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THE MASQUERADE OF ABU GHRAIB:  
STATE CRIME, TORTURE, AND  
INTERNATIONAL LAW

by

Dawn Rothe

A Dissertation  
Submitted to the  
Faculty of The Graduate College  
in partial fulfillment of the  
requirements for the  
Degree of Doctor of Philosophy  
Department of Sociology  
Dr. Ronald C. Kramer, Advisor

Western Michigan University  
Kalamazoo, Michigan  
July 2006

THE MASQUERADE OF ABU GHRAIB:  
STATE CRIME, TORTURE, AND  
INTERNATIONAL LAW

Dawn Rothe, Ph.D.

Western Michigan University, 2006

On April 28, 2004, pictures of abuse and torture of Iraqi detainees at Abu Ghraib prison by U.S. military personnel shocked many Americans. In the wake of the images, it became clear that several military personnel were involved in the acts of torture and abuse. This dissertation explores the interconnections of larger structural factors, state policies, and individual actors in an attempt to understand how and why torture and abuse occurred at Abu Ghraib. It builds upon an integrated theoretical model of state and corporate crime. The dissertation revises this model so that it can better address the complexities of state crime within the international arena. The findings suggest that despite unequivocal individual responsibility, this was not simply a case of a few individual acts committed by rogue soldiers. Rather, a thorough investigation and criminological analysis of the reasons and forces behind the torture at Abu Ghraib suggest that the Executive Branch, the Pentagon, CIA, and Military Commanders bear culpability for the way in which their policies and demands for intelligence altered the traditional handling of prisoners.

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## CHAPTER I

### INTRODUCTION

*What is past is not dead, it is not even past.  
We cut ourselves off from it, we pretend to be strangers.*

— Christa Wolf

On April 28, 2004, pictures of abuse and torture of Iraqi detainees at Abu Ghraib prison by U.S. military personnel shocked many Americans. The photographs, first released by CBS network and *The New Yorker*, showed a hooded man—naked on a box, arms spread, with wires dangling from his fingers; pyramids of naked bodies; a line of naked men posed as if masturbating; and a man on a dog leash. These images instantaneously spread around the world as the collective representation of Abu Ghraib. U.S. citizens were confronted with the reality of their government's involvement in the use of state sanctioned torture. While President Bush declared it "does not represent the America I know," the nation was faced with the stark contradiction between its stated principles and its practices. However, the dissonance created by these images was quickly reduced as the blame for the torture was placed on a "few bad apples." And it soon became clear that many Americans simply did not "want to see or hear the obvious. Frightened and searching for personal safety, the public chose to avert its eyes" (Harbury 2005: 1). Criminologists, however, should not avert their eyes from evidence of serious criminality. The torture that took place

at Abu Ghraib prison was a flagrant violation of international and domestic law and a state crime. The purpose of this dissertation is to describe and explain this crime.

To understand the illegal events that occurred at Abu Ghraib, we have to place them in the context of the Bush administration's general "war on terror" and the invasion and occupation of Iraq. The images from Abu Ghraib provide "a window into the larger picture" of U.S. policies since the current war on terror began (Brody 2004: 1). The state crimes committed at Abu Ghraib cannot be explained without placing them in this broader historical and structural framework.<sup>1</sup> Analyzing this historical background also demonstrates that the events in question were not just the unfortunate actions of a "sick few" but also a set of systemic practices endorsed by the chain of command at the highest levels in clear violation of international law.

I begin by providing a literature review that examines the central issues surrounding a criminological case study of state crime. This includes a review of theories of the state and the contributions of state and state-corporate crime scholars. Chapter II presents the theoretical frame that guides my analysis. Included in this section is a review of an integrated model addressing state crime along with contextualized proposed revisions to the original framework. I conclude Chapter II with a section discussing the methodological issues involved in this analysis.

---

<sup>1</sup> While the use of torture and violations of international law by the U.S. in the war on terror needs to be systematically and theoretically analyzed, it should be noted that far greater uses of torture and abuse happens worldwide on a systematic basis that are ignored (e.g., Sudan, Darfur, China, North Korea, Russia, Israel, Democratic of Congo, Egypt, Jordan, etc.).

Chapter III starts with a brief introduction to international law. This is followed by a more extensive look at the international laws relevant to the cases of Abu Ghraib torture. Specific legal issues concerning war crimes, torture, the status of detainees during times of conflict, and federal laws and military codes applicable to this case study will be considered.

Chapter IV describes the historical background leading up to the events at Abu Ghraib. I begin by charting the rise of the Neo-conservative agenda in American politics and then go on to discuss the invasion of Afghanistan, the installation of detention camps at Guantanamo, and the onset of the war on Iraq as a framework for understanding Abu Ghraib.

Chapter V is dedicated solely to the events at Abu Ghraib. I begin by providing a description of the events that occurred leading up to the cases of torture and/or cruel and inhumane punishment. Then I examine the subsequent charges and punitive measures taken (or not taken) thus far against those involved.

Chapter VI begins the theoretical analysis. Specifically, the analysis is organized according to the catalysts of motivation and opportunity. The chapter is divided between general and specific motivations and opportunity. Chapter VII continues the theoretical analysis focusing on the catalysts of constraints followed by controls at all four. I conclude each section with a brief summary of the analysis.

Chapter VIII offers some potential policies to address these types of state crimes at both the international and domestic levels. I then review the limitations of

my research followed by suggested future research of the torture and abuses at Abu Ghraib.

### Literature Review

The growing inter-relationships between the state, international organizations, transnational corporations, the mass media, and globalization generates a situation where the interplay and reinforcement of these processes in multiple institutions create profound implications for defining states. Moreover, as the state has been reified to the point of it being a seemingly “natural” institution, social scientists in general, and criminologists more specifically often analyze the state without ever providing a clear definition of the concept. Likewise, social scientists attempt to create a theory of state, describing its functions and or roles, while simultaneously failing to provide a working definition of the apparatus they are discussing. Therefore, I wish to fill this gap and to allow the implicit to become explicit. I begin by briefly exploring the complexities of state theory which have led to multiple and often contradictory models. This is followed by a brief examination of the political construct of the term, state, by the U.S., international law, and the United Nations. I conclude by offering my own working definition of the state, which is subsequently used in framing this analysis.

### *State Theories*

Attempts to develop a theory of the state have occurred for centuries. Philosophers such as Aristotle, Hobbes, Locke, and Rousseau all attempted to explore the political components of society and civil governance. Classical theorists, such as Marx (1906), Weber (1947), and Durkheim (1933) also developed theories of the state and its function. By mid 20<sup>th</sup> century, contemporary theorists continued to explore theories of states. These works come from several scholars including Miliband (1970), Poulantzas (1969, 1976), Habermas (1975), O'Connor (1973), and Gramsci (1971). The modernity and dependency schools also explored state theory in terms of globalization (see Smelser 1964; So 1990; Santos 1971; and Wallerstein 1986).

Nonetheless, during the 1980's state theory waned considerably so much so that the last decade was "notable for the impoverishment of state theory" (Barrow 2005: 1). There were negligible theoretical advances and many radical scholars, including critical criminologists, drifted away from state models. This was in part due to the complexities of the topic itself and a stalemate between "proponents of various theories."

There was also a broad abandonment of grand theory and grand scale meta-narratives. The move from a Neomarxist model to post structuralist and post modern theory shifted analysis from the macro to the micro forms of power and to "technologies of power" (Foucault 1972; Henri-Levi 1977; and Mitchell 1991). As such, there could be no "grand theory of the state-political . . . or of the economy"

(Poulantzas 1978: 19). Instead, merely “general propositions can be made” concerning the state unless specific to one nation state. The recognition that a Meta theory of the state was unrealistic resulted in a shift in focus of the state in general to the capitalistic state in particular. “What is perfectly legitimate is a theory of a capitalist state . . . made possible by the separation of the space of the state and that of the economy” (20). This change also led to a neglect of state definitions once present in Classical models.

There was also an emerging trend towards theories of globalization and states. The new interest in globalization sparked a renewal of political economy models. These began to take on an *a priori* assumption that state interests based on the political economy were “considered eternal and self-evident” (Creveld 1999: 415). Capital accumulation is seen as directly dictating the rhythm of state activity and is articulated to and inserted into state global policy (Poulantza 1978; Wallerstein 1977, 1979, and 1986). Moreover, the concept of one grand economy, the global economy, took center stage and was reified. Simply stated, the development of a capitalistic world economy was seen as “self-perpetuating.”

At the same time, recognition of the state as a more complex political apparatus surfaced wherein the state was recognized as a peculiar political entity composed of an assemblage of impersonal and anonymous functions distinct from economic power (Poulantzas 1978: 54). The state “is a specific and highly complex phenomenon, and it can by no means be reduced to, or treated as a simple variant of, the capitalist state” (Poulantzas 1978: 24). This included recognition of the relative

separation of the political from the economic. Nonetheless, the political, as conceived, still failed to take into account agency or the forces of individuals' ideological, religious, and moral interests framed as state interests. As Seabrooke noted, the state was effectively a faceless rational actor.

The globalization literature tended to analyze the state as potentially irrelevant in international relations (Whyte 2003). State theories waned due to assumptions that the nation state, as a meaningful unit of analysis, in the global economy, was ending (Ohmae 1995). Griffen (1995) concurred with the deterministic view of globalization as inevitable as well as the growing diminution of the nation state. Simply stated, the notion of sovereignty erosion was becoming popular leading to a further decline in state theories that focus more broadly on state functions domestically and internationally (Krasner 1995). Models accepting this premise focused on the undermining of state sovereignty by the globalization of markets beyond the institutional boundaries of states. Moreover, as such, states were not only seen as declining in relevance, the actors within the political process were completely omitted. Furthermore, these assertions rested upon a highly idealized and reified account of globalization (Whyte 2003). State policies were viewed as inevitably market driven. As such, state theories focused on the dynamics of a global and capitalistic economy, most notably, U.S. centered. For example, Aglietta (1990) focused on Imperialism as the emerging theme of globalization. This inevitably led to a state analysis that was "incomplete" as it was "restricted to the structure and dynamics of wage relations in the U.S." (Aglietta 2000; Barrow 2005). On the other hand, other scholars (Domhoff

1998) noted that theories of imperialism could not be constructed on the basis of economics alone.

In general, political scientists examined international relations and foreign policy using two approaches: (1) the structure of the international system (based on economics and rational choice models), and (2) decision making analyses that attempt to explain political processes from within states (Spiegel and Wheeling 2005). Both of these orientations failed to address the dialectic process between states and the international arena. Concerning this point, Seeley (1986: 133) stated, “Never be content with looking at states purely from within; always remember that they have another aspect which is wholly different, their relation to foreign states.” These interstate relations need not be limited to or solely based on political-economic relationships, but could incorporate tradition, religion, or ideological interests.

The focus for other scholars shifted to an elite centered model wherein (in Milibandian and Domhoffian terms) states were seen as captured by a “mere fraction of capital that is pursuing a myopic definition of national interest rather than the larger neoimperial interests of globalizing capital” (Barrow 2005: 20). This attention coincided with a renewed interest in class conflict now seen as intrastate contradicting interstate class interests. Simply stated, the state took on the personification or representation of class interests within a global conflict. As stated by Wallerstein 1977: xi), “we shift from seeing classes (and status groups) as groups within a world-economy.”

Interest also began to shift towards state models that could explain the significance of interstate relations more broadly. This shift inevitably led back to the ongoing debate over the significance of state theory within a global order. For example, Cox (1987; 1992: 31) challenged the idea the state was in retreat and proposed an internationalization of the state wherein the state was being transformed “into an agency for adjusting national economic practices and policies to a perceived global economy.” Others claimed the state was growing stronger in its role within the international arena because state specific resources remain core to economic activity. For example, transnational organizations “utilize the most advanced states for foreign investment and remain tied to specific dominant states” suggesting state economies may supersede a “global economy” (Hirst and Thompson 1996).

In general, models of the state either; focus on domestic affairs or on international relations and/or globalization. There are few accounts of state theory that are capable of addressing both without reducing one or the other to a point of irrelevance. Moreover, the few theories that do address both usually focus on the western capitalist state to do so (Barrow 2005; Cox 1987; Whyte 2003). With the reemergence of interest in political economy models, variables at the level of agency are often ignored. There are exceptions. For example, in exploring international relations and prohibitions on state behavior, Passas (2004: 1) states:

it is also true—despite the inattentions of most international relations scholars—that moral and emotional factors related to neither political nor economic advantage but instead involving religious beliefs, humanitarian sentiments, faith in universalism, compassion, conscience, paternalism, fear, prejudice, and the compulsion to proselytize can and do play important roles in the creation and the evolution of international relations.

Intrasocietal interactions as well as interstate relations entail highly complex processes in which not only “economic and security interests but also moral interests play a prominent role, in which the actions of states must be understood as the culmination of both external pressures and domestic political struggles” (Nadelman 2004: 2). This is not an argument suggesting states have moral views; rather, “the capacity of particular moral arguments to influence government policies, particularly foreign policies, stems from the political influence of domestic moral entrepreneurs as well as that of powerful individual advocates within the government.” Others, such as Charles Beitz (1979) and James Mayall (1982), also focused their research on morality in international politics, centered on individuals with agency, as opposed to a focus on the state.

In essence, these premises bring back the agentic forces that compose the state political apparatus and allow for an understanding of state actors beyond capital accumulation and domestic legitimation. It allows for the interactional level within the structural and international levels to be explored. This view, coupled with international critical legal theory (Carty 1991) that recognizes the diversity of states and state functions within international relations moves beyond the limitations of state theories that are focused on the economic relations wherein capitalism lies at the heart of the analysis.

From this brief review of state theories, a general lack of operationalizing of states is evident. As previously stated, there are relatively few contemporary state theories that provide a working definition of the state within their research.

Exceptions to this include Giddens (1985), who suggested the state can be defined as an apparatus of government of a definite type within a society. Neuman (2005) recently defined the state as “all the government, or the public sector, plus much of the what immediately surrounds it, connects it to society, and holds it together” (17). Yet, in general most political sociologists and critical criminologists, while putting the state at the center of their field, fail to provide a definition of the state at the core of their analysis. In part, this omission is simply because “defining the state is a notoriously difficult task” (Faulks 2000: 20). As such, it is often omitted. I wish to fill this gap by providing a working definition of the state. In doing so, I briefly review how the state has been defined by political entities.

### *Political Entities*

The preceding brief overview demonstrates the multiple ways the state has been analyzed and its subsequent role within sociology. Yet, defining a state is also done within the political arena, both internationally and domestically. For example, The Foreign Relations Law of the U.S. (S 201) and the 1933 Montevideo Convention on Rights and Duties of State used a more simplistic model for defining a state wherein the state has (1) a defined territory and population, (2) said territory and population are under the control of its own governmental apparatus, and (3) the entity engages in or has the capacity to engage in formal relations with other states. Another working definition used by the United States’ State Department when dealing with international legalistic matters and its foreign policy relating to other states includes

these characteristics: (1) the entity has effective control over a clearly defined territory and population, (2) possesses an organized governmental administration, (3) has the capacity to act effectively to conduct foreign relations and fulfill international obligations, and (4) has been recognized as a legitimate entity by the “international community.”

The defining of a state can often be done *ad hoc* and for self-serving interests of the state such as that offered on November 16, 2001, by President Bush. He defined the state as “any State, district, territory, or possession of the United States” (Federal Registrar, Vol. 66, p. 57835). While this definition is much more expansive than those offered by sociologists, the 18 USC goes further and defines the state as “all areas under the jurisdiction of the United States including . . . all places and waters, continental or insular, subject to the jurisdiction of the United States” (18 USC Section 5 and 49 USC 46501 (2)).

International Governmental Organizations also define states. For example, Article 4(1) of the UN Charter explicitly mentions the ability and willingness “in the judgment of the Organization” to carry out international obligations as a criterion for admission of new members to the United Nations, thus, as recognition of statehood. This stipulates what constitutes statehood in accordance with international law, i.e., the essentiality inherent to the state as a subject of international law. All other requirements for statehood according to international law, in particular the existence of effective power of control over a territory and its inhabitants, are derived from this one criterion: the necessary ability and readiness to act in accordance with

international law. Moreover, admission of new states as members of the United Nations takes place by an act of collective recognition by existing states.

Thus, statehood becomes defined by more abstract concepts such as recognition, self-determination (UN Charter 1: 2) and willingness to fulfill international obligations and relations. Simply stated, statehood becomes defined internationally using the constitutive approach: recognition by other states and/or by the declarative approach: states have a legal personality *de facto* regardless of international recognition or UN membership.

While international and state definitions are based on political interests, legalistic criterion and/or legal obligations, they demonstrate the ambiguities of defining a state. Consequently, it seems, as social scientists we must be aware of the socially constructed nature of and implicit assumptions of the term “state.” As such, it is essential that we operationalize such an ambiguous term, perhaps even more so when we claim criminal liability on the part of a state. Therefore, I suggest that the state be defined as:

the institutions, organizations, and/or agencies composed of actors representing and entrusted with the functions of the political apparatus governing the corresponding population via the legitimate and symbolic use of power, contained within a historically and culturally defined milieu and bound territory.

This definition allows us to conceptualize the state as composed of individuals and also as an entity that has been reified as the institution of political power within the existing territory and culture. Moreover, by recognizing the agentic forces that compose the administrative machinery, we are not limited to political-economic or

capitalistic models of the state, but can consider the political, ideological, and religious views of the actors that often frame the socially constructed “state interests.” After all, ideology always has roots “which go beyond the state apparatus and which always consist in relations of power” (Poulantzas 1978: 37). Once operationalized, we can analyze state actions as crimes. According to state and state-corporate criminological research, states can commit crime. While definitional issues plagued the concept of state criminality for nearly a decade, it is now recognized as a legitimate area of research within the field of criminology.

#### State Crime Literature Review

Only recently have criminologists studied state crime. Yet, state crime has been approached in a number of fashions by a number of disciplines (i.e., criminology, history, political science, sociology). For example, at the end of the nineteenth century, a French judge, Louis Proall (1898), in his book *Political Crime*, focused on the crimes of statesmen and politicians. Becker and Murray (1971) analyzed how state governments break the law as did Lieber in 1972. Sociologists, such as Giddens (1985) and Tilly (1985), explored the use of organized violence used by nation-states. Keelman and Hamilton (1989) analyzed crimes committed in accordance to obedience to state authorities.

State crime was also conceptualized as political crime. Austin Turk (1982), however, viewed this as crimes against the state not by the state. Instead, Turk (1982: 35) stated, “No matter how heinous such crimes may be, calling them political crimes

confuses political criminality with political policing or with conventional politics, and therefore obscures the structured relationship between political authorities and subjects.” Hagan (1997), on the other hand, argued that political crimes were crimes committed by the state. Ross (2000, 2003) combined the earlier work of Turk and Hagan and defines political crime as both, crimes against the state and crimes by the state. Other criminologists began exploring state crime from a political economy model. For example, Michalowski (1985) utilized a political economy model to explore crimes of capital committed by organizations. To date, the strongest body of work on state crime has been done in critical criminology.

The intellectual history behind White-Collar Crime (WCC) research on state crime can be traced back to Edwin Sutherland (1939) who called attention to a then-neglected form of crime, namely the crimes of respectable people in the context of a legitimate occupation, and of corporations. Although the significance of such crime—white-collar crime—was conceded by some criminologists in response to Sutherland, only a few began to focus on white collar crime until several decades after his 1939 speech, and the publication of his landmark book, *White Collar Crime* (1949).

Since the 1970’s, however, a fairly rich literature and substantial interest in white-collar crime has developed within criminology (e.g., Friedrichs 2004). Yet, Sutherland himself was not at all interested in crimes of states. For him “war crime” referred to black market activity of businessmen, and he disregarded the massive crimes of the Nazis, which were taking place during the decade that he was working on his *White Collar Crime* book. But his extension of the concept of crime beyond its

conventional parameters did provide an important foundation, built upon by several later scholars, for the establishment of a criminology of crimes of the state (Clinard 1946; Geis 1967; Schwendinger and Schwendinger 1970; Kramer 1982; Vaughn 1982; Turk 1982; and Michalowski and Kramer 1987). Nonetheless, for most of the twentieth century criminologists largely disregarded the topic of crimes of the state. For example, in 1988, Martin stated that criminologists neglected the study of large scale economically motivated international criminal networks. At about the same time Manuel Lopez-Rey complained “about the neglect of criminology of non-conventional crime” including state sponsored terrorism (Martin et al. 1988 in Barak 1991: 7).

While the concept of state crime had been addressed by a few criminology scholars one can argue that Chambliss’ (1989) American Society of Criminology Presidential address provided the more direct and immediate inspiration for more systematic attention to crimes of the state on the part of a number of criminologists (Barak 1990; Friedrichs 1992; Kramer 1992, 1995; Ross 1995; and Tunnell 1993). These early works (though often plagued by definitional issues) examined the crimes of the state as well as potential controls of such crime. The two issues that generated much debate in these early works were (1) whether the individual or the state (organization) was culpable for acts deemed a state crime and (2) what standards should be used to define state criminality.

*Definitional Issues I: Individual Versus State Entity*

Dating back to Sutherland, the notion of an organization being criminally liable has consistently been met with resistance by criminologists until the late 1970's through the mid 1980's. It was then some criminologists began to incorporate ideas from organizational sociologists' research (Ermann and Lundman 1981; Schragar and Short 1978; Gross 1978; and Vaughn 1982, 1983). In the 1970's the organizational sociologists emphasis argued that social scientists needed to move beyond focusing on the individuals who make up an organization and to recognize that the aggregate whole "functions as an entity" (Hall 1987, quoted in Kauzlarich and Kramer 1998: 7). Moreover, they are capable of actions that affect a community (Perrucci and Potter 1989). As such, it can be argued that organizations, as social actors, "can and should be the primary focus of analysis in state and corporate crime" (Kauzlarich and Kramer 1998: 9). Others strongly objected to the notion of a state, as a social actor, in an analysis of state or corporate crime (Cressey 1989). Nonetheless, research on state and corporate crime that defined the state as a social actor continued. However, within the international legal arena, the notion of a state actor was already well underway.

The concept of a state as an entity possessing individual rights and subject to criminal liability emerged back in the mid 1900's. As Henkin (1995: 111) points out:

At Nuremberg, sitting in judgment on the recent past, the Allied victors declared waging aggressive war to be a state crime (under both treaty and customary law) as well as an individual crime by those who represented and acted for the aggressor state.

In 1976 the International Law Commission again discussed the notion of state criminal responsibility (Jorgensen 2000: 28). Moreover, several legal scholars have observed, there is a connection between individual criminal responsibility and state criminal responsibility under international law (Kramer, Michalowski, and Rothe 2005). Cassesse (2003: 19) suggests that most of the offenses proscribed under international law “for the perpetration of which it endeavours to punish the individuals that allegedly committed them,” are considered by international law “as particularly serious violations by States”; consequently, when a crime is committed by an individual “not acting in a private capacity, a dual responsibility may follow: criminal liability of the individual, falling under international criminal law, and State responsibility, regulated by international rules on this matter.”

Furthermore, during the process of negotiations of the Rome Statute in 1998, the French delegate introduced a proposal for the inclusion of organizations including states. Of the two drafts proposed, one Draft Statue contained an Article that would subject legal entities to the Court’s jurisdiction if the crimes were committed on behalf of such legal persons or their agencies or representatives. In the end this was dismissed as contradictory to the principle of a complimentary system (Sadat and Carden 2000). Jorgensen (2000) also has called for the use of state criminal responsibility. I agree with her claim that there is a link between state and individual criminal responsibility. As social actors, an organization is nonetheless composed of specific agentic individuals.

The inclusion of states as criminally responsible actors would eliminate a major obstacle of non-liability currently evidenced in state criminological analysis. By including a state as criminally liable it would follow that, as acting Head of State, the individual(s) at the top of a political apparatus be held responsible. Thus, state officials cannot avoid responsibility through claims of ignorance, non-participation, hegemonic propagandized counter-claims, and plausible deniability to protect both their inner circle and military leaders by limiting prosecutions to the lowest levels of involvement (Schmitt 2005a). Such additional prosecutorial possibilities will place a level of responsibility upon state leaders that should undercut existing criminogenic tendencies in the modern nation states. It will also heighten the energies funneled into the due diligence governments practice in the oversight of their sub-units.

Moreover, a state as an organization will not necessarily be deterred from criminal action if it can merely sacrifice individual agents to the court as it can sacrifice individual soldiers and units on a battlefield (Mullins et al. 2004). With the precedent set at the Nuremberg Trials, acting Heads of States would be held liable. Furthermore, Kauzlarich and Kramer's (1998) work emphasizes that the loci of state criminality is the state, not the individual. Structural and organizational conditions combine with individual predilections and positions to generate these offenses; punishment of individuals will not be able to deter the polities themselves from offending. One can sanction numerous bureaucrats, soldiers and spies without eliminating a state's ability or motivation to engage in criminal behaviors. The most powerful motivational elements arise within the state itself, not within the state's

agents (Mullins et al. 2004). Moreover, states as criminal actors would further ensure victim(s) compensation and a sense of justice for those victimized. It also would allow for sanctions to be set against the state versus utilizing the underpowered ICJ or trying to get the Security Council to grant such a sanction with existing veto votes.

Obviously, one cannot incarcerate a state. However, the ability to levy trade and other sanctions upon criminal states may act as further controls. Restriction of trade, imposition of tariffs, denial of loans from foreign powers or the International Monetary Fund, or insistence upon collection of outstanding debts are all tools which the ICC could use to exert social control. This requires that there exist political and economic bodies capable of and willing to engage in such sanctioning behaviors. While sanctions are often criticized as ineffective, these claims are often made disingenuously as part of broader political rhetoric or the specificities of a case are inappropriately generalized (Rothe and Mullins 2006).

If we accept that a state is indeed an actor that may be held liable for its actions, we must then discuss what standards we should use to judge a states' action as criminal. This was the other issue of the contentious debate engulfing earlier works of state crime research.

#### *Definitional Issues II: Standards to Be Used*

Within criminology, the idea of a state being criminally liable was met with significant resistance. There were those that denied state criminality was possible. The common argument against state criminality was that "governments and their agencies

do not commit crimes, but only because the criminal law does not take cognizance of them as criminal actors.” Instead, states can only commit “noncriminal deviance” (Cohen 1990: 104). On the other hand, scholars who supported the idea of state criminality were divided upon the standards to be used between a legalistic frame and a broader frame including social harms to human rights.

Several criminologists argued that the standard for defining a crime by the state needed to be expanded to include social definitions. The earliest proponents of this view were the Schwendingers (1970) who proposed crime could be socially defined based on the notion of human rights. While some criminologists followed the idea of human rights (Galliher 1989) broader definitions were also put forth. For example, Michalowski (1985) suggested that socially analogous harm could be used to define state or corporate crimes (see also Barak 1990). Nonetheless, from its inception, the growth and development of state crime studies have been faced with a key conceptual problem: how can the state be a criminal actor when legally it is the state itself that defines criminal behavior? Barak (1991: 8) points out that:

the study of state criminality is problematic because the concept itself is controversial, in part because of a debate over whether one should define crime in terms other than law codes of individual nations. Some argue that if a state obeys its own laws, it should be judged by no higher criterion.

Sharkansky (1995) presents such a critique, arguing that while states may commit many undesirable behaviors one can not call them criminal unless they expressly violate their own laws. Labeling a state criminal on other grounds violates key precepts of national sovereignty and a nation’s right to regulate itself. However,

this critique sees even well recognized instances of state criminality, like the Holocaust, as “nasty” behaviors but not criminal.

In Chambliss’ 1989 presidential speech he suggested that state crimes are those that are “acts defined by law as criminal and committed by state officials in pursuit of their jobs as representatives of the state” (184). Kramer and Michalowski (1990) quickly followed with the definition of state-facilitated crime, those activities of the state which fail to constrain criminal and dangerous behaviors. Chambliss (1995: 9) subsequently again called for resolving the key question at the foundation of the discipline, the definition of crime, so that the discipline could remain viable and vital. He stated:

State organized crimes, environmental crimes, crimes against humanity, human rights crimes, and the violations of international treaties increasingly must take center state in criminology...Criminologists must define crime as behavior that violates international agreements and principles established in the courts and treaties of international bodies. (Chambliss 1995: 9)

Green and Ward (2000) have critiqued definitions of state crime that are based on a highly legalistic use of international law. They define state crime as the area of overlap between two phenomena: (1) violations of human rights and (2) state organizational deviance. They suggest that human rights are “the elements of freedom and well-being that human beings need to exert and develop their capacities for purposive action” and that state organizational deviance

is conduct by persons working for state agencies, in pursuit of organizational goals, that if it were to become known to some social audience would expose the individuals or agencies concerned to a sufficiently serious risk of formal or informal censure and sanctions to affect their conduct significantly. (Green and Ward 2000: 110)

They have opted for a deviance-based definition that draws upon the work of Howard Becker (1963) and other labeling theorists. Green and Ward assert that state crimes are only offenses when the action is labeled as such by a social audience. Other definitions, they claim, lack legitimacy. Moreover, their latest work (2004) examined state crime in relation to corruption, state-corporate crime, natural disaster, police crime, organize crime, state terror and terrorism, torture, war crimes, and genocide all under the rubric of International Human Rights Law (IHL) and the labeling of such by some social audience. This approach is far too vague concerning what constitutes a social audience and which audiences may legitimately label behavior a crime. Moreover, IHL draws from existing customary law and is incorporated in many Treaties. Others, such as Kramer and Michalowski (2005), have responded to the call of Green and Ward for using international human rights by claiming that human rights and/or more vague frames can indeed be incorporated within the body of an international legalistic frame.

In general, the critical critique of using legal codes as the base definition of crime is well discussed. Alternative formulations have been advanced, ranging from international legal codes to basic human rights precepts to the perceptions of the state's citizens (Barak 1991, Chambliss and Zatz 1993, Tunnell 1993, Ross 1995, Friedrichs 1996a, Kauzlarich and Kramer 1998, Ross et al. 1999, Green and Ward 2000).

The controversy over the appropriate definition of crimes of the state is sure to continue, as standards used for defining state crime remain problematic and have

not been fully resolved (see Ward and Green 2004). However, I contend that in general, most critical criminologists studying state crime agree that using international law (Customary, Treaties, Charters, and the newly emerged criminal law) constitute a basic foundation for defining state crime as this framework includes standards such as human rights, social and economic harms, as well as providing a legalistic foundation (Rothe and Friedrichs 2005). Furthermore, international criminal law covers individuals as well as states, thus resolving any ongoing reservations of state as actors versus individuals. As Jorgensen suggests, “all acts which constitute international crimes may in principle entail individual or state responsibility, or both, depending on the nature and circumstances of the breach, and that the two notions can complement each other” (Jorgensen 2000: 139). In sum, the emergent principle of criminal law is that states themselves can commit crimes, and they can and should be held criminally responsible for them (Kramer, Michalowski, and Rothe 2005). Consequently, I follow a more legalistic approach by drawing upon existing international law in the definition of an act as criminal similar to the recent definition proposed by Kramer, Michalowski, and Rothe (2005: 56) wherein state crime is defined as any action violating

public international law, international criminal law, or domestic law when these actions are committed by individuals acting in official or covert capacity as agents of the state pursuant to expressed or implied orders of the state, or resulting from state failure to exercise due diligence over the actions of its agents.

Their definition recognizes that offenders “under international or domestic law can be states *qua* states and/or officials using state power in pursuit of state goals”

which is also supportive of earlier claims that a state is indeed a social actor as well as the individuals within the agency (2005: 9). The complexities of this definition, however, can be simplified wherein state crime can be defined as:

Any action that violates international public law, and/or a states' own domestic law when these actions are committed by individual actors acting on behalf of, or in the name of the state even when such acts are motivated by their personal economical, political, and ideological interests. (Rothe and Mullins 2006)

### *State-Corporate Crimes*

Scholars of state crime have also explored how crimes can occur wherein states and corporations are often intermingled. Consequently, an act can be attributed to the actions (or lack thereof) of both, a state and a corporation(s). Building upon the growing interests in political and state crimes several presentations and/or articles brought the concept of state/corporate crime to the attention of criminologists. Kramer and Michalowski (1990: 4) provided the most widely cited definition of state-corporate crime: "State-corporate crimes are illegal or socially injurious actions that occur when *one* or more institutions or political governance pursue a goal in direct cooperation with one or more institutions of economic production and distribution."

State-corporate crime increasingly came to be seen as taking two forms, although these forms often interacted with each other. Accordingly, a distinction emerged between state-facilitated and state-initiated crimes (Kramer 1992; and Kauzlarich and Kramer 1993). These earlier works proposed and explored a "framework for examining how corporations and governments intersect to produce

social harm” (Kramer et al. 2000: 263). Such intersections can work in a myriad fashions. States can create laws which facilitate corporate wrong doing and crimes (e.g., the infamous Savings and Loan debacle within the United States). Regulatory and advisement agencies can simply fail to do their appointed tasks (see Aulette and Michalowski 1993; and Matthews and Kauzlarich 2000). States and state actors can also directly collude and conspire with private corporations to violate laws (Rothe, 2006).

On the surface, these cases and types of crime would seem to have little to do with the cases of torture at Abu Ghraib, as they are domestically-based violations. Yet, with the increasingly international nature of corporate operation, capital accumulation and dispersement, these types of crimes take on an increasingly international flavor and situation (Friedrichs and Friedrichs, 2002; Rothe, Muzzatti, and Mullins, 2006). Moreover, as states continue to privatize war efforts, utilize mercenaries and corporate warriors, the notion of state/corporate crime brings the role of transnational organizations within the context of crimes committed at Abu Ghraib.

The notion of a State as an actor did indeed raise scrutiny within academe while the notion of corporations as criminally liable has been generally accepted. However, within the courts domestically and internationally, liability of corporations has often been viewed as a civil case at best (Singer 2003). Nonetheless, international legal precedence has also been set for criminal liability of corporations and transnational organizations.

*Transnational Organizations*

The idea of criminal liability of organizations is not new. Within the scope of criminological research, such claims have been made for several decades. Moreover, during the Rome Statute Preparatory Committee meetings the concept of organizations and states were added into one of the existing Drafts (see Chapter III). Recently, agreements have been framed by the UN that compel transnational corporations to obey Human Rights Laws. For example the 2003 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights agreement expressly bring the behavior of corporations operating in multiple nations under the rubric of human rights laws. Drawing heavily upon the UN Charter, especially Articles 1, 2, 55 and 56, this agreement acknowledges that globally-active for profit corporations are major players in the international arena.

Traditionally, it has been the internationally held expectation that nation-states are the key players responsible for the maintenance and enforcement of human rights standards. Yet, due to the increasing power and influence of these corporate entities, it is their obligation as the core of a key social institution—e.g., the international society's economy, to abide by existing human rights law. If they are either active or complicit in such actions, then they are prosecutable by the ICC. Corporate actors, state agents, and even private citizens unconnected to a transnational or national entity are currently under the court's jurisdiction as long as the action in question occurs within a signatory state that has ratified the Rome Statute or they are nationals of signatory states. This means that representatives of transnationals who operate

within signatory states must abide by international human rights law or face prosecution (Rothe and Mullins 2006).

Furthermore, the recent Agreement by the Economic and Social Council (2003), to which the U.S. is a signatory, specifically addresses the criminal liability of transnational organizations and that these organizations (actors within the organization) fall under the purview of international law and the ICC. Article 18 also of this Agreement sets up criminal liability to which even the ICC could potentially have jurisdiction. It states: in connection with determining damages, in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law (E/CN.4/Sub.2/2003/12/Rev.2). As several of the actors directly involved in the events at Abu Ghraib were privatized corporate actors, it is pertinent that we consider the ramifications of their involvement within the context of corporate liability as well. Previously, individual and organizational criminal liability was avoided through “transnational loopholes” (Michalowski and Kramer 1987). Thus, the notion of transnational criminal liability is relevant to the ongoing sub field of state-corporate crime as well as the case at hand (Rothe and Mullins 2006).

Consequently, this brief overview of criminological inquiry of crimes of the state illustrates that by the late 1990’s and early years of the twenty-first century, a significant literature on crimes of the state has developed (Friedrichs 1996b, 1998; Kauzlarich and Kramer 1998; Kauzlarich et al. 2001, 2005; Mullins et al. 2004; Rothe and Mullins 2006; Ross 1995, 2000; Ross et al. 1999; and Simon 2002). However, at

the present stage, one would still have to concede that a criminology of crimes of the state is still very much in its infancy. Moreover, a general neglect of research on controls for state crime is increasingly apparent.

More specifically, relatively little attention has been given to international institutions of social control within the context of state crime (Rothe and Mullins 2005; Rothe 2004a; Mullins, Kauzlarich, and Rothe 2004). Additionally, there continues to be limited applications of a systematic theoretical model addressing and analyzing such crimes (see Kauzlarich and Kramer 1998; Kramer and Michalowski 2005; Kramer, Michalowski, and Rothe 2005). Instead additional typologies are created and/or abstract analysis is used in place of a rigorous theoretical frame (Friedrichs 1996a; Friedrichs and Friedrichs 2002; Ross 2000, 2002; Green and Ward 2000, 2004). This thesis aims to add to the limited literature utilizing a criminological model for analysis of state crime. Moreover, I attempt to add to the literature by expanding and revising the only integrated model for state or state/corporate crime to date. Therefore, the following section outlines the integrated model created by Kramer and Michalowski and later revised by Kauzlarich and Kramer followed by suggested expansions and revisions.

## CHAPTER II

### THEORY

Traditional criminological theories generally address one specific level of analysis. While some scholars have attempted to integrate traditional theories (Braithwaite 1989a; and Tittle 1995) they have done so by integrating theories addressing the same level of analysis. While this may be an acceptable form of integration for some I believe that an analysis of phenomena that is time and space specific<sup>1</sup>, and inevitably involving history, culture, politics, ideology, and economics, must include an integrated model that addresses all levels of analysis: the structural to the individual(s) involved in crime or crime control.

#### The Dialectic of Structure and Agency

While this thesis is not the place to fully lay out or resolve one of the key theoretical issues within social science since its inception, I cannot enter into a theoretical examination without acknowledging the tensions between social forces on the macro level guiding the behavior of states and individual level agency. For generations, scholars have wrestled with the contradictions inherent in attempts to

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<sup>1</sup> The concept of time-space refers to the specific era of a phenomenon, the location, and the exact actors involved. Simply stated, a snapshot of time involving specific actors, culture, ideology, and politics, making the phenomenon unique to its own time-space.

uncover the nature of the influence of social structure on individual human action and vice versa (Rothe and Mullins 2006). Moreover, the review of state theories, classical and contemporary, revealed the difficulty of attempting to bridge structure and agency. However, as the state crime literature has revealed, the complexities, multiple levels of catalysts, and actors with agency, make it necessary to integrate these historically divided levels of analysis.

Structure clearly frames action and thought, channeling human behavior toward certain outcomes and away from others; it defines possibilities and molds goal structures. Social actors respond to stimuli within their environments, yet, exercise individual choice in decision-making processes based on any number of variables. Consequently, I define agency as bounded voluntarism or bounded free-will. I see a clear dialectic where individuals respond to structural parameters that can influence what those parameters are by reinforcing, challenging or constructing them. Further, given the intent of this thesis, we must also consider the structure/agency interactions as they apply within and to complex organizations (Rothe and Mullins 2006).

As criminologists studying international law and social control mechanisms, we clearly place a strong emphasis on macro-level behavioral influences. Culture and structure form the cognitive landscape on which individual decisions are made. Global and historical forces come to bear upon organizations and establish environments in which decisions are made and that organizations must respond to. Any given incident of state crime is a product of a myriad of social forces that come together in the production of the event in question. Thus, attention must be given to specific time-

space. Global political and economic conditions make state crimes more or less likely, provide tensions and contradictions for nation-states to navigate and present problems for state actors to resolve—either criminally or legally. Contextualization of such acts is essential to understand both the idiosyncrasies of an individual event as well as the patterns that emerge in the phenomena as a whole (Rothe and Mullins 2006).

Yet, in our focus on the broadest of socio-historical forces, we do not ignore the influence of individual decision makers within these events. Of course all acts require that a singular social actor make a decision and produce an act. In any state crime, orders to carry out the activities must be reached, agreed upon and enacted. Within a structure as complex as a state, this involves not one, but a multitude of social actors in a number of organizational positions. While individual agency is indeed modified or even extremely constrained by the social conditions present within any complex organization, no bureaucratic actor is a mere automaton. Individuals carry with them pre-established cultural and ideological visions (Rothe and Mullins 2006). Such lens influence how they evaluate information, create policy objectives and direct organizational activities toward the realization of those policies. More essentially, at the top levels of power, agency can often be fully revealed and active. While indeed processes like groupthink can come into play, original decisions, directives and directions must be established through some form of agentic individual decision making process. These decision making processes, however, do not exist in a vacuum. Indeed, they are time and space specific.

