suffer. What they do intend is to compel them to give information or to otherwise influence their behavior or the behavior of others close to them.[64]

Finally, the DOJ memorandum asserts that the President may authorize interrogations that involve torture pursuant to his authority as Commander in Chief, and hence that "the Department of Justice could not enforce [the Anti-Torture Statute] against federal officials acting pursuant to the President's constitutional authority to wage a military campaign."[65] A Commander in Chief exception to the norm against torture renders it an empty promise, given states' tendency to rationalize torture for reasons of national security.[66] Moreover, such an exception is contrary to the explicit terms of the CAT, which specific that neither war nor public emergency may justify torture.[67]

The U.S. Justice Department has since retracted the first two of the three principal elements of its August 2002 policy on torture, and qualified the third, largely in response to public outcry over widespread evidence of the torture of detainees by U.S. personnel in Abu Ghraib prison in Iraq. Moreover, in January 2006, the U.S. Congress passed the Detainee Treatment Act, mandating humane treatment for all detainees in U.S. custody consistent with U.S. constitutional and international human rights standards.[68] The revised DOJ policy and the so-called "McCain Amendment" will be considered further in Section IV.C, after an exploration of a range of legal and moral arguments against torture. Treaty provisions, courts, writers and advocates reject the practice of torture. But international law and community activism have had little impact on the reality of torture on the ground. The monumental task of reaffirming the human rights of all those implicated in the war on terror remains.

IV. A RENEWED CALL FOR HUMANE TREATMENT IN THE WAR ON TERROR

In reasserting and strengthening the international commitment to humane treatment and protection against torture for all detainees in the war on terror, two powerful arguments emerge, both woven from strands of humanity as well as enlightened self-interest. The first is rooted in respect for the inherent dignity of all human beings, including terrorists, and embraces the very real possibility that suspected terrorists include individuals with no involvement in acts of violence whatsoever.[69] The second argument recognizes that human rights protections for

63. *See* Bybee, *supra* note 1, at 3.
64. *See* CAT, *supra* note 18, at art. 1(1).
65. Bybee, *supra* note 1, at 36.
66. *See* Bybee *supra* note 1, at Pt. II (A), 20-23.
67. *See* CAT, *supra* note 18, at art. 2(2).
68. Public Law 109-163, § 1403, *supra* n. 10.
69. According to defense counsel representing Guantanamo Bay detainees, Defense Department

suspected terrorists will help restore faith in the rule of law in all situations, including those of conflict, terror and insecurity. Fidelity in practice to the rule of law on the part of the most powerful countries will help demonstrate the integrity and moral content of constitutional democracy, while helping to ensure that reciprocal protections are accorded prisoners of war and civilian detainees of all nationalities throughout the world.

From this perspective, we must now give greater substance and definition to the norms of humane treatment for detainees. Despite the reality of abuse, the practice of torture remains condemned in law as well as popular culture. What follows then is an exploration and cataloging of international treaty provisions, social commentary and human rights advocacy demanding humane treatment for detainees in the war on terror.

A. Protections Against Torture Established in International Human Rights and Humanitarian Law

The five principal international instruments that prohibit torture and inhuman treatment in all circumstances are the Convention Against Torture (the CAT),[70] the International Convention on Civil and Political Rights,[71] the Universal Declaration of Human Rights,[72] the Geneva Conventions of 1949[73] and the Rome Statute of the International Criminal Court (ICC).[74] As explored in section III B (i), Article 1 of the CAT defines torture as the infliction of physical or psychological suffering on an individual, often for purposes of extracting a confession, and Article 2 prohibits such treatment in absolute terms.[75] The 1966 Civil and Political Covenant, ratified by the United States in 1994, reinforces the CAT's prohibitions against torture and inhuman treatment, as basic and non-derogable human rights linked to other civil rights such as the rights to life, physical security and freedom of expression.[76] The Universal Declaration unanimously approved by the U.N. General Assembly in 1948[77] prohibits torture and recognizes the fundamental right of individuals to humane treatment among a broad range of both civil/political and economic/social rights including the provision of social security.[78] The Geneva Conventions protect combatants and non-combatants alike in a variety of situations: wounded

documents indicate that less than half the detained population is alleged to have committed hostile acts against the United States, and only 8% are believed to be al Qaeda members. Warren Hoge, *Investigators for U.N. Urge U.S. to Close Guantanamo*, N.Y.TIMES, Feb. 17, 2006 at A6.

70. *See* CAT, *supra* note 18.

71. *See* ICCPR, *supra* note 54.

72. *See Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR].

73. *See generally* Geneva Convention IV, *supra* note 17.

74. *See* Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

75. *See* CAT, *supra* note 18 at arts. 1-2.

76. ICCPR, *supra* note 54, at art. 6 (1), 7, 9(1), 19 (2).

77. ROBERT B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 11(Little, Brown and Company 1995).

78. *See* UDHR, *supra* note 72, at arts. 2-27.

soldiers and sailors are protected by the First and Second Geneva Conventions,[79] prisoners of war protected by the Third,[80] and civilians are protected by the Fourth.[81] Finally, the Rome Statue of the ICC defines torture as a war crime and a crime against humanity.[82] Because of their applicability to international armed conflict situations, Geneva Convention protections for various types of detainees are worthy of further analysis.

1. Geneva Convention Protections for POWs

The Third Geneva Convention has been a subject of great controversy in light of the uncertain status of so-called "unlawful," "enemy" or "irregular combatants," including suspected terrorists. This treaty is regarded to grant privileged status to prisoners of war who are accorded special rights relating to interrogation, correspondence and access to the International Committee of the Red Cross [ICRC].[83] Most importantly, the Third Geneva Convention requires the humane treatment of prisoners of war [POWs].[84] Nevertheless, the treaty is perhaps more notable for the rights it accords the detaining state than those it accords prisoners, particularly the state's privilege to detain POWs without charge up until the cessation of hostilities.[85] Such prolonged imprisonment in peacetime would be regarded as arbitrary and unlawful imprisonment under both international human rights law and the U.S. Constitution.[86]

The United States Department of Justice and Attorney General Alberto Gonzales have taken the position that the Third Geneva Convention does not apply to Taliban or al Qaeda members, because they do not represent the national army of a state, wear uniforms or identifying insignia, or submit to the laws of war.[87] Written in his former capacity as White House Counsel, Gonzales' January 2002 memorandum to the President specifically referenced the Third Geneva Convention provisions defining the scope of POW status.[88] What is perplexing

79. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31[hereinafter Geneva Convention I]; Geneva Convention Relative for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II].

80. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 13, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

81. *See* Geneva Convention IV, *supra* note 17.

82. Torture is defined as a crime against humanity when "committed as part of a widespread or systematic attack directed against any civilian population." *See* Rome Statute, *supra* note 70, at art. 7(1)(f). Torture is also defined as a war crime and a grave breach of the Geneva Conventions. S*ee id.* at art. 8(2)(a)(ii).

83. *See id.* at arts. 9, 17 (POWs under questioning may only be required to provide name, rank, date of birth and serial number), 71 (correspondence), 125 (ICRC access to POWs).

84. *Id.* at art. 13 ("[p]risoners of war must at all times be humanely treated.")

85. *Id.* at arts. 21 (detaining power may intern POWs), 118 (POWs "shall be released and repatriated without delay at the cessation of hostilities.").

86. *See* U.S. CONST. amend. VI. *See also* ICCPR, *supra* note 54, at art. 9 (no deprivation of liberty without notice of charges and guarantee of "trial within a reasonable time or...release").

87. Gonzales, *supra* note 1, at 2.

88. *See id. See also* Geneva Convention III, *supra* note 80, at art. 4 (POWs include "[m]embers of

about Gonzales' position is its relevance to the treatment of Guantanamo Bay detainees, who have not been judicially determined to be members of either organization, let alone irregular combatants ineligible for POW status, despite the Bush administration's executive determination that they are "unlawful enemy combatants."[89]

Under the Third Geneva Convention, individuals apprehended in the theatre of war are presumed to be POWs, until a contrary determination by a competent judicial tribunal.[90] Indeed, the United States began organizing military hearings to review the "unlawful combatant" designation of Guantanamo Bay detainees in July 2004 subsequent to the Supreme Court's ruling in *Rasul* that they were entitled to challenge their status in court.[91] However, while 558 such status review panels had been convened as of May 2005,[92] U.S. District Judge Joyce Hens Green determined in January 2005 that these tribunals violate both U.S. and international law,[93] because they do not accord Constitutional due process, nor are they "competent tribunals" as required by the Third Geneva Convention.[94]

Military law scholars and international jurists continue to debate the issue of POW status and Third Geneva Convention protections for detainees in the war on terror. The extensive scholarship of Jordan Paust of the Houston Law Center is particularly illuminating in this regard.[95] But even assuming that certain terror

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armed forces . . . [and] [m]embers of other militias . . . including those of organized resistance movements," who are subject to command responsibility, have "a fixed distinctive sign," carry arms openly and subject themselves to "the laws and customs of war.").