To understand this point better, I turn to several hypothetical questions. For example, would the U.S. have invaded Iraq were George W. Bush not President at the time? If Donald Rumsfeld and Paul Wolfowitz did not control the Pentagon, would the same forces have been brought to bear on intelligence analysis? Would cabinet and Joint Chiefs of Staff meetings have come to different operational directives without the influences of Bush, Cheney and Rumsfeld? Would the torture of detainees have occurred if the actors within Abu Ghraib were different (e.g., personnel assigned to the 372<sup>nd</sup> MP Company and the 800<sup>th</sup> MP Brigade)? Of course, all of these questions are hypothetical and unanswerable, but they do illustrate the influence of a single person or small group of decision makers on the behavior of a nation-state. Moreover, these questions demonstrate the weaknesses of pure linear analysis and call for sensitivity and attention to specific time-space within any theoretical analysis. It is with this broad framework in mind that I turn to an integrated theoretical model of state crime that will not only help us explain the criminal behavior of states, but will also allow us to examine the events at Abu Ghraib, not as an atomistic event, but rather as a microcosm of a much larger set of historical and structural conditions involving the U.S.

#### An Integrated Model of State Crime

While many mainstream and critically-orientated theories of crime and criminality have relevance to the explanation of state crime, standing alone each contains serious shortcomings. Kauzlarich and Kramer (1998), building upon earlier

work by Kramer and Michalowski (1990), present an integrated model of state offending. This model is designed to indicate the fundamental variables that contribute to crimes of the state: motivation, opportunities and controls. Additionally, they suggest these variables are interdependent factors and as such can lead to difficulty addressing them as separate phenomenon without minimizing their significance. For example, most crimes involve motivation and opportunity, yet, all the motivation in the “world to act in a particular way means little if the opportunity to carry out that action is not available” (Kauzlarich and Kramer 1998: 150). Likewise, their integrated frame presents three levels for analysis: the cultural-structural, organizational, and the interactional. As noted with the catalysts of action, these levels are also interdependent and omitting one of them minimizes the significance of either actors or the larger environment within which they operate.

Moreover, their model integrates components of several criminological theories that fall short by themselves in addressing state crime. For example, Kauzlarich and Kramer utilize anomie and strain, rational choice, differential association, routine activities, political economy, and organizational models.

At the structural or institutional level of analysis, the major social institutions and social structure are included, particularly; the political and economic institutions and their interrelationship merit special attention in any effort to explain organizational crime. They suggest the primary assumption of that perspective is that the very structure of corporate capitalism provides the impetus toward organizational crime; thus, becoming crimes of capital (Michalowski 1985). They further propose

that the political economy perspective stresses the shaping and/or constraining influences of the broader historical structure of a society as a factor on organizational behavior. This includes factors such as the culture of competition, economic pressure, and performance emphasis under the catalyst of motivation. Also needed is the availability of legal and illegal means, blocked goals, and access to resources that are included under opportunities (See Appendix A). Controls at the structural level are said to include international reactions, political pressure, legal sanctions, media scrutiny, and public opinion.

At the organizational level, Kauzlarich and Kramer draw heavily from organizational theorists who argue that “there is built into the very structure of organizations an inherent inducement for the organization itself to engage in crime” (Gross quoted in Kauzlarich and Kramer 1998: 145). They, along with organizational theorists, argue that organizations are strongly goal oriented<sup>2</sup> and concerned with performance while governing norms may be weak or absent (anomie). Moreover, these goals may be blocked internally or externally causing strain (e.g., standard operating procedures or codes of conduct). As Kauzlarich and Kramer argue, organizational crime depends on two other factors . . . availability of illegal means and the social control environment that fosters organizational crime (146). Organizational opportunities are said to include instrumental rationality, role specialization, and task

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<sup>2</sup> These include operative goals, subunit goals, and managerial goals.

segregation while controls include a culture of compliance, reward structure, safety and quality control procedures, and effective communication processes.

At the social-psychological level of analysis, Kauzlarich and Kramer recognize the utility of differential association wherein a person in a particular environment may engage in a criminal act if the weight of the favorable definition of an act exceeds the unfavorable definition. They also incorporate sociological models of socialization (see Appendix A under motivation). At the social-psychological or interactional level, Kauzlarich and Kramer discuss how motivation is affected by one's socialization within that environment, the social meaning given to their behavior, an individual's goals, and issues of personality such as personal morality and obedience to authority. Borrowing from Sykes and Matza, they include techniques of neutralization as a variable of control.

While this model has proven useful in examining numerous cases of state crime including U.S. nuclear crime (Kauzlarich and Kramer, 1998), U.S. crimes of colonialism (Mullins and Kauzlarich, 2000), and the recent war on Iraq (Kramer, Michalowski, and Rothe 2005; and Kramer and Michalowski 2005), I believe it fails to recognize an additional and equally significant level of analysis: the international level. Moreover, the concepts of opportunity and controls are often intermingled, where controls that are assumed to be non-existent or non-functional are conceptualized under the rubric of opportunity. Consequently, constraints and controls are intertwined while they potentially represent two separate fundamental catalysts.

### *Division of Controls and Constraints*

Phenomenologically, a constraint differs from a control in that it is an inhibitor or barrier that occurs *at the onset* of an illegal action. This constraint can act as a complete blockage to the act, or it can act as a restraint, thereby inhibiting or causing the actor(s) to find alternative means to crime enactment. For the purposes of state crime, this could take the form of a propaganda campaign, a reduction in the scope of the act itself, more intense development of neutralizations, to name a few outcomes. I view a control as a *complete* blockage to an act or a criminal sanction that is ideally inevitable after the fact. This means that conceived criminal action will not occur and if it does there will be legal repercussions. This could lead to additional organizational strain, and the seeking out of other illegitimate means. A control is a perceived blockage due to existing and/or after the fact controls such as laws, regulations, and belief in sanctions or punitive measures, an imbalance of costs to benefits. Controls and constraints are separate conditions that do more than affect opportunity. They work independently of opportunity and can thus be conceptualized separately. It is for this reason that I believe the operationalizing of controls within Kauzlarich and Kramer's model needs to be drawn out and specified as constraints and controls. Moreover, the lack of one or the other is implicit that it would either foster motivation or provide opportunity. However, the control or constraint remains as such, whether functioning, non-functioning, present, or absent.

Broadly, state crime scholars identify both external and internal controls on the behavior of states (see Ross 1995, 2000). External controls are those that lie

outside of the specific state apparatus and are imposed on the state itself. Internal controls are those that arise within the state and are directed against itself such as previously discussed domestic laws and self-regulation. These controls can be tangible (i.e., the firing of an agent) or symbolic (i.e., an official statement of denial or a promise to investigate).

Internal controls are broadly conceived of as restrictions placed on state agencies by themselves or other state agencies. For example, the United Kingdom's establishment of a Royal Commission on Police Procedure and a Police Complaints Board in response to police brutality (Ross 2000), the passing of the Parliament of Canada Act and the Canadian Security Intelligence Service Act (Corrado and Davis 2000), the Zorea, Blatman and Karp Commissions in Israel (Miller 2000), and campaign finance reform laws in Japan (Potter 2000) are all examples of such internal controls. All of these internal control mechanisms were established in the wake of publicity generated by various criminal state practices—most of which involved the abuse of power by state-run intelligence agencies against their own citizens (Rothe and Mullins 2006).

Internal controls are those created by the state to govern itself. Generally, they are attempts to assuage public criticism of state actions. While the above examples all produced results, they are often limited to specific types of offenses that have already occurred (i.e., the Israel and U.K. investigative commissions) or often get quickly circumvented by new procedures or new depths of secrecy (i.e., the FOI acts in the

U.S. and Japan's campaign finance laws), or are left under-funded or understaffed (i.e., OSHA and the EPA).

External controls lie outside the apparatus of the state itself. To be effective, such controls actually have to exert some form of pressure after the fact (political, economic, legal or military) on the state. External controls can be localized either within states' own domestic territory or external to it. Suggested external controls *within* the state have included (1) media organizations, (2) interest groups, and (3) domestic non-governmental organizations (NGOs). I view these external agencies as constraints versus controls. Such pressures raise inherent contradictions within modern democracies that are supposedly citizen-driven, but operate in a more elite-orientated fashion. When media or other agencies specifically address these contradictions in a public sphere, the state has to respond. Responses are typically symbolic, and often involve the erection of new veils of secrecy. Moreover, they do not block or attempt to block a preceding act; at best they act to constrain a state's actions once such knowledge is made public (Rothe and Mullins 2006).

External controls located outside of the state's boundaries would include the United Nations (UN), the World Court (WC), the International Criminal Court (ICC) and, potentially, other nation-states. As international governmental bodies, these organizations hold the power to apply sanctions to states that violate either international law or are overly abusive of their own citizens. However, save for other nation-states, the ability to back up sanctions with coercive force is limited to members who are willing to volunteer the necessary force to act in the organization's

name. It is for this reason that U.S. violations of international law regarding nuclear weapons have gone unsanctioned (Kauzlarich and Kramer 1998). Also, economic organizations such as the World Bank (WB), the International Monetary Fund (IMF) and the World Trade Organization (WTO) represent potential controls on criminal states through the manipulation of financial assets, trade agreements, and trade sanctions. While the former set of organizations would be more broadly seen as having legitimacy to sanction and control criminal states, it is most likely the latter that hold real coercive power over the behavior of sovereign states. It is also more likely that such organizations would not use this coercive financial authority against some of the industrial democracies that need it.

At the international level, existing relations based on specific conditions create broad social forces that can act as constraints against a state's intended policy. This can include NGO's, other nation-states, and inter-governmental organizations such as the UN. Moreover, there are the broader global economic forces that can produce or constrain competition and goal attainment. The larger international culture or ethos can also produce an environment wherein a set of objectives can be replaced with covert or overt activities by a state. Presently, controls at the international level can occur by means of economic or political sanctions or through the threat of military actions. However, these mechanisms often fail to act as controls for other nation-states due to lack of consistent application. For example the UN Security Council can (and has) sanctioned states endlessly, but without formal mechanisms to enforce those sanctions, there is nothing to compel compliance. Alternatively, international criminal

law may hold more power. As street crime research has shown, social location and position strongly influences deterrence. (Paternoster and Piquero 1995; Paternoster and Simpson 1992; Piquero and Paternoster 1998; Sherman and Berk 1984; Stafford and Warr 1993). Those actors most likely to be involved in state crime would seem to be those who are most susceptible to legal sanctions. However, for the most egregious of crimes, such controls have historically done little to deter; typically, they come into play long after the criminal actions are over and the viability and integrity of the state which has committed them has been compromised (Rothe and Mullins 2006).

At the macro, or institutional level, broad social forces of competition and goal attainment intersect with the lack of effective controls to produce an environment where states are, once the micro and meso level elements align, able to ignore domestic legal codes as they see fit in the process of enacting their policy objectives. Moreover, any constraints, such as media, general population opinion, and/or internal state obstacles, can often be ignored or manipulated via hegemonic discourse, symbolic political gestures, or altering policy to immediately appease while continuing in a covert direction.

Control at the macro level emerges from a number of locations. Clearly law can serve to control actions, but due to the unique position of a state vis-à-vis its own domestic law and the problematic ways in which it is enforced, law may not hold the same deterrent power over a political body as it does over citizen actors. Moreover,

public forces embodied in the media, public opinion and social movement activism can potentially operate as constraints on state criminality at this level.

Controls at the meso level (organizational) also emerge from several factors. Codes of conduct and other internal controls and checks all serve to block organizational criminal activity. These controls can also be reinforced by some punitive measure when broken, thus serving as a form of deterrence. Constraints, on the other hand, include a general culture of compliance and reward structures. As previously noted, constraints generally act as temporary barriers and do not generally hold some sort of deterrence in the form of potential legal reactions or penalties. At the interactional level, controls include psychological factors such as obedience to authority and beliefs in the legitimacy of law, wherein constraints include such things as personal morality. Morality is a constraining factor due to the pressures of the organizational culture. Moreover, personal morality can be psychologically divided. This can be done through techniques of neutralization wherein acts at work that contradict one's moral code are justified. This allows the actor to leave work and enter other roles to which the moral code is intact, avoiding cognitive dissonance (Rothe and Mullins 2006).

The divisions of controls and constraints can be justified by these few examples (see also Appendices B and C). However, the levels of analysis also need to be addressed. The following section draws the distinctions between these levels, most significantly, the need to separate the institutional level from the surrounding geopolitical environment in which it exists.

*Fourth Level of Analysis*

Traditionally, the nation-state has been the preferred unit of analysis within sociology (see Mills 1956). Macro-level sociological theory developed in opposition to other social sciences (e.g., psychological models over-emphasizing the individual out of social context, economics and political science models which removed social institutions from their structural context). In that context, a focus on a single society's social structure arose, rightly so, to provide a holistic perspective which would allow scholars to understand institutional interrelationships and social forces at work. However, it is clear that singular societies are not atomistically separated from each other. Institutional arrangements and forces do not cease their influence at the arbitrary political boundaries currently drawn upon our maps. I do not propose an invalidation of this level of analysis; historical contingencies have created unique social arrangements that approximate geo-political units. However, there are social forces, arrangements and interactions that operate outside of this arena: a separate culture and separate rules governing actions.

As criminologists expand to areas of specialization which include the international level such as state crime, crimes of globalization, and international controls, the given macro level or cultural structural level is not sufficient to address the culture, economic, political, and historical environment of both the international realm and the nation-state. It can be argued that the current levels of analysis are fluid enough to address the surrounding environment regardless of whether it is at the state or international level. However, I argue that this cannot be the case. The

conceptualization of different levels of analysis should be consistent and objective.

The macro level must be separated into two distinct realms of analysis. The culture of a state: its economic, political, cultural, and historical environment is distinct from and often in contradiction to the international level. This, in and of itself, illustrates an essential need to examine a new level of analysis. Beyond this, as the process of globalization continues to expand, imperialistic agendas resurface, and transnational corporations become the norm in global economic relations, examining the macro at both the state and international level is essential. The two distinct environments proffer divergent information, culture, laws, history, relations, and ethos. Moreover, the catalysts of motivation, opportunity, controls, and constraints vary between the international and structural-cultural level. Thus, it becomes necessary to speak of the organization (multi-national corporation or governmental agency) as the meso level, the state as the domestic environment of that organization (the structure and culture in which it exists), and then the level examining the transnational formation of the international ethos, culture, history, politics, law, and economics.

The process of integration also includes utilizing different theoretical perspectives or frames within the overall model. Not only do I recognize four levels of analysis, each with specific catalysts such as motivation, opportunity, constraints, and controls, I recognize the varying theories within the integrated model, for example, Kauzlarich and Kramer's (1998) model utilizes anomie, rational choice, differential association, routine activities, political economy, and organizational models (Rothe and Mullins 2006).

Drawing upon strain theory (e.g., Merton 1938), I argue that broader forces of cultural goals of success and competition when met with blocked goal attainment processes push political organizations—and actors within them—toward the violation of law in the accomplishment of their objectives. Being a nation-state strongly enhances the ability to create and capitalize upon criminal opportunity. Even the poorest states have tremendous amounts of human and financial capital to draw upon for crime commission. Illegal means are often available; the desirability of drawing upon these means will be even more tempting when legal means of accomplishing the goals are absent, blocked, or constrained. While this is not to say that legitimate means may also be present, due to the concept of instrumental rationality, it is often the “by any means necessary” and the least costly in terms of consequences, thus resulting in the choice of illegitimate over legitimate means (Rothe and Mullins 2006).

At the meso, or organizational level, elements of organizational culture and goals structure decision-making environments that can lead either toward or away from criminal activity within a polity. Drawing upon broader theories of organizational behavior and corporate offending, it is argued that certain states may develop a bureaucratic environment where goal attainment is pushed to an “any means necessary” degree. Certain organizations further reinforce instrumental rationality within decision making processes (see Perrow 1986; Weber 1947) that can enhance the perceived value of criminal behaviors and reduce the perceived harm of the same act. Cultures can develop within organizations or subunits that can motivate criminal endeavors; further, managerial influences can push for illegal solutions to

goal accomplishment. Another factor within complex organizations is the ability of those in charge of staffing positions to fill those roles with individuals who tend to think and act like the managers themselves.

The very nature of complex organizations provides a host of opportunity producing elements. Any given governmental agency (or corporate unit) will have resources (human and otherwise) that can be directed toward a criminal action. Bureaucracies can maintain levels of secrecy on how their resources are utilized; external actors need not know what was done within the organization or by whom. Information may also be hidden from other organizational actors, including those who are actually carrying out elements of the criminal activity. Due to internal organizational structures of information control, the inability of external agencies (be they public media or law enforcement) to obtain information on the nature and dynamics of these decision-making events heighten criminal tendencies within some states. The ability to avoid detection is a strong motivator and facilitator (Rothe and Mullins 2006).

At the micro, or interactional level, this model combines aspects of associational and social learning theories (e.g., Akers 1977; Sutherland 1939). These factors are relevant in understanding state crimes at all levels of power within the polity—from the decision makers, to those who organize the act's implementation, to those who actually carry out the actions. Individual level motivations can be personal, but these individualized outlooks and motivations are highly malleable within the organizational culture and context that encapsulates the social actors. Again, cultural

elements discussed above come to bear—both in the broader socio-cultural sense (singular actors motivated for personal success and advancement) but also organizational cultures which the individual has been socialized into. Certain organizations may inculcate employees into broader ideological beliefs that facilitate violating laws for the sake of the institution; day-to-day interactions with coworkers provide ample opportunity for the transmission not only of criminogenic value systems but also of neutralizations to excuse such behaviors (Rothe and Mullins 2006).

Admittedly, this model for criminological analysis is complex. However, as previously stated, by ignoring the specific time-space, or the dialectic of structure and agency, we cannot address the complexities involved in state crime. Likewise, the application of this theory to the events in Abu Ghraib allows us to have a more detailed explanation of the torture that occurred. For example, addressing catalysts at all four levels (from structures to agents) helps us answer questions such as: (1) why the state decision making process occurred as it did; (2) why the individuals at Abu Ghraib were motivated to commit torture; (3) what opportunities were present at all levels that allowed such acts to take place; (4) what constraints occurred or failed to occur; and (5) what controls were present to block such acts of torture and cruel and inhumane treatment. Without such a complex model, any analysis would lead to reductionism.

## Method

To address such complexities involved in the abuse and torture of detainees at Abu Ghraib, the case study method provides the most suitable methods of inquiry. Therefore, the following section addresses the methods utilized for the analysis of the events leading up to, during, and after the torture at Abu Ghraib.

The quintessential characteristic of case studies is that they strive towards a holistic understanding of cultural systems of action: interrelated acts engaged in by the actors in a specific social time and space (Feagin, Orum, and Sjoberg 1991). A case study method is not a style of data gathering or an analytical technique: it is a methodological approach to research. Case studies emphasize detailed contextual analysis of a limited number of events or conditions and their relationships. This method incorporates a systematic gathering of information about specific phenomena to allow for an effective understanding of how or why the event(s) occurred. Robert K. Yin has defined the case study method as an empirical inquiry “that investigates a contemporary phenomenon within its real-life context; when the boundaries between phenomenon and context are not clearly evident; and in which multiple sources of evidence are used” (Yin 1984: 23).

This research design utilized the spatiotemporal chronology strategy for organizing the data (Hill, 1993). This included separating and recording the records according to dates that documented events surrounding the war on terrorism, invasion of Iraq, and subsequent abuses at Abu Ghraib. As new data were encountered, they were also included in the spatiotemporal chronology. This, in effect, allowed a

research design that would incorporate both primary and secondary data for analysis (to be discussed further in the data section). Furthermore, a key strength of this method involves using multiple sources and techniques in the data gathering process. After all, the method is known as a triangulated research strategy. For example, Snow and Anderson (Feagin, Orum, & Sjoberg 1991) state that triangulation occurs with data, theories, and methodologies. The need for triangulation in research stems from the ethical call to confirm the validity of specific research. In case studies, this could be done by using multiple sources of data (Yin 1984).

Using the case study method, data analysis typically relies upon inductive models of reasoning common to qualitative analysis. Traditional deductive reasoning begins with broader understandings and theory of a subject matter that is translated into casual predictions that are tested with relevant data. Qualitative data do allow for traditional theory-testing approaches that predominate quantitative inquiry, but such rigid approaches often do not allow the discovery of the unexpected. One of the strong values of rich, descriptive data is the ability to explore major trends within the data and find the unexpected by way of commentaries within unclassified memos, Congressional hearings, and legal documents such as Executive Orders, military manuals, and laws.

Inductive analysis begins with specific observations and then attempts to build generalized understandings from observations. Purely inductive work is rare; “data analysis is always guided to some degree by the existing theoretical and empirical literature” (Mullins 2005: 45). A researcher must determine in advance what evidence

to gather and what type of analysis to use with the data to answer the research questions. Simply, one cannot observe and collect data on everything relevant to a specific case. Similarly, one cannot look for any and all potential categories and themes. The data analysis, specific to this case, is guided by a frame or model of criminological state crime. This included examining the data in terms of the presence or lack thereof of the catalysts motivation, opportunity, constraints, and controls. However, this does not presuppose theoretical testing as the overall goal, but rather to understand and explain contingencies and processes at work before, during, and after the events at Abu Ghraib.

This case study includes several data sources and a multi-faceted in-depth investigation into the social phenomenon of torture at Abu Ghraib. Moreover, the case study is intrinsic in nature: meaning the events at Abu Ghraib are of interest to the existing social order (Adler and Clark 2003). Nevertheless, the central nature of the case study is not to test abstract theories, or to illustrate a general statement, but rather to understand the crucial aspects of the events at leading up to and including Abu Ghraib.

#### *Data Sources*

The data sources used for this research include primary and secondary data. The primary data are drawn from five main categories: (1) international legal documents generated from Treaties, Charters, Statutes, and customary laws; (2) intergovernmental reports generated by the United Nations and the International Red

Cross and Red Crescent such as the ICRC reports and the Secretary General of the United Nations Reports; (3) domestic legal documents generated from domestic laws, military codes, trial transcripts; (4) domestic reports generated by investigations including the Taguba Report, Fay-Jones Report, Schlesinger Report; and the Mikolashek Report; and (5) de-classified documents and memos generated by top officials within the DOD, DOJ, and other top military and legal offices as well as letters written to the Administration by the American Bar Association.

The bulk of this primary data was accessed from the following sources: the United Nations Library of Documents, the Yale Library of Law (Avalon Project-Online), International Red Cross (Online), Congressional Records at Western Michigan Waldo Library, White House records Online (Executive Orders), and the purchase of several books containing the reprints of de-classified memos and reports.

Secondary data were drawn from multiple sources. The strategy for obtaining these data was based on topical searches and name-oriented searches (Hill, 1993). This included searching for topical categories: Abu Ghraib, Torture, War crimes in Iraq, Detainee abuse, ghost detainees, scandal Abu Ghraib, etc. The name oriented search involved searches from secondary source bibliographies to attain a triangulation for presented facts as well contrasting accounts with formal documents (primary data). The data that were found by utilizing this procedure included media reports of events leading up to the war on Iraq and subsequent abuses (international coverage as well as domestic including but not limited to CNN, BBC, Al Jazeera, New York Times, Progressive, Common Dreams, The Nation). Other secondary

sources included legal scholars, state crime scholars, historical scholars, and journalistic prints of leaked memos. The secondary data were used only when at least two sources substantiated the descriptive information given.

## CHAPTER III

### INTERNATIONAL LAW

*International law? I better call my lawyer . . .  
I don't know what you're talking about by international law.*

— George W Bush, December 11, 2003  
(Sands 2005: 204)

My research on state crime operates under the assumption that the best standard for classifying state behavior as criminal is the body of international law. This chapter seeks to clarify the central tenants international law and describe the relevant laws pertaining to the cases of abuse and torture that have occurred since the war on terrorism, and more specifically, Abu Ghraib.

#### History

The evolution of the modern nation state, along with changes in the level of international commerce, presented practical and ideological challenges to conceptualizations of international law and international relations. Natural law, embodied in the principle of the social contract, was *the* major organizing principle of intra and inter-state relations. Natural law, as a conceptualization of social control, has subsisted for 2,500 years in a variety of forms. This tradition dates back to the system of Roman law, the Court of Chancery, and to philosophers such as Aquinas, Grotius, Locke, and Hume (Friedmann, 1967). It is rooted in the ideal that there

exists an objective, Natural Law, not one of human origin, rooted in norms of conduct seen to be an essential part of human nature and found “existing in the reason and conscience of every human being” (Brown, 1960: VI). The rise of the modern nation state and the expansion of international commerce produced numerous minor and major conflicts which began to erode the core of Natural Law. The base tenants of the philosophy were variously replaced by core ideologies of nationalism, capitalism, relativism, modern science, or positivism (also known as utilitarianism and pragmatism), and the rise of the Austinian jurisprudence (Brown, 1960). The Austinian model brought the central tenants of state sovereignty to bear on international law.

The Austinian model drew upon Kant’s rejection of yoking law to morality (Friedmann, 1967; Koskeniemi, 2003). Austin insisted that supreme power as embodied in a state limited by positive law is contradictory. The sovereign state, by its very nature, can impose positive law on itself vis-à-vis treaties, but is not under obligation to be fully bound by such self-imposed limitations. Thus, a polity can abrogate these mutual agreements regardless of positive law. With the acceptance of the positivistic legal philosophy that began to guide international law and international relations, legal scholars (e.g., Max Huber and N. Politis) refused to recognize the existence of an international code of conduct external to a nation-state. Such a position in and of itself stymies the development of an international society as, “if all states claim to be sovereign, then there can be no higher authority, no international

law, or restraint of any kind” (Ziegler, 1977: 103). Attempting to resolve these contradictions, a movement toward establishing such boundaries arose.

Most clearly seen in the development of the Hague and Geneva Conventions’ articulation of “rules” of war, the process was hastened by Europe’s collective horror at the devastation of World War I. By 1919, the first international political organization developed as an attempt to organize and encourage inter-state relations and peaceful settlement of international disputes. The League of Nations was formed with the purpose of unifying an international arena composed of sovereign states with divergent political interests, economic interests, cultural disparities, religions, state practices and traditions (Carty, 1991). However, even with the establishment of the League, international relations deteriorated. An economic crisis engulfed the world beginning in 1929. Conflicts increased and European powers found themselves in the middle of another world conflict.

The end of World War II brought new alliances and new attempts to generate and legitimate an international institution designed to foster peaceful cooperation among nations. In 1945, representatives of fifty states assembled in San Francisco, USA, to develop the charter of an international organization to maintain peace and security called the United Nations (UN) and to dissolve the failed League of Nations. With the development of the UN, international relations and law began to take on a fundamentally different character (Rothe and Mullins 2006). By the 1950’s “there existed an embryonic global constitutional order, with rules that remain in place to this day” (Sands 2005: 10).

International law does indeed have a long history; however, it is only in recent years (relatively speaking) that it also has become a regular feature of modern political life (Sands 2005). The second half of the twentieth century marked significant developments within the codification of public law (including the codification of criminal liability for individuals that violate public law) and the establishment of a permanent institution of international social control, the International Criminal Court. During the 1990's the vision of a rules based international system appeared to be becoming a reality. International rules now codified as criminal law provided a framework for judging and prosecuting individual behavior and state actions, and in theory, an end to impunity (Sands 2005).

International criminal law is composed of substantive law and procedural law. For the purposes of this case study, it is the substantive law that is relevant. This is the body of rules indicating what acts amount to international crimes, elements required for them to be considered prohibited, and under what conditions States must prosecute or bring to trial those accused of violating such laws (Cassese 2002a).

International criminal law is a branch of public law. Public law is best defined as the body of law that comes from treaties, Charters, Protocols, Resolutions, and Customary law. As previously stated, it was only after WWII that new categories of crimes developed. These include crimes against humanity, genocide, torture, and most recently terrorism. International criminal law is a "hybrid branch of law: it is public international law impregnated with notions, principles, and legal constructs derived from national criminal law, human-rights law, and customary laws" (Cassese 2002a:

19). However, with the recent creation of the ICC (1998), the world has entered a new phase wherein international criminal law is a full-fledged body of law.

*Customary Law, Jus Cogens, and Erga Omnes*

Customary laws are based on common and constant practices of states out of a sense of *opinio juris*—an ideal of natural law based upon legal obligation and principles. Simply stated, the fundamental principles behind customary laws are founded on willing state participation and a historical recognition of consistent state practices. For example, torture is considered to be within this paradigm of law. Moreover, eleven treaties, along with the principle of customary *jus cogens* law, have substantiated crimes of torture. Customary laws are viewed as *jus cogens*—a compelling law—in that they are internationally accepted principles, norms, and binding without exception. Unlike treaties, charters, and resolutions (which are codified laws and compelling for the signatory states), customary or *jus cogens* laws may or may not be *erga omnes*—or law which flows to all. Many times customary law becomes codified into treaties or statutes between states; however, the compulsory nature of customary law and general principles remain as the scaffold of international law. Moreover, the principles of *jus cogens* (compelling law) and *erga omnes* (flowing to all) can often be conflicting (Bassiouni, 1999; Danilenko, 1991). If a law is *jus cogens* it should follow that it is *erga omnes* (Bassiouni, 1999). When something is compelling to and for everyone, it would stand to reason that it should be expected for all. However, this is not always the case. For example, International

Human Rights Laws are compelling but not necessarily flowing to all. This is, in part, due to pre-existing agreements that can cover specific situations. In the case of Human Rights Law, they are not applicable during a time of war, as these legal conditions are addressed by the Geneva Conventions, which articulate similar principles, as they are to play out within a theatre of combat. As stated, customary laws, *jus cogens*, often find their way into multilateral treaties.

### War Crimes

International humanitarian laws are the foundation for classifying behaviors that constitute war crimes. This body of law consists of humanitarian principles and international treaties aimed at constraining the affliction of combatants and non-combatants during international or non-international armed conflicts. They are by definition *jus in bello* meaning the law governing how war may be fought once underway. They protect persons or property that are affected by the conflict and limit states' rights, within a conflict, to use methods and means of warfare of their choice. Thus, these rules limit the means and extent of permitted violence in armed conflicts. All actors involved in a conflict are bound by these international laws. Accordingly, when actors violate these rules their actions may be deemed war crimes and could potentially be penalized by a domestic nation/state or international court.

As a result of immense suffering, devastation, and death, laws of war were created to regulate acceptable state behavior during times of international armed conflicts. The first attempt to regulate acts during war occurred at the Diplomatic

Conference of Geneva in 1864 which resulted in the first treaty to establish international humanitarian law also known as the rules of war: *The Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*. Additional conferences were held that extended the laws of war to other categories including principles for war at sea (*Hague Convention of 1899*) and for treatment of prisoners including their status (*Geneva Conventions of 1907*), the Hague Rules of Ariel Warfare of 1923, the Geneva Convention of 1929 (*Articles 2,3,4,46, and 51*), and the International Military Tribunals of German War Criminals (*The Nuremberg Principles 1945*) (see Yearbook of the International Law Commission, 1950, Vol. II, pp. 374-378; English Text published in Report of the International Law Commission Covering its Second Session, 5 June-29 July 1950, Document A/1316, pp. 11-14).

After the Nuremberg Trials were conducted, the United Nations took the first step to combine the previously established rules of war into four separate conventions and added provisions for the protection of civilians during armed combat (*The Geneva Conventions of 1949 I, II, III, IV*). These include Convention I (*relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*) which provides for the care of the wounded and sick combatants to eliminate torture, murder, and biological experiments; the II Convention (*relative to the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*) which covers the wounded, captured or sick combatants at sea; the III Convention (*relative to the Treatment of Prisoners of War*) that covers

prisoners of war to be treated humanely, provide adequate housing, food, clothing, medical care, the prohibition of torture, medical experiments, acts of violence, insults and public curiosity against those captured and; the IV Convention (*relative to the Protection of Civilian Persons in Time of War*) which covers civilians by stating that all parties to the conflict must distinguish between civilians and combatants and direct their operations only against military targets. Civilians must be permitted to live as normally as possible and be protected against murder, pillage, torture, reprisals, indiscriminate harm, indiscriminate destruction of property and being taken hostage. Their honor, family rights, and religious convictions must be respected. Occupying forces shall ensure safe passage of food and adequate medical supplies and establish safety zones for the wounded, sick, elderly, children, expectant mothers, and mothers of young children (Geneva Conventions, August 1949).

Two additional Protocols were added to the body of law by which war crimes are classified. These include Protocol I and II (additional to the Geneva Conventions of 1949) that relate to the Protection of Victims of Non-International Armed Conflicts (8 June 1977). Protocol I provides further details of civilian protections in international conflicts and Protocol II that extends protection to victims of internal conflicts in which an armed opposition controls enough territory to enable them to carry out sustained military operations (Rothe 2005).

Further Precedence for the body of international humanitarian law was set by the recent development of the Rome Statute of the International Criminal Court

(ICC) 1998. The International Criminal Court utilizes customary law, human rights law, and the Geneva Conventions as a basis for what constitutes war crimes.

The International Criminal Court<sup>1</sup> is the first full-time international judicial institution, containing within the Rome Statute Treaty the first codification of criminal laws culminated from over a century of state practice. Currently the ICC covers the most heinous crimes of the international order: crimes against humanity, war crimes, and genocide (crimes of aggression are still to be defined within the treaty). Subsequently, war crimes are defined within this text representing all the aforementioned Charters and Protocols.

There is not a single unified Convention or text for the laws of war as they have been assembled throughout history in attempts to minimize the atrocities of armed conflicts and they continue to expand and change in specificity. However, individual and state obligations to abide to the rules of war are well founded and legitimized to the point that they are considered to be one of the leading crimes of international law (Rothe 2005).

The rules of war also include two other components for regulating armed conflict behaviors that are crimes against peace and crimes against humanity. While these crimes are considered crimes of internal or international armed conflict (in a broader sense, crimes of war) they cover a more expansive component of principles than war crimes.

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<sup>1</sup> For more information on the ICC see Rothe and Mullins 2006.

In summary, war crimes cover a vast array of offenses and acts (see Appendix A). Included within later Conventions, Protocols, and legal precedence, torture was included as an act falling under the purview of war crimes (Geneva Conventions II). Moreover, the illegalities of torture can be found in several Charters, Protocols, Treaties, and within the text of ICTR, ICTY, and the ICC. With the cases of cruel and inhumane punishments and torture at Abu Ghraib, these treaties are of significant importance to the overall analysis. Therefore, a succinct review of torture and international law is provided.

### Torture

Universal condemnation of torture is not merely the abstract ideology of political theorists, philosophers, or international legal scholars. The principle can be found in most of the basic documents of international law<sup>2</sup> including The Fourth Hague Convention, Annex Article 4 of 1907, the 1948 Declaration of Human Rights, the 1975 Declaration Against Torture, two UN covenants against human rights violations in 1976 (making torture a crime against humanity), and the UN Convention Against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment (1987).

The *Universal Declaration of Human Rights* (1948) was drafted by the United Nations Commission on Human Rights in 1947-1948 and adopted by the

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<sup>2</sup> See Appendix A for a complete history of legal documents banning torture.

United Nations General Assembly on December 10, 1948. Article 5 prohibits torture and cruel, inhumane, or degrading treatment: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The 1975 Declarations Against Torture Article 1 defines and prohibits torture as follows:

1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

*(General Assembly Resolution 3452 (XXX) of 9 December 1975)*

Article 3 then prohibits even cruel and inhumane treatment:

3. No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

The Convention Against Torture and Other Cruel and Inhumane Treatment or

Punishment of 1987 defines and prohibits torture as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from,

inherent in or incidental to lawful sanctions. (*Part One, Article 1, Paragraph 1*)

The United Nations Committee further delineated specific practices for inclusion under torture and/or cruel and inhumane treatment in response to several cases (e.g., observations concerning the Republic of Korea, New Zealand, Turkey, Azerbaijan, Germany, Australia, and the Netherlands). These include, but are not limited to, daily beatings, detaining individuals in small uncomfortable spaces for two weeks, forcing individuals to sleep on the floor while handcuffed following interrogation, sleep deprivation, depriving food and water, being hooded, loud music for prolonged periods, using cold air to chill, and the threat of torture. The UN Committee has also recommended that the use of blindfolds during questioning be prohibited by states (Committee Against Torture, United Nations Documents).

Torture is also defined within the context of the ICC under both war crimes and crimes against humanity. Article 7 defines crimes against humanity as acts that are widespread or a systematic attack against a civilian population. This includes acts of torture, intentional causing of great suffering to body or mental health, murder, and attacks directed against a civilian population. It is also listed in Article 8 with other war crimes that include torture or inhumane treatment, biological experiments, extensive destruction and appropriation of property, and willfully denying a prisoner of war or other protected person the right to a fair and regular trial.

Legal precedence has also been set reinforcing the notion of torture as universally condemnable and prosecutable offense, domestically and internationally. For example, dating back to 1900, in *Paquette Habana* 175 US 677, the U.S.

Supreme Court ruled, “like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power but because it has been generally accepted as a rule of conduct” (Harbury 2005: 127). More recently (1980) the U.S. Appeals 2 Circuit Court in *Filartiga v. Pena-Irala* stated:

Turning to the act of torture, we have little difficulty discerning its universal renunciation in the modern practice and usage of nations. . . . In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all the nations of the world, we find that an act of torture committed by a state official against one held in detention violates established norms of international law of human rights, and hence the law of the nations. (Harbury 2005: 114, 127-8).

Again in 1992, in *Siderman v. Republic of Argentina*, the Court of Appeals, Ninth Circuit, stated. “The right to be free from official torture is fundamental and universal, a right deserving of the highest statutes under international law, a norm of *jus cogens*.” This reinforces not only binding codified laws, domestic and international (even with reservations), but also precedence as customary law.

While torture is universally prohibited and reinforced via criminal law and customary law (*jus cogens*) it is more than a crime against the victims. It is a crime against every individual as it not only corrupts those directly involved, it corrupts the whole social fabric as it prescribes a silencing of what happened by those that committed the acts as well as the rest of the society that sits by and does nothing (Levinson 2004). Likewise, it destroys the social fabric as every regime that tortures does so under the guise of some higher ideology (superior goal, name of salvation, or for the greater good). However, it cannot be denied that torture continues to be used

by both supporters of the universal judgment against it (state signators) as well as those opposing or non-signators.

For example, states that ratify treaties outlawing torture do not necessarily have a better record for adhering to their obligations than do those that do not (Hathaway 2004). Likewise, states that have a worse record of using torture are slightly more likely to ratify the Convention than those who have been found to use torture less. Specifically out of 160 states, Hathaway reports that 41% of countries that seldom practice torture are ratifiers of the Convention Against Torture. This is compared to 47% of countries that have ratified the Convention that use torture as a military or political means more often. Simply stated, there is a larger percentage of signators and ratifiers that use torture more commonly than those that rarely use it. Comparing democratic with non-democratic states, 24% of non-democratic states with better torture ratings have signed the convention compared to 40% of nondemocratic with worse torture ratings. Moreover, among democratic states 57% of those with better torture ratings ratified the Convention compared to 62% with worse torture ratings. Hathaway further found that torture is not limited to the myth of dictatorship; 43% of dictatorships signed and ratified the Convention. However, democratic states that have signed and ratified (which is necessary for a state to be legally bound by its signator) the Convention, and where torture is the most prevalent, constitute 60% of all the states legally bound domestically and legally by their ratification (Hathoway 2004). Thus, it appears that a state's public support of the

Conventions and Treaties as well as their legal obligations do not dissuade them from the practice of torture.

Torture has a long historical record of uses that vary in their extremism (e.g., death and dismemberment to stress and duress positions). Some of the “lesser” means of torture, such as sensory deprivation and stress positions are common methods used by modern intelligence services (including Britain and Israel). Other extreme forms of torture are commonplace in states (overtly and covertly practiced) such as Afghanistan, Israel, Jordan, Egypt, Saudi Arabia, China, North Korea, and Russia. Moreover, the U.S. has covertly used torture tactics over the past 50 years. One need only remember the CIA’s “Kubark Counterintelligence Interrogation Manual” (1963-1975), the Phoenix Program (1968-1971), the “U.S. Psychological Operations Manual” (1962), the “Human Resource Exploitation Training Manual” (1983), and the “Handling of Sources Manual” (U.S. School of the Armies guide) to recall the systematic training and use of such practices covertly in Vietnam, Latin America, and the Philippines.

The ideology for and/or the nullification of practicing torture is far from being recognized as it persists today just as it did during times of the Gulag and the Holocaust predating criminal liability. What is more, states not only ignore their legal obligations by pursuing this tactic but many attempt to create legal loopholes justifying the systematic use and practice of torture. This is well illustrated by the U.S. attempt to create a legal loophole excluding its obligations to IHL with the classification of detainees as enemy combatants versus prisoners of war (which alleges

to guarantee treatment of detainees in a conflict). The following section addresses relevant international law concerning the status of detainees in conflicts followed by a section addressing the source and history of the term *enemy combatant* and its relevance to international law.

### Enemy Combatants

*I don't care what the international lawyer says . . .  
we are going to kick some ass.*

—G. W. Bush, September 12, 2001

### *POW Status*

The Geneva Convention III and IV specifically regulates treatment of POW's and the treatment of civilians based on precedent standards dating back to the early 1900's as well as in response to atrocious treatment of POW's and civilians during WWII. Specifically Convention III states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) the passing of sentences and the

carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Article IV continues to define those falling under POW status: A. Prisoners of War, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

In the case of the U.S. war on terrorism Article III and IV (A:3) are relevant to the classification of detainees. Moreover, Article V specifically addresses conditions of contest regarding status:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Despite the clear legal requirements, the Bush Administration chose to ignore International Humanitarian Law. In 2001, the Administration coined the term *unlawful combatant* (later renamed *enemy combatant*) to describe certain individuals

the U.S. had either captured during the war in Afghanistan or suspected of having links to the terrorist organization Al Qaeda. The Administration set a new precedent using an Executive Order to classify any individual as an enemy combatant that the Administration deems a threat or danger to the United States, including “citizens who associating themselves with the enemy and with its aid, guidance, and direction, or enter into this country bent on hostile acts are enemy belligerents” (U.S. District Court, Lower Manhattan, *U.S. v. Padilla*, 2002).

The term *enemy combatant* derives from two sources: international law and the 1942 US Supreme Court *Ex parte Quirin* (317 U.S. 1) decision. International law recognizes combatants and non-combatants in Article 3 of the Geneva Convention Rules of War (Hague 4, Chapter #1, Article 3, October 18, 1907). These terms articulate who qualifies for prisoner of war status in order to establish who is then duly protected with rights. Article 3 states: “The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.” International law standards for non-combatant status are reserved for persons accompanying the armed forces without being members, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces (Article 4:4, Hague Convention 3, 1949). *Combatant* is defined by the following standards:

- (a) That of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war. (Article 4:2, Hague Convention 3, 1949)

The origins of the terms *unlawful* and *enemy combatant* can be traced to the 1942 Supreme Court *Quirin* case. The U.S. Supreme Court drew from the distinction in international law between armed forces and peaceful populations of belligerent nations and lawful and unlawful combatants. *Quirin* pertained to eight suspected Nazi saboteurs, one of whom was a U.S. citizen.

The court defined *enemy combatant* with the same terminology as *spy* under international law stating that unlawful combatants—including U.S. citizens—were subject to trial and punishment by military tribunals for acts that render their belligerency unlawful. The decision by the court was based on the existing legal definition of spy which includes the secretive passage through military lines, without uniform, (a criteria under international law for POW) in a time of war for the purpose of waging war by destruction of life or property making them belligerents (who are not entitled to the status of POW) or offenders against the law of war and therefore subject to trial. The two most significant points that should be taken into account from this decision is the emphasis on enemies in uniform or non-uniformed attire and the covert crossing of belligerent lines. Since *Quirin*, no new case has elaborated upon or superseded this definition. However, that did not stop the Administration from creatively misusing the term to create a legal loophole wherein it would appear as if the U.S. was not obliged to adhere to IHL.

Categorization as an “enemy combatant” denies a captive access to the rights of the Geneva Convention to which those categorized, as “prisoners of war” are entitled. Enemy combatants are not permitted contact with lawyers, family, or friends.

Individuals labeled enemy combatants may be denied counsel, held incommunicado, without due process and without review of their designation as enemy combatants by the U.S. Court of Appeals.

Once classified as an enemy combatant, U.S. citizens or foreigners could be detained indefinitely. The government argues that military interrogators must be allowed to question suspects at length and detain some suspects indefinitely on the grounds that exceptional measures are necessary to protect homeland security. Critics counter that the elimination of due process is unconstitutional. The American Bar Association claims that it ignores the precedent set by 18 U.S.C. 4001(a) which sought to restrict the detention of U.S. citizens to situations in which statutory authority for their incarceration exists. The inclusion of U.S. citizens as enemy combatants is contrary to the legal precedents set in international law and U.S. case law.

On September 5, 2002 letters from Senator Carl Levin and Senator Russ Feingold were sent to Attorney General John Ashcroft and Defense Secretary Donald Rumsfeld raising questions about the new categorization of enemy combatant (Press Office Documents 9/2002). The intent of these letters was to clarify eight major points concerning the category, including the operative definition along with a document providing a clear and distinct definition (and its sources), the process of designation of the label, the criteria used in determination, the rights (specifically of U.S. citizens named enemy combatant), time line for detention, any documented changes to existing U.S. military regulations implementing the Geneva Convention of

1949, and an un-redacted copy of the President's orders designating Padillo and Hamdi as enemy combatants were requested. The term *enemy combatant* is also being used for those currently detained in Guantanamo Bay and Afghanistan, which has created a forfeiture of their rights by the state. The significance of these letters defines the pragmatic problem of the Administrations efforts to create a category for those individuals the state wants to detain. Indeed, equating terrorists as enemy combatants is contrary to all codified and customary Rules of War. Nor is it defined under the U.S. Code or the Uniform Code of Military Justice. Furthermore, the Geneva Conventions address that a contracting party (U.S.) cannot suspend any part of the Geneva Conventions. Common Article I states that parties are to respect and to ensure respect for the present Convention in all circumstances.

Nonetheless, even with the ambiguous and unprecedented classification as enemy combatant, detainees are covered under domestic laws that prohibit the use of torture. The following section briefly discusses relevant domestic laws to the cases of abuse and torture at Abu Ghraib.

#### United States Legal Codes

There are several legal codes of conduct governing interrogation of detainees. Specifically, there is the Eighth Amendment of the U.S. Constitution, the U.S. Torture Statue (18 USC 2340), and the United States Code of Military Justice (UCMJ) that all provide a basis for the illegality of such torture. Furthermore, the

War Crimes Act of 1996 and the Expanded War Crimes Act of 1997 provide further domestic legal culpability in response to the development of the Rome Statute.

The Eighth Amendment of the Constitution prohibits cruel and unusual punishment. Specifically it states, Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. The annotation to the Amendment further states:

Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture [such as drawing and quartering, emboweling alive, beheading, public dissecting, and burning alive], and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.

Cruel and unusual punishment has been interpreted and further delineated by U.S. courts to include such acts as prolonged confinement (see *Ingraham v. Wright* 1977; *Whitley v. Albers* 1986, and *Hudsen v. McMillian* 1992) and sleep deprivation (see *Singh v. Holcomb* 1992; *Green v. CSO Stack* 1995; and *Ferguson v. Cape Girardeau Count* 1996).

The U.S. Torture Statute (18 USC 2340) is the domestic codification of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment of Punishment (ratified by the U.S. in 1994). While establishing torture as a federal crime it also provides a definition. Section 2340 reads:

- (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
- 2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—

- (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
- (B) the administration or application, or threatened the administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (C) the threat of imminent death; or
- (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

As will be discussed in later chapters, this statute has great significance wherein legal counselors for the DOD, DOJ, and the White House have systematically attempted to reinterpret or restrict the law to fit with requests for expanding interrogation techniques.

The UCMJ is the Code that subjects all military personnel to criminal responsibility for acts such as:

(Article 93) Cruelty and Mistreatment: Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.

(Article 118) Murder: Any person subject to this chapter whom without justification or excuse, unlawfully kills a human being, when he—

- (1) has a premeditated design to kill;
- (2) intends to kill or inflict great bodily harm;
- (3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or
- (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson.

(Article 125) Sodomy: Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

While rape and carnal knowledge are also listed as offenses, they are defined as male upon female other than wife without consent or under the age of 16.

(Article 128) Assault:

- (a) Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.
- (b) Any person subject to this chapter who—
  - (1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or
  - (2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon; is guilty of aggravated assault and shall be punished as a court-martial may direct.

Moreover, Article 77 (1) states that criminal culpability for any of these crimes include “anyone who commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission” (USC 18, Section 2340).

Just as the UCMJ provides criminal culpability, the 1996 and 1997 War Crimes Act further support this doctrine (though these were legislated to bypass legal responsibility from the developing Rome Statute (see Rothe and Mullins 2005, 2006). This legislation enforced the State’s position that, as a sovereign nation, it could and would domestically prosecute its own citizens for breaches of international war crimes that were to be included in the Rome Statute of the International Criminal Court. In 1997, The Expanded War Crimes Act, 18 USC & 2401 (SEC. 583) amended and re-defined the circumstances that were necessary for State prosecution and recognition of international law. Domestic prosecution for war crimes could and would be convened with a military trial (a court martial) or a civilian court (Rothe 2005). More

specifically, the 1996 WCA was amended in 1997 (USC & 2401 hereafter called USC & 2441) further ensuring jurisdiction of an ICC would not be imposed upon the U.S. as it pertained to war crimes (this includes torture). This also included limiting the previous text of 1996 which originally included “Grave breaches” to “war crimes”:

- (1) in subsection (a), by striking “grave breach of the Geneva Conventions” and inserting “war crime”;
- (2) in subsection (b), by striking “breach” each place it appears and inserting “war crime”; and
- (3) so that subsection (c) reads as follows:

(c) Definition.—As used in this section the term “war crime” means any conduct—

- (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
- (2) prohibited by Articles 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
- (3) which constitutes a violation of common Article 3 of the international conventions 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or
- (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

Thus, the revised act replaced grave breaches with war crimes so the 1996 WCA now reads:

- (a) Offense.— Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances.— The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) Definition.— As used in this section the term “war crime” means any conduct—

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

The Expanded War Crimes Act, 18 USC & 2401 (SEC. 583) amended and re-defined the circumstances that were necessary for State prosecution and recognition of international law focusing solely on war crimes as defined through the Geneva Conventions. Recall this would include the Geneva Conventions Relative to the Protection of Civilian Persons in Time of War and the Convention Relative to the Treatment of Prisoners of War. While the War Crimes Act serves as protection against international prosecution, it does so only if domestic prosecution occurs. This means if a state fails to charge those responsible with war crimes, potentially, the international arena could take jurisdiction (or another state) and prosecute those alleged to have committed the offenses of war crimes or torture.

### Summary

The various domestic and international laws reviewed within this chapter constitute the legal frame I use in this study of events at Abu Ghraib. Historically, during conflicts such as Vietnam and Korea, the policy of the U.S. was to presume that all military prisoners were entitled to POW status regardless of potential non-qualifications under Geneva III. This was a direct policy guided by the ideology that in so treating prisoners or detainees as POWs, potential future cases of U.S. military being held would be treated in accordance with the Convention. However, from the onset of the war on terrorism, the Bush Administration labeled individuals captured as unlawful combatants (AKA enemy combatants), thus claiming the Conventions were inapplicable to their treatment. This had a direct impact on the Administration's decisions and expansions of interrogation techniques allowed by U.S. military personnel in Afghanistan and Guantanamo. Additionally, the expanded interrogation techniques were in violation of both, domestic law and international conventions. Furthermore, these techniques spilled over into Abu Ghraib prison once the official war on Iraq began. However, before exploring the events at Abu Ghraib, it is necessary to first survey the events leading up to the war on terrorism and the occupation of Iraq.

## CHAPTER IV

### HISTORICAL BACKGROUND

Before analyzing the events at Abu Ghraib and subsequent cases of torture and abuse, we must first have an understanding of the historical events leading to the war on Iraq. Furthermore, to explore the war on Iraq, we must examine the neoconservatives within the Bush Administration, their underlying agenda, ideology, and roles. This chapter provides a glimpse into each of these phenomena. I begin with a brief exploration of the neoconservative movement and the unipolar moment that surfaced following the end of the cold war. This is followed by a brief discussion of Presidents Bush Sr. and Clinton's years in office as they relate to the neocon agenda including the significance of the Project of the New American Century. Then I examine the 2000 election which resulted in the neocons placement in office and the subsequent tragedy of September 11, 2001, which provided the opportunity for their agenda to be put into motion. I then briefly discuss the war on terrorism, focusing on the events surrounding Afghanistan and Guantanamo, and including the torture memos and their relevance to international law. I close this chapter with an account of the invasion and occupation of Iraq and the growing Iraqi resistance.

### Neoconservatives and the Unipolar Moment

The collapse of the Soviet Union in 1991 brought the Cold War to an end and presented the United States with a new set of opportunities. With U.S. military supremacy unrivaled, the primary means at Washington's disposal to achieve global hegemony could be used with relative impunity (e.g., invading Panama and Grenada, or using Iraq's incursion into Kuwait to establish a more permanent U.S. military presence in the oil-rich Persian Gulf region). Indeed, the unipolar moment had arrived (see Krauthammer 1989, 1991).

The unipolar moment was not without its challenges (Kramer and Michalowski 2005). The end of the Soviet Union weakened domestic political support for expanding military budgets or the permanent war economy and removed the ideological rationalization of an individual nationalistic agenda. In general, the U.S. general population expected the end of the Cold War to produce a "peace dividend" (Zinn, 1980).

Economic and political elites (often the same actors), did not acquiesce to the reduction in their power that would have resulted from such a realignment of U.S. foreign interest goals, however. A struggle emerged between rival factions over how to capitalize on the opportunities offered by the breakup of the Soviet Union (Kramer and Michalowski 2005). One group supported an internationalist approach, particularly the George H. W. Bush and Bill Clinton Administrations, while the other, often referred to as "neoconservatives," argued for a more nationalist, unilateralist,

and militarist approach. It was this latter group that would find itself in a position to shape U.S. policy in the middle of 2001.

The term *neoconservative*, neocons, was first used in the early 1970's by the U.S. democratic socialist leader Michael Harrington to describe a group of political actors who had been his companions in the U.S. Socialist Party, but were moving politically to the right. Many of the original neoconservative group had been associated with Henry Jackson's faction of the Democratic Party (e.g., Irving Kristol and Norman Podhoretz). In reaction to the liberalism and anti-Vietnam war stance of the Democrats, they moved to the right, joining the Republican Party (Dorrien 2004: 9-10).

A number of neocons affiliated with the Reagan administration provided the political justification for the administration's policies of military growth and use of covert activities. Moreover, as the Soviet Union was weakening, neocons in the administration of President George H. W. Bush began vigorously promoting an aggressive neoimperialist ideology. This included staving off cuts in the military budget in response to the weakened Soviet threat and the popular expectations for peace.

Although the first Gulf War temporarily reduced the pressure to cut the defense budget, "the swift victory in Kuwait and the complete disintegration of the Soviet Union in 1991 reinvigorated calls for a peace dividend and with them the threat of cuts to critical military-industrial budgets" (Kramer and Michalowski 2005: 26).

In 1992, aides under then Secretary of Defense Richard Cheney prepared a draft document titled *Defense Planning Guidance* (DPG). The DPG was an internal classified Pentagon policy statement used to guide military officials in their planning process. The draft provides the first look at the emerging neoconservative agenda. As Armstrong (2002: 78) notes, the DPG “depicted a world dominated by the United States, which would maintain its superpower status through a combination of positive guidance and overwhelming military might. The image was one of a heavily armed City on a Hill.”

The draft DPG endorsed the use of preemptive military force to achieve its goals. The document called for the United States to maintain an extensive arsenal of nuclear weapons and the development of a missile defense shield. The DPG was a clear statement of the neoconservative vision of “unilaterally using military supremacy to defend U.S. interests anywhere in the world, including access to vital raw materials such as Persian Gulf oil” (Kramer and Michalowski 2005: 457; see also Armstrong 2002; Halper and Clarke 2004b; Mann, 2004). Upon a firestorm of criticism that ensued after the draft was leaked to the press, President George H. W. Bush and Secretary Cheney publicly distanced themselves from the DPG. Additionally, they ordered a less unilateralist and nationalistic version be created.

The election of the democratic President, Bill Clinton, removed the neocons from political positions of power within the U.S. government. Moreover, the rapid collapse of the Soviet Union had already revealed that the neocons had been wrong on almost every issue concerning the Soviet threat. Consequently, neoconservatism

lost much of its legitimacy as a mainstream political ideology, and eventually they found themselves in political exile, labeled as the far-right wing of the Republican Party. However, from the sidelines they continued to generate a steady stream of books, articles, reports and op-ed pieces in an effort to influence the direction of U.S. foreign policy (Kramer and Michalowski 2005). Many of the neoconservatives joined well-funded conservative think tanks to advocate for their agenda as well. One of the most important of these was the Project for the New American Century (PNAC).

Throughout the Clinton years, the neocons opined about new threats to domestic security, calling for greater use of U.S. military power to address them (Mann 2004). Some of the “threats,” a persistent theme in their writings, included the need to eliminate Sadaam Hussein’s regime from Iraq, consolidate U.S. power in the Middle East, and change the political culture of the region (Dorrien 2004).

However, where Iraq was concerned, the Clinton administration had a policy of “containment plus regime change” (Rai 2003). This included the comprehensive and devastating economic sanctions that had been imposed on Iraq following the 1991 war, low intensity warfare in the form of unauthorized no fly zones (Rai 2003; Ritter 2003; Simons 2002). Moreover, while the Clinton administration hoped to provoke regime change in Iraq, it did not consider doing so without sanctioning and support of the UN.

Neocons, however, continued to “subject the Clinton administration to a barrage of foreign-policy criticism, particularly with respect to Clinton’s handling of the Middle East and Iraq” (Kramer and Michalowski 2005: 458). During the early

1998's, the Project for a New American Century (PNAC) released a letter to Clinton urging him to militarily remove Hussein from power (Halper and Clarke 2004; Mann 2004).

In September of 2000, the Project for the New American Century issued a report entitled *Rebuilding America's Defenses: Strategy, Forces and Resources for a New Century*. This report grew out of the previously mentioned controversial draft *Defense Planning Guidance* of 1992 and clearly stated the ideology that would come to guide George W. Bush's foreign policies and the war on Iraq. Recall that the report called for massive increases in the military budget, the expansion of military bases, and the establishment of client states supportive of United States' economic and political interests. Moreover, the agenda included getting rid of Saddam Hussein and his regime, the realignment of the Middle East,<sup>1</sup> and a preemptive military action to combat terrorism (as state defined).

Preemption and unilateralism would emerge as the overriding ideology behind the Bush Administration (Hersh 2004a). The imperial goals of the neocons<sup>2</sup> were clear. The opportunity to implement these goals came from two unanticipated events, the first being the appointment of George W. Bush into the office of the Presidency (Kramer and Michalowski 2005).

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<sup>1</sup> See Appendix D for map of area.

<sup>2</sup> For a full analysis of the Neocons and their political agendas see G. Dorrien. 2004. *Imperial Designs: Neoconservatism and the New Pax Americana*. New York: Routledge.

### The Bungled 2000 Election

The primary “happenstance” was the appointment of the Bush/Cheney ticket to the White House. This put the neocons in political positions near the center of power. In December 2000, after a botched election put the question in their lap, the Supreme Court of the United States awarded the U.S. Presidency to George W. Bush, despite his having lost the popular vote by over one-half million ballots. This political debacle restored the neocons to state power, with more than 20 neoconservatives and hard-line nationalists being awarded high-ranking positions within the administration (Dorrien 2004).

Moreover, the Pentagon and the Vice-President’s office became unipolarist strongholds as a result of the close links between neoconservatives, Vice-President Dick Cheney and the new Secretary of Defense Donald Rumsfeld (Moore 2004). However, at this point, Bush’s political ideology “remained more persuaded by ‘pragmatic realists’ in his administration such as Secretary of State Colin Powell, than by their aggressive foreign policy agenda” (Kramer and Michalowski 2005: 26). Yet, the neocons had expected this as the PNAC report predicted that “the process of transformation is likely to be a long one, absent some catastrophic or catalyzing event-like a new Pearl Harbor.” Consequently, they still needed another happenstance.

The second “happenstance” was September 11, 2001. The terror attacks created a climate of fear and anxiety which the neocons mobilized as now they found themselves in empowered positions to again promote their geopolitical strategy to a

president who lacked a coherent foreign policy and to the nation as a whole (Hartung 2004). This included the long-time goal of invading Iraq, regime change, and the reconstruction of the Middle East. As former Treasury Secretary Paul O'Neill revealed, the goal of the unipolarists in the Bush administration had always been to attack Iraq and oust Saddam Hussein (Susskind 2004). This would allow the United States to consolidate its power in the strategically significant Middle East and to change the political culture of the region.

#### Post September 11<sup>th</sup> and the War on Terrorism

*I am driven with a mission from God. God would tell me, "George, go and fight these terrorists in Afghanistan." And I did. And then God would tell me "George, go and end the tyranny in Iraq." And I did. And now, again, I feel God's words coming to me, "Go get the Palestinians their state and get the Israelis their security, and get peace in the Middle East." And, by God, I'm gonna do it.*

— G. W. Bush, stated to Nabil Shaath, News 24; BBC; and Guardian October 6, 2005

On the evening of September 11, 2001, and in the days following, neocons in the Bush administration campaigned to attack Iraq immediately (Clarke 2004b; Woodward 2004). The Bush administration implied on numerous occasions that there was a strong connection between Saddam Hussein and the Al Qaeda terrorist organization that was responsible for the September 11, 2001 attacks in the United States. While they never stated it directly, administration officials repeatedly implied that Iraq was somehow involved in the 9-11 terrorist attacks. During the build up to the war, no major statement on Iraq by the Bush administration was made without

multiple references to terrorism in general and Al Qaeda specifically (see Prados 2004). Attacking Iraq, they argued, was part of the broader war on terrorism. This campaign was highly successful as evidenced by the fact that prior to the start of the invasion, 70% of U.S. citizens believed that Iraq was responsible for 9-11 (see Corn 2003). The clear implication of the Administration was that Saddam Hussein was responsible for the terrorist attacks against the U.S. and that war on Iraq was a legitimate form of self-defense (Kramer 2005).

There is, however, no evidence that Iraq had any ties to Al Qaeda or any responsibility for the 9-11 terrorist attacks. The Bush administration claims concerning Iraqi connections to Al Qaeda have been thoroughly investigated, most recently by the 9-11 Commission, and found to be false (see Rampton and Stauber 2003; Scheer, Scheer, and Chaudhry 2003). Richard Clarke (2004b), the Counterterrorism expert, reported that he personally informed President Bush that Al Qaeda was responsible for the terrorist attacks and that Iraq had no connection to Al Qaeda (see also Dorrien 2004; Suskind 2004). Yet statements implying such a connection became a staple of the pre-war campaign to build public support for an invasion.

After an internal struggle between the “pragmatic realists” led by Secretary of State Powell and the unipolarists led by Vice President Cheney and Secretary of Defense Rumsfeld, the decision was eventually made to launch a general “war on terrorism,” beginning with the attack on Al Qaeda’s home-base in Afghanistan and removing the country’s Taliban government (Mann 2004). The Administration’s war

on terrorism began with Al Qaeda but would not stop there. G. W. Bush (September 24, 2001) stated, “Tens of thousands of trained terrorists are still at large. These enemies view the entire world as a battlefield, and we must pursue them wherever they are.” Again in his State of the Union speech he declared that this war on terrorism “will not end until every terrorist group of global reach has been found, stopped, and defeated” (Bush, September 23, 2001). While the legalities of the war on terrorism remain dubious at best, it was largely supported as the U.S. went after Osama Bin Laden in Afghanistan.

### Afghanistan

The initial invasion in Afghanistan had already occurred before the official announcement and embedded media coverage of the Army Rangers arrival nearly 60 miles west of Kandahar on October 20, 2001. The first to arrive was an Army Pathfinder team (a behind the lines specialty unit) sent ahead to ensure there were no Taliban near the airfield where the strategically planned parachuting of the Army Rangers was to take place. A second Special Operations (SO) unit also arrived right outside of Kandahar October 20<sup>th</sup>, at a complex that included a house used by Mullah Omar, the alleged Taliban leader. The previous two weeks had consisted of an air war against Afghanistan, the Taliban, and Al Qaeda. The arrival of the second SO, consisting of a Delta Force unit, displayed the intensity of Rumsfeld’s displeasure of the military command structure. When the assault on Omar’s complex had not been successful or as one Delta member stated “a total goat fuck” (a military slang for

everything that could go wrong did go wrong), Rumsfeld claimed the military operations were “far too cautious and clumsy” and as the after-actions arguments continued over the next few weeks, the new philosophy of “gloves off” became prevalent. (Hersh 2004a: 121).

By the middle of November 2001, Bin Laden remained at large and fighters continued to put up resistance to U.S. military presence. After fleeing from defeats at Mazar-i-Sharif, Taloqan, and Pul-i-Khumir, many Afghanis and Taliban fighters arrived in Kunduz, a haven from the bombing and a place to attempt to negotiate surrender terms. However, the Bush Administration adamantly and successfully opposed all surrender negotiations. The Northern Alliance stormed and took Kundez.

On November 25, 2001, the Northern Alliance upon taking Kunduz, captured nearly four thousand alleged Taliban and Al Qaeda fighters. Within weeks of the invasion of Afghanistan, the U.S. and allies were inundated with prisoners. While Afghani Taliban were allowed to return to their local villages, all foreign-born “soldiers” were taken as detainees and relocated to Mazar-I-Sharif, the Qala-I-Jangi fortress (except for Pakistan military, intelligence, and other underground individuals who were flown out of Kunduz back to Pakistan per an agreement with the Administration). Others, as we know now, were handed over to allies “who were not afraid to get very rough with prisoners.” A former intelligence official stated that the allies would tell U.S. intelligence officers that “we pulled out teeth and fingers from a prisoner, but we got some good shit. He’s dead now, but we don’t care” (Hersh 2004a: 49). It was also at this time when Rumsfeld authorized the establishment of a

highly secretive program (SAP or Special Access Programs) that endorsed a blanket approval to kill or capture and if possible interrogate “high-value” targets. The program was strategically located in a secure part of the Pentagon that as previously mentioned was now one of the strongholds of the neocons.

The targeting and killing of Al Qaeda members, without any judicial process, came to be seen and justified as necessary military action as this was a “new kind of war” composed of terrorist organizations and failed states. Moreover, Defense Department lawyers emphatically stated that this type of assassinations was not illegal under the Army’s Law of War as the targets were “combatant forces of another nation, a guerilla force, and or terrorists whose actions pose a threat to the security of the United States”<sup>3</sup> (Hersh 2004a: 264).

At this same time (end of November 2001) at the Qala-I-Jangi fortress a prisoner detonated a hand grenade, killing himself and two of the Northern Alliance General’s aids. The prisoners were then hand bound for the CIA to interrogate. A fight ensued between CIA Johnny Spann and a prisoner that led to the death of Spann (after Spann had shot and killed 4 prisoners). The prisoners then charged the guards and attempted to retrieve their guns. In the following days U.S. forces killed the majority of detainees. It has been claimed by some media and NGOs that U.S. Special Forces had Northern Alliance troops pour diesel into the basement of Qala-I-Jangi

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<sup>3</sup> This is a direct contradiction to the 1976 Presidential Executive Order signed by President Ford that bans all political assassinations, which is still in effect.

setting it on fire killing all the detainees in hiding. The London Times and British Broadcasting Company aired on November 29, 2001 a report showing U.S. Special Forces firing down on prisoners (that were hand bound) from outside the compound.

On November 13, 2001 President Bush signed an Executive Order authorizing military tribunals for suspected terrorists. This was an example of the blatant disregard for international law that would come to be the standard practice for this Administration (e.g., Geneva Conventions Article 5: International Covenant on Civil and Political Rights, and the UN Principles of Protection Under any Form of Detention of Imprisonment). Under Bush's Executive Order, any foreign national who has been designated as a suspected terrorist or as a terrorist's aid could be detained, tried, convicted, and executed without a public trial or counsel, without the proof of guilt beyond a reasonable doubt, and without right of appeal. Ironically, the State enacted an order that it had previously denounced. The State Department routinely criticized the use of military tribunals, practices of secret trials that do not adhere to "fair public trials," and omissions of due processes in similar situations around the world. In the annual Human Rights Practices Country Reports the U.S. condemned Burma in 1990, China in 2000, Colombia in 1996, Egypt in 2000, Kyrgyzstan, Malaysia in 1975, Nigeria from 1966-1999, Peru in 1996, Russia in 1999, Sudan in 2000, and Turkey (Rothe and Mullins 2006).

Additionally, by mid December 2001, U.S. operatives had participated in the kidnapping of two Egyptians who were sent to Cairo where they underwent brutal, repeated and extensive interrogation techniques (Hersh 2004a; The Guardian

September 13, 2004).<sup>4</sup> The position of the Administration towards international law was becoming very clear: international law would not act as a control against their interests—it was seen as irrelevant.

December 2001 was the high point of U.S. involvement in Afghanistan as the Northern Alliance, U.S. airpower, and Special Force units took Kabul, removing the Taliban from power. On December 22, Hamid Karzai was sworn in as the new leader of Afghanistan and within a few months the most highly skilled U.S. units and CIA paramilitary teams were diverted from Afghanistan. As Clarke (2004b) noted, “The U.S. Special Forces who were trained to speak Arabic, the language of Al Qaeda, had been pulled out of Afghanistan and sent to Iraq.” While this was not in response to the stated goals of the invasion of Afghanistan (finding Bin Laden, Al Qaeda, and removing the Taliban from power) and as “warlordism, banditry and opium production” got a new lease on life, it does symbolize the underlying priorities and agenda of the neocons (Rothstein 2002). The invasion of Iraq was the priority.

#### Guantanamo

Guantanamo, strategically placed in a legal black hole of U.S. leased land in Cuba, soon became “home” to over 650 detainees from over forty states; all were claimed to be officials or supporters of Afghanistan’s Taliban regime or of the Al-Qaeda terrorist organization responsible for September 11, 2001. A Senior Fellow at

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<sup>4</sup> One of those men was later released in October 2003; the other is serving a 25 year prison sentence in Egypt.

the Brookings Institution (a well known liberal think tank in Washington, DC), Michael O'Hanlon, stated in a radio interview on January 6, 2002 the underlying ideology behind choosing Guantanamo:

We can sort of do what we want to there. It's on foreign soil and yet the foreign government doesn't have much say in how we use the place . . . and it's close enough to the United States, you can imagine flying in various intelligence experts to interview these detainees and try to get information from them. So for a number of reasons, it seems the best choice and I think Rumsfeld is right here to have selected it.

Within weeks of the high point of U.S. involvement in Afghanistan and the capture of 4,000 prisoners, the first detainees arrived at Guantanamo, January 11, 2002 (Strasser 2004). Photographs of detainees in orange jumpsuits hooded and in chains provoked an international outcry against the treatment of detainees the Administration had put in place. They were labeled as the "worst of a very bad lot . . . devoted to killing millions of Americans" (Cheney 2002). The issue of their guilt was not questioned as Bush (2003) stated: "The only thing we know for certain is that these are bad people." Days before their arrival at Guantanamo, the Administration had already begun discussing the United States' legal obligations (as they so chose to interpret them) to the Taliban and Al-Qaeda detainees.

A memo dated January 9, 2002 from Deputy Assistant Attorney General John Yoo of the DOJ to General Counsel of the DOD William Haynes reinforced the hardliners position within the Administration: "We conclude that these treaties do not protect members of the Al-Qaeda organization . . . we further conclude that these treaties do not apply to the Taliban militia." The DOJ goes as far as dismissing even the most fundamental principles guiding international relations: customary law. Yoo

states, “We also conclude that customary international law has no binding effect on either the President or the military because it is not federal law, as recognized by the Constitution” (2002: 41). On January 19, 2002, nearly a month before the public declaration or Executive Order by President Bush, Rumsfeld sent a memorandum to the Joint Chiefs of Staff to transmit the following orders to all Combatant Commanders:

- 1) The U.S. determined that Al Qaeda and Taliban individuals under the control of the DOD are not entitled to prisoner of war status for the purposes of the Geneva Conventions of 1949.
- 2) The Combatant Commanders shall, in detaining Al Qaeda and Taliban individuals, under control of the DOD, treat them humanely and, *to the extent appropriate and consistent with military necessity*, in a manner consistent with the principles of the Geneva Conventions of 1949. [*italics my emphasis*]

Several other memos continued to circulate between the DOD and DOJ, including the January 26, 2002 memo by Colin Powell to the Counsel to the President reinforcing the need for the Administration to adhere to international law and provide the necessary and customary status of POW. However, his efforts failed and the stage was again set for blatant misuse and abuse of international law as it conflicted with the larger goals and interests of the Administration, specifically those of neocons.

Alberto Gonzales, Counselor to the President, also participated in the legal discussions of classifying detainees. In a memo dated January 25, 2002, he advised President Bush to declare the prisoners in the war on terrorism outside of the protections of the Geneva Conventions with this declaration:

As you have said, the war against terrorism is a new kind of war. The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order

to avoid further atrocities against American civilians. . . . This new situation renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.

On February 7, 2002, the White House Spokesperson announced that President Bush had determined that the Provisions of Geneva applied to Taliban detainees, but not al-Qaeda detainees. However, Bush stated:

Common Article 3 of Geneva does not apply to either Al Qaeda or the Taliban detainees. . . . I determine that the Taliban detainees are unlawful combatants and, therefore do not qualify as prisoners of war under Article 4 of the Geneva, I note that, because Geneva does not apply to our conflict with Al Qaeda, Al Qaeda detainees also do not qualify as prisoners of war.  
(Memorandum for the Vice President)

The announcement confirmed that neither group was entitled to prisoners of war status; instead they would be left without a classification or at best classified as an enemy combatant. Moreover, on March 21, 2002, Defense Secretary Donald Rumsfeld asserted that the U.S. had the right to hold detainees without a trial until the end of the war against terrorism (Sands 2005). Without the privileges and or protections of the Geneva Conventions, the legal status and treatment of detainees would soon come to also be defined by the Administration and justified as wholly legal. Moreover, the underlying ideology of the neocons, now in charge of much of the day-to-day operations and decisions within the Administration, was coming to fruition by means of military force.

By February 26, 2002, discussions were already underway for easing or redefining the application of international rules constraining interrogation techniques of persons captured in Afghanistan. Moreover, getting the interrogation process to work was seen as crucial as "this is a war in which intelligence is everything . . .

winning or losing depends on it” (Pentagon Consultant John Arquilla in Hersh 2004a: 2). Yet, the interrogations at Guantanamo were not producing any intelligent or viable information. By this time a report by a CIA analyst not only showed most of those detained at Guantanamo should not have been, but that the conditions and their treatment were horrendous. For example, detainees included one 13-year-old, one 14-year-old, two 15-year-olds, one 16-year-old, an 88-year-old, and a 98-year-old (Human Rights Watch 2004). The issue was not only direct torture, which was observed, but also cruel and inhumane treatment (Hersh 2004a). The first week of August 2001, 598 detainees were being held in Guantanamo.<sup>5</sup> However, the worst was yet to come. On August 1, 2002, internal memos again began to circulate attempting to circumvent U.S. obligation under international law pertaining to issues of torture and interrogation methods. The stage for torture was being set not only for detainees at Guantanamo and Afghanistan, but would also spillover to Abu Ghraib.

#### Torture Memos

At the height of the holding of detainees in Afghanistan and Guantanamo, strategic and legal manipulation of international and domestic torture laws was taking place within the Administration. As previously mentioned, little to no valued information was being obtained from detainees leading to the capture or death of Bin Laden and/or other high ranking Al Qaeda members that the Administration needed to

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<sup>5</sup> For an updated account of detainees at Guantanamo, see Appendix E dated 2005.

justify the billions of dollars being spent on the vast and ambiguous war on terrorism. Moreover, to achieve some success in the area of capturing terrorists could boost public support for the silent but growing plans to attack Iraq as part of the larger war on terrorism. With over 600 detainees being held in Guantanamo, and thousands in Afghanistan, little progress was made in the way of actionable intelligence. However, some actionable intelligence was reported to have been gotten from the illegal transportation of detainees to states viewed as harsh interrogators or those willing to torture for the U.S. For example, Vincent Cannistraro, a former intelligence official, told reporters at Newsday:

Better intelligence has come from a senior al Qaeda detainee who had been held in the U.S. base at Guantanamo, Cuba, and was “rendered to Egypt after refusing to cooperate. . . . They promptly tore his fingernails out and he started to tell things.” (Newsday, February 6, 2003)

While a practice of transporting detainees (ghost detainees) to other states was systematically practiced, the interrogators at Guantanamo also wanted increased interrogation techniques to be justified in a cloak of legal interpretations.

In a memo (August 1, 2002) to Alberto Gonzales, Counsel to the President, addressing the CIA’s request for guidance on interrogation, Jay Bybee, Legal Counsel of the DOJ, reinterpreted the Torture Convention and other international laws setting the stage for harsher interrogation techniques. Bybee states that the Torture Convention “prohibits only the most extreme acts by reserving criminal penalties solely for torture and declining to require such penalties for cruel, inhumane, or degrading treatment or punishment” (Bybee August 1, 2002). Moreover, he suggests that “Certain acts may be cruel, inhumane, or degrading, but still not produce pain

and suffering of the requisite intensity to fall within a legal proscription against torture” (Bybee 2002; Hersh 2004a; Greenberg and Dratel 2005; Danner 2005). Bybee (currently a federal appeals court judge) stated that torturing al-Qaeda detainees in captivity abroad “may be justified,” and those international laws against torture “may be unconstitutional if applied to interrogations” conducted in the war on terrorism. The memo also discussed how the doctrines of “necessity and self-defense could provide justifications that would eliminate any criminal liability” on the part of officials who tortured the al-Qaeda detainees. Consequently, Bybee provided an extremely narrow vision for which acts constitute torture asserting that “physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death” and that “mental torture” only included acts that resulted in “significant psychological harm of significant duration, e.g., lasting for months or even years.”

Dana Priest and Jeffrey Smith, in the *Washington Post*, June 27, 2004, cited unnamed U.S officials as saying that the Bybee memo was prepared after a debate within the government about the methods used to interrogate alleged al-Qaeda leader Abu Zubayda (see below) after his capture in April 2002. Other reports suggested that CIA interrogation methods were authorized by a secret set of rules, endorsed by the DOJ and others in the Administration. These were said to include feigned drowning and refusal of pain medication for injuries. According to the *New York Times*,

The methods employed by the CIA are so severe that senior officials of the Federal Bureau of Investigation have directed its agents to stay out of many of

the interviews of the high-level detainees, counterterrorism officials said. The F.B.I. officials have advised the bureau's director, Robert S. Mueller III that the interrogation techniques, which would be prohibited in criminal cases, could compromise their agents in future criminal cases, the counterterrorism officials said. (Risen, Johnston, and Lewis, May 13, 2004)

Of course, what is new here is that the U.S. is trying to make torture legal and is being bold enough to bring it out of the closet. But this has been the unofficial practice, despite claims otherwise by Senator John McCain, as far back in history as one wants to go. Most, but not all, of the methods of the CIA agents, private contractors, and the military personnel employed today, for instance, were field-tested in Vietnam as part of the Phoenix program, and later imported to Latin America and Asia under the guise of police training "counter-terrorism" programs. More specifically, declassified training manuals from the School of the Americas, in both English and Spanish, speak volumes to how military and police officers from across the hemisphere and beyond were instructed in many of the same "coercive interrogation" techniques that have since migrated to Guantanamo and Abu Ghraib: hooding and blindfolding, forced nudity, sensory overload and deprivation, stress positions, mock drowning, etc. (Barak 2005).

By October 2002 a series of memos were issued considering alternative acceptable counter-resistance techniques: interrogation techniques wavering between torture and cruel and inhumane treatment. In light of what key Administrators of the Office of the Secretary of Defense and Joint Task Force 170 saw as "tenacious resistance . . . despite our best efforts" for gathering key intelligence, more memos circulated discussing the legality of additional techniques (General Hill, Memo

October 25, 2002: 1). The official stated problem was that the “current guidelines for interrogation procedures at GTMO limit the ability of interrogators to counter advanced resistance” (Phifer JTF-J2). Hill’s memorandum includes the Joint Task Force 170’s proposed counter-resistance techniques divided into three categories: the first two were “believe(d)” to be legal but the Task Force wanted legal clarification and approval for the third category. While stating reservations regarding the third category, Hill asserted that he

desires to have as many options as possible at my disposal and therefore request that Department of Defense and Department of Justice lawyers review the third category. . . . I welcome any suggested interrogation methods that others may propose. I believe we should provide our interrogators with as many legally permissible tools as possible.

Others within the DOD and Joint Task Force included similar memos on October 11, 2002 with their determination that the proposed techniques are legal under domestic and international law (e.g., Dunlavey, Beaver, and Phifer). While overtly requesting verification of the suggested techniques legality, what was being surreptitiously sought were “exquisitely refined lawyer skills to justify some part of” or all of the expanded techniques (Weisberg 2004: 301).