89. *See Hamdi,* 542 U.S. 589; *Padilla,* 352 F.3d at 713; *Rasul,* 542 U.S. at 555. *But see* Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005) (certiorari petition pending). Gonzales argued in his 2002 memorandum that the non-application of the Third Geneva Convention would "substantially reduce the threat of domestic criminal prosecution under the [U.S.] War Crimes Act." *See* Gonzales Memo, *supra* note 1, at 2. This is a perplexing argument as well, given that 18 U.S.C. § 2441 defines "war crimes" to include both grave breaches of any of the four 1949 Geneva Conventions and all violations of common Article 3, which is found in all four Geneva Conventions, and prohibits all "outrages upon personal dignity." 18 U.S.C. § 2441(c)(1)-(3) (2005); Gonzales Memo, *supra* note 1 at 2; Geneva Convention IV, *supra* note 17, at art. 3(c). *See also Khalid,* 355 F.Supp.2d at 326 (where despite denying habeas relief to the Guantanamo Bay detainees, Judge Leon recognized the application of the War Crimes Act to all four Geneva Conventions.) The non-applicability of the Third Geneva Convention would not bar, and indeed would trigger, the application of the Fourth Geneva Convention.

90. Geneva Convention III, *supra* note 80, at art. 5 ("persons, having committed a belligerent act and [falling] into the hands of the enemy . . . enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.").

91. *See Rasul,* 542 U.S. 466 at 563. *See also* Neil A. Lewis, *U.S. is Readying Review for Detainees in Cuba,* N.Y. TIMES, July 17, 2004, at A10.

92. *See* Paisley Dodds, *Records Reveal Guantanamo Stories,* THE ASSOCIATED PRESS, May 23, 2005, *available at* http://abcnews.go.com/International/wireStory?id=781536.

93. *See In re* Guantanamo Detainee Cases, 355 F.Supp.2d at 481 ("CSRT [Combatant Status Review Tribunal] procedures are unconstitutional for failing to comport with the requirements of due process. Additionally, the Court holds that Taliban fighters who have not specifically been determined to be excluded from prisoner of war status . . . have also stated valid claims under the Third Geneva Convention.").

94. *See* Geneva Convention III, *supra* note 80, at art. 5. *But see Hamdan* 415 F.3d at 42-43 (certiorari petition granted, *Hamdan v. Rumsfeld,* 126 S.Ct. 622 (Mem.) Nov. 7, 2005).

95. *See generally,* Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons*

detainees do not merit POW status, they are then relegated to civilian status, and the occupying power loses the privilege to detain them without charge pending cessation of hostilities.[96] It is this aspect of the U.S. position as to the non-POW status of terror detainees that is not only perplexing but seemingly against the U.S. goal of long-term detention.

2. Geneva Convention Protections for Civilians

If the United States deems that individuals apprehended in Iraq and Afghanistan are irregular combatants, and for that reason not entitled to POW status under the Third Geneva Convention, some other legal justification must be provided for their encampment. As civilians they then fall under the protective ambit of the Fourth Geneva Convention,[97] which regulates the treatment of civilians who find themselves under occupation, in this case by the United States.

The most rational basis for the detention of non-POWs by an occupying power would appear to be that they are civilians suspected of involvement in criminal conduct, including acts of terrorism. But then by the terms of the Fourth Geneva Convention, they must be charged with war crimes or released.[98] Indeed this view is fully consistent with Justice Scalia's dissent in *Hamdi*, in which he concluded that "[a]bsent suspension of the writ [of habeas corpus], a citizen held where the courts are open is entitled either to criminal trial or to a judicial decree requiring his release."[99] The ongoing detention without criminal charges of 540 terror suspects at Guantanamo Bay is hence prohibited by the Fourth Geneva Convention, as is the U.S. detention without charge and without POW status of individuals in Iraqi and Afghan jails.[100]

Detained Without Trial, 44 HARV. INT'L L.J. 503 (2003); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335 (2004). Professor Paust cautions against withholding POW status from members of the armed forces of a party to a conflict on the basis that they are "unlawful combatants," given that such action may have negative repercussions for U.S. military personnel serving abroad. *See id.* at 1352. Colonel Kenneth W. Watkin, of the Office of the Canadian Judge Advocate General, takes a similar view. *See* Colonel Kenneth W. Watkin, *Combatants, Unprivileged Belligerents and Conflicts in the 21st Century*, 1 ISR. DEF. FORCES L. REV. 69, 83-84 (2003). ("It has been noted that the decision to exclude a group from attaining combatant status should not be taken lightly . . . . There is also a very real danger it could result in a reciprocal denial of POW status to captured personnel.")