The specific requests of the Joint Task Force 170 of Guantanamo included Category I, II, and III techniques:

Yelling; techniques of deception; multiple interrogators; and interrogator identity (identify himself as from a country with a reputation for harsh treatment).

Use of stress positions for a maximum of 4 hours; use of falsified documents or reports; isolation for up to 30 days or beyond with approval by the Commanding General; interrogating detainee in environment other than the standard interrogation booth; light deprivation and auditory stimulation;

hooding; 20 hour interrogations; removal of all comfort items (including religious items); switching from hot rations to MRE's; removal of clothing; forced grooming; using detainees phobias (such as fear of dogs) to induce stress.

The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family; exposure to cold weather or water; use of wet towel and dripping water to induce the misperception of suffocation; use of mild, and non-injurious physical contact such as grabbing, poking and light pushing (any techniques requiring more than this is to be administered only by individuals specifically trained in their safe application).

Along with the legal department exploring these techniques, General Counsel William Haynes sent Rumsfeld a memo asking that all of Categories I and II be approved along with one of Category III (use of mild physical contact). Rumsfeld, made a specific remark in a notation on the memo that he stands for 8-10 hours a day so "why is stands limited to 4 hours?" (November 27, 2002). On December 2, 2002 Rumsfeld approved Category I, II, and the final article of Category III (the same conditions that Haynes approved). However, six weeks later, Rumsfeld sent a memorandum to the Commander USSOUTHCOM and rescinded his December 2 approval (January 15, 2003). It was at this time a working group within the DOD began to assess the legal policy and operational issues relating to interrogations.

Nearly two months later, March 6, 2003, the Working Group submitted its report. The report outlines the Administrations position regarding international law and techniques of interrogation, potential defenses, intent, necessity, superior orders, potential civil cases against the U.S, and transporting detainees to other states for interrogation: The U.S. understanding relating to Article 3 of the Convention, is that it only applies if it is more likely than not that the person would be tortured (p. 2).

Less than two weeks later, President Bush announced that upon his orders “coalitions forces have begun striking selected targets of military importance” in Iraq (Presidential Address to the Nation, March 19, 2003). While hundreds of detainees were being held in Guantanamo and Afghanistan in disarray and violence, unclear, inconsistent and open orders for interrogation techniques continued to guide the treatment of thousands of individuals, the official war on Iraq had begun.

It was not until April 4, 2003, when the working group provided an updated version and revision of its reporting in which they argue that it might be essential to interrogate detainees “in a manner beyond that which may be applied to a prisoner of war who is subject to the Geneva Conventions.” The report also recommended 35 interrogation techniques be used on unlawful combatants. Moreover, it provides an in-depth discussion of legal technicalities that could be used to create a “good faith defense against prosecution” (see also Appendix F for details of the techniques and their consistency with domestic and international law). On April 6<sup>th</sup>, Rumsfeld sent a memo to USCCO Hill that included a new list of approved techniques that varied significantly from his earlier approved methods and from the working group report. Within a matter of months the methods approved and/or disapproved by high officials changed causing uncertainty and an unclear, inconsistent mandate for interrogators guidance.

These memos depict the erroneous legal analysis that guides the Bush Administration’s decisions and policies in an effort to pursue their geo-political and ideological agenda. Moreover, as will be discussed in more detail in Chapter VI, the

assessment of international law is in blatant error. Yet, these “are the memorandum the White House was willing to put in the public domain” (Sands 2005: 214). Furthermore, the global war on terrorism, as a new form of war based on intelligence, was used to justify additional interrogation techniques in Afghanistan, at Guantanamo, and in Iraq. Moreover, the inconsistency between approved methods, regardless of legality, the receded orders, and the obscure classification of enemy combatants contributed to the already existing quagmire of the war on terrorism.

As previously mentioned, the U.S. was now officially in a war on Iraq. However, in many ways, the war on Iraq had begun well before March 19, 2003. Months before the official public declaration was made: coalition forces were attacking. In November 2002, British and U.S. warplanes were already attacking Iraq’s defenses daily. While indiscriminate bombing of Iraq had occurred throughout the 1990s, post-the first Gulf War and UN sanctions/boycott of Iraq, the consistency of daily attacks on Iraq’s defenses aiding the upcoming invasion was significantly different. Additionally, U.S. Special Forces were deployed in Western and Northern Iraq at the same time officials were claiming they would attempt diplomatic means to deal with Iraq.

### The Iraq Build-up

While the Afghanistan war was still underway, the Administration began planning an invasion of Iraq (Clarke 2004b; Fallows 2004). By November, barely one month after the invasion of Afghanistan, Bush and Rumsfeld ordered the Department

of Defense to formulate a war plan for Iraq (Woodward 2004). In late 2001, Richard Pearle and James Woolsey helped to create a surge of articles and columns calling for the extension of the war on Afghanistan into Iraq, exactly as had been planned. Pearle stated:

The question in my mind is: Do we wait for Saddam and hope for the best? . . . What is essential here is not to look at the opposition to Saddam as it is today, without any external support, without any realistic hope of removing that awful regime, but to look at what could be created with the power and authority of the United States. (November 2001, Meeting of the Foreign Policy Research Institute, Philadelphia, in Sands 2004:169)

Throughout 2002, as plans for the war on Iraq were being formulated and covert activities were underway, the Bush administration made a number of formal pronouncements demonstrating that the goals of the neocons were now the official goals of the U.S. government. In the January 29<sup>th</sup> State of the Union address, Bush recast the focus of the war on terrorism by associating terrorism itself with states such as Iran, Iraq and North Korea (the “axis of evil”) presenting them as legitimate and necessary targets for military action (Callinicos 2003). In a speech to the graduating cadets at West Point on June 1<sup>st</sup>, the President provided the fullest articulation of the strategic doctrine of preventative war that “was critically interpreted to be the most open statement yet made of imperial globalization” (Falk 2004: 189).

In the campaign to build public support for the invasion and occupation of Iraq, the Administration exploited the political opportunities provided by the fear and anger over the September 11<sup>th</sup> terrorist attacks (Rothe and Muzzatti 2004). In 2002 the Bush administration promulgated a new National Security Strategy (NSS) that claimed the United States had the right to use force preemptively against any

perceived threat to U.S. security (Mahajan, 2003). This document not only claimed the right to wage preventative war as previously discussed, but it claimed that the U.S. would use its military power to spread democracy and laissez-faire capitalism around the world as the “single sustainable model for national success” (Callinicos 2003: 29). As Roy (2004: 56) notes: “Democracy has become Empire’s euphemism for neo-liberal capitalism.” Moreover, the highest stated value of democracy, liberty, quickly became what Gramsci (1995: 242) anticipated, “a practical instrument of government used as an ideology to pursue international self-interests disguised as a human value.”

The NSS doctrine was then asserted as legal justification for the use of force against Iraq. Testifying in front of Congress on September 19, 2002, Secretary of Defense Donald Rumsfeld rejected the idea that a U.S. attack would violate international law and evoked a right of anticipatory self-defense against Iraq’s alleged weapons of mass destruction.

Moreover, by linking Saddam Hussein and Iraq to the wider war on terrorism, the Administration established the necessary propaganda wherein domestic security required the State’s ability to attack any other nation-state believed to be supporting terror, no matter how weak the evidence. This obscured the underlying geopolitical and economic neocons goals of creating a Pax Americana. In Falk’s (2004: 195) words: “the Iraq debate was colored by the dogs that didn’t bark: oil, geopolitical goals in the region and beyond, and the security of Israel.”

### Iraq Occupation

This Administration's views on the irrelevance of international law had direct effects on the decision to classify prisoners as enemy combatants, expand interrogation techniques to include torture, and in its efforts to pursue larger geo-political and ideological goals. Consequently, illegal or not, the U.S. invaded a sovereign nation committing the supreme international crime (Nuremberg Tribunal). "The Bush administration chose to risk invasion and occupation despite widespread concern around the world that this choice would result in more rather than less death, injury, and material destruction for Iraqis" (Kramer et al. 2005: 24).

The onset of the invasion of Iraq began with shock and awe bombings as ground forces made their way in. Days of concentrated bombing of Baghdad continued. In other areas of Iraq, resistance was significant. For example, stronger than expected resistance fighting continued in the southern port town of Umm Qasr, Nassiriya, and Basra. U.S., its allies, and Iraqi forces continued to suffer casualties in the face of stronger than expected resistance from Iraqi soldiers (The Guardian, March 23, 2003).

As the intense and often indiscriminate bombing continued, hundreds of civilian casualties also occurred. The high civilian death toll was the result of various military tactics and weapons. Ridha (2004: 1) demonstrates that indiscriminate "missile attacks caused scores of civilian deaths throughout Iraq without any discernable military gains." According to a Human Rights Watch (2003) report, during the invasion the widespread use of cluster bombs and numerous attempted

“decapitation” strikes targeting senior Iraqi officials—often based on scanty or questionable intelligence—were responsible for the deaths of many Iraqi civilians. The World Tribunal on Iraq came to similar conclusions (Whitson 2004). Coalition forces have also exposed Iraqi civilians to significant “collateral damage” through the deployment of napalm-like Mark 77 firebombs (Buncombe 2003; Ridha, 2004), and the indiscriminate use of depleted uranium munitions that release dangerous radioactive debris in the short term and pose long-term environmental hazards to people exposed to uranium-contaminated soil or water (Michalowski and Bitten 2004).

As Iraqis watched the continued devastation of their country from the bombings, the U.S. further fueled resistance when on March 31, 2003, U.S. forces killed seven women and children at a checkpoint in southern Iraq. Less than 24 hours later another civilian was killed while another was injured after troops fired on their car as it approached a roadblock (The Guardian, April 1, 2003). The pattern of civilian deaths continued throughout April, as did the growing resistance. Once Baghdad was taken over by U.S. and allied troops, mass protests against the occupation began. On April 18, 2003, tens of thousands of Iraqis demonstrated against the U.S. occupation of Iraq in central Baghdad. Ten days later, as protests continued U.S. forces fired on a group of Iraqi demonstrators near Baghdad, killing 13 people and wounding approximately 75 others.

On May 7<sup>th</sup>, Paul Bremer was named as Iraq’s new civil administrator. The Bush administration’s agenda in Iraq went far beyond “regime change.” The

Administration's goal from the outset was to transform Iraq from a state controlled economy into a showpiece for Middle East capitalism characterized by free trade, supply-side tax policy, privatization of key economic sectors, and widespread foreign ownership in those sectors (Bacon 2004; Juhasz 2004; Krugman 2004a). However, the economic transformation also was prohibited by international law. As Greider (2003: 5) notes:

The obstacle is the Fourth Geneva Convention of 1949, which codified in greater detail the principles of "occupation law" first framed by the Hague Convention of 1907 rules of warfare meant to prevent a military power from plundering a defeated nation or reordering the country to conform to the conqueror's ideology and economics.

International law governing military occupation requires the occupying power to respect the domestic laws of the subjugated country unless absolutely prevented from doing so by military necessity. Yet in a series of Orders in 2003, L. Paul Bremer, the head of the Coalition Provisional Authority, rewrote Iraqi law in order to make the country available for foreign investment and ownership. As Juhasz (2004: 2) notes:

These orders include the full privatization of public enterprises, full ownership rights by foreign firms of Iraqi businesses, full repatriation of foreign profits, the Flat Tax, the opening of Iraq's banks to foreign control, national treatment for foreign companies (which means, for example, that Iraq cannot require that local firms able to do reconstruction work should be hired instead of foreign ones), and (with an earlier Order) elimination of nearly all trade barriers. (Kramer and Michalowski 2005)

In essence, Bremer's reconstruction was given over primarily to U.S.-based corporations, with Bechtel and the Halliburton subsidiary of Kellogg, Brown and Root being the major winners (Rothe 2006).

U.S. efforts to remake Iraq into a U.S.-like free-market economy had a devastating impact on ordinary Iraqis. Privatization led to 70% unemployment at a time when there was no unemployment insurance or system of public welfare to offset the effect of privatization (Klein 2003). According to Bacon (2004: 1),

the violence of grinding poverty, exacerbated by economic sanctions after the first Gulf War, has been deepened by the U.S. invasion. Every day the economic policies of the occupying authorities create more hunger among Iraq's working people, transforming them into a pool of low-wage, semi-employed labor, desperate for jobs at almost any price.

The growing conditions of occupation, deaths of civilians, and the structural conditions within Iraq fueled the existing resistance.

The use of privatization (PMC) by the U.S. in the war on terrorism also reached an unprecedented high. An article on PMCs in Iraq in the New York Times, April 19, 2004, commented:

Far more than in any other conflict in United States history, the Pentagon is relying on private security companies to perform crucial jobs once entrusted to the military. In addition to guarding innumerable reconstruction projects, private companies are being asked to provide security for the chief of the Coalition Provisional Authority, L. Paul Bremer III, and other senior officials; to escort supply convoys through hostile territory; and to defend key locations, including 15 regional authority headquarters and even the Green Zone in downtown Baghdad, the centre of American power in Iraq.

All said, the presence of private contract workers exceeded the number of British troops (14,000) (Rothe 2006). As previously mentioned, corporations such as Bechtel and Halliburton were attaining vast contracts for logistic contracts. Other corporations were used for mercenaries for hire and/or protection services (see Blackwater, including protection of U.S. high ranking personnel and for the newly formed Interim Iraqi Government). Other corporations were given contracts for

interrogations and or interpretations such as CACI International, Inc. from Arlington, Virginia, and Titan of San Diego, California.

On May 1, G. W. Bush declared “major combat operations” over. During this period and in the following weeks, U.S. military and allies captured and imprisoned thousands of Iraqis. Many of those captured would find themselves in the facility Bremer had recently dedicated as a temporary holding prison: the infamous Abu Ghraib (an Iraqi prison under Saddam alleged to have been the site of vast cases of torture). By late summer of 2003, resistance to the occupation soared in comparison to the first months. Uprisings began and the U.S. and allies were overwhelmed (Strasser 2004). Yet, despite the claim of “mission accomplished,” U.S. forces were “being ambushed, hit by rocket-propelled grenades, and surprised by roadside bombs that exploded under army vehicles” (Peacework 2005: 1). In their attempts to control insurgents, U.S. and British forces shot and killed demonstrators, bombed civilian areas, demolished homes and destroyed property in acts of collective punishment. They deployed excessive and sometimes lethal force in encounters with Iraqi citizens, even when there was little evidence that these Iraqis were resistance fighters or guilty of any other crimes (Amnesty International 2004). Coalition forces have used hostage taking as way of rooting out insurgents, effected arbitrary arrests, and held detainees indefinitely without charges or access to lawyers.

The U.S. DOD and the military were eager to get more information from prisoners to help in the growing resistance with Iraqi fighters. A decision was made to send Guantanamo commander Major General Geoffrey Miller to Iraq in September

2003. His job was “to review Iraqi Theater ability to rapidly exploit internees for actionable intelligence,” according to Major General Antonio Taguba (Taguba Report: Annex II 2004).

According to the Taguba, Miller stressed that “detention operations must act as an enabler for interrogation.” Miller also briefed military commanders in Iraq on interrogation methods used at Guantanamo: sleep deprivation, exposure to extremes of cold and heat, and placing prisoners in “stress positions for agonizing lengths of time” (Hersh 2004b). Prison guards were assigned to prepare the conditions for interrogation. Moreover, he brought with him Rumsfeld’s April 16, 2003 policy guidelines for Guantanamo to Iraq, handing them over to General Sanchez. Recall that these methods were approved by the Administration originally for those classified as enemy combatants; however, all detained Iraqis should have been classified with POW status. Moreover, the techniques themselves are not considered legal under international law.

By November, the number of attacks by Iraqi resistance increased as did the death toll of U.S. forces, increasing from 41, when Bush declared major combat over, to 110 (Danner 2004a). At this point, U.S. officers had little to no idea who was behind the killing of troops or the mounting resistance and were becoming desperate to find out. In response, U.S. forces began conducting a cordon and capture offense to try to gather intelligence to find those responsible. General Fay (August, 2004) states in his report:

As the pace of operations picked up in late November-early December 2003, it became a common practice for maneuver elements to round up large

quantities of Iraqi personnel (i.e., civilians) in the general vicinity of a specified target as a cordon and capture technique.

Thousands of Iraqis were arrested as a result. This included men, children, and women. The population of the U.S. detention system in Iraq alone was nearing ten thousand (Danner 2004). Moreover, the “flood of incoming detainees contrasted sharply with the trickle of released individuals” (Schlesinger, August, 2004). In December 2003, the Bush Administration authorized an escalation of Special Forces designated as Task Force 121 (Army Delta Members, Navy Seals, and CIA Paramilitary operatives). The task was the neutralization of the insurgents by capture or assassination. The critical goal, however, remained intelligence (Hersh 2004a). Many individuals captured by Task Force 121 added to the growing numbers of detainees already held at the designated intelligence gathering prison: Abu Ghraib. The numbers of detainees being held were believed to be between 5,000 to 8,000 during high points of cordon and capture (Strasser 2004; Danner 2004; and Hersh 2004a). This is reminiscent of the Phoenix program where agents of the CIA, based on press reports and Congressional and Senate probes, operated some 40 interrogation centers in South Vietnam that killed more than 20,000 suspects and tortured thousands more (Barak 2005).

### Summary

While cases of abuse and murder of Iraqi detainees (as well as those at Guantanamo and in Afghanistan) were sporadically reported (e.g., media reports, ICRC, HRW, and AI) the most prominent ones occurred at Abu Ghraib. But the

question remains what separates Abu Ghraib from the rest of abuses that occurred elsewhere during the war on terrorism? Perhaps it is not the specific methods of physical and psychological techniques as these have been a systematic covert practice for decades, but the images themselves. Until the images surfaced in the media, the suppression of visual information regarding military operations had kept invisible to the public and those high in the echelon of political ranks the devastation due to war or state covert activities. The images of abuses and torture that came out of Abu Ghraib left nothing for the symbolic imagination to elaborate or deny. Instead, they presented a literal fact of the image and what it represented (Stein 2004).

Representation and what it represented coincided: a long history of state torture as practiced within the U.S. prison system, a legacy of CIA tactics abroad, and the inherent contradiction between values and practice. Indeed, the images out of Abu Ghraib serve as more than the archetype of interrogation tactics since September 11, 2001. They represent a side of the U.S. and its population that can no longer be dismissed. Accordingly, exploring the actual events that occurred within the walls of Abu Ghraib leads to a better understanding of what the images represent.

## CHAPTER V

### TORTURE AT ABU GHRAIB

*You may remember it was a place of torture under Saddam Hussein  
and most recently of the abuse scandal.*

— HCNN 4/14/2004

Before analyzing why torture and abuse occurred, we must first look at the organizational structure of Abu Ghraib. This chapter provides a glimpse into the history, actors, and standard operating procedures at the prison. I begin with a brief exploration of the history behind Abu Ghraib and the subsequent choice by the U.S. to use it as a detention center. From this, I provide a descriptive account of the formal and informal chain of command and daily operating procedures. I then provide a voice for the victim's accounts with detailed transcripts recalling their experiences. In closing this chapter, I explore the Administration's response to the cases of abuse and torture.

#### Introduction to Abu Ghraib

Since Saddam Hussein came to power in 1979, Abu Ghraib was the symbol of death and torture. Over 30,000 Iraqis were executed there and thousands more were tortured and mutilated only to be returned to society as visible evidence to others of Saddam's power (American Enterprise Institute 2004; Kupelian 2004). A film of mutilation and torture carried out by Saddam's regime, released by the American

Enterprise Institute (2004), depicted some of the horrors that occurred within the walls of Abu Ghraib. This included amputations of body parts, rape, the removal of tongues, and systematic beatings. Executions were routine at Abu Ghraib. For example, during 1984 up to 4,000 prisoners, respectively, were said to have been executed. The pattern continued through the 1990's until October 2002 when Saddam granted amnesty to most prisoners in Iraq including those at Abu Ghraib. (e.g., 2,500 prisoners were said to have been executed during 1997 through 1999; during June 2000 through April 2001 130 Iraqi women were beheaded) (Amnesty International 2002).

Prior to the U.S. invasion of Iraq, Abu Ghraib was completely abandoned, leaving only the memories of executions, torture, and mutilations that occurred under Saddam's rule. After the fall of Baghdad, coalition forces needed a detention center for the growing numbers of prisoners captured by U.S. forces. Abu Ghraib was chosen by Ambassador Paul Bremer, Administrator of the Coalition Provisional Authority. Less than one month after the invasion, April 2003, the Abu Ghraib prison complex was stripped of everything that was removable. Coalition authorities had the cells cleaned and repaired, floors were tiled, and toilets and showers installed, all in preparation to become a place of detention for Iraqi resisters (Danner 2004a).

Bremer's choice of Abu Ghraib as a detention operations center placed a strict detention mission-driven unit assigned to operate in the rear of enemy lines in the middle of a combat environment (Schlesinger Report, August 2004). To Iraqis, the facility served in the national imagination as a constant reminder of past abuses that

now coincided with the current occupation and abuses as suspected resisters or supporters of Saddam were taken away bound and hooded often in the middle of the nights (ICRC Report, February 2004). An Iraqi translator alluded to the connection of past with present, represented at Abu Ghraib when he said “I always knew the Americans would bring electricity back to Baghdad. I just never thought they’d be shooting it up my ass” (November 2003, quoted in Hersh 2004a: 29). While many U.S. media outlets and politicians now refer to Abu Ghraib as a place where abuses occurred, most Iraqis see it as a place of torture under both Saddam Hussein’s rule and now under U.S. occupation.

By late summer 2003, thousands of Iraqis were being detained, all loosely defined as suspected of crimes against the coalition, common crimes against Iraqis or high value detainees (Hersh 2004a). According to the ICRC between 70 and 90% of the approximate 8,000 of those being detained had been arrested by mistake. For example, a former Commander of the 320<sup>th</sup> MP Battalion stated in a sworn statement:

It became obvious to me that the majority of our detainees were detained as the result of being in the wrong place at the wrong time, and were swept up by Coalition Forces as peripheral bystanders during raids. I think perhaps only one in ten security detainees were of any particular intelligence value.

Nonetheless, Abu Ghraib continued to fill with few detainees being released (Danner 2004a). According to General Fay’s report (2004):

Combat Commanders desired that no security detainee be released for fear that any and all detainees could be threats to coalition forces...The Chief of Intelligence, Fourth Infantry Division informed Major General Fast that the Division Commander did not concur with the release of any detained for fear that a bad one may be released along with the good ones. . . .We wouldn’t have detained them if we wanted them released.

### Command of Abu Ghraib

While the strategic decision to use Abu Ghraib as a detention facility is attributed to Paul Bremer, he had no authority over the facility. Mr. Lane McCotter, director of business development for Management & Training Corporation, a Utah-based firm claiming to be the third largest private prison company, was picked by Attorney General Ashcroft to go to Iraq as part of a team of prison officials, judges, prosecutors and police chiefs to rebuild the state's criminal justice system. While 80 to 90% of Abu Ghraib had been destroyed, McCotter was chosen to direct the rebuilding and reopening of the prison as well as to train the guards deployed to Abu Ghraib.

In June 2003, Brigadier General Janis Karpinski was named Commander of the 800<sup>th</sup> MP Brigade and was put in charge of all military prisons in Iraq. While having no experience in running a military prison, she was put in charge of three jails, eight battalions, and 3,400 Reservists (Hersh 2004a). Within 6 months, Karpinski would be admonished and suspended, a result of the abuses that occurred under her watch. Ironically, the month prior to her suspension, December 2003, Karpinski was quoted as saying that for many of those detained in Abu Ghraib "living conditions now are better in prison than at home. At one point we were concerned that they would not want to leave" (St. Petersburg Times, quoted in Hersh 2004a: 21). In June, 2003 the Chain of Command was as follows in Figure 1.

In the summer of 2003, the 519th Military Intelligence Battalion headed by Captain Carolyn Wood left Bagram (Afghanistan) despite an ongoing criminal

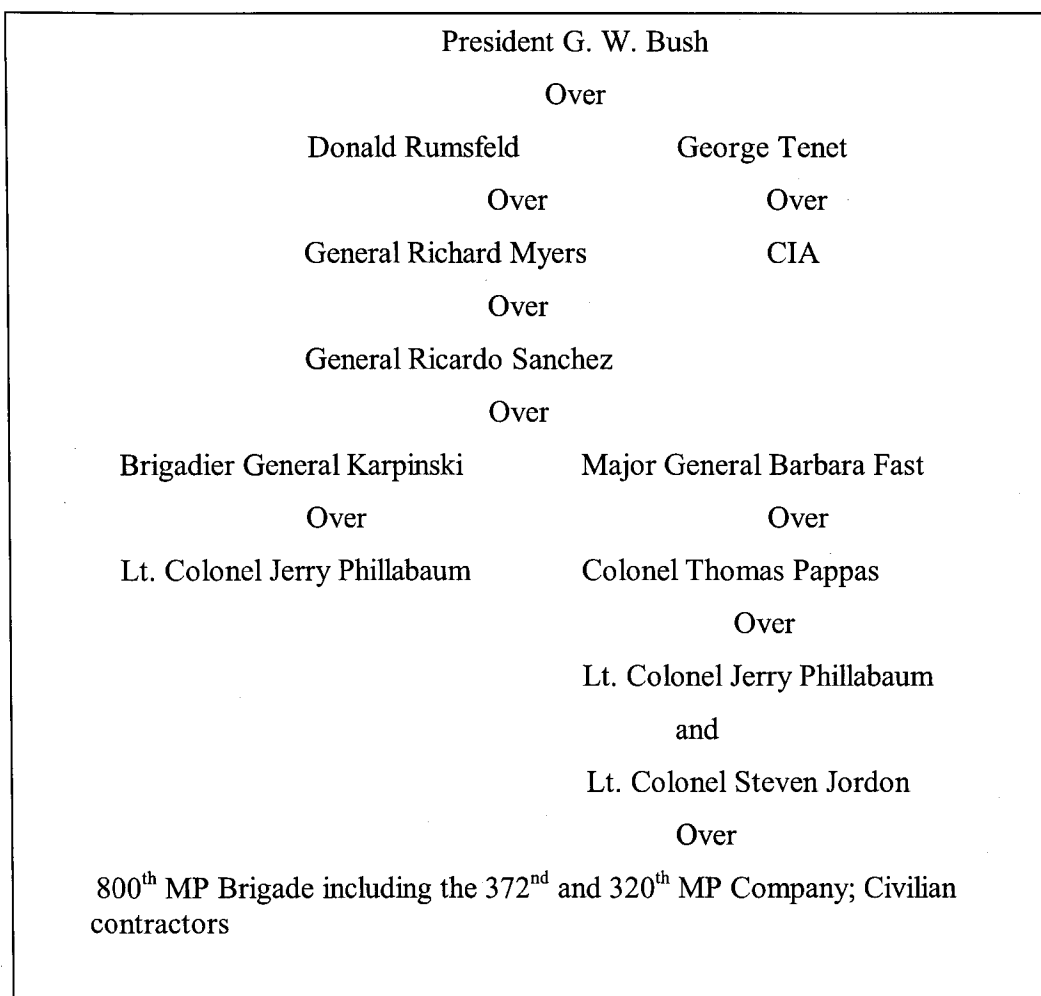


Figure 1. Chain of Command, June 2003

investigation into alleged cases of abuse and murder, and were redeployed to Abu Ghraib. There, Wood proceeded to implement new interrogation rules that, as a Pentagon report later noted, were “remarkably similar” to those she had developed at Bagram (Hersh 2004a). These included adding nine techniques to the existing practice of interrogations approved by Army interrogator Chris Mackey. These additional

techniques were not approved by military doctrine or included in Army field manuals (Bazelon 2005; Harbury 2005). Specifically, the list included “the use of dogs, stress positions, sleep management, [and] sensory deprivation,” according to the Fay-Jones report. Moreover, the report noted other techniques, such as “removal of clothing and the use of detainee’s phobias,” that had been used at Bagram were now to be fully implemented at Abu Ghraib. In September 2003, an internal Army probe headed by Brigadier General John Furlow, received tips from military police officers that members of the 519th had beaten prisoners at Abu Ghraib, but the investigators found the allegations unsubstantiated. Members of the 519th have not been directly implicated in the photographed abuses that set off the scandal.

On August 31, 2003, General Miller, once Commander of Guantanamo, arrived in Iraq bringing with him a team of experts to review the Army’s procedures and to make recommendations to aid in more effective information gathering (Hersh 2004a; Danner 2004b; and Strasser 2004). Miller filed his assessment of Counter-terrorism Interrogation and Detention Operations on September 13, 2003. The report laid out his recommendations that the “detention operations function must act as an enabler for interrogation” (p. 1). This included “setting the conditions to exploit internees to respond to questions that answer theatre commanders’ critical questions” (p. 3). He further stated that the current conditions of interrogation did not enable the interrogation mission, therefore it was his recommendation to “dedicate a detention guard force subordinate to the JIDC Commander that sets the conditions for the successful interrogation and exploitation of detainees” (p. 4). Thus, the MP’s should

be supportive of the MI's interrogations. In essence, Miller's intent was to "Gitmoize" the prisons in Iraq and shift the focus to interrogation and intelligence gathering (Hersh 2004a). However, this was in conflict with Army Regulations since MP units are to have control of the prison system (Taguba Report, Annex 19). Nonetheless, on November 19, 2003, General Sanchez issued an order giving the 205<sup>th</sup> MI Brigade tactical control over the prison. During Miller's visit, he also met with and briefed military commanders on interrogation techniques used in Guantanamo. This included leaving behind Rumsfeld's April 2003 list of approved (though extended and meant for enemy combatants) interrogation tools. In March 2004, Miller was transferred from Guantanamo to Iraq and was named as the Head of Prison Operations in Iraq (Karpinski's previous position). Once the images from Abu Ghraib became public, Miller was promoted as the General who would clean up the Iraqi prison system and instill respect for IHL (Sanchez 2004, in Hersh 2004a: 32).

Hidden from the official chain of command was Stephen Cambone, Undersecretary of Defense. Cambone answered directly to Rumsfeld and was heavily involved with the creation and implementation of the Special Access Program (SAP) enacted several weeks after the invasion of Afghanistan. Directly under Cambone was Army Lieutenant General William Boykin.<sup>1</sup> The SAP was composed of elite forces from Navy Seals, Delta Force, and CIA Paramilitary experts. The SAP Forces were

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<sup>1</sup> Recall that Boykin came under fire in the Fall of 2003 when it was reported that while giving a speech in an Oregon church he equated Satan with the Muslim religion (Hersh 2004).

heavily involved in the operations called Black Special Access and Copper Green. Their job was to covertly and effectively obtain time sensitive intelligence. Using secret detention sites, detainees were interrogated with techniques most generally associated with the crudest dictatorships.

While initiated and overseen by Rumsfeld, President Bush was also well aware of the Special Access Programs operating in Iraq and Abu Ghraib. A member of Congress confirmed this in May 2004 stating that Bush had signed the mandated finding notifying Congress of the program (Hersh 2004a). Moreover, back in June 2002, the Administration objected to a provision of the annual Pentagon Appropriations Bill that would have provided for a thirty-day advance notice to Congress before any SAP's were initiated. The White House stated "Situations may arise especially in wartime . . . in which the President must promptly establish special access controls on classified national security information." While the provision remained, Bush stated to Congress as he signed the Bill "The U.S. Supreme Court has stated that the President's authority to classify and control access to information bearing on national security flows from the Constitution and does not depend upon a legislative grant of authority" (Bush 2002, quoted in Hersh 2004a: 47-48).

It was also Cambone, along with Rumsfeld, who sent Miller to Iraq to assess interrogation procedures. Moreover, it was Cambone who would bring MI officers in Iraqi prisons under the SAP forces and CIA. The role of the CIA in the war on terrorism was extensive. Many missions were overseen and carried out by CIA agents acting independently or in conjunction with Special Forces.

### Ghost Detainees

Prior to September 11, 2001 U.S. covert practice of rendering detainees abroad as well as interrogating them in secret did indeed exist (e.g., Guatemala 1984-1986); however, post September 11, 2001 the practice surged. It is now known that over 100 individuals have been detained as ghost detainees: those being secretly detained without being recorded or identified to any MP or MI personnel, essentially disappeared persons (Hersh 2004a).

The SAP operations called Black Special Access and Copper Green included hiding ghost detainees during interims between interrogations and/or renditions to other states. This included utilizing the site of Abu Ghraib as a temporary holding area and for hiding ghost detainees in special dedicated sections (including Tier 1 {A}). Operating in segregated parts of Abu Ghraib, the CIA and SAP Forces carried out methods of interrogation beyond the scope of any extended authorized techniques. The protocol was also to place detainees in Abu Ghraib secretly and undocumented.

The Taguba report states:

The detention facilities operated by the 800th MP Brigade routinely held persons brought to them by Other Government Agencies (OGA's also known as CIA) without accounting for them, knowing their identities, or even the reason for their detention. The Joint Interrogation and Debriefing Center (JIDC) at Abu Ghraib called these detainees "ghost detainees." On at least one occasion, the 320th MP Battalion at Abu Ghraib held a handful of "ghost detainees" for OGAs that they moved around within the facility to hide them from a visiting International Committee of the Red Cross (ICRC) survey team. This maneuver was deceptive, contrary to Army Doctrine, and in violation of international law. (Taguba Report: Findings and Recommendations, Part II, No. 33)

This illustrates the existence of an entirely off-the-books detention system within Iraq and even more importantly within the walls of Abu Ghraib, run by the CIA and the Special Access Program Forces. Drogin (2004: 1) writes that NGO Human Rights Organizations said “the practice of keeping prisoners off written lists and physically concealing them from humanitarian aid groups and independent monitors has been well known over the years in dictatorships from Guatemala to Sudan.”

U.S. Army investigators reported to Congress that ghost detainees at Abu Ghraib prison ranged from two dozen up to 100 and were hidden from the ICRC upon request of the CIA. General Kern, senior officer who oversaw the Army inquiry, reported to the Senate Armed Services Committee that “The number [of ghost detainees] is in the dozens, to perhaps up to 100,” while Fay put the figure at “two dozen or so.” Both officers said they could not give a precise number because no records were kept and because the CIA refused to provide information to the investigators (Schmitt and Jehl 2004: 2).

Two separate sworn statements confirm an arrangement regarding detainees, who were kept “off the records” for CIA interrogation. In one of the statements it was claimed that Colonel Thomas Pappas met with CIA and Task Force 121 officials and signed a memorandum regarding procedures for dropping ghost detainees at Abu Ghraib. In the May 17, 2004 New York Times, Douglas Jehl reported on the practice:

Army Lt. Col. Steven L. Jordan, second in command of the intelligence gathering effort at Abu Ghraib while the abuse was occurring, told military investigators that ‘other government agencies’ and a secretive elite task force ‘routinely brought in detainees for a short period of time’ and that the detainees were held without an internment number, and their names were kept off the books.

The Fay report also discusses Jordan's claim that it was difficult to track the ghost detainees and that he had requested that a memorandum be drafted between the 205<sup>th</sup> MI Brigade, the 800<sup>th</sup> MP Brigade, and the CIA. Fay's report further shows how one Major suggested processing detainees via fingerprints and giving them assumed names; however, Col. Thomas M. Pappas, the acting top MI officer, decided against it. Jordan's statement continues and states that Pappas then began a formal written memo of understanding in November of 2003 between the CIA and Task Force 121 for procedures of dropping off ghost detainees.

The Washington Post reported on March 12, 2005, that they had obtained documents showing that "Top military intelligence officials at the Abu Ghraib prison came to an agreement with the CIA to hide certain detainees at the facility without officially registering them" (White 2005: 1). In a separate deposition, Brigadier General Karpinski confirmed that there were indeed orders to hide these prisoners so that the ICRC would not be allowed to see them (ACLU 2005).

While these reports show that knowledge about ghost detainees existed at the highest level of officials, the documents "also demonstrate the collaboration between the military and the CIA in torturing detainees while hiding them from the Red Cross" (ACLU 2005: 1). Senator McCain stated, "The situation with the CIA and the ghost prisoners is beginning to look like a bad movie" (Schmitt and Jehl 2004). As the Taguba Report concluded, the practice of putting ghost detainees at the prison was deceptive, contrary to Army Doctrine, and in violation of international law.

Beyond the illegalities, the U.S. use of this practice added to the existing quagmire of an overpopulated and understaffed detention facility. Furthermore, the interrogation tactics of these SAP forces and the CIA encouraged and endorsed physical coercion and sexual humiliation of prisoners in an effort to gain actionable intelligence to end the increasing Iraqi resistance (Hersh 2004a). Likewise, as Military Police were placed under the authority of Military Interrogators who answered to Special Forces, the lines of authority at Abu Ghraib became further tangled.

#### Private Contractors

To further complicate matters, the role of private contractors (PC) in prisons in Iraq, specifically Abu Ghraib, was pivotal to the lack of command and inconsistent policies regarding detainee treatment. The use of private contractors in the war on terrorism is unprecedented. This integration began with efforts to adapt to a downsized military through increased reliance on just on time privatized logistic contracts. The move to an active war footing following the attacks of 9/11, including the wars in Afghanistan and Iraq and the permanent “war on terror,” further cemented the private-public strategy for war-making by the United States (Rothe 2006). While many private corporations were contracted to provide logistical services (e.g., Halliburton, Bechtel, Blackwater Security, and Lord and Abbott), others were contracted for more sensitive jobs, interrogation and interrogation assistance (Titan and CACI International).

CACI's mission statement declares that they are ready to "Help America's intelligence community collect, analyze, and share global information in the war on terrorism" and to "uncover terrorist activity by providing capabilities ranging from complex space based operations to human source intelligence" (CACI 2006). Of course, they desire that all potential employees have "experience in conducting tactical and strategic interrogations in accordance with local standard operating procedures and DOD regulations" (CACI 2002).

Both CACI and Titan employees have been implicated in torture, abuse, and murder in Iraq, more specifically Abu Ghraib. This is contrary to General Miller's testimony to Congress when he stated, "no civilian contractors had a supervisory position" (Miller 2004: 2). Of the 37 "formal" interrogators at Abu Ghraib, 27 belonged to CACI and 22 linguists' interpreters assisting interrogators were employed by Titan.

As with CIA and SAP personnel, civilian employees are not bound by the U.S. Uniform Code of Military Justice or the Code of Conduct. This alarmed the many in the Judge Advocate General's Corps. According to the Chairman of the NY City Bar Association, Scott Horton, the use of civilian contractors in interrogation processes created an "atmosphere of legal ambiguity . . . as a result of a policy decision at the highest levels in the Pentagon" (quoted in Hersch 2004a: 66; see also Chaffin 2004).

Previously I documented how the command structure of Abu Ghraib had both a direct formal chain of command and a secretive chain. Whether it was Military

Police, Military Intelligence, Special Forces, CIA agents, or civilian contractors, the command structure was inadequate, as Karpinski stated:

I thought most of the civilians were interpreters, but there were some civilians that I didn't know . . . I called them the disappearing ghosts . . . they were always bringing somebody for interrogation or waiting to collect somebody going out. . . . I had no idea who was operating in my prison. (Karpinski, in Hersch 2004a: 61)

More importantly, the distinction between civilians and MI's was further blurred as MI personnel often wore unmarked uniforms or civilian clothes while on duty. The blurring of identities and organizations made it nearly impossible for the MP's or the detainees to know who had authority to give orders. Regardless of the unclear command structure, the systematic practice of torture and abuse was present in Iraq from the onset.

### Abuse and Torture

From the onset of the Iraq invasion torture and cruel and inhumane treatment was practiced by U.S. forces. However, these practices intensified as the number of detainees continued to grow into the thousands. The images of abuse and torture that briefly penetrated the media and the public's conscience were not representative of the vast numbers of actual cases that were occurring in the war on terrorism or at Abu Ghraib specifically.

As noted, by late summer 2003 thousands of Iraqis were being held in Abu Ghraib. The command structure had already experienced several changes. Recall that in late August into September 2003, Major General Geoffrey Miller, the commander

at Guantanamo Bay, was sent to Iraq to assess detention centers, subsequently sharing his interrogation techniques with interrogators. That same month, General Sanchez, authorized expanded interrogation techniques. These quickly became standard U.S. practice and, according to a Human Rights Watch report; prisoners started dying during interrogation sessions almost immediately thereafter. During this same time, the number of ghost detainees being brought into the prison increased along with the presence of CIA and Special Forces.

During October 2003, the heaviest uprisings against the U.S. occupation occurred. At this point, several cordon and capture missions were carried out, significantly increasing the numbers within the confines of Abu Ghraib. Specifically, there were 7,000 prisoners in Abu Ghraib and only 92 MP's to keep control. When the 372<sup>nd</sup> MPs arrived at Abu Ghraib, they were but a fraction of their supposed Company total. Their roles had already been significantly altered from prison guards to support for MI personnel and moved right into Tier 1 where CIA, SAP, and MI held high value detainees. Likewise, the practice of torture and abuse appeared to be part of the standard operating procedure of the prison. For example, in early October 2003, Staff Sergeant Fredrick was found abusing a detainee. When two other soldiers arrived, they demanded the prisoner be clothed and then took him back to the general population. Sergeant Fredrick was quoted as saying, "I want to thank you guys, because up until a week or two ago, I was a good Christian" (Fay Jones Report 2004). He also states in a note to his family that "I questioned some of the things that I saw . . . and the answer I got was this is how the MI wants it done." Sergeant Davis

also told the Criminal Investigating Department “he witnessed prisoners in the MI hold section being made to do various things that I would question morally.”

Testimony given to Taguba also shows that during this month several other cases of abuse were noted (see Detainee #151108, #151362, 150542, #7787, and #151365).

During this same month, the International Committee for the Red Cross made two unannounced visits to Abu Ghraib and noted cases of abuse and torture that violated the rules of war governing the treatment of Iraqi detainees. This included the practice of keeping detainees naked and bound in stress positions.

By mid-November the complete takeover of MP supervision by MI's had occurred. Simply stated, the “frago” order stated that the 205<sup>th</sup> MI Brigade under Pappas would have tactical control over Abu Ghraib. A report done during this period when tactical control was handed over to the MI's by General Ryder discusses concerns over the tensions between the missions of the MP's and their new role as interrogators. The conditions in Abu Ghraib continued to deteriorate leading to additional frustration of the already strained guard unit. Additional cases of abuse and torture occurred. For example, Detainee #152529 reported to Taguba that during this month he was picked up by U.S. forces, taken to Abu Ghraib, where he underwent extreme treatment and abuse. By mid November 2003 the Associated Press aired that they had received a report of abuses occurring in Abu Ghraib. Yet, few stations aired the news story.

We now know from testimonies of U.S. soldiers, available in investigative reports, that systematic abuse continued to occur and that multiple attempts were

made to notify high command officials regarding the “questionable” treatment of detainees. Nonetheless, reports were ignored and the practice continued all in the name of attaining actionable intelligence. During November, MP guards killed four detainees during a riot. The detainees were alleged to have gathered near the front gate where guards panicked and open fired using live ammunition (a method approved of by commanders). Furthermore, the ICRC was denied access to several detainees during the course of their visits. Some of these detainees were ghost detainees being held by the CIA and SAP forces. Their treatment and or condition remain a mystery at this time.

The numbers at Abu Ghraib continued to be in the thousands. This included numbers of ghost detainees being interrogated by CIA agents, civilian contractors, and Special Forces. The insurgency continued, and little to no actionable intelligence was coming from the interrogations. Additionally, expanded interrogation techniques were consistently used leading to the use of torture and abuse.

At the beginning of December, a confidential report was given to Army Generals that warned that members of the CIA and SAP forces were abusing detainees. The report, by Colonel Stuart Herrington, (Commissioned by Major Barbara Fast) claimed members of a Special Operations Force had been abusing detainees throughout Iraq, including Abu Ghraib. While little to no public disclosure of the CIA’s role in Abu Ghraib has emerged, one account speaks volumes of what the OGA was capable of. Al-Jamadi, one of the CIA’s “ghost” detainees, died in a prison shower room in a position known as “Palestinian hanging,” during about a

half-hour of questioning. "One Army guard, Sgt. Jeffery Frost, said the prisoner's arms were stretched behind him in a way he had never before seen" and he was surprised al-Jamadi's arms "didn't pop out of their sockets," according synopsis of his interview (Democracy Now 2005: 1). Frost along with several other guards were called to reposition al-Jamadi, when an interrogator said he was not cooperating. When the guards released the "shackles and lowered al-Jamadi, blood gushed from his mouth as if a faucet had been turned on according to the interview summary" (Democracy Now 2005: 1). Moreover, the pathologist discovered several broken ribs. Staff Sergeant Fredrick wrote in November 2003 to his family that Jamadi was brought to his unit for questioning and

they stressed him out so bad that the man passed away. They put his body in a bag and packed him in ice for approximately 24 hours in the shower . . . the next day the medics came and put his body on a stretcher, placed a fake IV in his arm and took him away. (Fredrick, quoted in Hersh 2004a: 45)

His death became known when photos were released of Abu Ghraib guards giving a thumbs-up over his bruised, puffy-faced corpse, packed in ice (see Appendix 1(b)).

On December 14, 2003, Saddam Hussein was found and a general hope surfaced that the insurgency would significantly decrease. Nonetheless, the culture within the confines of Abu Ghraib was already well established and the systematic practice of cruel and inhumane punishment continued. For example, videos made by MP's sent back to family members were showing signs of the growing frustrations and boredom as they often depicted aggressiveness and violence.

Less than one month later, January 13, 2004, the Command received a written notice from the ICRC claiming abuse and torture had been witnessed by them during

their spot visits. This included the systematic practice of keeping prisoners naked and bound in cruel positions. Yet, as Brigadier General Karpinski stated in her testimony to the Senate Panel, “senior officials treated it in a lighthearted manner” (Danner 2004b: 1). Moreover, the military response was to require ICRC inspectors to make appointments before visiting the cellblock, thus trying to “curtail the international organization’s spot inspections of the prison” (Danner 2004b: 1). Karpinski’s redress to the ICRC was that “military necessity” required this of those designated as SIV (significant intelligence value) who were not entitled to “obtain full Geneva Conventions Protection.” The ICRC also alleged that it had alerted U.S. authorities repeatedly to practices that were “serious violations of international humanitarian law and in some cases tantamount to torture” (ICRC 2004).

On this same day, January 13, 2004 Specialist Darby handed over a copy of a CD containing photos depicting abuses and acts tantamount to torture to the MCID when attention focused on detainee treatment. With images that could not be denied, the Combined Joint Task Force 7 (CJTF-7), Central Command, Chairman of the Joints Chief of Staff and the Secretary of Defense were all informed. Even at this point, officials did not recommend that the images be shown to more senior officials. On January 16<sup>th</sup>, the Central Command issued a press release stating there was an ongoing investigation into reported incidence of detainee abuse (Final Report of the Independent Panel to Review DOD Detention Operations) and on January 19<sup>th</sup> Lieutenant General Sanchez requested a secret outside investigation, one to be headed by Major General Taguba (Memo to U.S. Central Command, January 19,

2004). Rumsfeld claimed that up until January 16<sup>th</sup>, with the release of the Central Commands press release, he had no knowledge of abuses. It was also on the 16<sup>th</sup> when Rumsfeld informed President Bush of the photos. On the 28<sup>th</sup> of January, the Army's Criminal Investigation Division Report of allegations of abuse was released to Taguba.

Public accounts also began to surface yet were largely dismissed by the media and the general public. For example, on January 21, 2004, the Washington Post published a sworn statement released from the Military Criminal Investigation Division describing a detainee's account of his abuses during his time at Abu Ghraib (the MCID was released January 28, 2004) (Greenberg and Dratel 2005). This case of abuse was also included in the Taguba Report as Detainee #151365.

Another investigation was conducted after a complaint was submitted January 18, 2004, regarding detainee abuse at Abu Ghraib. A detainee stated that he had witnessed a "translator forcibly sodomizing a male juvenile detainee while a female U.S. soldier observed and took pictures." However, the CID did not investigate the allegation until May 28, 2004. Moreover, "the Special Agent in Charge determined further of the [sic] investigation would be of little or no value" (Army CID File ©/ssI-0132-04-CID 259-80138/6F8A/6X1).

By mid-March an interim report of the investigation was given to CJTF-7 and Central Command. The Taguba Report was also released. Upon receiving the Taguba Report, Sanchez requested a separate investigation into the allegations of involvement of MI personnel. This request, attributed to the Taguba Report, may also have been

sparked by an earlier report done by General Ryder, at Sanchez's request, after having received several troubling reports coming from Iraq jails. While not released at the time of the Taguba Report, Ryder's Report was filed November 2003. In it, Ryder discussed serious concerns regarding the tensions between the missions of the MP's and the MI's wanting to interrogate them (Ryder, November 2003, in Hersh 2004a: 29). Taguba (2004) noted "many of the systematic problems that surfaced during Ryder's assessment are the very same issues that are the subject of this investigation."

By mid-April, the second investigation into the role of MI's in cases of abuse was concluded. Lieutenant General McKiernan (appointed official) reported the results through the chain of command to the DOA and JAG. He further advised that the review panel not send a copy to Rumsfeld (Final Report of the Independent Panel to Review Department of Defense Detention Operations). By this time, CBS had attained copies of some of the photographs. General Richard Myers, Chair of the Joint Chiefs of Staff, asked CBS to delay the broadcast as intense fighting in Fallujah and Najaf was underway; CBS accommodated them. While cases of abuse were making their way into the media-it was well recognized that the images themselves would be far more damaging than the occasional news story (Schlesinger Report 2004).

On April 29, 2004, *60 Minutes II* on CBS aired the photos (see Appendix D). However, until the publication of these images of abuse out of Abu Ghraib, the Bush Administration officials took "at best a see no evil, hear no evil approach to all reports

of detainee mistreatment” (HRW 2004: 5). Nevertheless, the images showed a reality that could not be denied.

We now know that additional proof exists depicting such cases of torture and abuse. On September 29, 2005, U.S. District Court Judge Hellerstein ordered the release of 74 additional photos and three videotapes depicting various brutal images from Abu Ghraib alone. There are still 13 additional photos and one videotape that remain sealed due to “so many redactions that they were unintelligible” (ACLU 2005). This coincides with Iraqi claims of widespread abuse and mistreatment during detention. Additionally, new allegations of abuse in Iraq (with the 82<sup>nd</sup> Airborne) and in Abu Ghraib (Iraqi Police) continue to surface (Washington Post 2005b; HRW Report 2005).

While the images depict a snapshot of the detainees’ treatment, they fail to provide the emotive and contextual details of the torture and abuse inflicted by U.S. personnel. Indeed, the images lack the victims’ voices. Consequently, the following section provides detailed accounts of alleged abuses in Abu Ghraib by Iraqi detainees.

### *Cases of Abuse*

Testimonies recorded in the Taguba Report:

#### *Detainee #151365*

I entered Abu Ghraib 10 July 2003 . . . they put me in a tent and then brought me to the Hard Site. The first day they put me in a dark room and started hitting me in the head and stomach and legs. They made me raise my hands and sit on my knees, I was like that for four hours. Then the interrogator came and he was looking at me while they were beating me. Then I stayed in this room for 5 days, naked with no clothes . . . they replaced the Army with the Iraqi

police and after time they started punishing me in all sorts of ways. And the first punishment was bringing me to room one, and they put handcuffs on my hand and they cuffed me high for 7 to 8 hours. They kept me this way on 24, 25, and 26 October. The following days they put a bag over my head, and I was without clothes and without anything to sleep on. In November they started a different type of punishment, where an American Police came in to my room and put the bag over my head and cuffed my hands and he took me out of the room into the hallway. He started beating me, him and 5 other American Police. Some of the things they did was make me sit down like a dog and they would hold the string from the bag and they made me bark like a dog. And the policeman was tan color because he hit my head to the wall. When he did that the bag came off my head and one of the police was telling me to crawl in Arabic, so I crawled on my stomach and the police were spitting on me and hitting me on my back, my head, and my feet. It kept going on until 4 in the morning. The same thing would happen in the following days. And I remember one of the police hit me on my ear, then the police started beating me on my kidneys and then they hit me on my right ear and it bleeding and I lost consciousness. The American Police put red woman's underwear over my head and then tied me to the window in my cell with my hands behind my back until I lost consciousness. When I was in Room #1, they told me to lay down on my stomach and they were jumping from the bed onto my back and my legs, others were spitting on me and calling me names and they held my hands and legs. Then two officers tied my hands to the door while laying down on my stomach. One of the police was pissing on me and laughing. He released my hands and I went and washed and then the soldier came back into the room and the soldier's friend told me to lie down, so I did that. And then the policeman was opening my legs, with a bag over my head, and he sat down between my legs on his knees and I was looking at him from under the bag and they wanted to do me because I saw him and he was opening his pants, so I started screaming and other police started hitting me with his feet on my neck and he put his feet on my head so I couldn't scream. They left and the guy with glasses comes back with another person and he took me out of the room and they put me inside the dark room again and they started beating me with the broom that was there. Then they broke the glowing finger and spread it on me until I got on to the floor. And one of the police he put a part of his stick that he always carried inside my ass and I felt it going inside me about 2 centimeters. And I started screaming and he pulled it out . . . and the two American girls that were there when they were beating me, they were hitting me with a ball made of sponge on my dick . . . one of the girls was playing with my dick . . . And they were taking pictures of me during all these instances.

*Detainee ISN 13077*

When I first went to the Hard Site, the American soldiers took me. We stood in the hallway before the hard site and they started taking off our clothes one after another. After they took off my clothes . . . they told me to stroke my penis in front of her (Ms. Mays). And then they covered my head again. And then they removed the bag off my head and I saw my friend, he was the one in front of me on the floor. Then they told me to sit on the floor facing the wall. They brought another prisoner on my back and he was naked. Then they ordered me to bend onto my knees and hands on the ground. Then they placed three others on our backs naked. After that they ordered me to sleep on my stomach and they ordered the other guy to sleep on top of me in the same position and the same way to all of us. And they were six of us. They were laughing and taking pictures and they were stepping on our hands with their feet . . . and they wrote on our bodies in English . . . then they forced us to walk like dogs on our hands and knees. And we had to bark like a dog and if we didn't they start hitting us hard on our faces and chest with no mercy. After that they took us to our cells, took our mattresses out and dropped water on the floor and they made us sleep on our stomachs on the floor with bags over our heads and they took pictures. All that for 10 days.

*Detainee #19446*

I was in solitary confinement, we were treated very bad . . . they took our clothes off, even our underwear and they beat us very hard, and they put a hood over my head. And when I told them I am sick they laughed at me and beat me. And one of them brought my friend and told him stand here and they brought me and had me kneel in front of my friend. They told my friend to masturbate and told me to masturbate also while they were taking pictures. After that they brought my friends and I and they put us 2 on the bottom, 2 on top of them, and 2 on top of those and one on top. Then they beat us. After the end of the beating they took us to our separate cells and they opened the water in the cell and told us to lay face down in the water and we stayed like that until the morning. Then one of the other shift gave us clothes but the second shift took the clothes away at night and handcuffed us to the beds. . . . They forced us to crawl on our hands and knees and they were sitting on our backs like riding animals and writing on our asses.

*Detainee #151108*

They stripped me of all my clothes, even my underwear. They gave me woman's underwear . . . and they put a bag over my face. One of them whispered in my ear 'today I am going to fuck you' and he said this in Arabic. Whoever was with me experienced the same thing. This was on October 3 or

4 2003 . . . when they took me to the cell an American Soldier and his rank was sergeant I believe he called me faggot because I was wearing woman's underwear and my answer was no... And they forced me to wear this underwear for 51 days . . . and most of the days I was wearing nothing else. I faced harsh punishment from Grainer. He cuffed my hands with irons behind my back to the metal of the window, to the point my feet were off the ground and I was hanging there for about 5 hours just because I asked about that time because I wanted to pray. And then they took off my clothes and he took the female underwear and he put it over my head. After he released me from the window, he tied me to my bed until before dawn. He prohibited me from eating food. They took pictures of everything they did to me. . . . I don't know if they took a picture of me because they beat me so bad I lost consciousness after an hour or so. They did not give us food for a whole day and night. Now I am talking about what I saw. They brought three prisoners naked and tied them together with cuffs and they stuck one to another. I saw American soldiers hitting them with a football and they were taking pictures. I saw Grainer punching one of the prisoners right in his face very hard... and the American soldiers told to do like homosexuals (fucking). I saw --- fucking a kid, his age would be about 15. The kid was hurting very bad and they covered all the doors with sheets. Then when I heard the screaming I climbed the door because on top it wasn't covered and I saw who was wearing the military uniform putting his dick in the little kid's ass and the female soldier was taking pictures and that was in cell #23. On the North side, I was right across from it on the other side, they put sheets again on the doors and they cuffed one prisoner in room 1, they tied him to the bed and they were inserted the phosphoric light in his ass and he was yelling for God's help . . . used to get hit and punished a lot because I heard him screaming and they prohibited us from standing near the door when they do that. Not one night for all the time I was there passed without me seeing, hearing, or feeling what was happening to me.

*Detainee #152307*

I am going to start from the first day I went into A1. They stripped me from my clothes and all the stuff they gave me and I spent 6 days in that situation. And then they gave me a blanket only. 3 days after that they gave me a mattress and approximately 2 am the door opened and Grainer was there. He cuffed my hands behind my back and he cuffed my feet and took me to the shower room. After interrogating me, . . . they threw pepper on my face and the beating started. This went on for half an hour. And then he started beating me with a chair until the chair was broken. After that they started choking me. At that time I thought I was going to die, but it's a miracle I lived. And then they started beating me again. They concentrated on beating me in my heart until they got tired from beating me. They took a little break and then they

started kicking me very hard with their feet until I passed out. The second scene, I saw a guard that wears glasses. He charged his [pistol] and pointed it a lot of the prisoners to threaten them with it. I saw things no one would see, they are amazing. They come in the morning shift with two prisoners and they were father and son. They were both naked. They put them in front of each other and they counted 1, 2, 3 and then they removed the bags from their heads. When the son saw the father naked he was crying. And then at night Grainer would throw food into the toilet and said 'go take it and eat it'. And in room 5 they brought the dogs and they bit him in the right and left leg. He was from Iran and they started beating him up in the main hallway of the prison.

*Detainee #150422*

First they tortured the man whose name is Anjid Iraqi. They stripped him of his clothes and beat him until he passed out and they cursed him and when they took off his head I saw blood running from his head. They took him to solitary confinement. The evening shift was sad for prisoners. They brought three prisoners handcuffed to each other and they pushed the first one on top of the others to look like they are gay, when they refused they beat them up until they put them on top of each other and took pictures of them. They beat up an Iraqi whom they ordered to stand on a food carton and they went pouring water on him and it was the coldest of times. When they torture him they took gloves and they beat his dick and testicles with the gloves and they handcuffed him to the cell door for a half day without food or water. After that they brought young Iraqi prisoners and tortured them by pouring water on them from the second floor until one of them started crying and screaming saying my heart. They brought six people and they beat them up until they dropped to the floor and one of them his nose was cut and the blood was running from his nose and he was screaming but no one was responding. The doctor came to stitch the nose and the Grainer asked the doctor to learn how to stitch and its true the guard learned how to stitch. After that they beat up the rest of the group until they fall to the ground. Grainer beat up a man...and he was beating him until he gotten almost crazy . . . and after they put him in his cell for four days they were pouring water on him and he couldn't sleep. They hanged him and he was screaming but no one helped.

*Detainee #150425*

One day while I was in the prison the guards came and found a broken toothbrush, and they said that I was going to attack the American Police; I said that the toothbrush wasn't mine. They said we are taking away your clothes and mattress for 6 days and we are not going to beat you. But the next day the guard came and cuffed me to the cell door for 2 hours, after that they

took me to a closed room and more than five guards poured cold water on me and forced me to put my head in someone's urine that was already in the room. After that they beat me with a broom and stepped on my head with their feet while it was still in the urine. They pressed my ass with a broom and spit on it. Also a female soldier was standing on my legs. They used a loud speaker on me for 3 hours, it was cold. The truth is they gave me my clothes after 3 days, they didn't finish the 6 days and thank you.

*Detainee #150542*

Two days before Ramadan the guard came with the other guards, they brought two prisoners and they made them take off their clothes down to naked and then they were beating them a lot. One of the prisoners was bleeding from a cut he got over his eye. Then they called a doctor who came and fixed him. After that they started beating him again. They removed all my clothes down to naked for seven days and they were bringing a group of people to watch me naked. . . . They brought a prisoner with a civil case...they beat him a lot then they removed his clothing then they put a wire up his ass and they started taking pictures of him. . . . One day Grainer brought six Generals and they stripped them down to naked and started torturing them and taking pictures and they were enjoying that.

*Detainee #152529*

One the date of November 5, 2003, when the U.S. forces transferred to Isolation, when they took me out of the car, an American soldier hit me with his hand on my face. And then they stripped me naked and they took me under the water and then he made me crawl the hallway until I was bleeding from my chest to my knees and my hands. And after that he put me back into the cell and an hour later he took me out from the cell the second time to the shower room under cold water and then he made me get up on a box, naked, and he hit me on my manhood. I don't know with what, then I fell down on the ground. He made me crawl on the ground. And then he tied my hands in my cell naked until morning time until Joyner showed up and released my hands and took me back up to my room and gave me my clothes back. About two days later my interrogation came up when it was done . . . a soldier grabbed my head and hit it against the wall and then tied my hand to the bed until noon the next day and then two days later the same soldier and he took all my clothes and mattress for 3 days.

*Detainee ISN #7787*

One day in Ramadan, I don't know the exact date, we were involved in a fight in Compound 2, so they transferred us to the Hard Site. As soon as we

arrived, they put sandbags over our heads and they kept beating us and called us bad names. After they removed the sandbags they stripped us naked as a newborn baby. Then they ordered us to hold our penises and stroke it and this was only during night. They started to take photographs as if it was a porn movie. And they treated us like animals not humans. They kept doing this for a long time. No one showed us mercy. Nothing but cursing and beating. Then they started writing words on our buttocks which we didn't know what it means. After that they left us alone for 2 days naked and with no clothes, with no mattresses, as if we were dogs. And every single night the military guy comes over and beat us and handcuffed us until the end of his shift...this was for three days. The first night they stripped us naked they made us get on our hands and knees and they started to pile us one on top of the other. . . . When we were naked he ordered us to stroke, acting like we're masturbating and when we start to do that he would bring another inmate and sit him down on his knees in front of the penis and take photos which looked like this inmate was putting the penis in his mouth. Before that I felt like someone was playing with my penis with a pen. After this they make --- stand in front of me to slap him on the face, but I refused 'cause he is my friend. After this they asked --- to hit me so he punched my stomach, I asked him to do that, so they don't beat him like they had beaten me when I refused to hit ---.

*Detainee NDRS 151362*

I was arrested on the 7 Oct 2003. They brought me over to Abu Ghraib Prison they put me in a tent for one night. During this night the guards every one or two hours and threaten me with torture and punishment. The second day they transferred me to the hardsite. Before I got in a soldier put a sand bag over my head. I didn't see anything after that. They took me inside the building and started to scream at me. They stripped me naked, they asked me "Do you pray to Allah?" I said Yes. They said "fuck you and fuck him." One of them said your not getting out of here health, you are getting out of here handicapped. One of them said to me "Are you married?" and I said yes, they said "If your wife saw you like this she would be disappointed." One of them said "but if I saw her now she would not be disappointed now because I would rape her." The one of them took me to the shower, removed the sandbag, he told me to take a shower and he said he would come inside and rape me and I was very scared. Then they put the sandbag over my head and took me to cell 5. And for the next five days I didn't sleep because they use to come to my cell, asking me to stand for hours and hours. And this black man took me once more to the showers, stood there staring at my body. And he threaten he was going to rape me again. After that they started to interrogate me. I lied to them so they threaten me with hard punishment. Then the other interrogator came over and told me "if you tell the truth we will let you go as soon as possible before Ramadan" so I confessed and said the truth. Four days later

they took me to the camp and I didn't see those interrogators anymore. New interrogators came. After 18 days in the camp they sent me to the hard site. Two days before led, an interrogator came to me with a woman and an interpreter. He said I am one step away from being in prison forever. The first day of led, the incident of firing happened. I got shot with several bullets in my body and got transferred to the hospital. And there the interrogator, Steve, came to me and threaten me with the hardest torture when I go back to the prison...After several days he came back and said to me, "If I put you under torture do you think this would be fair?" I said to him why. He said he needed more information. I told him I already told you everything I know, he said, "We'll see you when you come back to prison." After 17 or 18 days I was released and went back to Abu Ghraib, hew took me somewhere and the guard put a pistol to my head. The next morning they took me to the hardsite. They receive me there with screaming, shoving, pushing, and pulling. They forced me to walk from the main gate to my cell. Otherwise they would beat my broken leg, I was in very bad shape. The guards started to hit my broken leg several times with a solid plastic stick. They stripped me naked . . . one of them told me he would rape me. He drew a picture of a woman on my back and makes me stand in shameful positions holding my buttocks. . . . Someone else asked me "Do you believe in anything?" I said I believe in Allah, so he said, "but I believe in torture and I will torture you." . . . Then they handcuffed me and hung me to the bed. They ordered me to curse Islam and because they started to hit my broken leg, I cursed my religion. They ordered me to thank Jesus that I'm alive. And I did what they ordered . . . they left me hang from the bed and after a little while I lost consciousness. When I woke up I found myself still hang between the bed and floor. Until now, I lost feeling in three fingers in my right hand. I sat on the bed and one of them stood in the door and pee'd on me. . . . The second night Grainer came hand hung me to the cell door. I told him I have a broken shoulder, I am afraid it will break again, cause the doctor told me don't put your arms behind your back. He said, "I don't care." Then he hung me to the door for 8 more hours. I was screaming from the pain the whole night. . . . I told the doctor that I think my shoulder is broken . . . he checked my shoulder and said to me "I will bring another doctor tomorrow." The next day another doctor checked my shoulder and said to me he taking me to the hospital the next day for x-rays. The next day they took me to the hospital . . . then they took me back to the hardsite. I have to crawl back to my cell 'cause I can't walk. The next night other soldiers come at night and took photos of me while I'm naked. They humiliated me and made of me and threaten me. After that, interrogators came over and identify the person who gave me the pistols between some pictures. And this guy wasn't in the pictures. When I told them that, they said they will torture me and they will come every single night to ask me the same question accompanied by soldiers having weapons and they point a weapon to my head and threaten they will kill me; sometime with dogs and they hang me to the

door allowing the dogs to try to bite me. This happened for a full week or more.

*Detainee #18470*

On the third day after 5 o'clock, Mr. Grainer came and took me to room 37, which is the shower room and he started punishing me. Then he brought a box of food and he made me stand on it with no clothing except a blanket. Then a tall black soldier came and put electric wires on my fingers and toes and on my penis, and I had a bag over my head. Then he was saying "which switch is on for electricity" and he came with a loudspeaker and he was shouting near my ear and then he brought the camera and he took some pictures of me, which I knew because of the flash of the camera. And he took the hood off and he was describing some poses he wanted me to do, and then I was tired and I fell down. And then Mr. Grainer came and made me stand up on the stairs and made me carry a box of food. I was so tired and I dropped it. He started screaming at me in English, He made me lift a chair high in the air. . . . Then the chair came down and then Mr. Joyner took the hood off my head took me to my room. . . . I couldn't go to sleep after that because I was so scared.

These 12 cases, the only specific cases in the Taguba Report, were all registered between January 16<sup>th</sup> -19<sup>th</sup> and the 21<sup>st</sup> of 2004. With thousands of detainees and only five days of hearing testimony, the cases here cannot demonstrate the extent of or extremism of the abuse and torture that occurred at Abu Ghraib. Sworn statements from the ACLU Lawsuit, filed March 1, 2005 on behalf of eight plaintiffs, provide additional descriptive accounts of abuse. Three of the Plaintiffs' stories are listed herein:

*Arkan Mohammed Ali*

A 26-year-old Iraqi citizen who was detained by the U.S. military at various locations in Iraq, including Abu Ghraib prison. Ali was detained for almost one year, from July 2003 to June 2004. While in custody, Ali was tortured and subjected to cruel and inhuman treatment, including severe beatings to the point of unconsciousness, stabbing and mutilation, isolation while naked and hooded in a coffin-like box, mock execution and death threats. Military personnel severely beat Ali during interrogations, sometimes leaving him

unconscious. U.S. forces stabbed Ali, shocked him with a small metal device, and urinated on him to humiliate and degrade him. He was repeatedly locked in a wooden coffin-like box for several days, sometimes after having been stripped naked and left with a hood tied over his head. On other occasions, Ali was kept in a "silent tent" in which he was denied sleep for days at a time. When it appeared as though he might be falling asleep, guards would drag Ali facedown along the ground and severely beat him. Ali was also repeatedly threatened and subjected to psychological intimidation while in custody. U.S. military personnel made multiple death threats against Ali, including threatening to run him and other detainees down with a large military vehicle and brandishing guns and swords and threatening to slaughter him. Soldiers also threatened to transfer Ali to Guantánamo, where he was told soldiers could kill detainees with impunity. Upon Ali's release, an American official threatened him by telling him that if he ever reported or discussed the abuse he and others suffered in detention, the United States government would find him and he would never see his family again. (ACLU Complaint #402388.1; #402382.1; #402375.1; #403155.1 2005)

*Thahe Mohammed Sabbar*

A 36-year-old Iraqi who was detained by the United States military for approximately six months from July 2003 to January 2004. Sabbar was detained at various locations in Iraq, including Camp Bucca and Abu Ghraib prison. While in American custody, Sabbar was subjected to acts of torture and cruel and degrading treatment. Sabbar's quality of life has suffered greatly since his detention. He has nerve damage and pain in his shoulder and is prone to uncontrollable bouts of shaking and crying. Sabbar received frequent and severe beatings from U.S. military personnel. Soldiers used guns and an electric weapon to beat and shock Sabbar, and forced him and other detainees to run through a gauntlet of 10 to 20 uniformed soldiers, who screamed at them and beat them with wooden batons. Sabbar was also shackled to a fence with his hands behind his back and was left for several hours at temperatures exceeding 120 degrees Fahrenheit. In addition to physical abuse, Sabbar was sexually assaulted by U.S. military personnel. On one occasion, one or more soldiers inserted their fingers into Sabbar's anus and grabbed and fondled his buttocks while making moaning sounds and jeering at him. This was done in the presence of other soldiers, including females, in order to further degrade and demean Sabbar. Soldiers also staged mock executions with Sabbar and other detainees to terrorize and humiliate them. During one such execution, Sabbar and others were forced to stand against a wall in front of a firing squad. The squad simulated gunfire and then laughed as the detainees lost control of their bladders. Sabbar was also threatened by soldiers who told him they would send him to Guantanamo, where he would be killed. Throughout his detention, Sabbar was routinely deprived of food and water. At times,

guards gave Sabbar and other detainees' spoiled food, which caused some detainees to vomit. He was also kept shackled for extended periods and denied access to a toilet, causing him to soil his pants. As a result of this treatment, and of the sexual and physical abuse, Sabbar currently suffers from incontinence, impotence and nightmares. (ACLU Complaint #402388.1; #402382.1; #402375.1; #403155.1 2005)

*Sherzad Kamal Khalid*

A 34-year-old Iraqi citizen who was detained by the United States military for approximately two months from July 2003 through September 2003. Khalid was held at various locations in Iraq where he was subjected to frequent and severe beatings, sexual abuse and other cruel treatment. Military personnel regularly and intentionally inflicted physical abuse on Khalid during his detention. Soldiers would severely beat Khalid before each interrogation, leaving his body covered with deep bruises. They also kicked and punched Khalid repeatedly over a period of hours while he was hooded and shackled and seated on the ground, terrorizing and injuring him with random and unanticipated blows. On one occasion, Khalid was forced to run a gauntlet of 10 to 20 uniformed U.S. soldiers who beat him with batons. Like many other detainees, Khalid was sexually assaulted and humiliated. During a severe beating, soldiers punched him in the mouth, breaking one of his teeth, and grabbed his buttocks while brandishing a long wooden pole and threatening to sodomize him on the spot and on every night of his detention. Soldiers also simulated anal rape by grabbing his buttocks and pressing a water bottle against the seat of his pants. Throughout his detention, interrogators threatened to kill Khalid and subjected him to mock executions in order to coerce confessions. Soldiers would demand a false confession while holding a gun to his head, and placed him before a mock firing squad with simulated gunfire. Khalid was also routinely deprived of sleep, food and water. At times, guards gave Khalid spoiled food, causing him to vomit. He was also kept shackled for extended periods and denied access to a toilet, which would cause him to soil his pants. On one occasion, Khalid was shackled to a fence with his hands behind his back and was forced to stand in that position for several hours at temperatures exceeding 120 degrees Fahrenheit, without any water or food. At another point of his detention, Khalid was forced to stay in a so-called "silent tent" for several days, during which time he was severely beaten whenever he started to fall asleep. (ACLU Complaint #402388.1; #402382.1; #402375.1 IL; #403155.1 2005)

Accounts of abuse from U.S. soldiers listed in the investigative reports included physical abuse (e.g., kicking, punching, twisting the hands of detainees once

handcuffed, restricting breathing, poking injuries of detainees, and dislocating joints), use of dogs (e.g., biting prisoners, intimidating and creating fear [cases include small children being threatened by dogs] and for entertainment or competition see who could make detainees piss themselves first), and humiliating treatment (e.g., nakedness, photographing during states of undress or staged sexual acts and/or positions, improper use of isolation).

The most concentrated violations included brutalities against detainees upon capture and initial custody (sometimes resulting in death and/or serious injury), physical and psychological coercion during interrogation, prolonged solitary confinement, and excessive and disproportionate use of force resulting in deaths or serious injuries. The ICRC Report states “in Abu Ghraib military intelligence section, methods of physical and psychological coercion used by the interrogators appeared to be part of the standard operating procedures by military intelligence personnel to obtain confessions and extract information” (9). Perhaps the most disturbing accounts by the ICRC include the abuse and torture of children at Abu Ghraib (the ICRC states that at least 107 children are being held in 6 facilities in Iraq including Abu Ghraib) and the rape of female detainees (see photo 1a). One case includes the MI interrogating a 15-year-old girl when MP’s stopped them after finding her half undressed. Another incident included a 16 year old being soaked with water, “driven through the cold, smeared with mud, and then presented to his weeping father, who was also a prisoner” (Pitt 2004: 1).

From the ICRC, Fay-Jones Report, the Taguba Report, and the ACLU lawsuits against Rumsfeld, Karpinski, Pappas, and Sanchez, a pattern of abusive behavior by U.S. military (MP and MI) and draconian interrogation techniques emerge. Moreover, most instances of abuse and torture listed within these reports are reflected in some version in the modified and re-modified expanded interrogation techniques approved by the Administration. This is in contradiction to Schlesinger's report (August 2004) which states, "the pictured abuses, unacceptable even in wartime, were not part of authorized interrogations nor were they even directed at intelligence targets." The Fay-Jones Report alludes to similar conclusions wherein it stated that there was only "circumstantial connections" to MI officers regarding detainee abuses, yet 27 MI officers were implicated in cases of abuse. Moreover, how uninvolved could the MI's be when the Fay report also tells us that one of the notorious images of the human pyramid served as a screen saver on one of the computers in the MI office? (Danner 2004a).

Top military officials now claim that interrogations at Abu Ghraib yielded little to no new intelligence and most of the detainees were not linked to the insurgency in Iraq. Furthermore, techniques approved for Guantanamo detainees or "high value terrorist targets" were used on people pulled off the streets and cab drivers. For example, the hooded prisoner, whose story is listed in this section, was picked up for "getting out of a cab in a suspicious manner" (Danner 2004a: 100-101). While we know of the aforementioned cases revealed in the Taguba Report, Fay-Jones Report,

Schlesinger Report, and the ICRC, we also know that many of the cases of abuse have not been disclosed to the general public.

Recall earlier in this Chapter, I discussed Judge Hellerstein recent order for the U.S. government to release additional video and over 70 photos depicting other instances of abuse. Due to the governments reluctance to release this data to the ACLU in lieu of their on-going court case against the government, it is highly unlikely that the released data will contain duplications but instead reveal a much more systematic and widespread SOP of abuse and torture in Abu Ghraib. Moreover, the Taguba Report failed to include these incidents that provided further “detailed witness statements and the discovery of extremely graphic photographic evidence” because of their “extremely sensitive nature” (Taguba, quoted in Hersh 2004a: 22). Seymour Hersh, who first broke the story of torture in Abu Ghraib, has seen the video now being released and stated that young “boys were sodomized with the camera rolling, and the worst part is the soundtrack, of the boys shrieking . . . and this is your government at war” (in Pitt, July 20, 2004: 1).

#### Images of Brutality: The Administration’s Response

*Oh, I’m not one for instant history.*

— Donald Rumsfeld, May 4, 2004

Taguba recommended “strongly” that immediate “disciplinary action” be taken against several higher-ranking officers. The recommendations included the following: that Brigadier General Karpinski and Captain Reese be relieved of command and

reprimanded; Colonel Pappas be given a Memorandum of Reprimand and further investigated; LTC Phillabaum be relieved from command, given a Memorandum of Reprimand, and removed from the Colonel/0-6 Promotion List; LTC Jordan, Major DiNenna, Lt. Raeder, Sergeant Major Emerson, and Sergeant Lipinski be relieved from duty and given a Memorandum of Reprimand; Sergeant First Class Snider be relieved from his duties, receive a Memorandum of Reprimand, and receive action under the UCMJ; and Civilian Stephanowicz and Civilian Israel (CACI 205<sup>th</sup> MI Brigade) be given a Reprimand to be put in their employee files and have their security clearances reviewed (Taguba 2004).

Taguba also recommended the initiation of a Procedure Inquiry 15 to determine the full extent of culpability. As previously noted, the Procedure Inquiry 15 did not occur. Moreover, Taguba's recommendations overall were ignored as were previous recommendations by other investigations into abuses that revealed inefficiencies within higher ranks. For example, the investigations by Schmidt and Furlow concluded that General Miller should have been reprimanded for degrading and abusive interrogation techniques (specifically involving Al-Qahtani) in Guantanamo. However, the recommendation was rejected by General Craddock (USA Today, July 13, 2005). Miller not only escaped reprimands but the following month he was given the authority to overhaul the dysfunctional prison system in Iraq shortly before the Abu Ghraib scandal was revealed to the public).

Senator Warner, Chair of the Armed Service Committee, whom convened public hearings in early May targeting General Miller and Stephen Cambone's roles in the abuses, despite pressure from the Administration, stated:

This mistreatment of prisoners represents and appalling and totally unacceptable breach of military regulation and conduct. . . . There must be a full accounting for the cruel and disgraceful abuse of Iraqi detainees consistent with our law and protections of the Uniform Military Code of Justice.  
(Senator Warner, May 11, 2004, before the Armed Service Committee)

He did not succeed and no independent committee investigation occurred.

Moreover, Warner backed down in his call for such an investigation and acknowledged that there had been a lot of pressure on him. With limited resources and extreme pressure, Senator Warner temporarily ended convening witnesses until the Army completed the prosecutions of the low ranking MP's. This put any further hearings delving into deeper issues of the Administration's policies in the distant future, if any, until after the elections of 2004. With the lack of an investigations into the abuses and without a tacit acknowledgment or willingness to probe how the Administration's policies led to the systematic abuses of Afghanistans, Iraqis, or captives from over 44 states in Guantanamo, only 27 individuals have been cited/or reprimanded. The results are further limited when we consider who is being held accountable for the abuses that occurred in Abu Ghraib.

What has occurred as of October 2005 includes several small reprimands against Commanding Officers and several low ranking MP's being found guilty in Military Courts. To date, the U.S. military has reprimanded six senior commissioned and non-commissioned officers in connection with the abuse of prisoners at the Abu

Ghraib (Al-Atraqchi 2004)). Recall Taguba “strongly” recommended a course of action; however, the military was not under obligation to follow through with the specifics. Additionally, U.S. officials claim that the punishments are considered private, thus, no details were released on the names or ranks of those receiving reprimands or admonishment letters. However, it is known that at least two of the senior commissioned officers included Karpinski and Pappas.

In January 2004, Lieutenant General Sanchez formally suspended Karpinski. On April 8, 2005, Karpinski was formally relieved of command of the 800th MP Brigade. On May 5, 2005, Bush approved Karpinski’s demotion to Colonel. As a high-ranking official, the demotion was not linked to the Taguba Report or the cases of abuse and torture at Abu Ghraib. Instead it was stated that she was demoted for “dereliction of duty, making a material misrepresentation to investigators, failure to obey a lawful order and shoplifting” (stealing less than \$50 worth of cosmetics from a military store) (Wiklopedia, JK, 2005).

Colonel Pappas was reprimanded only by being denied any further promotions and fined \$8,000 with no criminal charges or investigations pending. LTC Phillabaum is pending “Relief for Cause,” for dereliction of duty. He has already been removed from duty. Captain Reese was simply admonished for failing to supervise his subordinates.