96. *See* Geneva Convention III, *supra* note 80, at art. 21.

97. *See* Geneva Convention IV, *supra* note 17.

98. *See id.* at arts. 79 (general prohibition against internment of civilian persons), 42 (internment only if "security of the Detaining Power makes it absolutely necessary"), 68 (duration of internment for commission of offence must be "proportionate to the offense committed"), 78 (internment only "for imperative reasons of security").

99. *See Hamdi*, 542 U.S. at 572, 124 S. Ct at 2670 (Padilla, who disputes his status as an enemy combatant, should be charged with a war crime or released), distinguishing *Ex parte Quirin*, 317 U.S. 1, 45-46 (1942) (it was undisputed that the petitioners in *Quirin* landed in the U.S. as part of the German war effort).

100. *See* Geneva Convention IV, *supra* note 16, at arts. 79, 68. Moreover, violations of the Fourth Geneva Convention may lead to criminal prosecution under the War Crimes Act, just as Third Geneva Convention violations would. *See also* Gonzales, *supra* note 85; 18 U.S.C. § 2441(c)(1) (2003).

What is not only perplexing but also insidious about the foregone conclusion by the Bush administration that Guantanamo Bay detainees are not POWs is that it encourages another fallacious conclusion. The official U.S. position, boiled down, seems to be that such detainees have no rights under international law, because effectively they lack any legal status whatsoever.[101]

The legally unbounded nature of the detention of terror suspects in Guantanamo Bay by the United States has been denounced by a wide range of human rights organizations and jurists, perhaps most eloquently by a member of the U.K. House of Lords, Johan Steyn, when he delivered the twenty-seventh annual Mann Lecture on November 25, 2003. "The most powerful democracy," Lord Steyn warned, "is detaining hundreds of suspected foot soldiers of the Taliban in a legal black hole at the U.S. naval base at Guantanamo Bay, where they await trial on capital charges by military tribunals."[102] The U.S.-based Human Rights Watch as well as the International Committee of the Red Cross have similarly spoken out against the United States for purporting to place detainees "beyond the law" in Guantanamo.[103]

The antidote to this specter of legal limbo is the application of the Fourth Geneva Convention, which picks up right where the Third Geneva Convention leaves off.[104] In addition to the prohibition against detaining civilians without charge, civilians have a number of additional enumerated rights under this Convention.

Civilians suspected of crimes may not be forcibly transferred from a territory currently or formerly occupied by the United States. Transfers of detainees from Iraq and Afghanistan to Guantanamo Bay, Cuba by the United States, a contracting party to all four Geneva Conventions, is potentially a grave breach of Article 147 of Geneva Convention IV, which prohibits unlawful deportations or transfers of civilians from occupied territory.[105] Article 147 also prohibits renditions to third countries of terror suspects from Iraq and Afghanistan.[106]

Most fundamentally, the Fourth Geneva Convention prohibits torture and all forms of brutality against civilians, whether detained or not, and regardless of

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101. Professor Paust rejects the rightless status of any persons under humanitarian law. "Under the Geneva Conventions, there is no gap in the reach of at least some forms of protection . . . . Such rights include the right to be 'treated humanely' [and] freedom from 'cruel treatment and torture' . . . ." *See* Paust, *supra* note 91, at 1351 (citing Common Article 3 of all four Geneva Conventions).

102. The Mann lecture is given every year under the auspices of the British Institute of International and Comparative Law, in memory of the late British jurist F.A. Mann. *See* Johan Steyn, *A Monstrous Failure of Justice: Guantanamo*, INT'L HERALD TRIB., Nov. 27, 2003.

103. *United States: Guantanamo, Two Years On*, (Human Rights Watch, New York, N.Y.), Jan. 9, 2004, at 3, *available at* http://hrw.org/english/docs/2004/01/09/usdom6917.htm. *See also supra* note 21.

104. *See* Watkin, *supra* note 91, at 84 (recognizing that irregular combatants who are not accorded POW status would be protected persons under the Fourth Geneva Convention).

105. Geneva Convention IV, *supra* note 17, at art. 147. *See also id.* at art. 49 ("individual or mass forcible transfers . . . from occupied territory to the territory of the Occupying Power or to that of any other country . . . are prohibited, regardless of their motive").