The only individuals being held criminally accountable are the low ranking military personnel. Of the nine accused in the Abu Ghraib abuse and torture cases, seven have pleaded guilty. Spc. Ambuhi pled guilty, lost her rank, and was given a

“other than honourable discharge.” Spc. Cruz pled guilty and received 8 months in jail along with a bad conduct discharge. Staff Sergeant Fredrick also pled guilty and received 8 years in jail and a dishonorable discharge. Spc. Sivits pled guilty and received 1 year in jail along with a bad conduct discharge. Sgt. Davis, upon guilty plea was sentenced to 6 months in jail and received a bad conduct discharge. Spc. Krol also entered a guilty plea and received 10 months in jail and a bad conduct discharge. Spc. Harman was found guilty and given 6 months in jail and received a bad conduct discharge. Private Graner took his case to trial and was convicted and sentenced to 10 years in Fort Levenworth in January 2005. He was also reduced in rank and will be given dishonorable discharge upon completion of his sentence. Private England was also found guilty, after her earlier plea entry of guilty was denied, and was sentenced to three years in jail and received a dishonorable discharge (BBC News 9/29/2005:1; MSNBC 9/28/2005).

As no senior Commander received criminal charges and as the Bush Administration failed to acknowledge the implicit role of its policies in the cases of torture and inhumane and cruel treatment, the ACLU has moved forward and registered formal Civil Complaints. On March 1, 2005, the first federal court lawsuit to name a top U.S. official, Secretary of Defense Donald Rumsfeld, in the ongoing torture scandal in Iraq was officially filed. The suit claims that Defense Secretary Donald Rumsfeld bears “direct responsibility for the torture and abuse of detainees in U.S. military custody” (ACLU and Human Rights First Lawsuit 2005). The lawsuit was filed in federal court in Illinois on behalf of eight detainees (three of which their

stories appear in this section) “who were subject to torture and abuse at the hands of U.S. forces under Secretary Rumsfeld’s command.” Rumsfeld is charged with violations of the U.S. Constitution and international law prohibiting torture and cruel, inhuman or degrading punishment. The ACLU and Human Rights First say they filed these suits in response to the Administration’s unwillingness to provide an independent investigation of senior commanders and U.S. policy:

Since Abu Ghraib, we have vigorously campaigned for an independent commission to investigate U.S. policies that have led to torture and cruel treatment of detainees. These calls have gone unanswered by the administration and Congress, and today many of the illegal policies remain in place. We believed the United States could correct its policy without resort to the courts. In bringing this action today, we reluctantly conclude that we were wrong. (Michael Posner, Executive Director of Human Rights First, 2005: 1)

The ACLU and Human Rights First have also filed three similar complaints against Colonel Thomas Pappas, Brigadier General Janis Karpinski and Lt. General Ricardo Sanchez on behalf of the torture victims who were detained in Iraq. These three complaints were filed in federal courts in Connecticut, South Carolina, and Texas due to court requirements regarding jurisdiction. Time will tell if these suits precede or if they bring any type of accountability.

### Summary

Cases of cruel and inhumane treatment and torture clearly took place within the confines of Abu Ghraib. As testimonies from prisoners and military personnel have shown, it was not a matter of a few rogue MP’s on the night shift. However, not everyone stationed at Abu Ghraib (or serving in general in the war on terrorism) was

active in these offenses. Nonetheless, there were widespread abuses occurring from Afghanistan, Guantanamo, Iraq, and into Abu Ghraib. The question is not if abuse and torture occurred, the larger questions still remaining are how and why did these abuses occur? Moreover, if torture was mandated from the highest levels within the State, why didn't everyone at Abu Ghraib participate? This brings us to the significance of exploring multiple levels of analysis, from the international to the interactional, in an effort to understand the correlations between the decision making process within the Administration to the realities of serving in Abu Ghraib. The next chapter attempts to answer these fundamental questions by addressing the forces of motivation and opportunity.

## CHAPTER VI

### THEORETICAL ANALYSIS I

In the following two chapters, I provide a criminological analysis of the torture that took place at Abu Ghraib prison. This analysis will draw on the multi-level and multi-catalyst framework discussed in Chapter II. While this analytical frame is rather complex, I believe that it is necessary if we are to consider the holistic environment of a phenomenon such as the torture at Abu Ghraib. Before proceeding to the analysis, let us briefly revisit the integrated model.

It is clear that singular societies are not atomistically separated from each other. Institutional arrangements and forces do not cease their influence at the arbitrary political boundaries currently drawn upon our maps. At the international level, existing relations based on specific conditions create broad social forces that can act as constraints on a state's intended policy. Moreover, international relations have an influence on states' opportunities to engage in illegal acts. Global economic forces can produce or constrain competition and goal attainment. The larger international culture or ethos can also produce an environment where a set of objectives can be accomplished by states using covert or overt activities.

At the structural or institutional level of analysis, the national social structure and its major social institutions are examined. When broad cultural, economic, political, and ideological goals are blocked, political organizations and actors within

them can be pushed toward the violation of law in order to accomplish their objectives. Within this level, I include the governmental political apparatus defined as the state. Being a nation-state strongly enhances the ability to create and capitalize upon criminal opportunity. Clearly law can serve to control actions, but due to the unique position of a state vis-à-vis its own domestic law and the problematic ways in which it is enforced, law may not hold the same deterrent power over a political body as it does over citizen actors. Furthermore, public forces embodied in the media, public opinion and social movement activism can potentially operate as constraints on state criminality at this level. The process of legitimation plays a significant role in state decision-making processes as well as official responses (e.g., state propaganda and the role of the media).

At the organizational level, elements of organizational culture and goals structure decision-making environments that can lead either toward or away from criminal activity. In this case, the organizational level analysis focuses on Abu Ghraib prison. Certain organizations utilize instrumental rationality within decision making processes (see Perrow 1986; Weber 1947) that can enhance the perceived value of criminal behaviors and reduce the perceived harm of the same act. Cultures can develop within organizations or subunits that can motivate criminal endeavors. Moreover, bureaucracies can maintain levels of secrecy on how their resources are utilized; external actors need not know what was done within the organization or by whom. Codes of conduct and other internal controls and checks may serve to block organizational criminal activity. Punitive measure may be utilized when conduct

norms are broken, thus serving as a form of deterrence. Constraints, on the other hand, include a general culture of compliance and reward structures. As previously noted, constraints generally act as temporary barriers and do not generally produce a deterrent effect as some legal reactions or penalties may.

At the social-psychological or interactional level, motivation is affected by one's socialization within a specific environment and the social meaning given to objects in the social world. Individual goals and issues of personality such as personal morality and obedience to authority are relevant factors in understanding state crimes at all levels of power within the polity—from the decision makers, to those who organize the act's implementation, to those who actually carry out the actions. Individual level motivations can be personal, but these individualized outlooks and motivations are highly malleable within the organizational culture and context that encapsulates the social actors. Again, cultural elements discussed above come to bear—both in the broader socio-cultural sense (singular actors motivated for personal success and advancement) but also in terms of organizational cultures into which the individual has been socialized.

This brief review alludes to the complexities and bulkiness of such an analysis. For this reason I have divided the theoretical analysis into two separate chapters: the first chapter deals with the catalysts of motivation and opportunity while the following chapter focuses on constraints and controls. More specifically, in Chapter VI, I examine the motivations and opportunities in relationship to international relations and economic conditions, political and ideological interests, organizational

culture and ethos, socialization, rationalization, and other core variables suggested by the theoretical frame. In Chapter VII, I examine constraints and controls in relation to international reactions and political pressures, international and domestic laws, the role of the media, the perceived legitimacy of law, religion, and morality.

### Motivation and Opportunities

When the Abu Ghraib scandal broke in April 2004, the images, sadistic and evil, left no doubt that abuse and torture had occurred at the hands of the U.S. military. Senior officials in the Bush administration claimed that the prisoner abuse was committed by only a few rogue, poorly trained reserve personnel at one facility during the nightshift in Iraq. Since then, hundreds of other cases from Afghanistan to Iraq have surfaced. Indeed, torture was and is being used by the U.S. in the name of a “greater good,” to secure information deemed necessary to prevent terrorism and to quell the Iraqi insurgency. Furthermore, some of the acts continue to be done systematically below the “radar screen, without political accountability, and indeed with plausible deniability” (Dershowitz 2004: 257). Thus, this “torture lite,” as classified by military and civilian officials, was not just the acts of a few bad apples (Dershowitz 2004: 264). While the military acted by initiating investigations which led to nine prosecutions of lower-ranking personnel and closed administrative hearings which handed down soft administrative punishments such as pay reductions and reprimands, the military made no effort to conduct a broader criminal investigation. Moreover, the administration continues to insist that the reported abuse had nothing

to do with its decisions on the applicability of the Geneva Conventions or with any approved and expanded interrogation techniques. Nonetheless, a case can be made that the U.S. government was criminally responsible for the torture that took place. We can analyze the specific motivations and opportunities of the Bush Administration in relation to the crimes at Abu Ghraib.

### Motivation

The fundamental factor of motivation is goal attainment. However, there are often multiple layers of goals. These can be further delineated into what I call general and specific goals. While both of these types of goals are present in the motivation for the case of Abu Ghraib, they differ in their affect. I use the term *general* to refer to the larger goals that had an affect on the decision making processes that would come to define other or more specific goals. For example, general goals include factors such as the pursuit of an Imperialist agenda, economic gain, revenge for the attacks of September 11, 2001 and international interest in reducing terrorism. Specific goals include those directly related to the torture that occurred such as the push for actionable intelligence and the strain experienced by U.S. forces. After all, motivation for crimes of the state can vary in degree, content, and intent. For example, motivation must not be assumed to be solely in terms of the state accumulating capital or in terms of legitimacy. This negates the agentic force that composes the state political apparatus. Factors such as morality and religion may play a significant role. Consequently, this section is divided into two subsections: general and specific goals.

In doing so, the international and state structural levels are combined to discuss the larger general goals. I then combine the state structural, organizational, and interactional levels to discuss the specific goals.

### *General Goals*

The end of the Cold War weakened domestic political support for expanding military budgets and the permanent war economy, and removed the ideological rationalization for a nationalistic agenda. However, economic and political elites did not acquiesce to the reduction in their power that would have resulted from such a realignment of U.S. foreign policy goals. The “neo-conservatives,” argued for a more nationalist, unilateralist, and militarist approach along with a disdain of international law and/or constraints. Moreover, as the Soviet Union was weakening, neo-cons in the administration of President George H. W. Bush began vigorously promoting an aggressive neo-imperialist ideology.

In 1992, aides under Secretary of Defense Richard Cheney prepared a draft document that later came to guide President George W. Bush’s foreign policies after September 11, 2001. This Defense Planning Guidance of 1992 (DPG) “depicted a world dominated by the United States, which would maintain its superpower status through a combination of positive guidance and overwhelming military might” (Armstrong 2002: 78). This included the use of preemptive military force to achieve such goals and the need to eliminate Sadaam Hussein’s government from Iraq, consolidate U.S. power in the Middle East, and change the political culture of the

region (Dorrien 2004). Recall also, in September of 2000, the Project for the New American Century (PNAC) issued a report entitled *Rebuilding America's Defenses: Strategy, Forces and Resources for a New Century*. This report grew out of the earlier DPG. PNAC called for massive increases in the military budget, the expansion of military bases, and the establishment of client states supportive of United States' economic and political interests. Moreover, the agenda included getting rid of Saddam Hussein and his regime, the realignment of the Middle East,<sup>1</sup> and a preemptive military action to combat terrorism (as state defined). A general motivation to create a new Pax Americana (U.S. Empire) permeated this document.

As noted in Chapter IV, with the happenstance of the 2000 elections, the neocons found themselves in a position to shape U.S. policy. Consequently, the underlying motivation of the global war on terrorism was the pursuit and realization of the neocon's imperial designs. The invasion and occupation of Iraq was the first step in this plan. Economic and strategic interests that included the opening of a new capitalistic market for U.S. corporate exploitation as well as the eventual political control of the Middle East were all general motivations that would have an indirect impact on the use of torture and cruel and inhumane punishment that occurred throughout the war on terrorism and Abu Ghraib specifically.

Directly related to this was the need to respond to the changing global economic order wherein the dollar was being seriously challenged. In late 2000,

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<sup>1</sup> See Appendix D for map of area.

Saddam Hussein switched from the dollar to the euro and then converted his \$10 billion reserve fund at the UN from dollars to euros. Iraq profited immensely from the switch further motivating the Administration to overthrow Saddam and put in place a U.S. driven economy (The Observer, February 16, 2003). The dollar-euro changeover was powerful enough to risk any economic backlash in the short-term to stave off the long-term dollar crash of an OPEC transaction standard change. This reinforced the broader general motivation to invade Iraq. The Observer states:

A bizarre political statement by Saddam Hussein has earned Iraq a windfall of hundreds of millions of euros. In October 2000 Iraq insisted upon dumping the U.S. Dollar—"the currency of the enemy"—for the more multilateral euro.

It was also reported that Iraq's UN oil for food reserve fund swelled from \$10 billion dollars to \$26 billion euros. As Saddam changed to the euro for oil and with talks of the Organization of the Petroleum Exporting Countries (OPEC) following suit, the Bush Administration became alarmed. They began planning to block OPEC momentum towards the euro as the currency standard as well as to return the Iraqi reserves back to the U.S. dollar. In order to pre-empt OPEC, the Administration needed to control Iraq and its oil reserves.

Otherwise U.S. economic supremacy could potentially be challenged as the situation would have presented an overarching macroeconomic threat to the hegemony of the U.S. dollar. As Clark (2003: 2) noted:

The Federal Reserve's greatest nightmare is that OPEC will switch its international transactions from a dollar standard to a euro standard. The real reason the Bush administration wants a puppet government in Iraq—or more importantly, the reason why the corporate-military-industrial network conglomerate wants a puppet government in Iraq—is so that it will revert back to a dollar standard and stay that way. While also hoping to veto any

wider OPEC momentum towards the euro, especially from Iran—the 2nd largest OPEC producer who is actively discussing a switch to euros for its oil exports.

Moreover, Clark (2003: 3) suggests that the following scenario would occur if OPEC made a collective switch to euros:

Otherwise, the effect of an OPEC switch to the euro would be that oil-consuming nations would have to flush dollars out of their (central bank) reserve funds and replace these with euros. The dollar would crash anywhere from 20-40% in value and the consequences would be those one could expect from any currency collapse and massive inflation (think Argentina currency crisis, for example). You'd have foreign funds stream out of the U.S. stock markets and dollar denominated assets, there'd surely be a run on the banks much like the 1930s, the current account deficit would become unserviceable, the budget deficit would go into default, and so on. Your basic 3rd world economic crisis scenario.

The ultimate result could potentially be the U.S. and the E.U. switching roles in the global economy, thus the U.S. would lose its sole status as superpower.

The attacks that occurred September 11, 2001 provided further general motivations. This included both, a motivation to address the growing concern of terrorism that had emerged at the international level for several decades and as a response to the attacks themselves. Throughout the twentieth century, the international arena sporadically focused on terrorism. For example, in May of 1937, the League of Nations appointed Council for the Repression of Terrorism convened a conference in which thirty-six nations attended. The Final Act of the international conference was signed in November 1937 and it created a multilateral treaty for the Prevention and Repression of Terrorism (League of Nations Proceedings of the International Conference on the Repression of Terrorism, 1937). At the III

International symposium in Syracuse, Sicily, 1973, the topic was again investigated (Bassiouni 1973; Rothe and Mullins 2006).

Yet, during the Cold War, terrorism was the “trade of the superpowers . . . they fought wars by proxy across the world by funding local armed groups with legal or covert operations” (for example the Contras in Central America) (Napoleoni 2003: 1). However, with changes in ideology, international relations, and globalization at the end of the cold war, the use of terrorism as a political tool greatly increased by states as well as independent political or religious groups (e.g., Israel, World Trade Center, Belfast, Russia, Kizlar, Chechnya, Sri Lanka, Saudi Arabia, Tokyo, Iran, Egypt, Turkey, Japan, Al-Qaeda, IRA, Hamas). Indeed, as international economic and financial barriers between states were lowered, terror groups expanded their activities becoming transnational. Terrorism came to be seen as endemic.<sup>2</sup> There emerged an ordinariness of brutality used by states and independent organizations.

With the renewed interest in and international focus on terrorism, the terrorist attack on the U.S. provided the motivation to pursue a global war on terrorism. Immediately after the September 11<sup>th</sup> attacks, the West Wing of the White House wanted action and Rumsfeld led the charge. While there was an ongoing neo-con agenda driving the invasion and occupation of Iraq, the onset of the Afghanistan invasion was stimulated by political and public reactions to the terrorist attacks and

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<sup>2</sup> Again, in 1989, Trinidad and Tobago approached the UN with a proposal for an ICC as a device to address drug trafficking and terrorism.

the motivation to suppress future attacks. Consequently, the attacks themselves were useful as a motivating force.

Once the global war on terrorism began and the U.S. invaded Afghanistan, another significant variable, motivated by international practice as well as state interest, was stepped up: the use of covert governmental programs to aid in the state's political agendas. Since WWII, many states have used covert activities for the pursuit of state or individual interests. For example, the French have been accused of having its police covertly acting in Spain and sponsoring the GAL (anti-terrorist liberation group) death squads in their war against the leftist and Basque separatists. Chile, under Pinochet, used covert means to assassinate General Carlos Prats in Argentina as well as the attempted assassination of Bernardo Leighton in Italy. Iran under the Shah (1953-79) was notorious for its state terrorism through its covert intelligence agency SAVAK (which was founded in 1957 with the aid of the CIA). Israel covertly planned an assassination of Yasser Arafat on two separate occasions. In Spain, numerous groups such as the Guerrilleros de Cristo Rey, Batallón Vasco Español, Antiterrorismo ETA (ATE), and Grupos Antiterroristas de Liberación (GAL), alleged to consist of Spanish police and funded with secrete money, violently attacked suspected members of the ETA (Vidgen 1995).

As state sponsored covert activities flourished, the U.S. remained one of the leading users of covert activities against other nation states and/or their representative puppet governments. After the assassination of Kennedy in 1963, the CIA's use of covert operation programs or SAP's increased on a dramatic scale (Vidgen 1995).

Recall that in President Bush's speech to the nation on September 24, 2001, he declared a global open-ended war on terror, which would "not end until every terrorist group of global reach has been found, stopped, and defeated." To attempt to do this, resources far beyond the U.S. traditional military would be needed. The increased use of special operations and clandestine activities was a potential resource for the Administration. Moreover, the increased use of SAP's and other clandestine activities in the war on terrorism was motivated by the fact that during the 1990s, intelligence funding suffered deep cuts (Annual Report on Military Expenditures 1991-1999; H. Res. 229).

As discussed in Chapter IV, the CIA and SAP's were heavily involved in "intelligence gathering," rounding up, and killing suspected Al-Qaeda members. Moreover, they were heavily involved in Iraq and Abu Ghraib as SAP's were granted authority over MI's and MP's. As with any state covert activity, the goal was to achieve its mission without outside scrutiny and at a quicker pace than could be done using traditional military techniques or through diplomatic channels.

Private military firms were also used extensively in the global war on terrorism. In part motivated by need and also for self-serving interests, the role of PMC's reached an all time high (Rothe 2006). While the Administration made the claim that utilizing private corporations was more cost effective than the military, thus saving the public's tax money, it was much more complex (this will be discussed in the following sections). For example, personal financial interests were at stake (e.g., Cheney and Halliburton; G. H. W. Bush with Carlisle; and Lord and Abbott). There

was also a level of deniability and legal ambiguity that using PMC's provided. For example, the funds to pay corporations for wartime efforts were taken from funds unregulated by Congress<sup>3</sup> (see also Rothe 2006). Moreover, with an expansive war on terrorism and with the underlying motive to move quickly into Iraq, the Administration openly began advertising in multiple countries (e.g., Russia) for PC's and or individual rogue ex-military personnel to aid in the Afghanistan invasion. The uses of these PC's continued and were expanded in the subsequent war on Iraq and in prisoner handling and interrogations.

While the initial war on terrorism, beginning with Afghanistan, was framed as a new type of war, the ideological underpinnings coincided with the neocon agenda: a militaristic nationalistic response wherein "the gloves come off." The assertion of the Bush Administration after September 11, 2001 was that fighting terrorism was justified by whatever means chosen (Greenberg and Dratel 2005). Moreover, a political cultural change was in the making. This included the Administrations disdain for a soft military and for international law. Thus, the policies set forth by the Administration were an effort to alter U.S. military policy and practice while at the same time disavowing allegiance to international law. As Yoo stated, "this was a new

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<sup>3</sup> In Iraq, contractors were originally to be paid with money approved by Congress, but the CPA decided to use Iraqi money through the DFI funds, which was subject to "fewer restrictions and less rigorous oversight" (Mother Jones 2004, in Rothe 2006).

kind of war wherein we had to adapt to a war wherein the enemy was not a traditional state” (Frontline, October 18, 2005).

The redefining of the way war was to be fought included Rumsfeld’s longstanding “desire to wrest control of clandestine and paramilitary operations from the CIA” (Hersh 2004a). With the bungled elections of 2000, Rumsfeld found himself in a position to make real his long-standing desires. Not only did he initiate the first SAP clandestine effort in the war on terrorism in August 2003, but he also expanded the highly secretive programs into the prison of Abu Ghraib.

This “new kind of war” also motivated a change in military techniques to gather intelligence. There was a brutal tug of war occurring within the State between the FBI and the CIA over detainees considered high value intelligence (HVI). The FBI had a practice of repertoire building in interrogations while the CIA was using harsh tactics and practices of rendition: outsourcing of torture for intelligence. The CIA did not take most prisoners in Afghanistan so they fell under the auspices and responsibility of Secretary of State Rumsfeld. His priority was “actionable intelligence.” However, little to no actionable intelligence was being attained on the whereabouts of Al-Qaeda or Bin Laden. This was the specific motive for finding ways around the Geneva Conventions. The DOD lawyers did just that. In Chapter III, I discussed these memos as well as the attempts by DOD and Counsel to the President to ignore and manipulate the legal interpretations from legal precedence and existing laws, domestic and international (this will be discussed further within the specific opportunity and the controls sections). In doing so, the Administration paved the way

for what eventually came to public attention, the abuses and torture of Abu Ghraib. Additionally, the change in military tactics and ideology of gloves off had a direct impact on more specific goals related to the torture and abuses that occurred at Abu Ghraib.

### *Specific Goals*

From the onset of the Afghanistan invasion, the need for intelligence was high. With the failure to capture Bin Laden, mass roundups of detainees were conducted in an effort to obtain some sort of actionable intelligence. With the growing number of prisoners, the U.S. needed additional places to detain them. As will be discussed in the following section, opportunities, Guantanamo was chosen.

With the arrival of detainees at Guantanamo, the quest for actionable intelligence amplified. However, interrogations were not going well and an intensive process ensued. This was in part due to the Afghans putting up resistance to interrogation but was mostly associated with the fact that most of the detainees were insurgents against the U.S. “but none had any knowledge that was useful for intelligence on Al-Qaeda or Bin Laden” (Frontline 2005). This was contradictory to Rumsfeld’s claim that “they were the most dangerous and the worst of the worst” of terrorists. Moreover, as the MI’s were “young and inexperienced active duty reserve service personnel” they were not equipped to obtain the information Rumsfeld was pushing for. In Washington, the military command knew Rumsfeld was unhappy with the amount of usable information coming out of Guantanamo. The general belief was

that the MP's were coddling detainees and a harder stance was needed. This motivated the Pentagon to expand the interrogation tactics being used (Baccus 2005). This resulted in the multiple memos discussing interrogation techniques that could bypass international law if manipulated and redefined (this will be discussed further in the state opportunity section). This also resulted in Rumsfeld's decision to relieve Baccus of his duty and to send General Miller to Gitmo. Camp X-Ray became Camp Delta with 625 detainees at this time.

Miller's presence at Gitmo brought "noted improvements" in the daily operating procedures; however, little intelligence was being gathered (Baccus 2005). With the arrival of Miller, the atmosphere and structure changed. MP's and MI's were to work together as a combined team. Moreover, Rumsfeld authorized the harshest techniques for interrogation "ever in U.S. history" (Baccus 2005). These techniques were discussed in Chapter IV and included using dogs, stress, shackling in stress positions, standing, isolation, and "other innovating" (getting in the detainees' heads) tactics. While Rumsfeld approved these methods, the desire for even harsher ones was alluded to in Rumsfeld's memo wherein he added "I stand for 8 hours, why only 4?" The uses of psychological techniques were further generated by the availability of a team of U.S. psychologists for advice and aid in finding mental and cultural vulnerabilities the MP's and MI's could use. Some of these methods of innovating were later visible in the cases at Abu Ghraib. For example, female MP and MI's committing sexual innuendos (females straddling detainees and using red substance claiming it was menstrual blood to smear on detainees) were used for

cultural vulnerabilities, detainees wearing bras, and putting them on leashes and walking them like dogs.

As Human Rights Organizations and international political actors continued to press the Administration on its classifications of enemy combatants and the treatment of detainees at Gitmo there was further motivation to move quickly, to attain more information, and to proceed with the invasion of Iraq. Moreover, international support began to dwindle and was replaced with scrutiny and or outright protests, thus motivating the Administration to move quickly in Afghanistan to get out, refocus the war on terrorism off of Bin Laden and recast the threat in a much larger frame. In the 2002 State of the Union Address, this is exactly what they did. Now the “axis of evil” was part of the larger war on terrorism. Moreover, the connection had been made between Iraq and the ever-looming threat of Al-Qaeda.

In March of 2003, the shock and awe attacks began. Heavily criticized for its unilateral attack on Iraq, the U.S. needed a quick victory (one which Rumsfeld was sure would happen). Shortly after the fall of Baghdad, Iraqi street crimes escalated and a growing insurgency was surfacing. As the resistance intensified pressure from Rumsfeld for intelligence on who the insurgents were and where were they coming from. This pressure created an even more intense desire down the chain of command to produce some sort of actionable intelligence. With no good intelligence on this “unexpected” insurgency, the explosive mix of fear, uncertainty, and revenge led to even larger detention sweeps as well as an increase of violence by U.S. personnel. Many of these detainees ended up in Abu Ghraib. Abu Ghraib was not only chosen as

the site for detaining the escalating number of criminals charged with looting but also for those deemed HIV.

From the onset, the choice of Abu Ghraib for a detention center was troubling. It was “not a good site-in middle of combat space . . . you just don’t do it” (Karpinski 2005a). The 280-acre site, with only three towers, was located in civilian neighborhoods where insurgent snipers were easily hidden. This added to the already explosive mixture of emotions that led to the escalation of violence by U.S. troops on civilians at large. Moreover, as the resistance to the U.S. occupation continued to grow, mass roundups were being initiated, detaining thousands of Iraqis that were “in the wrong place at the wrong time.” As the ICRC and other Reports noted, at least 90% of the detainees did not need to be detained.

By the Fall of 2003, as the numbers of detainees increased and the necessary staff within Abu Ghraib was lacking. In that environment a growing brutality surfaced as MP’s were overwhelmed (380 MP’s to guard thousands of detainees). This was evidenced by the change in videos MP and MI’s were sending back home to loved ones that were growing more intense, filled with hostilities amongst each other (Frontline 2005). Moreover, the push for “actionable intelligence” and the foreign role of MP’s working under MI’s and SAP’s significantly worsened an already hostile environment towards more extreme physical reactions as anger and frustration was growing among U.S. forces. As a constant reminder and motivator, a photocopied letter with Rumsfeld’s signature was taped to a column in Abu Ghraib, declaring the

“need for actionable intelligence” along with suggested means such as using dogs, and a command to “make sure this happens” (Karpinski 2005b: 241).

Command levels within Abu Ghraib were also aware of daily briefings with the National Security Council for updates on intelligence results. There was direct pressure from Rumsfeld via teleconferences with Sanchez pressuring for intelligence to find out “who the hell is responsible for the insurgency . . . who are they” (Karpinski 2005a). With any line of command, the need to have success in attaining goals is significant. Likewise, it was known on the field that the word from high levels within the Administration (including Cheney and Rumsfeld) was that field interrogations were not providing the needed intelligence. Consequently, “to a soldier in the field it meant sometimes using ways that were not in accordance with the Geneva Conventions and the law of war” (Wilkerson 2005: 1). Thus, individuals were motivated to commit or at best ignore abuses and torture to obtain the demanded goals. Their individual success would be rewarded by future promotions and internal reviews as well as through verbal confirmations such as “Good job, they’re breaking down real fast. They answer every question. They’re giving out good information, Finally, and Keep up the good work” (Taguba 2004: v11U (c)). This environment had a huge impact on generating the individual motivation to torture.

I have noted that every regime that tortures does so in the name of a greater good or a superior goal. The U.S. clearly used this strategy, as the greater good was to bring peace and democracy, and end the evils of terrorism. This philosophical doctrine of the greater good is more than a technique of rationalization. It is a moral

argument. Scholars have long discussed the acceptable use of torture in a ticking bomb scenario. This moral argument is also a motivating factor at the individual level. Moreover, state actors used the moral debate when discussing expanded interrogation techniques. As Assistant Attorney General Bybee stated, “In a war like the present one, the information gained from interrogations may prevent future attacks by foreign enemies” (Memo, August 2002: 8). This had a direct effect at the Interactional level of analysis. As Levinson (2004: 16) suggests, “torturers do not generally think of themselves as evil but rather as guardians of the common good.” A claim is made to some higher virtue for acts of torture. Simply stated, torturers believe they get their hands dirty to protect others from a greater harm.

While rationalizing one’s behavior as for a greater good or a higher virtue played a role, so did the variables of adrenaline and power. In an interview with Dan Rather, 60 Minutes II, Staff Sergeant Chip Fredrick (2004) alludes to both of these variables. He stated:

The elixir of *power*, the elixir of believing that you’re helping the CIA, for God’s sake, when you’re from a small town in Virginia, that’s *intoxicating* . . . and so good guys sometimes do things believing that they are being of assistance and helping a just cause. [my emphasis]

Recall that detainees were labeled as Gollum, an animalistic character of ignorance and stupidity. This coupled with the term PUC (prisoner under control originally devised in Afghanistan), reinforced the mentality of the dehumanized enemy. Moreover, the term *PUC* became part of a larger organizational isomorphic affect when it was transmitted from Afghanistan to Iraq. With a label of under control

versus the protected status of POW, personnel were able to claim a higher good and to neutralize their tactics of torture and abuse through the process of dehumanization.

Ignoring abuse and torture is also an individual response to the processes of socialization within the environment.<sup>4</sup> As Sergeant Davis told CID investigators, “I witnessed prisoners in the MI hold section being made to do things that I would question morally . . . but I assumed if they were doing things out of the ordinary or outside the guidelines, someone would have said something” (Davis 2004: 30). Due to the processes of socialization, studies of torturers have shown that ordinary individuals, regardless of their psychological traits, can be made to torture others by being socialized to atrocity in terms of necessity. The notion of necessity was reinforced by the organizational structure of Abu Ghraib. As MP’s were put in the position to aid MI’s in intelligence gathering, the primary goal was to obtain necessary intelligence to (1) end the insurgency, (2) save their fellow military personnel, and (3) to come closer to a date to return to the States. Soldiers learned that it was acceptable to “‘fuck’ (i.e., beat up) and ‘smoke’ (i.e., bring to collapse through forced physical exertion)” detainees from their initial time of arrival (Captain Fishback 2005). Low-ranking personnel witnessed OGA civilian and MI interrogators ignoring the Geneva Conventions and came to believe that anything goes, further reinforcing their socialization into the systematic practice of abuse and torture.

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<sup>4</sup> This is also referred to as the stander-by effect.

Once the systematic use of abuse and torture was institutionalized within the walls of Abu Ghraib, some individuals then engaged in a competition with each other, which escalated the torture and abuse. For example, in General Fay's Report, one of the cases noted states that "dog handlers were subjecting two adolescents to terror from the dogs for the purposes of playing a game . . . dog handlers competed to see who could be the first to get detainees bowel movements and urination to work."

At other times, torture occurred in an environment that was filled with frustration, anger, confusion, and most significantly boredom. The photographs and videos reveal the immediate effect of this boredom as they were taken as a form of entertainment. Furthermore, abusing and torturing detainees was used as a stress and boredom release by enlisted men of all kinds. For example, one of the whistleblowers in the Human Rights Watch Report (2005) claimed that he witnessed a cook break a detainee's leg with a metal baseball bat out of boredom.

### *Summary*

This chapter distinguishes between general and specific goals that led to the torture at Abu Ghraib. General goals generate from broader interests such as the neocon agenda, maintaining supremacy of the U.S. dollar, a broader focus on terrorism, and the attacks of September 11<sup>th</sup>. Specific goals included the desire and need for actionable intelligence, the strain on military personnel, and psychological issues such boredom, frustration, and strain. As previously noted, however, motivation itself is not sufficient; opportunity must also exist.

## Opportunities

Opportunity for illegitimate means must be present though its significance may vary in degree or circumstances. These variations can be delineated into general and specific opportunities. I use the term *general* to refer to opportunities that already exist due to larger structural factors. These can include the global capital market, time specific interstate relations, and a complimentary legal system.

On the other hand, a state, or an individual, can be highly motivated but without an appropriate opportunity will be unable to act on that motivation. Thus, opportunities are often created. This is more often the case at the state level wherein its very structure allows for law making or decriminalization of acts that provide opportunities to obtain goals. Other examples of created opportunities include things such as, the role of MP units as interrogators, lack of an organizational command structure, or using private contractors for sensitive jobs are all opportunities that were created or presented as the result of specific decision-making.

The following analysis utilizes these distinctions. Consequently, this section is divided into two subsections: general and specific opportunities. General opportunities include both the international and state structural levels and specific opportunities combine the state, organizational, and interactional levels consistent with the analysis of motivation.

### *General Opportunities*

After the Cold War, the U.S., along with other industrialized nations, began downsizing its military and privatizing military logistical services. Private military companies (PMC) have become common and “significant players in conflicts around the world, supplying not merely the goods but also the services of war” (Singer 2005:

1). As Singer also points out:

The modern private military industry emerged at the start of the 1990s, driven by three dynamics: the end of the Cold War, transformations in the nature of warfare that blurred the lines between soldiers and civilians, and a general trend toward privatization and outsourcing of government functions around the world.

PMC's have grown to include nearly 90 companies and they are used in more than 110 nation-states providing an array of services (Whyte 2003). The overall pattern of transnational globalization and military privatization that emerged out of the early 1990's reinforced a general symbiotic relationship between states and corporations. It has long been acknowledged by many scholars that the state plays a major role in protecting the capitalistic system, thus, corporate interests (Marx 1906; Chambliss and Zatz 1993; Matthews and Kauzlarich 2000; and Gold et al. 1975).

States and markets have a relationship of interdependence and as markets are embedded in states, it is often, though not necessarily always in the states' interests to maintain a dominant role in forming coalitions with transnational institutions and the private sector. Moreover, a symbiotic relationship between state and capitalism does not historically mean ipso facto that it supports corporate interests. It does not mean

that it is some inescapable law of capitalism. It is not.<sup>5</sup> I am not implying a simplistic instrumentalist conceptualization of PMC's wherein they act to fulfill state foreign policy by "proxy." Instead the privatized military corporate activities present a more complex network of economic, legal and political reciprocity. Furthermore, as the international arena openly promotes a global market and laissez-faire capitalism, transnational corporations play an enormous role within the globalizing economy. This presents the opportunity to use such private corporations as a seemingly natural phenomenon (Rothe 2006). Thus, the emergence of privatized military markets can act as an "expansion of the coercive and violent capacities" of nation-states (Whyte 2003: 1). Consequently, the international environment wherein PMC's were used in such a large context, facilitating new means for delivering violence and terror, provided yet another opportunity for the U.S. to expand the "traditional role" of these

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<sup>5</sup> Historically, it was not always the case that supporting capitalism meant unregulated deference to corporate private interest. Originally, corporate charters, etc. were designed to serve and protect the public interest from private abuse. This did not change in the U.S. until after the 14<sup>th</sup> equal rights amendment intended to protect freed slaves was used by capitalists like Rockefeller, Dupont, and Mellon to redefine the corporation as a "person" entitled to these same rights, while at the same time, the Constitutional safeguards and protections of freedom to gather or speak or to due process were no longer applied to the worker/employee or to the common community, and the only responsibility or obligation of the corporation became to the privately owned share holders or to the bottom line, as the individuals making up the corporation were freed from any personal or individual liability for corporate injury or harm (Barak 2005).

companies to one beyond logistical services to include interrogations and other previously sensitive and specialized military roles.

The use of PMC's allowed the U.S. to carry out actions that would not otherwise have been possible such as those operations that would have failed legislative or public approval. More specifically, the use of PMC's allowed the U.S. an additional resource for achieving a foreign policy goal without the need of legislative approval as required when using military forces. As Tombs and Whyte state (2003: 220), accountability is stymied through the use of private contractors by absorbing the "‘corporate veil,’ ‘commercial confidentiality’ and the inapplicability of Freedom of Information legislation into their security activities." Conversely, PMC's provide an "ambiguous legal status" for private contractors in theatres of conflict and/or reconstruction and may extend the shield of national security through keeping information classified (Jameson and McEvoy 2005). Contractors then further obscure reality by hiding behind the complexities of corporate structures intermixed with state contractual arrangements.

Perhaps as significant is the opportunity to minimize the numbers of enlisted men needed in this global war on terrorism. The desire to keep down the numbers of troops actively engaged in warfare to appease the public while still having enough personnel to do the necessary job is in part a reaction to past wartime experiences. Privatization provides the opportunity, in part, to limit the public's abhorrence of the death and violence that war inevitably inflicts on U.S. soldiers. Since the end of the Vietnam War, presidents have worried that their military actions would lose support

once the number of troop casualties climbed and/or news media began distributing pictures of the remains of U.S. soldiers on the battlefield or in draped coffins. “They were afraid of turning this into another Vietnam,” Larry Makinson, a senior fellow at the Center for Public Integrity said. “They know what it’s like to see casualty figures day after day. The reliance on civilian contractors in Iraq is really a different variation on the same theme that led the Pentagon to ban taking photographs of flag-draped coffins” (Ivanovich 2004).

This reluctance to commit U.S. troops to overseas conflicts has been termed by Robertson (2000: 200), the “Mogadishu factor,” wherein risk of public outcry weighs heavily in the decision-making to use private resources to achieve foreign policy goals. When we consider that private contractor casualties are not reported or tallied by the Pentagon, it is logical that the use of PMC’s can indeed keep the number of “official” casualties down while maintaining the necessary forces.

In essence, PMC’s provided the Administration with a means to carry on an open-ended war on terrorism, operate in a multi-theatre of operations, lower the numbers of official military personnel, and to have an additional source of labor beyond the scope of regulation and/or scrutiny. Moreover, it allowed the Administration to utilize PMC’s to work alongside CIA and within SAP Special Forces to move unhindered across borders and without a declared operation. As one senior CIA official confirms, these SAP operations provided the Administration a shelter wherein if exposed, “would eviscerate the moral standing of the U.S. and expose American soldiers to retaliation” (Hersh 2004a: 47).

By using privatized security forces, an atmosphere of ambiguity was created and legal culpability was reduced, allowing the Administration to utilize various military practices and techniques under the radar screen. As reported in the Financial Times UK on May 22, 2004, high ranking officials believed the Pentagon used PMC's to interrogate prisoners in Afghanistan and Iraq to obscure its aggressive practices from congressional oversight. A civilian lawyer, recalling a meeting with JAG lawyers stated that high ranking officials in JAG, "believed that there was a conscious effort to create an atmosphere of ambiguity, of having people involved who couldn't be held to account" (Chaffin 2004: 1).

The implication of employees from CACI International in the Abu Ghraib prisoner-abuse scandal highlights many of the aforementioned negative characteristics of outsourcing intelligence functions as well as state-corporate complicity. The type of "blanket purchase agreement" under which CACI provided these services is advocated by federal agencies in terms of efficiency but often mask the services that are being supplied. Additionally, the intersection of public-private or state-corporate agendas has increased the mutual reinforcement of potential illegal practices, particularly in circumstances of lax scrutiny and oversight, such as Abu Ghraib.

The agreement between the U.S. and Cuba provided the opportunity for the U.S. to make other strategic decisions that had a direct impact on the cases of torture and abuse that occurred throughout the war on terrorism including Abu Ghraib. The U.S. presence in Cuba was established in 1898, when it obtained control following the invasion of Guantanamo Bay. The U.S. obtained a permanent lease on February 23,

1903. The Treaty was incorporated into the Platt Amendment in the Cuban Constitution. The Treaty stated that the United States, for the purposes of operating naval stations, had complete jurisdiction and control of Guantanamo Bay though Cuba retained ultimate sovereignty (Wikipedia 2005). The Treaty was reaffirmed in 1934. Consequently, the use of U.S. leased land at Guantanamo provided a realm wherein accountability of U.S. actions would be murky at best, internationally and domestically. Recall from Chapter V, that once the war on terrorism had begun and over 3,000 Afghanis were being detained, a decision of what to do with them needed to be made. As noted above, Guantanamo had been strategically chosen. It provided the Administration with a place out of arms reach of international law or scrutiny. Moreover, it provided a place wherein the focus on actionable intelligence could be achieved with gloves off and out of sight and mind of the general public. The strategic decision to use Guantanamo as the detention center for alleged Taliban or Al-Qaeda members provided the Administration with the opportunity to manipulate domestic and international laws to create a category of detainees that it deemed as enemy combatants, thus denying them the basic rights afforded by the Geneva Conventions concerning methods of interrogation and treatment.

Closely related to the opportunities provided by the U.S. and Cuba's agreement is the current complimentary legal system that operates at the international level. This provides a realm wherein states have an option to be or not to be held accountable legally for their actions vis-à-vis multi-lateral treaties (such as the ICC), thus negating certain components of controls and creating opportunities for

illegitimate means to be used. Simply stated, the opportunity is then present for state behaviors without the potential for blocks or controls. Consequently, the existing complimentary legal system reinforced the strategic decision of the Administration to choose Guantanamo as a detention camp. The legal structure and the complimentary component will be dealt with in more detail in Chapter VII. Yet, it is necessary to note that as it is structured it does provide a realm of opportunity that may not have been present under different circumstances such as a universal system of international social control.

Another factor that provided the opportunity to torture detainees was the attack of September 11, 2001. This event provided the Bush Administration with the perfect opportunity to fulfill the long-planned neo-con agenda. As Bush stated in reference to the attacks, it was “an opportunity to strengthen America.” This included carrying out foreign policy agendas in the name of a global war on terrorism. Moreover, it provided an immediate environment of fear. In general, the U.S. population was in a state of shock, denial, and fear. This fear provided an opportunity for the Administration to implement its agenda. As stated by Nazi Reich- Marshal Herman Goering at the Nuremberg War Trials:

The people can always be brought to the bidding of the leaders. That is easy. All you have to do is tell them they are being attacked and denounce the peacemakers for lack of patriotism and exposing the country to danger. It works the same in any country.

International support for the U.S. “war on terrorism” immediately after September 11, 2001 was also striking. NATO’s unanimous and unprecedented decision to invoke Article V of its Charter, which calls an attack against any one

NATO member an attack against them all, illustrated the overall support of the international arena. It is important to note that international support for the Administration's foreign policies was significantly higher immediately after the attacks on U.S. soil than just weeks before. Before September 11, 2001 an opinion poll conducted by the Pew Research Center, the Council on Foreign Relations, and the International Herald Tribune showed that Europeans held very low negative opinions of the Administration. The poll showed the greatest concern was that the U.S. was pursuing its own interests without the interests of the international arena in general being considered. This perception was, in part, the result of Bush's resistance to International Treaties including the Rome Statute, the Kyoto Treaty, and its plans to terminate the Anti-Ballistic Missile Treaty (ABM) (see Rothe and Mullins 2006). Nevertheless, after September 11<sup>th</sup>, "for a moment, the terrible events seemed to change everything, including the perception of Americans by Europeans" (Heinrich Büll Foundation 2003: 26). As stated on *Le Monde's* title page on September 12, 2001, "We are all Americans."

At this point, Europeans hoped that U.S. policy was changing from the previous year's unilateralist stance to one that reflected an internationalist or multilateralist position. In part, this was due to the Administration's decision to pay its long overdue UN dues and asking its allies to invoke Article 5 of the NATO Treaty immediately after the terrorist attacks. While international support for the Afghanistan war quickly waned as reports of abuses started to surface, G. W. Bush threatened the "Axis of Evil," and with preparations to attack Iraq, the original

opportunity to move forward with the Administration's agenda for the Middle East was undeniable.

Likewise, September 11<sup>th</sup> provided a broader cultural climate of fear and shock.

Along with the high levels of fear and shock, patriotism and support of the government escalated. This was reflected in the support and approval ratings of President G. W. Bush that reached an all time high since his appointment to the White House. In the Congress, support of the Administration suppressed partisan politics and on September 13, the Senate and House of Representatives voted to approve the administration's "Authorization for Use of Military Force." The bill gave President Bush a virtually unlimited mandate:

To use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons in order to prevent any future acts of international terrorism against the United States. (White House, 2003)

Congress further abrogated its Constitutional duty in October 2002 when it provided Bush with an opportunity to assume war powers. Simply stated, the War Resolution passed on October 10, 2002 did not keep the fundamental right to declare war in the hands of Congress. According to the U.S. Constitution, there must be a congressional declaration of war (see Article 1, Section 8). As legal analyst Louis Fisher (2004: x) has written, "Did Congress actually decide to go to war? Not really. Members of Congress transferred that choice to Bush. They decided that he should decide." The resolution did not declare war against any nation but stated that the

president “has authority under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States . . .” Additionally, the authorization specifically provided Bush with the right to defend-not to declare a war. The resolution by Congress did not grant Bush authority to declare war; the resolution merely provided the president the facade of legitimacy, wherein an opportunity for the use of illegal means was created.

(a) AUTHORIZATION—The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—

1. defend the national security of the United States against the continuing threat posed by Iraq; and
2. enforce all relevant United Nations Security Council resolutions regarding Iraq.

The disproportionate reactions by politicians overpowered any scrutiny of the “legalities” of a global war on terrorism, thus enhancing the opportunity.

The use of fear also facilitated the catalyst of opportunity. With fear as the fundamental emotion of the public, little outcry occurred over the legal manipulations carried out by the Administration. As the political schema enlarged to include a geopolitical agenda of imperialism, the level of public consensus and support was even more relevant. Thus, the use of fear was used. As stated in a press release by Ari Fleisher (September 18, 2001), Press Secretary to Bush, “The Al Qaeda organization is present in, as you've heard from the President, more than 60 countries, and its links are—its links are amorphous.” The threat was repeated and promoted with the Homeland Security System providing citizens with levels of danger such as orange, yellow, and red. The Administration continued to remind citizens of the lingering and

ominous threat posed to the state and to its culture as a whole (Rothe and Mullins 2005).

Great tragedy has come to us, and we are meeting it with the best that is in our country, with courage and concern for others. Because this is America. This is who we are. This is what our enemies hate and have attacked. And this is why we will prevail. (President Bush, September 15, 2001)

When the Administration began its campaign for public support to invade Iraq the use of the public's fear continued to be used. As Bush stated, "We are in imminent danger" and pre-emptive measures are now necessary (Rothe and Muzzatti 2004).

For months after September 11, 2001, the press was consumed with coverage of the September 11th. Every hosted TV show, newspaper editorials, syndicate columns, panel of pundits, and news stories dwelled on the terrorist attacks (Parenti, 2002). For one year and fifty days<sup>6</sup>, a total of 17,744 stories ran in the *New York Times* regarding terror, 10,761 in the *Washington Post*, and 5,200 in the *USA Today*<sup>7</sup> (Rothe and Muzzatti 2004). The U.S. public were presented with a barrage of newspaper headlines that escalated the shock of the attacks and general fear that existed. Everywhere citizens turned a reminder of the terrorists and their potential threats could be found. Repeated reminders of the fear that people in the U.S. should be experiencing echoed through the terrorvision. CNN journalists broadcasting from

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<sup>6</sup> The fifty days was added to encompass the coverage of the one-year anniversary of 9/11 and the following days.

<sup>7</sup> The three newspapers used in the content analysis were searched via the computer database LexisNexis.

live from Kosovo remarked, “I probably feel safer here than you do back home in the states” (CNN News 2001, in Rothe and Muzzatti 2004).

What Der Derian referred to as “media spasms of a seismic scale” and “hyper production” was clearly evidenced by the abundance of books written about terrorism in response to the event. Similarly, following a brief respite from its standard fare of exploding buildings and vehicles, Hollywood aired weekly drama shows with themes of terrorism and terrorists, always depicting the evil and horrors of the folk devil (*The Shield*, *Third Watch*, *24*, and *Law and Order*). Conversely, movie reviewers wrote that this or that film was a welcome antidote to the events of September 11, 2001 (Parenti, 2002). This rigorous adherence to coverage of the events and/or the production of shows playing on terrorism maintained the level of fear and provided the opportunity for the neo-con agenda to be enacted (Rothe and Muzzatti 2004).

While the media propagated fear, it was also heavily censored by the Administration.<sup>8</sup> According to the propaganda model, the media is dependent on government as an information source leading to political considerations and overlapping interests as the media is also embedded in the market system. Additionally, media are also constrained by the dominant ideology, which prevents the media from criticizing political actions domestically or internationally. This was even more of an issue after September 11<sup>th</sup>. The media were not only limited by the

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<sup>8</sup> Admittedly, the U.S. media participates in self-censorship for political and economic reasons. For more information on this see Chomsky and Herman’s Propaganda Model.

political reigns, but high level executives, fearing State reprisals (i.e., being “cut out of the loop”) ordered correspondents to remind viewers that the Taliban were evil and harbored terrorists that killed thousands of Americans whenever they broadcast reports or footage of civilian deaths, hunger, or devastation in Afghanistan as a result of the U.S. war on terrorism (CNN Chair, Walter Isaacson, quoted in Parenti, 2002: 51). Additionally when letters to the editor or viewpoint columns that contained any criticisms of the Administrations’ policies were submitted to media outlets they were rejected. This occurred at home as well as abroad with embedded journalists.

In April 2003, The International Federation of Journalists expressed concern over the growing number of foreign reporters being harassed and censored by U.S. forces in Iraq. “There is a growing sense that military frustration over continuing hostility in Iraq is leading to acts of intolerance against journalists and media,” (Aidan White 2003: 1). The Pentagon had become increasingly weary of any unfiltered media exposure, which would lead to public awareness (especially international awareness) of civilian casualties or the degree of resistance in the war. Moreover, as was noted in Chapter IV, the media are often subservient to requests by the Administration to sit on stories and/or to not cover them at all as was the case with the Abu Ghraib photographs. Indeed, censorship of the media provided further opportunity for the Administration to operate under a veil of secrecy. This allowed the Administration to conceal its motives, operations, and illegalities. Moreover, in an environment of fear, shock, and escalated levels of patriotism the state has the opportunity to make strategic choices that may well not be afforded to it under different conditions. This

includes creating other opportunities to attain goals that may not have been realized without these changed circumstances.

### *Specific Opportunities*

Perhaps the most significant factor of opportunity is the state's ability to define violence; including torture and abuse. After all, the contradictions of labeling violence do not stem from the nature of violence itself, but are a product of the social machinery of structural legitimation. The publicly advanced perceptions (and legal definitions) of a violent act are dichotomized into legitimate/legal violence and non-legitimate/illegal violence. Legitimizing or de-legitimizing violence is an ongoing dynamic process dependent upon the social location of the perpetrators of violence *vis-à-vis* power structures within society (Rothe and Mullins 2006). The partitioning of these definitions (real and/or perceived) is most problematic at the state level. As the theoretical models of the state have illustrated, the position of power the state holds not only determines the legislative, judicial, and conceptual framework for controls of violence, it holds the ability to alter the context and perceptions of violence deemed in its interests. Moreover, the state is empowered to define what constitutes a crime and to determine what responses should flow from that classification. In this case, the illegal call to war or redefining the rules of war illustrates the state's ability to alter the context and perceptions of an act as legal or justifiable (Rothe and Mullins 2006).

For over a decade, the U.S. had used a “loose definition of torture” that was out of line with most of the rest of the international arena. Additionally, “officials in Congress and the executive branch have winked and nodded at practices” such as SAP’s and OGA’s utilizing torture and or sending prisoners to states “that will do our dirty work for us” (Levinson 2004: 20). With the placement of the neocons in office and Rumsfeld leading the way, the definitions of torture and rules of war were further manipulated and misused.

Recall that on January 19, 2002, nearly a month before President Bush’s Executive Order, the U.S. Department of Justice under Attorney General John Ashcroft proposed that the Geneva Convention III on the Treatment of Prisoners of War “does not apply to the conflict with Al Qaeda . . . (or) with the Taliban” (Gonzales, Memo 7, 2002: 1). Based on this, Donald Rumsfeld sent a memo declaring “Army regulations on the interrogation of prisoners would not be observed” leading to many detainees being held incommunicado and without an independent review mechanism (Internal Memo 5). In essence, Yoo and Haynes claimed the U.S. could utilize whatever means necessary and ignore international or domestic law in “times of war.”

The following week several other memos circulated between the DOJ, DOD, and Counsel to the White House claiming “the new situation renders obsolete the Geneva’s strict limitations on questioning of enemy combatants” (Gonzales 2002). On February 7<sup>th</sup>, Bush officially opened the door to extensive illegitimate means to carry on interrogations “to quickly obtain information from captured terrorists” when he

stated the Geneva Conventions were not applicable to the Taliban or Al-Qaeda (Gonzales 2002).

The DOD discussed extending the Executive Order by creating several inconsistent pre-interrogation and interrogation techniques designed to soften up detainees (Jehl, Myers, and Schmitt, 2004). Recall that in a February 26, 2002 memo, it was noted that in the war on terrorism, intelligence was everything . . . winning or losing depended on it. Yet, little to no valuable information was coming out of Guantanamo. Memos continued between agencies such as the CIA to Bush's Legal Counsel, the DOD and the DOJ. These memos not only discussed expanding the interrogation techniques, but also discussed how laws and precedence could be reinterpreted to allow the state to use such methods without the worry of legal blameworthiness. As Weisberg (2004: 301) states, "the rationalizers of torture micromanaged it by bringing our exquisitely refined lawyer-like skills to justify some part of it." The end result of these memos was that the opportunity to commit torture was created via the access to illegitimate means by the state utilizing its resources to define violence. Torture, according to the Administration, was now almost impossible to commit, again providing the opportunity to obtain its goals through the creation of illegitimate means. Moreover, even when Rumsfeld rescinded his list of approved techniques six weeks later, torture had already become an omnipresent and systematic practice. Additionally, since the memos were classified, the Administration had a level of concealment that it could operate under.

These decisions created an opportunity (and motivation) for the systematic maltreatment of prisoners from the Afghan war held both in Afghanistan and Guantanamo (Danner 2004a; Ratner and Ray 2004). The state (in this case the DOJ and the Office of the Legal Counsel) was in a position to “reinterpret” the rules of war, treatment and classification of detainees, and the definition of torture previously provided by U.S. Criminal Statute and international precedent (Harbury 2005). Simply stated, the Administration was able to create and then take advantage of illegal means to achieve their goals; actionable intelligence, the capture of Bin Laden, a quick exit out of Afghanistan, and the invasion of Iraq.

The strategies used in Afghanistan and Guantanamo were then subsequently applied to prisoners in Iraq, often by members of the same units that had abused prisoners in Cuba and Afghanistan (Jehl and Schmitt 2004b; Taguba 2004; Kramer and Michalowski 2005). In essence, there was an organizational isomorphic affect where policy transcended the political boundaries of Guantanamo and Afghanistan into Iraq. Simply stated, organizational isomorphism is a process where a specific practice is diffused through knowledge and/or contact via a network linking individuals and roles.

One key factor that aided the diffusion of these organizational practices was the knowledge and practice of these torture techniques by other state agencies (e.g., the CIA and SAP Forces). The CIA has spent over fifty years trying to master effective torture methods. These tactics are known as “no touch torture” and included sensory deprivation, forcing subjects to assume stress-induced positions for long

periods of time, and sexual humiliation. “Looking at the pictures from Abu Ghraib, it is not hard to recognize CIA research transformed into practice” (Davidson 2005). This not only means Abu Ghraib is not an anomaly, but is in part a product of organizational diffusion. The CIA and the military have not only employed various torture techniques throughout the last half of the twentieth century, but they also have instructed others how to do the same (e.g., Ferdinand Marcos of the Philippines, the Shah of Iran, right wing dictators of Guatemala, Nicaragua and the Contras, Argentina, Chile, etc.). One of the training agencies was the U.S. Agency for International Development’s Public Safety Program. In 1963 the CIA “developed a how-to guide to torture known as the Kubark Counterintelligence Interrogation manual” (Davidson 2005: 1). It was initially to be used on captured Soviet operatives but by 1967 the Agency was running forty interrogation camps in Vietnam as part of its Phoenix Program (Harbury 2005). Thousands of Vietnamese were tortured in these centers using techniques the CIA had developed.

Along the same lines as the KUBARK manual there was the Human Resource Exploitation Manual of 1983, which was used extensively in Latin America during the Reagan Era. These techniques, along with those being “perfected” by the CIA have been a part of the training at the School of Americas (SOA). The SOA also serves as a recruitment center for the CIA (Harbury 2005). There is also a program at Fort Bragg, North Carolina, known as SERE (Survival, Evasion, Resistance, and Escape) that was intended to be used to train U.S. soldiers to resist abuses they potentially may face in enemy custody (Bloche and Marks 2005). During a June 2004 briefing,

General James T. Hill reported that a team from Guantanamo went to SERE and developed a list of techniques to be used on high value detainees. He reported that he had sent this list to Rumsfeld who approved most of the tactics in December 2002 (recall that this was the list that was rescinded 6 weeks later by Rumsfeld). Furthermore, SERE trained psychologists and psychiatrists sent to Guantanamo applied the techniques to detainees (along with MI's).

The process of institutional isomorphism or diffusion can thus be traced back to clandestine practices of the CIA, instructional agencies such as the SOA and SERE, but also to the process of contact and network. This can be direct, as was the case with General Hill and his team or indirect. Direct diffusion can be linked with the CIA's clandestine operations and interrogations in Abu Ghraib as well as SAP forces that had knowledge of such techniques. The indirect diffusion comes from the role of the CIA and SAP's within the walls of Abu Ghraib where these techniques were being used and occasionally witnessed. A notable example is the murder of Iraqi Abed Hamad Mowhoush by CIA forces. Mowhoush was forced into a sleeping bag, restrained with a cord, and "roughed up," a technique called the "sleeping bag technique" directly out of CIA manuals. He died of asphyxiation and blunt trauma. There was also the iconic image of the hooded man with arms and feet spread while attached to alleged electric wires, known as the Vietnam. Clearly the low-ranking soldiers did not create this technique or name it. Instead, it is a clear indication of organizational isomorphism (an indirect linkage to past institutional practices by the

CIA and SAP's). Thus, it can be concluded that opportunity for torture was created by the process of diffusion and institutional isomorphism.

The issue of centralization of power and role specialization was also a factor that facilitated the abuses and torture. Secretary of Defense Rumsfeld had a long-standing desire to wrest control of U.S. clandestine and paramilitary operations from the C.I.A (Hersh 2004a). Rumsfeld wanted control over and an expansion of highly secret operations, which originally were focused on the hunt for Al Qaeda, and then moved into operations which included the interrogation of prisoners in Iraq. The Pentagon's operation, known by several code words, including Copper Green, included hand-selected individuals from Delta Force, SEALs, and some CIA. This provided additional opportunities to use torture and for it to become systematically incorporated into the larger organizational culture. These forces encouraged physical coercion and sexual humiliation of Iraqi prisoners "in an effort to generate more intelligence about the growing insurgency in Iraq" (Hersh 2004a). Moreover, this program was under the sole authority of Rumsfeld and his Undersecretary of Defense Cambone. The office Cambone holds, the Undersecretary for Intelligence is the new office voted by Congress at Rumsfeld's request in response to his struggle with the CIA and the other intelligence agencies. As Hersh (2004a: 1) notes, "Certainly he wants to take over the covert warfare, the idea of being able to operate overseas. I think one thing he did with his special activity he did, was sort of bureaucratically ace out CIA."

Furthermore, once the war on Iraq was said to be over, and the UN officially labeled the U.S. and Britain as occupiers, National Security Directive 24 was signed by President Bush. The Directive gave the Pentagon overall control over aspects of Post war Iraq. Thus, the early tug of war between the DOD and the State Department was over and the Pentagon won. Power was now centralized within the DOD with regard to decision making in Iraq including Abu Ghraib.

There was also the issue of a chain of command that was counterproductive to smooth operations within Abu Ghraib. While there was indeed a formal chain of command, there was also an informal chain. Recall that Stephen Cambone, Undersecretary of Defense, was answering directly to Rumsfeld and was an active player in placing Rumsfeld's clandestine operations into the Iraqi theater, more specifically Abu Ghraib. It was Cambone who eventually authorized SAP control over both the MI and MP's in Abu Ghraib. In doing so there was also an agreement between Sanchez and the CIA and SAP forces for hiding ghost detainees in Tier 1 of Abu Ghraib. The turnover of power at Abu Ghraib, first to MI's and then SAP's was counter to military practices. The later agreement by Sanchez to allow ghost detainees to be hidden within the confines of Abu Ghraib further provided illegitimate means as well as access for illegal interrogations. Recall also that through the centralization of power in the Pentagon, as Rumsfeld successfully gained control over clandestine operations, the use of these programs and the presence of ghost detainees was carried out with even less transparency. As the ICRC report noted, the fact that ghost detainees were being held unaccounted for or registered through proper channels was

a clear violation of international law and further exemplified the dysfunctional environment within Abu Ghraib.

Additional organizational factors contributed to an environment wherein torture and abuses became part of the standard operating procedures in Abu Ghraib. Not only were the MP's roles conflicted with multiple tasks such as overseeing prisoners in Iraq, reconstruction efforts, and battle zone security, they were also being "assigned" to tasks of pre-interrogation. Recall that in September 2003, Major General Geoffrey Miller, the commander at Guantanamo Bay (where abuse and torture was already routinized) was sent to Iraq to assess detention centers and subsequently shared his techniques with interrogators. His job was to "Gitmoize" the process. This included the recommendation that MP's be used to soften up and prepare detainees for MI interrogators. What did this mean in practice? As one former military intelligence officer, familiar with Miller's directives, put it, "it means treat the detainees like shit until they will sell their mother for a blanket, some food without bugs in it and some sleep." Shortly after his visit, civilian contractors began to show up to aid in the interrogation process.

That same month, General Sanchez authorized expanded interrogation techniques. These were a result of Miller's visit and a CD that was left behind with Rumsfeld's previously approved and rescinded expanded techniques. These quickly became standard U.S. practice and, according to a Human Rights Watch report prisoners started dying during interrogation sessions almost immediately thereafter. As these practices became part of the organizational SOP, a sense of normalization

also occurred wherein it became routine to see naked Iraqi detainees or to hear their screams as SAP, CIA, or civilian contractors carried out interrogations.

By mid-November the complete takeover of MP supervision by MI had occurred. The “frago” order stated that the 205<sup>th</sup> MI Brigade under Pappas would have tactical control over Abu Ghraib. By this time, the presence of civilian contractors was omnipresent as were SAP forces. The chain of command was murky at best. Karpinski overtly stated this in an interview with Frontline (2005), “I did not know who was there or what role they were playing with all the civilian attire walking around.”

Not only was Abu Ghraib functioning with a murky chain of command and dysfunctional SOP, there was also a general lack of resources and staff. For example, during October 2003 there were 7,000 prisoners in Abu Ghraib and only 92 MP's to keep control. When the 372 MP Company arrived at Abu Ghraib, they were but a fraction of their supposed Company total. Their roles had already been significantly altered from prison guards to support for MI personnel and moved right into Tier 1 where CIA, SAP, and MI held high value detainees. In essence there was a general lack of role and task segregation that had devastating effects. It created opportunities for MP's to carry out torture and abuses that would not have existed without this intermingling of duties and lack of clearly defined roles. Moreover, the institutionalization of instrumental rationality (any means necessary to attain intelligence) that emanated from the highest levels down to the MP's played a role in an already anomic environment. Coupled with inconsistent doctrines on interrogation

techniques this had a direct impact on the organizational culture that dominated the walls of Abu Ghraib.

There was also a clear subculture of resistance present within the military in general and specifically within the walls of Abu Ghraib. Recall that the ICRC, after observing abuses during their October 2003 visit, complained in writing to military officials on November 6, 2003. Not only did Senior Officers take lightly the alleged abuses, but reacted by curtailing the ICRC from future spot inspections of the prison, thus reinforcing a culture where outside regulation was not seen as viable. This was also reinforced by the significant use of Abu Ghraib as a base for SAP forces and the CIA. Neither of these organizations or clandestine forces was subject to outside regulation of their techniques or mission.

The perception of illegal means being available to MP's and MI's can also be traced back to the White House. As the Administration always called the Iraqi detainees terrorists, confusion over how to treat them occurred. This coupled with the propaganda that terrorists "do not abide by the Conventions of War thus, are not entitled to them" further aided the perception that legal obligations did not pertain to them. As stated by Frontline (2005), "The Conventions were seen as malleable . . . moreover they were seen as a joke."

Techniques of rationalization were also used by individuals from the White House to Abu Ghraib. Memos by Legal Counsel, DOJ, and DOD offer a variety of rationalizations by the Administrations lawyers to soften the taboo against torture. Other techniques of rationalization can be found in the torture memos. These

justifications were used in an effort to defend initial decisions and objectives, namely the avoidance of international law and the expansion of what “could be” viewed as techniques of torture used in interrogations (Greenberg and Dratel 2005).

Another issue that was at play in the use of torture at Abu Ghraib was group think. Groupthink is a concept originally identified by Irving Janis (1972) that refers to faulty decision-making in a group. Groupthink may potentially occur under conditions where groups are highly cohesive, in a closed or isolated environment, or under considerable pressure to make a moral, ethical, or quality decision. Some features of groupthink include not being critical of each other’s actions, a strong desire for unanimity, and not examining alternatives or seeking an expert opinion. The rationalizing of poor decisions, the unquestioning belief in the group’s collective morality and shared stereotypes that affect decisions are other attributes of groupthink. Groupthink was present within Abu Ghraib. For example, Private England stated in her testimony, “I had a choice, but I chose to do what my friends wanted me to” (Washington Post 2005a). Another example, can be found in a statement given by Sgt. Davis during the Taguba investigations, “I assumed that if they were doing things out of the ordinary or outside the guidelines someone would have said something” (see Taguba Report 2004).

All actors engage in a social process of defining the situation they find themselves in. This process can be examined as it operated in Abu Ghraib in relation to the detainees. In this case, as with all conflicts and war, U.S. forces found themselves facing off and fighting what they perceived was their enemy. The process

of dehumanization of enemies is a common practice during all wars, and as such was present in the war on terrorism. This facilitated the ability of individuals to commit torture and abuse. From the onset, George W. Bush declared that the United States was not involved in a war against political enemies, but a war against “evil,” a rhetorical move that placed anyone identified as an enemy in the war against terror in the category of less-than-human. The fact that Pfc. England could describe the abuse of prisoners at the Abu Ghraib as “amusing” rather than torture (Zernike, 2004b) is testimony, not to the depravity of a single soldier, but to the existence of a frame of mind that identifies enemies in the “war on terror” as evil ones, thus forfeiting their humanity. Consequently, as less than human they need not be treated humanely. Moreover, labeled as PUC’s and Gollum, the dehumanized enemy was not even worthy of protections against abuse and torture. This was reinforced with the Administration’s classification of enemy combatant and the constant referrals to all detainees as terrorists.

### *Summary*

This section analyzed both general and specific opportunities for goal attainment. General opportunities exist as a result of factors that are either already present or come about by happenstance. This included the global transnational and privatization movement that had been occurring for over two decades, existing interstate relations such as the one between Cuba and the U.S., and an existing complimentary system of international law. Then there were opportunities provided

by happenstance such as the September 11<sup>th</sup> attacks that generated broader international and domestic support for the U.S. and a general climate of fear and patriotism. Specific opportunities were also created that provided additional means to attain goals. These included the state's ability to define violence, the restructuring of military roles, an anomic organizational environment, and psychological factors.

### Conclusion

In this chapter, I have explored two of the four catalysts of the integrated theoretical model: motivation and opportunity. More specifically I have attempted to illustrate how these catalysts each contain multiple variables at work in a given case of state crime, in this instance, the systematic use of torture and abuse. I have suggested that at the international level, economic interests (e.g., OPEC to the Euro and the use of PMC's), international relations (e.g., Cuba, political support, complimentary legal system), and the international foci and practices (e.g., renewed interest in terrorism and the practice of covert military activities) had an impact on the subsequent use of torture.

At the structural-cultural level several other variables were at play. For example, imperial design (e.g., neocon agenda), September 11, 2001, the state's ability to define violence deemed in its interest as legitimate, goal attainment (e.g., quick regime change in Iraq and actionable intelligence) and the media, all had a role to varying degrees with the use of torture. At the organizational level, goal attainment (actionable intelligence), the strategic choice of Abu Ghraib, an anomic and resistant

culture, and the effects of isomorphism between institutions were also variables at work. At the interactional level, ideology (e.g., the process of dehumanization of the enemy and claim to virtue), rationalization, power, goal attainment, entertainment and competition played a function in the institutionalization of torture and abuse within the walls of Abu Ghraib.

## CHAPTER VII

### THEORETICAL ANALYSIS II

The previous chapter examined the catalysts of motivation and opportunity concerning the torture at Abu Ghraib. This chapter analyzes the catalysts of constraints and controls that were in play in this case.

#### Constraints and Controls

The theoretical model outlined in Chapter II suggests that phenomenologically, a constraint differs from a control. A constraint is an inhibitor or barrier that occurs *at the onset* or during an illegal action. This constraint can act as a complete blockage to the act, or it can act as a restraint, thereby causing the actor(s) to find alternative means to goal attainment. These constraints are present at all four levels of analysis (see Appendix B) and, though often intermingled or having a dialectic nature, they nonetheless represent different restraints at each level. Controls, on the other hand, are operationalized as a *complete* blockage to an act or a criminal sanction that is *ideally* inevitable after the fact. This means that conceived criminal action will not occur, and if it does, there should be legal repercussions. Controls also exist at all four levels of analysis, though certain levels may contain more controls than others or have a stronger impact.

### *International Level Constraints*

One of the most significant constraints at the international level is negative international reaction to a state's behavior. This was indeed the case concerning the use of the loosely defined term *enemy combatant*, the creation of detention camps at Guantanamo, the war on Iraq and the subsequent cases of abuse and torture at Abu Ghraib. From the outset the Administration's decision to use the term *enemy combatant* created a public and political international outcry. This negative reaction strengthened as the Administration began discussing and planning the invasion and occupation of Iraq. There was resistance to these plans by political leaders, NGO's, and many in the public. The general international support for the U.S. following the September 11, 2001 attacks plummeted after President Bush gave his 2002 State of the Union Address in which he referred to the "axis of evil." This comment acted as a red flag that the unilateral tendencies of the Administration were resurfacing, thus estranging the vast majority of Europeans, both political leaders and the general citizenry (Heinrich Bull Foundation 2003).

The general trend of lack of trust in the Bush Administration was reflected in a March 2003 Heinrich Bull Foundation opinion poll that showed that Bush was viewed as more of a security threat than terrorism. Once the war on Iraq was being marketed negative attitudes increased. Beginning in September 2002, NGO's and international peace groups mobilized against the U.S./U.K. plan for the invasion and occupation of Iraq, forming the largest anti-war movement in history (Amnesty International 2005). A global antiwar protest involving over 10 million people took place on February 15,

2003 in an effort to constrain the Bush Administration's unilateral war on Iraq. These protests were "the single largest public demonstration in history" (Jensen 2004: xvii). Antiwar protests continued after the invasion. The Associated Press (March 19, 2005) reported that "tens of thousands" of activists turned out across Europe to protest and mark the Iraq war's second anniversary, with London drawing the largest crowd of between 45,000 and 100,000. Furthermore, once the Abu Ghraib abuses and torture became public in late April 2004, widespread negative international reactions occurred again. In June 2004, a visit to Turkey by President Bush was preceded by a series of protests and bomb blasts. In Istanbul and Ankara tens of thousands of Turkish and international protesters demonstrated against the Iraq war.

As large as it was, the antiwar movement ultimately failed to prevent the invasion or end the occupation in the short term. In part, it failed because it did not make the war politically costly enough for the U.S. The neocons believed the benefit of regime change, expansion of military bases, and additional control and power in the Middle East would outweigh any temporary political consequences. Additionally, the Administration, Rumsfeld in particular, believed these goals could be achieved in a relatively short period of time, undercutting the antiwar movement. Administration officials believed that the war on Iraq would ultimately be justified as illegal but legitimate similarly to NATO's intervention in Kosovo.

Due to the political pressures placed on the Bush Administration, the immediate invasion of Iraq was suspended for several months. For example, in response to these pressures the Administration made a half-hearted attempt to receive

UN support for the use of military force. President Bush addressed the UN on September 12, 2002 and asked for multilateral action against Iraq. Later, a U.S. sponsored war-sanctioning resolution failed to gain support in the UN Security Council in March 2003. The war on Iraq faced strong political opposition from France, Germany, Russia, and China, as well as the great majority of UN member states. Mr. de Villepin of France, acting Chairman of the UN Security Council, stated, “We will not associate ourselves with military intervention that is not supported by the international community. . . . Military intervention would be the worst possible solution” (Peel, Graham, Harding, and Dempsey 2003: 1). The Administration’s attempt to overcome the stiff opposition on the Security Council used “both carrot and stick, by reconsidering economic and military assistance deals as well as prospects for oil and trade in post-war” (Global Policy Forum 2005: 1). Nonetheless, the Security Council did not authorize military force against Iraq. Political reactions did indeed act as a temporary restraint. Ultimately, however, the opposition did not control the Administration’s agenda to go to war on Iraq.

Once the invasion of Iraq had begun, the opposition grew stronger in an attempt to have the U.S. and Britain end its occupation. For example, President Vladimir Putin, in some of the harshest words by a world leader said the war was “unjustified and must end quickly” (Reuters, March 20, 2003: 1). Meanwhile, the governments of Pakistan, Saudi Arabia, and several other Muslim countries filed formal protests with Washington. Yet, these political pressures did not alter the Administration’s position to remain in Iraq.

Non-governmental (Human Rights Watch [HRW], and Amnesty International [AI]) and inter-governmental organizations (International Committee of the Red Cross [ICRC] and the United Nations [UN]) continuously attempted to restrain the Administration from its unilateral and unlawful international positions. As with many non-profit peace movements, HRW and AI were actively writing letters to the Administration in an effort to constrain their decision-making with regard to an illegal invasion of a sovereign state (HRW 2002-2004; AI 2002, 2004). In June 2003, Amnesty International called for an independent investigation into allegations of abuse and torture in Afghanistan and Guantanamo. Other cases of torture and abuses were reported by NGO's in an effort to get the Administration to reconsider its exploitation of international laws on torture and foreign detentions.

Along with NGO's, the ICRC, the sole intergovernmental oversight agency for international humanitarian law, also attempted to act as a restraint. The ICRC made several reports at different times and at different levels during 2003. The reports included concerns beyond "only issues of water and food but also clearly of treatment" (ICRC 2005: 1). The ICRC submitted an additional confidential report on detention conditions and charges of abuse and torture in Iraq in February 2004 (dated January 2004), to the Coalition Forces, namely Paul Bremer and Lt. General Sanchez. The January 2004 report included observations and recommendations from visits between March and November 2003. The report, published in the Wall Street Journal, indicated abuse at U.S.-run prisons in Iraq went on for more than a year, though the Red Cross complained privately to U.S. officials many times. In essence, the ICRC

repeatedly made its concerns known to Coalition Forces and requested corrective measures. The pressure extended by the ICRC report did cause some internal discomforts, as U.S. officials feared that the alleged abuses and torture allegations would become public knowledge.

On a number of occasions the ICRC was assured that its findings were being taken very seriously, and that measures would be taken; in later visits there were indications that some of the material problems had been addressed; however, more remained to be done. (ICRC 2004)

Actions by the ICRC would be expected to act as a restraint on future cases. However, in light of allegations of abuse and torture that continue to surface, the ICRC has failed to control or restrain such acts. Actors often find alternative means to achieve their goals beyond the scope of these institutions. Such was the case with the ICRC as their scrutiny led to more secrecy and a subculture of resistance to outside regulation. Nonetheless, the ICRC continues to monitor the 8,800 detainees held at over 33 Iraq detention sites under the authority of the Multi-National Forces for Iraq (MNF-I), the Iraqi transitional government, and the Kurdish Regional Government (ICRC 2005).

Beyond these organizations, international lawyers also spoke out calling on the international arena to act together and restrain the Administration from its unlawful actions (Sands 2005). This included the Citizen's International Criminal Tribunal for Afghanistan (ICTA). On March 13, 2004, *The People v. George W. Bush* was settled after a two-year investigation. The tribunal found President Bush guilty of war crimes "resultant to U.S. attacks against Afghanistan in 2001" (ICTA 2004). The verdict of guilty included charges of war crimes for the torture and killings of

prisoners of war, for their detention, and deportation. The direction ordered by the Presiding Judge Professor Osamu Niikura stated:

The Defendant is a convicted war criminal consequently unfit to hold public office; citizens, soldiers and all civil personnel of the United States would be constitutionally and otherwise, justified in withdrawing all co-operation from the Defendant and his government; and in declining to obey illegal orders of the Defendant and his administration; including military orders threatening other nations or the people of the United States on the basis of the Nuremberg Principle, that illegal orders of Superior must not be obeyed.

The ICTA failed to constrain the Administration's policies of unilateralism and disregard for international law. As a non-empowered ad hoc Tribunal, composed of independent lawyers and citizens, it did not have a large enough impact publicly or politically to constrain future policies of the Administration.

International media raised concerns over the U.S. treatment of detainees. The Windsor Star of Ontario (2002) and St. John's Telegram of Newfoundland (2002) ran a story on December 30, 2002 that stated, "U.S. officials who take part in torture, authorize it, or even close their eyes to it, can be prosecuted by courts anywhere in the world." Additional coverage of the issue occurred in the Ottawa Citizen (May 2003: A17) titled "Fear of terrorism is no excuse to flout laws." During October of that same year, reports of Iraqi detainee abuse and cruel and inhumane treatment at Abu Ghraib also surfaced. An article by The Gazette, Montreal, (2003: A18) stated "Situation doesn't meet rights standard . . . this is wrong." Random reports continued to appear within the international media months before the images were released by the mainstream U.S. media. In March 2004, the ONASA News Agency (March 9, 2004: A1) ran a 473-word article decrying abuse and torture by U.S. forces and the

Pakistan Press International Information Services Limited ran a similar story on March 12, 2004.

However, even with political or public negative reactions, disapproval does not necessarily change the situation. In the cases of the invasion of Iraq and using torture as a means of intelligence gathering, public and political reactions failed to restrain the Administration's policies. Instead, the negative reactions indirectly reinforced the Administration's illegal policies. As political pressure was being placed on the Administration for its decisions, the need for a quick and successful regime change and stability in Iraq was imperative. As a latent function, this pressure reinforced an already hyper-mentality for actionable intelligence, which was a key factor in the abuses that occurred.

There was also significant international public reaction that occurred when the images of abuse and torture hit the airwaves. In part, this reaction was in the form of peaceful political protests. For example, anti-American protests over reports of torturing prisoners occurred throughout the Muslim world including the Gaza Strip and West Bank to Indonesia. Protests were also reported in Egypt, Sudan, and Pakistan. Australian doctors protested to express their "horror at gross dereliction of the Hippocratic oath by US military doctors, who participated in the torture of Iraqi prisoners in the infamous Abu Ghraib prison in Iraq" (Medical Association for the Prevention of War, August 21, 2004: 1). These protests had some effect as the Guardian (2004: 1) noted, "Worldwide revulsion at the scandal has forced the U.S.

president into a public apology and threatened the position of the U.S. defense secretary, Donald Rumsfeld.”

There were also acts of retribution and rage that took place in an effort to constrain U.S. behavior. For example, a few days after the images broadcast, Nicholas Berg was beheaded as retribution for the Abu Ghraib cases (Harbury 2005). Rage also swept through the Islamic territories reinforcing the view that “the Americans are an occupation force, not liberators, and we should fight to drive them out” (Ahmad 2004: A8). Muslim and Islamic leaders also called out the U.S. and demanded immediate action. The acts of retribution and the political outcry from Muslim and Islamic leaders failed to constrain the practice of abuse and torture by the U.S. Instead, the acts of retribution were used to further justify the U.S. position that it was dealing with extremists that needed to be controlled by any means necessary. Additionally, the U.S. has held the public position that terrorist demands or threats would not be addressed under any conditions. Likewise, the demands of religious political leaders did not hold enough economic or political power within the international arena to constrain the Administration.

#### *State/Cultural Level Constraints*

At the state/cultural level, constraints are created by social movement groups (e.g., Veterans for Common Sense, Moveon.org, and American Civil Liberties Union), internal investigative reports (e.g., Senate and House Hearings; Taguba Report), the use of the Freedom of Information Act, and media organizations.