106. *Id.* at art. 147

whether the basis for their detention is legal. Article 32 of the Fourth Geneva Convention is quite explicit about what conduct toward civilians is prohibited under all circumstances. Signatories may not "cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments, but also to any other measures of brutality whether applied by civilian or military agents."[107]

In 2003 the International Committee of the Red Cross criticized the U.S. government for its treatment of detainees in the Abu Ghraib prison in Iraq,[108] Guantanamo Bay, Cuba[109] and Bagram detention center in Afghanistan.[110] In February of 2006, a panel of five independent experts appointed by the United Nations Commission on Human Rights concluded that torture of detainees was occurring in Guantanamo Bay,[111] at which time U.N. Secretary General Kofi Annan called for the closure of the U.S. detention center.[112] Moreover, the U.S. military confirms that of 98 deaths that occurred in U.S. custody in Iraq and Afghanistan since 2002, 34 are suspected or confirmed homicides.[113] While abusive conditions in Abu Ghraib, Bagram and Guantanamo violate the Article 32 prohibition against physical suffering, the documented deaths of Habibullah and Dilawar and others also violate the Article 32 prohibition against extermination.

In conclusion, the Geneva Conventions of 1949 prohibit the arbitrary detention, arbitrary transfer, torture, abuse and murder of all persons – whether wounded combatants, irregular combatants, civilians, suspected terrorists or war criminals – who find themselves in the hands of a belligerent or occupying power. Regardless of status and place of detention, the Third and Fourth Geneva Conventions forbid the inhuman treatment of POW and civilian detainees alike.[114] The humanitarian protections enshrined in the Geneva Conventions are reflected, reinforced and refined by the protections against torture and abuse set forth in the CAT, the Civil and Political Covenant, the Universal Declaration and the Rome Statute of the ICC. Moreover, these treaty-based human rights norms resonate with popular and scholarly demands for humane treatment of all persons.

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107. *Id.* at art. 32.

108. Douglas Jehl & David Rohde, *Afghan Deaths Linked to Unit at Iraq Prison*, N.Y. TIMES, May 24, 2004, at A1 (referencing "I.C.R.C. report which said that what Red Cross officials witnessed during visits to the prison in October [2003] 'included deliberate physical violence,' as well as verbal abuse, forced nudity and prolonged handcuffing in uncomfortable positions").

109. *See* Human Rights Watch, *supra* note 103.

110. *See* Golden, *supra* note 15.

111. *See* Farley, *supra* n. 22.

112. *See* Edith M. Lederer, *Annan Says U.S. Should Close GITMO Prison*, THE ASSOCIATED PRESS, Feb. 16, 2006.

113. Douglas Jehl & Eric Schmitt, *U.S. Military says 26 Inmate Deaths May be Homicide*, N.Y. TIMES, March 16, 2005, at A1. *See also* William Fisher, *Death in U.S. Custody*, TRUTHOUT, Feb. 26, 2006, available at http://www.truthout.org/docs_2006/022606Y.shtml (of 34 deaths that the military suspects to be homicides, only 12 have resulted in punishment).

114. *See* Rome Statute, *supra* note 74, at art. 13. *See also* Geneva Convention IV, *supra* note 17, at art. 32.

B. Repudiating Torture in Human Terms

While torture must be understood in legal terms, such technical analysis should not occur in a vacuum. Legal definitions and analysis often distance us from the human reality of man's inhumanity to man. Torture, stated simply, is a painful assault on the body or psyche of a human being. The person who imposes the pain need not intend cruelty for the suffering experienced by the victim to be cruel indeed.

In seeking non-legalistic depictions of torture, the writing of Jonathan Schell and Wole Soyinka stand out. Schell, author of *The Fate of the Earth*,[115] writes that:

> [t]orture is wrong because it inflicts unspeakable pain upon the body of a fellow human being who is entirely at our mercy. The tortured person is bound and helpless . . . . The victim bears no arms, lacking even the use of the two arms he was born with. The inequality is total. To abuse or kill a person in such a circumstance is as radical a denial of common humanity as is possible.[116]

While Nigerian Nobel laureate in literature Wole Soyinka has not written extensively on the issue of torture, he has addressed slavery and other repressive institutions in great depth. Slavery, Soyinka writes, is about denial – a fundamental denial of the humanity of the enslaved.[117] While writing about two related institutions, slavery and apartheid, Soyinka might have been writing about torture as well. Although 20th century apartheid and pre-20th century slavery were *de jure* systems of racial discrimination and oppression, and torture often entails individual acts of inhumanity, there is an institutional aspect to torture as well. When torture occurs in the context of counter-insurgency policy or the war on terror, at the hands of a government that has ratified the Convention Against Torture, there is a systemic denial of both the practice of torture and the humanity and legal personality of the person who is suffering the abuse.

Given the ongoing reality of prisoner abuse, we need to evaluate honestly the impact of civil society's condemnation of the torture and inhuman treatment of detainees in the war on terror. There has been some notable public outcry against the United States' arbitrary and brutal treatment of suspected terrorists detained in the United States, Cuba, Iraq and Afghanistan. In response to the mounting evidence of abuses and deaths of detainees in U.S. custody in Iraq and Afghanistan since 2002,[118] human rights groups have called for official investigations into detention operations [119] Official U.S. policy has already changed regarding the

115. JONATHAN SCHELL, THE FATE OF THE EARTH (Alfred A. Knopf 1982).

116. Jonathan Schell, *What Is Wrong With Torture*, THE NATION, Feb. 7, 2005.

117. Wole Soyinka, THE BURDEN OF MEMORY, THE MUSE OF FORGIVENESS 69-71 (Oxford University Press 1999). "Now what is a denial of humanity? . . . . Do we wish to dispute that apartheid South Africa did correspond overwhelmingly to a denial of humanity? The condition of 'slave' is a denial of the freedom of action, of the freedom of choice." *Id.* at 70.

118. Jehl & Schmitt, *supra* note 113. *See also* Fisher, *supra* note 113.

119. Jehl & Schmitt. *supra* note 113..

definition of torture,[120] but neither the administration nor the courts have yet held individual U.S. officials to account. Whether the widespread practice of arbitrary treatment, brutality and torture will stop remains to be seen.

C. Human Rights Advocacy and Evolving U.S. Policy on the Treatment of Detainees in the War on Terror

In a December 30, 2004 memorandum that responded to public outcry over the torture of Iraqi detainees by U.S. military police and intelligence officers in Abu Ghraib prison, the DOJ retracted two elements of its earlier August 2002 torture memo.[121] As of December 2004, DOJ policy now concedes and clarifies that torture is not limited to the "severe physical pain" associated with organ failure or death. Moreover, the revised policy no longer requires proof of the interrogator's specific intent to cause the detainee to experience harm, suffering or pain.[122] Finally, with regard to the DOJ-asserted presidential authority to authorize torture in certain circumstances, the recent policy directive only states that the Justice Department need not address this issue, because the President has expressed no present intent to do so.[123]

The December 2004 DOJ memorandum was belated and fell far short of an acknowledgment, rejection of, or apology for the brutal treatment of individuals apprehended and detained in the war on terror. The current policy also leaves a dangerous loophole for presidential authorization of torture.

In part to address such gaps, in 2005 Senator John McCain of Arizona introduced legislation prohibiting torture and inhumane treatment of all detainees in U.S custody throughout the world.[124] With his support and negotiating skills, this amendment was enacted into law and signed by President Bush. Nevertheless, in a signing statement promulgated on December 30, 2005, the President reasserted a zone of executive discretion, clarifying that "[t]he executive branch shall construe . . . [the detainee provisions] in a manner consistent with the constitutional authority of the President to supervise the unitary executive and as Commander in Chief . . . which will assist in . . . protecting the American people from further terrorist attacks."[125]

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120. *Compare* Bybee, *supra* note 1, at pt. IIB, 20-23, *with* Levin memorandum, *supra* note 122.

121. *See id.*

122. Neil A. Lewis, *U.S. Spells Out New Definition Curbing Torture,* N.Y. TIMES, Jan.1, 2005, at A1; *see also supra* notes 60-64 and accompanying text.

123. While the December 30, 2004 memorandum expresses that "[t]orture is abhorrent both to American law and values and to international norms," it does not explicitly deny the President's authority as Commander-in-Chief to broaden the scope of interrogations in the war on terror if deemed necessary. Nevertheless, the memo does state that "such authority would be inconsistent with the president's unequivocal directive that United States personnel not engage in torture." Lewis, *supra* note 116; Memorandum from Daniel Levin, Acting Assistant Attorney General, to James B. Comey, Deputy Attorney General, *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A* (Dec. 30, 2004) at 1-2, *available at* http://www.usdoj.gov/olc/dagmemo.pdf; *see also supra* notes 65-67 and accompanying text.

124. Public Law 109-163, *supra* n. 10, § 1403 (defining humane treatment in terms of the U.S. Constitution and the Convention Against Torture).

125. Statement of President Bush on the signing of H.R. 2863 (Dec. 30, 2005) *available at*

Coupled with the recent Supreme Court decisions in *Hamdi* and *Rasul*,[126] the McCain Amendment and the Justice Department's recanting of its unprincipled narrowing of the norm against torture appear to represent positive steps towards the reestablishment of the rule of law in the U.S.-led war on terror. Yet despite recent changes in official U.S. policy on torture, throughout 2005 and early 2006 there have been increased reports of widespread torture and abuse in U.S. detention facilities worldwide without any accountability at the highest levels of government.[127]

In April of 2005, Human Rights Watch spoke out most vehemently against torture and homicide by U.S. officials in U.S. facilities overseas:

It has now been one year since the appearance of the first pictures of U.S. soldiers humiliating and torturing detainees at Abu Ghraib prison in Iraq . . . . In the intervening months, it has become clear that torture and abuse have taken place not solely at Abu Ghraib but rather in dozens of U.S. detention facilities worldwide, that in many cases the abuse resulted in death or severe trauma, and that a good number of the victims were civilians with no connection to al-Qaeda or terrorism. There is also evidence of abuse at U.S.-controlled "secret locations" abroad and of U.S. authorities sending suspects to third-country dungeons around the world where torture was likely to occur.[128]

Human Rights Watch concludes that Secretary Rumsfeld in particular "approved interrogation methods that violated the Geneva Conventions and the Convention Against Torture.[129]

In May of 2005, the London-based and Washington-based offices of Amnesty International (AI) issued simultaneous press releases launching AI's annual report for 2005. Irene Kahn, AI's Secretary General, condemned the U.S. detention center in Guantanamo Bay as "the gulag of our times." William Schultz, Executive Director of AI USA called for an independent investigation:

It's far past time for President Bush to prove that he is not covering up the misdeed of senior officials and political cronies who designed and authorized these nefarious interrogation policies. So Congress must appoint a truly impartial and independent commission to investigate the masterminds of the atrocious human

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http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html.

126. *See Hamdi*, 542 U.S. at 601; *see also Rasul* 542 U.S. at 563.

127. An investigation on the conduct of U.S. interrogations in Iraq and Afghanistan was concluded in March 2005 by Naval Inspector General and Vice Admiral Albert T. Church. The Church report criticized senior U.S. officials for failing to articulate clear interrogation guidelines, but concluded that U.S. policy did not approve of detainee abuse and that Pentagon and other senior officials were not directly responsible for such abuses. *See* Eric Schmitt, *New Interrogation Rules Set for Detainees in Iraq*, N.Y. TIMES, Mar. 10, 2005, at A1. *See also* Taguba report, *supra* note 11.

More recently, when U.N. Secretary General Kofi Annan and five U.N.-appointed experts concluded that the U.S. detention facility in Guantanamo Bay should be closed in light of ongoing torture of detainees, White House spokesman Scott McClellan asserted that the U.S. military treated detainees humanely. He then cautioned "[t]hese are dangerous terrorist that we are talking about who are there." Hoge, *supra* note 69.

128. Human Rights Watch, *supra* note 22, at 1.

129. *Id.* at 32.

rights violations at Abu Ghraib and other detention centers, and President Bush should use the power of his office to press Congress to do so.[130]

Also writing in 2005, international law scholar Jordan Paust concludes with Human Rights Watch and Amnesty International that Secretary of Defense Rumsfeld approved illegal interrogation methods in Guantanamo Bay, which subsequently helped dictate interrogation practices in Iraq. Professor Paust places Rumsfeld's misconduct in the context of a broader plan to circumvent international law, and specifically condemns President Bush for refusing to accord the protections of humanitarian law to individuals suspected of involvement in terrorism:

I know of no other instance in the long history of the United States of a plan approved by lawyers and at the highest levels of our government systematically to deny human beings protections under the laws of war. I know of no other denial by a President of the United States of the fact that the laws of war apply to an international armed conflict during which U.S. armed forces engage an enemy in battle. I know of no other authorization of a President to deny treatment required under the Geneva Conventions. I know of no other instance in our history when a Secretary of Defense... approved such denials of protection or the use of interrogation tactics that were either patently violative of the laws of war or could clearly constitute violations in various circumstances.[131]

Spurred on by the outrage of leading human rights organizations and scholars, will the American people demand that our government stop the torture and inhuman treatment of detainees in the war on terror? To end such practices, our moral and legal compasses must first call us to action.

V. CONCLUSION

As scholars, advocates, jurists and citizens, we have failed so far to protect suspected terrorists from abuses by U.S. officials. Our country is shamed. In our struggle to restore to ourselves and to our society some measure of legality and dignity, we must begin by affirming the humanity and dignity of those implicated in terrorist attacks as well as those targeted by terrorist violence. We must reject the claims that international treaties cease to apply in the context of terrorism. Far from becoming outmoded, "obsolete" or "quaint,"[132] the 1949 Geneva Conventions, the Convention Against Torture, human rights principles and Constitutional guarantees of due process have only grown in relevance and power since, as a nation, we first confronted large-scale terrorist violence on our own soil.

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130. Alan Cowell, *U.S. 'Thumbs Its Nose' at Rights, Amnesty Says*, N.Y. TIMES, May 26, 2005, at A10.

131. *See* Paust, *supra* note 12 at 862-63; *See also id.* at 847 ("Major General Miller brought the Rumsfeld April 16, 2003 list of tactics to Iraq and gave them to the Commander of the Joint Task Force-7, Lieutenant General Ricardo Sanchez").

132. Gonzales, *supra* note 1, at 1 (alleging that particular provisions of the Third Geneva Convention do not apply to the war on terror).

If we abandon the rule of law in the "war on terror," we risk becoming what we fear.[133] Ultimately it is our responsibility as moral actors to clarify for our government the rights of all counter-terror detainees, and to demand that these rights are respected. Torture imposes severe suffering on the body or psyche of the victim, but torture need not entail a specific intent to cause such suffering.[134] Torture is purposeful – it seeks to compel a confession, to punish or to coerce.[135] Torture is never justified, even and especially in time of war and insecurity, when it is most likely to occur, and even when authorized by the President.[136] Like torture, inhuman treatment is prohibited absolutely, and differs only from torture in that it may be gratuitous – unconcerned with the gathering of intelligence or compelling behavior.[137] Finally, terror suspects are *never* beyond the pale of the law: they are protected from inhuman treatment either as POWs under Article 13 of the Third Geneva Convention,[138] or as civilians under Article 32 of the Fourth Geneva Convention, [139] and as human beings in time of both war and peace under Articles 7 and 4 of the International Covenant on Civil and Political Rights.[140]

The Quaker tradition of non-violent social activism requires citizens to "speak truth to power,"[141] and to demand government fidelity to the rule of law. Today, our government continues to use the threat of more terrorism to justify the unfair and sometimes horrific treatment of terror detainees. We must expose and reject the practice of torture, brutality and arbitrary detention in our name. Only by speaking law to terror, [142] and truth to power, will we begin to restore the legal and moral foundation of our society and thus to reclaim our democratic traditions.

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133. Writing about the abuses of prisoners in Guantanamo, Hendrik Hertzberg writes, "[w]e have to be respectful of Muslim sensibilities and Muslim beliefs, and the surest way to do that is to be respectful of our own. Otherwise . . . [w]e'll lose sight of what we're fighting for, and little by little, become the mirror of what we're fighting against." Hendrick Hertzberg, *Big News Week*, THE NEW YORKER, May 30, 2005, at 33.

134. CAT, *supra* note 18, at art. 1(1).

135. *Id.*

136. *Id.* at art. 2(2).

137. *Id.* at arts. 1(1),16; ICCPR, *supra* note 54, at arts. 4, 7.

138. *See* Geneva Convention III, *supra* note 80.

139. *See* Geneva Convention IV, *supra* note 17, at 32.

140. *See* ICCPR, *supra* note 54.

141. American Friends Service Committee, *Speak Truth to Power*, PEACEWORK MAG., Dec., 2001-Jan. 2002, (This article is based on a document titled *Speak Truth to Power: A Quaker Search for an Alternative to Violence*, which was prepared in 1955 by the American Friends Service Committee responding to the Cold war and the nuclear arms race. It explores the Quaker philosophy of non-violence, and reminds Quakers of their original 18th century call to bear witness before their leaders to the terrible consequences of war.),
available at http://www.afsc.org/pwork/0112/011204.htm.

142. *See generally,* Joan Fitzpatrick, *Speaking Law to Power: The War against Terrorism and Human Rights*, 14 EUR. J. HUM. RTS. 241 (2003) (calling for the application of international human rights law in the war on terror), *available at* http://www.ejil.org/journal/Vol14/No2/art3.pdf.