As Justice Robert Jackson (1946) stated, “The chief restraint upon those who command the physical forces of the country . . . must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.” It is the political, moral, and legal judgments of the public that can serve as a restraint on government officials and their political decision-making in a representative democracy. Within the U.S., the public’s unrest could ultimately serve as a tool for restraining objectionable foreign policies (e.g., the civil disobedience that ultimately ended the war in Vietnam). Across the country, there were numerous public protests of both the pre-war buildup and in response to the abuses and torture that occurred. For example, Peace Action and MoveOn.org, both non-profit antiwar organizations, staged numerous nationwide protest activities. Activists in dozens of cities would announce where and when public protests and demonstrations would occur and then notified members via the Internet. This was in an effort to constrain the Administration from going further with its neocon agenda and the invasion of Iraq. In general, the organized movements failed. For example, public dissent and organizations such as the Peace Movement and Moveon.org were cast as unpatriotic and not supporting the troops. Additionally, the movement did not disrupt the general status quo and pose a large enough political threat to the Bush Administration.

After the abuse and torture cases were brought to the public’s attention, many of the protesters were indignant that their country was actively engaged in the use of torture. Some groups, such as the Veterans for Common Sense (VCS), a veterans’ organization with 12,000 members, called for an independent commission to

investigate the torture allegations. In a letter, signed by over 2,000 veterans, they urged Congress and the Administration to commit to the creation of an independent commission to investigate on the detention and interrogation practices of U.S. military and intelligence agencies. The U.S. health professional community has spoken out forcefully to protest the unethical involvement of physicians and psychiatrists in the abuses and torture that occurred. The American Psychiatric Association, the American Psychological Association, and the American College of Physicians, together representing more than 300,000 members, each have made public calls to Congress to investigate the allegations and later joined efforts to support Congressional legislation against cruel and inhumane treatment (Physicians for Human Rights, July 15, 2005).

Several internal investigations undertook to examine the cases of abuse and torture. These included the Taguba Report (March 2004); the Mikolashek Report (July 2004); the Schlesinger Report (August 2004); and the Fay-Jones Report (August 2004). A key problem with these investigations, however, is that public officials monitored the examination of their own behavior. As such, it should come as no surprise that the reports promote the politically tolerable view that the abuses and torture were, in effect, the result of individual misbehavior and sadism. Granted, these behaviors were said to occur due to the lack of authority and leadership. Nonetheless, the acts remain an aberration of a few individuals out of the MP ranks. Visible in the text of these reports, especially the Fay-Jones Report, is the “subtle bureaucratic response” dealing with the opposing interests within the state apparatus itself. Simply

stated, the reports reflect the political war that erupted between agencies once the Abu Ghraib images became known. On one side were the actors (including JAG, DOJ, and the FBI) opposing expanded interrogation techniques and the disregard for the Geneva Conventions, while on the other side were those in favor of such techniques and who tried to keep Abu Ghraib from becoming a political scandal (such as senior officials in the DOD and the Executive Administration). Thus, the reports, while recognizing a failure in the chain of command and the latent effects of isomorphism of techniques originally intended for the Taliban and Al-Qaeda, maintain that responsibility was in no way that of the Administration. As the Fay-Jones Report stated, responsibility lay with the individuals in the 800<sup>th</sup> MP Brigade night shift at Tier 1 in Abu Ghraib, or as Schlesinger stated “acts of brutality and sadism” were the result of a few that resembled “animal house on the night shift.”

Additionally, each investigation was limited to a specialized area. The Taguba Report (an internal investigation led by Major General Antonio M. Taguba at the request of General Sanchez) investigated the MPs and alleged cases of abuse; the Mikolashek Report investigated the detention procedures themselves; The Schlesinger Report (appointed by Secretary Rumsfeld and led by former Secretary of Defense Schlesinger) advised the DOD on the allegations; and the Fay-Jones Report (an internal army report led by Major General George R. Fay and Lieutenant General Anthony R. Jones) investigated the role of MI's. This specialization limited the investigations to the organizational components and that of individuals within specialized branches. This ensured that a holistic investigation did not occur, while at

the same time appeasing the conflicting interests within the Administration. Thus, the investigations served as an exercise in damage control. They were an attempt to maintain state legitimacy.

Beyond the internal military investigations, Senate and House Committees held hearings in an attempt to assess what happened at Abu Ghraib and who was responsible for torture and other cruel, inhuman or degrading treatment. In all, there were five Senate Armed Service Committee Hearings, four House Armed Services Committee Hearings, and three Public House Permanent Select Committee on Intelligence Hearings. While some sincere efforts were made to obtain answers, a number of factors limited the impact of the hearings to act as a constraint against future decisions that may enable or lead to torture and abuses. One of these factors was the unwillingness of the Executive Branch, Pentagon, and CIA to disclose information. As Senator Clinton (2004) stated during the Congressional investigation of abuses and torture at Abu Ghraib,

If indeed, General Miller was sent from Guantanamo to Iraq for the purposes of acquiring more actionable intelligence from detainees then it is fair to conclude that the actions that are at point here in your report are in some way connected to General Miller's arrival and his specific orders, however they were interpreted, by those MPs and the MI's that were involved. . . . Therefore, I for one don't believe I yet have adequate information from Mr. Cambone and the DOD as to exactly what General Miller's orders were . . . how he carried out those orders, and the connection between his arrival in the fall of 03 and the intensity of the abuses that occurred afterward. (quoted in Hersch 2004a: 64)

There was also the fear of political repercussions. For example, originally, Senate Armed Forces Committee Chairman John Warner took a strong stand against torture calling for and heading an investigation. Yet, he succumbed to White House

pressure to postpone Senate hearings on the subject until after the November 2004 election (McGovern<sup>1</sup> 2005).

Thus, the Congressional Hearings did not produce any form of constraint. Their efforts did have a limited impact on legislation such as the Congressional Resolution and the McCain Bill condemning the use of torture. However, to date, cases of abuse and torture continue to surface. Additionally, the potential of these actions to be constraints was further limited by President Bush's claim that Congressional Resolutions or Bills cannot constrain his executive power as Commander in Chief or his decisions during a time of war.

Furthermore, Congress abdicated its responsibilities of oversight by not insisting on the disclosure of information that was kept from them in their attempts to investigate the role of the Administration in the cases of torture. Similarly, Congressional Oversight Committees have also failed to insist that the investigation by Brigadier General Formica into the detention activities of Special Forces (under the SAP) be released. Instead they have allowed the Pentagon to claim the investigation was ongoing and therefore, not able to be produced during Congressional Hearings. Without Congressional pressure on the Pentagon to release its report on the detention practices of Special Forces, the investigation by Congress was significantly reduced and they failed to constrain the Administration's policies.

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<sup>1</sup> Ray McGovern served as a captain in the U.S. Army from 1962-64 before serving 25 years as an analyst in the CIA.

The Freedom of Information Act (FOIA) is also a constraint. The FOIA is based on the principle of governmental transparency to the people. By its nature as a mechanism of transparency or openness, it attempts to act as a deterrent to behavior that is counter to public expectations and/or trust. The FOIA has compelled state agencies to turn over millions of documents relating to government operations and performance. However, the original goal was not to control or constrain the actions of the state, but to provide citizens with the knowledge they need to be active democratic agents and to assist the process of historical research. As President Clinton stated, "The act is a vital part of the participatory system of government."

The FOIA has been a useful tool for organizations (e.g., ACLU) to obtain information regarding the cases of abuse and torture that have occurred since the beginning of the war on terrorism. For example, suits filed by a coalition of human rights and civil liberties groups (including the ACLU and the Center for Constitutional Rights) requested the release of classified or blocked materials pertaining to the abuses. This included the additional photos and video tapes kept from the public, inter- and intra-departmental memos discussing interrogation techniques, and investigations into allegations of torture. These suits generated thousands of pages of documents, once classified, documenting torture and abuse and in some cases murder. Furthermore, the government was ordered to release the remaining photos and three of the four videotapes. Other released documents included death certificates indicating the murder of over two dozen detainees and FBI memos that implicated the Administration (Bush and Wolfowitz) in promoting and condoning the use of cruel

and inhumane punishment as well as what is classified as torture within international law.

While the FOI has acted as an after-the-fact constraint to some degree, its very structure also contains loopholes that the government has seized upon in an attempt to block the constraint. Such actions include recent restrictions on obtaining information through the FOIA. More specifically, an exemption was included in the 2002 Homeland Security Act for infrastructure organizations and corporations (including the Energy Department). As Representative Henry Waxman (2005: 1) states:

The Administration has expanded the authority to classify documents and dramatically increased the number of documents classified. It has used the USA Patriot Act and novel legal theories to justify secret investigations, detentions, and trials. In addition, the Administration has engaged in litigation to contest Congress' right to information.

Included in the newly classified material were documents describing the prison abuses at Abu Ghraib. Some documents released to the ACLU were so heavily redacted they did not reveal any vital information.

Among the efforts to restrict state openness is Executive Order 13,292.86 issued by President Bush on March 25, 2003. This Order rescinds many of President Clinton's innovations to the Reagan classification order and further amended Executive Order 12958. In essence, it reintroduces a presumption of harm to national security for the release of information (Pozen 2005: 650). Congress has also narrowed access to information via FOIA. This includes placing limits on who may submit a FOIA request. The 2003 Intelligence Authorization Act precluded

intelligence agencies from disclosing records in response to any request made by foreign states. This in effect stops foreign states from requesting documents that could be used to prosecute state actors. Consequently, the increase in classifications, the restrictions imposed on the Freedom of Information Act, and the declining culture of openness has significantly hampered the Act from being an effective constraint.

Closely related is the significant increase in the use of the “mosaic theory.”

The mosaic theory has been used to describe the premise for intelligence gathering.

As Pozen (2005: 3) stated:

It is the view that disparate items of information, though individually of limited or no utility to their possessor, can take on added significance when combined with other items of information. Combining the items illuminates their interrelationships and breeds analytic synergies, so that the resulting mosaic of information is worth more than the sum of its parts.

As the Department of the Navy argues, “apparently harmless pieces of information when assembled together could reveal a damaging picture” (32 C.F.R. § 701.31). In other words, separate pieces of information that may not be significant to national security (a, b, and c), when pieced together may reveal a larger picture (x) that could potentially reveal information that would risk the country’s security. Since the attacks of September 11, 2001, the use of the mosaic theory by the DOD, CIA and the Executive Branch has significantly increased resulting in an extraordinary increase of government secrecy. The Administration has used the theory to classify materials that previously would have been declassified, thus, preventing information from being obtained through the FOIA. As a result, constraints, including Congress, the media, NGOs, academics, and the public, were seriously hindered in their

capability to monitor state activities, in this case the systematic use of torture and abuse by the military and other OGAs. Moreover, the use of the theory contravenes the purpose of FOIA as a source of public knowledge—in essence weakening its ability to act as a constraint.

Ideally, within a democratic government, the media's role is to be the public's watchdog: keeping an eye on the political apparatus and keeping it in check. In essence, the media are to inform the citizenry and to make sure representative government is indeed acting in the best interests of its constituencies. A watchdog media could function to constrain state acts that are contrary to the public's interest by reporting information that allows people to see through state propaganda. However, the mainstream media do not always function in this manner due to self-censorship.

While there is no formal censorship in the USA, there is what some call "Market Censorship" (Chomsky 2004). Market censorship or self-censorship is a function of a for profit news institution. The mainstream media do not want to run stories that will offend their advertisers and owners. A process of self-censoring did indeed occur during the war on terrorism, invasion of Iraq, and the subsequent cases of abuse and torture. For example, the news media self-censored reports about Iraq because of concern for public reaction to graphic images and details about death and torture, according to a survey of 210 U.S. and international journalists. Many reporters and editors chose less-graphic images and/or omitted explicit details, or made them less noticeable, according to an anonymous survey conducted between

September and October 2004 by Hall and Bear (2004). Hall and Bear also found that of the journalists surveyed from March 2003 to September 2004, respondents from European and Middle Eastern Outlets (26%) said they were not as confined as the U.S. media in showing graphic content. In contrast, U.S. journalists were far more concerned about publishing images of dead contractors and military personnel. "Our community is notoriously squeamish and vocal about it to boot," said one respondent. "So, we usually avoid dead bodies if we can" (Hall and Bear 2004: 1). Out of 73 journalists working in Iraq, 11 said they "thought that on one or more occasions editing in the newsroom had distorted the final version of their story." An embedded journalist claimed that on some occasions the reports he sent were edited to make them less negative and more in line with official views. Another said, "The real damage of war on the civilian population was uniformly omitted." Thus, it appears that media self-censorship compromised accuracy and contributed to its general failure as a constraint.

Nonetheless, there were instances when mainstream U.S. media attempted to act as a watchdog by alerting the public to early cases of abuse and torture, albeit briefly before vanishing without a trace or follow-up. For example, on December 26, 2002, the Washington Post wrote a piece on the CIA's "brass knuckled quest for information" subjecting Taliban and al-Qaeda suspects to "stress and duress" techniques of dubious legality, including sleep deprivation (BBC News 2005). In November 2003, the Associated Press first raised the issue of abuses and torture in Abu Ghraib, yet few media outlets noticed the news story.

In January 2004, the U.S. Command issued a one-paragraph press release discussing impeding investigations into abuses and torture that occurred in Abu Ghraib. Yet, very limited coverage of this press release occurred. For example, the New York Times published a 367-word report on page 7 noting an inquiry into allegations of abuse. Other outlets include the Philadelphia Inquirer with a 707-word article (also on page 7) of U.S. probing reports of abuse of detainees; The Boston Globe with 100 words about an investigation at the end of a lengthy article on Iraq; and the Dallas Morning Star with only 20 words on 26A (Ricchiardi 2004).

Once the photographs hit the headlines, the topic dominated headlines for a month. Even then, in general, the coverage of the horrors did not receive the same level of coverage as abroad. This was not only due to market censorship, but also because of direct pressure from the Pentagon (Hann 2004). For example, CBS had come under severe pressure from the Pentagon not to broadcast the images, thus, holding back for nearly two weeks. Other media outlets were also pressured from showing the real costs of war. For example, ABC Nightline was going to run a story on torture and the deaths of U.S. military personnel. However, a group controlling eight of the ABC affiliated stations pulled the show claiming it a “blatant anti-war ploy” (Hann 2004: 1).

A statement from the Pentagon Working Group in their Revised Report on Interrogation Methods of April 2003 implies that the potential of the media and public scrutiny as a constraint could be quite large. They state, “should information regarding the use of more aggressive interrogation techniques than have been used

traditionally by U.S. forces become public, it is likely to be exaggerated or distorted in the U.S. and international media accounts, and may produce an adverse effect.”

(2003: 60). Nonetheless, in essence, the media, as an institution, did not constrain the Administration by questioning the PR or assessing the claims made overall in the global war on terrorism, and even more by failing to stay on top of the limited leaked cases of abuse and torture that occasionally surfaced. The effect of the media acquiescing to the government’s demands of non-coverage or to corporate interests is to create a situation whereby they cannot be an effective constraint when bound by such contradictory interests. The Washington Post and the New York Times have admitted to such shortcomings in their reporting, specifically that of pre-war Iraq.

However, had it not been for the media releasing the story and images of Abu Ghraib, the cases of abuse and torture may very well have remained unknown. Furthermore, the few articles questioning systematic practices of the military, the Administrations’ decision to hold thousands of prisoners as enemy combatants, or the overall foreign policy goal does represent the potential the media could have as a catalyst of constraint had it been more effective as a watchdog of political power and corruption. When the media did act and release the images and subsequent stories of abuse and torture, the Administration came under increased pressure to explain its stance on international humanitarian rules and the Geneva Conventions.

*Organizational Level Constraints*

Within an organizational setting, a culture of conformity is normally established with standards, norms, rules, and regulations. These regulations are both internal and external. Internal regulations are associated with the larger mission or goal of the organization and its capacity to carry out daily standard operating procedures. External regulations are meant to monitor the organizations activities and to ensure rules and laws are being adhered to. This environment of compliance acts to constrain activities that are counterproductive to internal smooth operations and/or against external regulations or laws. A failure of an organization to maintain a culture of compliance can result in two phenomenon: (1) a culture of anomie, and (2) a subculture of resistance. Both of these conditions existed within the walls of Abu Ghraib. The organizational structure and subsequent environment within Abu Ghraib was dysfunctional because of a general lack of regulation and lawlessness. Norms and regulations that generally guide individual behaviors within the structure of a military detention center were missing, leading to a culture of anomie. Recall that the MP's, normally in charge of prisoner oversight, were handed over to the MI's and SOP forces. This created unclear roles and responsibilities as well as accountability. General Karpinski was also generally unaware of events and actors in Abu Ghraib. This also demonstrates a weakness or failure of the formal chain of command and unclear roles and responsibilities. Investigative Reports stated that soldiers were often untrained in interrogation methods and were left without proper training on the rules of prisoner treatment from the Geneva Conventions.

There was also a subculture of resistance within the organization preventing potential constraints from effectively operating. Recall on January 13, 2004, the Command at Abu Ghraib received a written notice from the ICRC claiming abuse and torture had been witnessed by them during their spot visits. The response by Commanders was to require ICRC inspectors to make appointments before visiting the cellblock, thus trying to “curtail the international organization’s spot inspections of the prison” (Danner 2004b: 1). Additionally, on May 7, 2004 a declassified e-mail notes that, “we will continue to be asked about these practices as long as the Committee visits. . . . I think we need to weight their relative worth” (DOD044801).

There was an agency of the state that operated with a culture of compliance: the FBI. The ACLU released several documents obtained through the FOIA revealing a culture of compliance within the FBI. For example, Doc 1836: 5/6/04 states:

In late 2002 and continuing into mid-2003, the Behavioral Analysis Unit raised concerns over interrogation tactics being employed by the U.S. military. As a result an E dated 5/30/03, was generated summarizing the FBI’s continued objections to the use of SERE techniques to interrogate prisoners. . . . It should be noted that FBI concerns and objections were documented and presented to General Miller . . . MG Miller appeared in the New York Times defending “coercive and aggressive” methods.

Not only did the FBI object to and report on the use of expanded techniques, such as those coming out of the SERE program in Ft. Bragg, but they also refused to follow the previously discussed Executive Order by President Bush. E-mail correspondence states, “We have instructed our personnel not to participate in interrogations by military personnel which might include techniques by the Executive Order but beyond the bounds of standard FBI practice” (ACLU FBI Doc 1836 2005).

There was also a confidential report given to Army Generals by Colonel Stuart Herrington in December 2003 warning that members of the CIA and SAP forces were abusing detainees. This report is an exception to the permissive culture that was rampant within Iraq and specifically, Abu Ghraib. The report (commissioned by Major Barbara Fast) claimed that members of a Special Operations Force had been abusing detainees throughout Iraq and using detention facilities to hide their activities. Recall the death of the Iraqi detainee in the shower after interrogation by these actors who was later photographed packed in ice. So why was the FBI operating in a culture of compliance? This can be partially answered by the FBI's traditional standard practices. The FBI has long held the belief that harsh interrogation techniques do not produce reliable or valid information. Internal Memos, released by the ACLU, affirm the view that FBI agents viewed torture as counterproductive, unreliable, immoral, and legally indefensible. This led to a chasm between the interrogation techniques followed by the FBI and the more aggressive tactics used by some military interrogators. While the actions and reports submitted by the FBI failed to constrain some cases of abuse, it did have a small impact. Several detainees were interviewed and allowed to make allegations that would later be used to expose the abuses that were occurring. Additionally, the constraint by the FBI did act to block potential abuses at least while agents were present.

Internal constraints, such as clear lines of communication, are a normative component of an organization (Perrow 1986). Effective communication can act to restrain deviant behavior through monitoring actions and openly discussing

counterproductive activities. In other words, proper communication lines would allow the bad news to travel up through the hierarchy of an organization. The communication system at Abu Ghraib, however, failed to be an active constraint. This is illustrated by the many instances when abuses and torture were reported through a broken chain of command leading to reports being ignored. For example, Specialist Mathew Wisdom testified before an Article 32 Hearing in April 2004 that he told superiors that he witnessed a case of abuse involving England, Davis, Graner, and Frederick, yet nothing materialized and abuses continued (Hersh 2004a). The reports did reach certain levels higher in authority; however, the news did not travel to the top of the chain. In part, this was due to the overall dysfunctional structure and the operating informal chain of command. The line of communication should have produced a consistent set of expectations within the organizational environment. However, the channels of communication were not open, thus failing to restrain activities normally associated with illegalities.

#### *Interactional Level Constraints*

At the interactional level, the strongest constraints exist within the individual: self-constraints. These include an individual's morality or values stemming from their socialization. While such constraints may restrain some, as was the case with the torture at Abu Ghraib, they by no means consistently act as restraints for all individuals after prolonged periods within an environment where they were heavily socialized into expanded interrogation techniques (differential association) including

torture. For example, in early October 2003, Staff Sergeant Fredrick took part in abusing a detainee. When two other soldiers arrived, they demanded the prisoner be clothed and then took him back to the general population. Sergeant Fredrick was quoted as saying, "I want to thank you guys, because up until a week or two ago, I was a good Christian" (Fay Jones Report 2004). He also states in a note to his family "I questioned some of the things that I saw . . . and the answer I got was this is how the MI wants it done." Sergeant Davis also told the Criminal Investigating Department "he witnessed prisoners in the MI hold section being made to do various things that I would question morally." Nonetheless, Davis was one of the nine prosecuted in the abuses and torture.

Davis' story shows how internal constraints can eventually fail in certain environments. Simply stated, the competition between "institutional power versus the individual will to resist" is an ongoing process that some endure longer than others (Zimbardo 2005: 19). Nonetheless, internal constraints played a role in restraining the systematic and widespread use of torture and cruel and inhumane punishments that occurred throughout the war on terrorism and at Abu Ghraib specifically. For example, a Captain of a MP Brigade unit in Baghdad was approached in the fall of 2003 by a MI Officer requesting that he have his MPs keep a group of detainees awake around the clock in preparation of interrogations. The Captain was quoted as stating in an interview with Hersh (2004a: 34) "No, we will not do that." When asked by the MI Officer why he was refusing the Captain stated, "because when you ask an eighteen-year-old kid to keep someone awake, and he doesn't know how to do it,

he's going to get creative . . . the Army is made up of people and we've got to depend on them to do the right thing."

Within the walls of Abu Ghraib, internal moral restraints also existed. In the Taguba Report (2004: 45), three soldiers were specifically mentioned for their refusal to use torture and cruel and inhumane punishments for intelligence gathering means. Master at arms William Kimbro (a Navy dog handler) refused to participate in using his dog to terrorize detainees because "he knew his duties and refused to participate in improper interrogations despite significant pressure from the MI personnel."

Another such instance involved Lieutenant David Sutton who "stopped an abuse, then reported the incident to the chain of command." SPC Joseph Darby, the most well known name, also demonstrated internal constraint by not only refusing to participate but also by being the whistleblower exposing the activities at Abu Ghraib. Sergeant Joseph Darby, then Spec. Darby, secretly delivered a CD full of photos of abuse to Army Criminal investigators. Some of the photos were also released to CBS and the New Yorker, which led to public awareness, the Taguba Report, several other investigations and Congressional Hearings, and the eventual criminal punishments of nine low ranking MPs.

Beyond the individuals noted in the Taguba Report, other soldiers refused to participate in what they viewed as something reprehensible. For example, Specialist Mathew Wisdom testified on April 9, 2004 during an Article 32 Hearing that he refused to participate because he "did not want to be a part of anything that looked criminal" (quoted in Hersh 2004a:12). Others testified to the same effect.

### *Summary*

Constraints were present at all levels of analysis (e.g., international and state political pressure, NGO and INGOs, public movements, the media, and morality). Some constraints had an impact, such as the FBI culture of compliance, media coverage once the images appeared, and individual moral restraints. Nonetheless, in general, the constraints at all levels failed to restrain the Administration's policies or acts of torture by U.S. personnel. The reasons for their failure varied in context. Other constraints had an opposite affect causing additional cases of torture to occur. For example, political and public negative reactions to the U.S. invasion of Iraq resulted in the Administration's enhanced push for actionable intelligence by any means to counter the growing insurgency.

### *Controls*

Since the Administration or military personnel were not constrained, we need to look at existing controls. Recall that controls are a perceived blockage due to existing and/or after the fact controls such as laws, regulations, belief in sanctions or punitive measures, and criminal sanctions that are ideally inevitable after the fact.

#### *International Level Controls*

At the international level, controls include international law and institutions of social control such as the ICC, ICMT, United Nations, and the International Court of Justice (WCJ). As noted above there is an extensive body of international

humanitarian law addressing war crimes (specifically in this case, the classification of detainees, torture, and cruel and inhumane treatment) that exist to control states' behaviors during times of conflict. Consequently, international law provides for a variety of punitive actions that can be taken against individuals (ICC) or states (ICJ and UN) through various institutions of social control. The unique position of each institution as a potential control of cruel and inhumane punishment and torture will also be discussed below.

### *International Law*

As noted, there is an extensive body of international law (see Appendix C) established to guide state and individual actions during times of conflict or peace. The capacity of international law as a control can be viewed as two-fold: as a deterrent and as a guide for state behaviors. However, due to the problematic ways in which international law can be enforced it does not hold the same deterrent power over states as domestic laws may have over its citizens. Additionally, states that hold vast economic, military, and political power within the international arena have long ignored international law as a frame for their behaviors if it conflicted with their foreign policy interests. For example, on July 24, 2002, the Administration attempted to block a UN effort to establish a system of regular inspections of prisons and detention centers worldwide to check for abuses (Guardian, July 24, 2002: 1). Though it failed to do so, the political pressure put on the UN Economic and Social

Council illustrates how powerful states attempt to block such efforts to protect their self-interests.

The failure of international law to work as a control was also due to the lack of deterrence these laws hold when not in the interest of the state. For example, when the Administration ignored international humanitarian law for the treatment and classification of prisoners, it did so to pursue its interests to categorize detainees as enemy combatants. The decision to classify prisoners as enemy combatants opened the door to claims that, as such, they were not entitled to benefits normally granted by the Geneva Conventions regarding the rules for prisoners. This led to discussions and rationalizations to expand interrogation techniques that further violated the Conventions and other Treaties the U.S. ratified. As the world's leading superpower, the U.S. is also in a unique position and has often attempted to circumvent international law, and also to block advancements or monitoring efforts.

The failure of international law as a deterrent was also evident in comments made referring to the Geneva Conventions as "obsolete...and rendered quaint" (Gonzales, January 25, 2002: 1). When law is viewed as irrelevant or illegitimate it no longer holds a deterrent value. Likewise, international treaties are structured in such a way that reservations may be attached to them by states, thus, further limiting the original intent of a treaty. For example, the U.S. ratified the torture treaty; however, it included a reservation regarding the definition of torture. The deterrence value is further limited when institutions of control are unable to enforce the existing laws.

*The International Criminal Court*

The creation and empowerment of the International Criminal Court significantly changes the landscape of international criminality. The intention of the ICC is to provide an international system of justice that can address heinous crimes against humanity when a state is unable or unwilling to investigate or prosecute any individual accused of the crimes specified in the Rome Statute (Mullins, Kauzlarich, and Rothe 2002). A key distinction between the ICC and other institutions of social control at the international level is that it addresses crimes of individuals versus states. The crimes that are subject for prosecution under the Rome Statute are defined in Articles 5, 6, 7, and 8.

Article 5 of the Rome Statute lists the crimes within the jurisdiction of the ICC: crimes of genocide, crimes against humanity, war crimes, and crimes of aggression (still to be defined by the Assembly of State Parties [ASP]). Crimes of genocide refer to “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group” (Article 6, Rome Statute).

Article 7 defines crimes against humanity as acts that are widespread or a systematic attack against a civilian population. This includes acts of torture, intentional causing of great suffering to body or mental health, murder, and attacks directed against a civilian population. Crimes against humanity are not as inclusive as previously recognized Human Rights Law (HRL). The HRL applies in times of peace or war but is primarily conscious of protecting people against governmental violence

against their recognized civil, political, economic, social, and cultural rights (Universal Declaration of Human Rights, GA. Res.217A (III), UN Doc A/810 at 71 [1948]).

War crimes are defined by breaches of the Geneva Conventions of August 1949 (Article 8, Rome Statute). These include torture or inhumane treatment, biological experiments, extensive destruction and appropriation of property, and willfully denying a prisoner of war or other protected person the right to a fair and regular trial. This category has the potential to be invoked by the ICC against U.S. personnel and state actors.

While these acts are both customary and criminal offenses, the ability of the ICC to penalize all who offend is limited. For example, the ICC is limited in its investigative reach making it unable to subpoena any state or their records. While the Court may request a warrant or subpoena, the Prosecutor and the Court lack an empowered policing agency to ensure the enforcement of either request (Articles 54-58). However, on December 22, 2004, a cooperation agreement between the Offices of the Prosecutor (OTP) and the International Criminal Police Organization (Interpol) was signed establishing a framework for cooperation between the two agencies. The agreement enables the OTP and Interpol to exchange police information and criminal analysis, and to cooperate in the search for fugitives and suspects. The agreement also gives the OTP access to Interpol telecommunications network and databases (Rothe and Mullins 2006).

The Rome Statute describes an ability to have jurisdiction over the most serious crimes but realistically has limited jurisdiction. For example, its jurisdiction is

inclusive only of a state party to the treaty or by agreement of a state not a party to the Statute. The criteria listed in Article 12 for the exercise of jurisdiction requires a state to become a party to the statute or accept the jurisdiction of the Court if the crime occurred on that State's territory, its vessel, or aircraft, or if the State of which a person accused is a national (Article 12, a-b). No person can be held liable by the court unless the crime occurred within the jurisdiction of the court. Thus, the potential of the Court to address the systematic cases of torture, murder, and cruel and inhumane punishment committed by the U.S. is extremely limited. First, compliance by a non-party state is highly unlikely and non-compliance can act as a detriment to the ability of the ICC to be an effective measure of international justice. Secondly, the alternative route to the ICC would be for the U.N. Security Council to unanimously recommend the case to the prosecutor for investigation. Again, with U.S. veto power, this scenario is not likely. Furthermore, the U.S. has consistently, throughout the attempts to develop an ICC and the Rome Statue specifically, attempted to ensure that the court would not impose its authority over its citizenry.

#### *U.S. Opposition to the ICC*

The U.S. failed to support the establishment of an ICC throughout the "cold war era" as it pursued its own self-interests, economic gains, and strategic and military expenditures. Issues of sovereignty, universality of jurisdiction, a system of complimentary, and pre-conditions of consensus have figured in the political and ideological objections to the establishment of an ICC by the U.S. It appears that the

U.S. wanted a court for the rest of the world, but not for itself. U.S. officials insisted the jurisdiction of the court could not impinge on the US, its policies, or its own state actors.

To ensure that U.S. military personnel, Foreign Ambassadors, and other U.S. officials remained out of the reach of international jurisdiction, two key pieces of domestic legislation were passed. As negotiations over the court were taking shape in 1996, the U.S. passed the War Crimes Act (18 USC § 2441). This legislation stated that, as a sovereign nation, the U.S. would domestically prosecute its own citizens for breaches of international war crimes to be included in the Rome Statute.

A year later, the U.S. decided that this was not a strong enough or an exclusive enough set of protections and passed The Expanded War Crimes Act, 18 USC & 2401 (SEC. 583). In essence, this legislation provides the necessary law guaranteeing precedence for the domestic prosecution of any alleged U.S. war crimes, ensuring that the Court would not have jurisdiction over any U.S. defendants. Additionally, the legislation enforces previously signed international treaties while ensuring U.S. primacy of jurisdiction.

The position of the U.S. towards the ICC is contentious at best. The U.S. took the dubious position that humanity is best served by the U.S. remaining free from the limitations imposed by the Rome Statute. U.S. Ambassador Scheffer argued at the international level that the consequence imposed by Article 12, particularly for non-parties to the treaty, limit severely those lawful, but highly controversial and

inherently risky, interventions that the advocates of human rights and world peace so desperately seek from the United States and other military powers.

The Bush Administration's determination to undermine the ICC was demonstrated by the political and legislative maneuvering that has taken place during their term in office. In an effort to further restrict cooperation with the Court, in 2001, President Bush signed into law H.R. 2500 (Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations Act) that contains an amendment which prohibits the use of appropriated funds for cooperation with, assistance, or other support to the International Criminal Court or its Preparatory Commission. This was a political move by the U.S. to restrict the use of military finances that supported any action for the ICC.

The Bush Administration then submitted a letter to the UN on May 6 2002 that "formally declared U.S. intention not to ratify the Rome Statute, and renounced any legal obligations arising from its signature of the treaty." In August 2002, President George W. Bush signed the Supplemental Appropriations Bill, making the American Servicemembers' Protection Act binding U.S. national law. The American Servicemembers' Protection Act (ASMPA) has been dubbed the "Hague Invasion Act" (CICC 2002, Documents). The ASMPA restricts: (1) U.S. cooperation in any comportment with the ICC, (2) Participation in UN Peacekeeping, and (3) giving military assistance to most countries that ratify the Rome Statute. Section 2005 of the ASMPA restricting the U.S. from UN Peacekeeping missions is broken into several

aspects providing the U.S. “legitimate legislation” for a coercive tool to de-legitimize the efficacy of the ICC.

The U.S. National Security Strategy Policy, released in September 2002, had a direct reference to the ICC:

We will take the actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court (ICC), whose jurisdiction does not extend to Americans and which we do not accept.

This premise figures prominently in the multiple memos discussing expanded interrogation techniques during 2002 and 2003. For example, Memo (15) dated August 1, 2002 (p. 1) to Judge Gonzales states, “actions taken as part of the interrogation of Al Qaeda operatives cannot fall within the jurisdiction of the ICC although it would be impossible to control the actions of a rogue prosecutor or judge.” The Memo continues with “we cannot guarantee, however, that the ICC would decline to investigate and prosecute interrogations of al Qaeda members . . . it is possible that an ICC official might at least disagree with the President’s interpretation of GPW.”

The Bush Administration put substantial pressure on the UN to ensure immunity from the ICC’s jurisdiction by threatening to end all relief aid to Bosnia and Herzegovina. If the UN did not agree to the U.S.’s demands for immunity the renewal of the United Nations Transitional Administration in East Timor (UNTAET) would have been put at risk. The result of the pressure put on the UN and the international

community by the U.S. resulted in a controversial UN resolution. On July 12, 2002, the Security Council voted on resolution 1422 granting peacekeepers from non-State Parties a one-year immunity from prosecution by the ICC. A year later, Resolution 1422 was up for renewal at the UN. The proposed Resolution 1487 would offer the U.S. the same privileges of impunity granted in 1422. The U.S. concern over sovereignty, jurisdiction, and laws of *jus cogens* and *erga omnes* are evident in the U.S. Ambassador's speech to the UN:

The resolution is consistent with the fundamental principle of international law, the need for a state to consent if it is to be bound, is respected by exempting from ICC jurisdiction personnel and forces of states that are not parties to the Rome Statute. . . . I would suggest that even one instance of the ICC attempting to exercise jurisdiction over those involved in a UN operation would have a seriously damaging impact on future UN operations...The US has been and will continue to be a strong supporter of the tribunals established under the aegis of this Council. However, unlike the ICC, those tribunals are accountable to the Security Council. (USUN Press Release # 85 (03) June 12, 2003)

The U.S. established bilateral agreement known as Article 98(2) is a response by the U.S. to Article 98 of the Rome Statute. The precautions taken by the Preparatory Commission to recognize pre-dated international agreements between states resulted in a perceived weakness within the text of the Rome Statute (Article 98). The Preparatory Commission took great pains to ensure requests for assistance and/or surrender of individuals by the Court would not require a state to act inconsistently with its obligations under international agreements with respect to state or diplomatic immunity pursuant to a State's signature and ratification of the Rome Statute. This resulted in the misuse and misinterpretation of Article 98 that the U.S. seized to pursue U.S. interests by establishing the U.S. Bilateral 98(2). These bilateral

agreements where an effort to de-legitimize the ICC and bind the Courts already limited jurisdictional powers. The U.S. has drafted and circulated to over 100 countries a version of Article 98, 98(2), that would literally render the ICC ineffective in attaining jurisdictional authority over U.S. nationals, military, peacekeepers abroad as well as any national the U.S. allowed into its own territory. For example, in the Working Group Report of April 2003, they state:

Other governments could take a position contrary to the U.S. position on this point. For those state parties to the ICC that take the position that the ICC grants universal jurisdiction to detain individuals suspected of committing prohibited acts, if these countries obtain control over U.S. personnel, they may view it as within their jurisdiction to surrender such personnel to the ICC. In an effort to preclude this possibility, the U.S. is currently negotiating “Article 98” agreements with as many countries as possible to provide protection. (p. 54)

This concern demonstrates the potential of the ICC, as slight as it may be, to serve as an institution of social control.

### *International Court of Justice*

The International Court of Justice is the principal judicial organ of the United Nations. The Court has two functions: (1) to settle legal disputes submitted by States and, (2) to give advisory opinions on legal questions. The ICJ is a court for state arbitration, not for addressing individual criminality. Similar to the ICC, ICJ jurisdiction is only applicable if the States involved have accepted its jurisdiction. The U.S. withdrew from the ICJ shortly after it was found responsible for several illegal acts against Nicaragua (1984). Exceptions to the Court’s mandate for consensual jurisdiction can occur by “virtue of a jurisdictional clause, i.e., typically, when they are

parties to a treaty containing a provision whereby, in the event of a disagreement over its interpretation or application, one of them may refer the dispute to the Court” (ICJ 2005: 1).

It should be noted that the ICJ lacks the ability to enforce its rulings. If parties do not comply with the Court’s decision, they can be taken before the Security Council for enforcement action. However, if the judgment were against one of the permanent five members of the Security Council or its allies, any resolution on enforcement would be vetoed. This occurred, for example, when Nicaragua brought the issue of the U.S.’s non-compliance before the Council. Furthermore, if the Security Council refuses to enforce a judgment against any other state, there is no alternative method of forcing the state to comply. Nonetheless, it is possible that Afghanistan or Iraq could bring charges against the U.S. to the ICJ. Specific charges could be related to violations of the Geneva Conventions Relative to the Protection of Civilian Persons in Time of War and Relative to the Treatment of Prisoners of War, The Convention Against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment, and the International Covenant on Civil and Political Rights. If this did occur, the U.S. would probably reject the Court’s jurisdiction or not comply with its ruling. In case of the latter, as a member of the Security Council, no enforcement would occur. It should also be noted that the ICJ is only able to require monetary reimbursements or restitution; it is not a criminal court.

### *International Military Tribunals*

International Military Tribunals (IMT) are ad hoc systems of justice. After WWII, the first IMT's, the International Military Tribunal of Nuremberg and Tokyo, were established to address the atrocities and illegalities that occurred during the war. They were not used again until the 1980's and 1990's to establish Tribunals for Yugoslavia and Rwanda. However, due to their *Ad hoc* nature, the Tribunals for Yugoslavia and Rwanda proved to be more than challenging. In part, this was due to the costs associated with IMT's, the complexities of reaching consensus on the procedures or desires for an IMT, and because of the veto power of the Security Council that allows for a selectivity of cases that would be eligible for IMT (Bassiouni, 1999). Since this time, the Security Council has become less willing to continue the processes of ad hoc Tribunals.

Nonetheless, an IMT could be created to prosecute the Administration. The principle of individual criminal responsibility for ordering the commission of a crime is

expressly recognized in Article 49 of First Geneva Convention, Art. 50 of Second Geneva Convention, Art.129 of Third Geneva Convention, Art.146 of the Fourth Geneva Convention, as well as in the Statutes creating the Criminal Tribunals on the ex-Yugoslavia (Art. 7.1) and Rwanda (Art. 6.1). (Derechos, October 29, 1998:1)

Furthermore, the ex-Yugoslavia and Rwanda Statutes, respectively, provide that:

“The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment” (Article 7, Paragraph 2). With the Pinochet case, two precedents have been established and/or reinforced: (1) universal

jurisdiction by IMT; and (2) Heads of State as responsible actors. For example, under international law, superiors are responsible for acts committed by their subordinates. Heads of State no longer enjoy personal immunity once they leave office. They become liable for prosecution if extradited by another state to a location wherein charges are filed (e.g., Spain for the Pinochet case). Furthermore, the rule provides that

in case of perpetration by a state official of such international crimes as genocide, crimes against humanity, war crimes, torture such acts, in addition to being imputed to the state of which the individual acts as an agent, also involve the criminal liability of the individual. In other words, for such crimes there may coexist state responsibility and individual criminal liability.  
(Cassese 2002a: 6)

Ideally, the potential for an IMT against key Bush Administration Officials (e.g., G. W. Bush, Cheney, Rumsfeld, Gonzales, Bybee, etc.) is possible under IMT rules and precedent. However, the likelihood of this occurring is not great.<sup>2</sup>

Fear of IMT prosecutions was formally discussed within the State Department. For example, the FBI has warned several former U.S. officials not to travel to some countries, including some in Europe, “where there is a risk of

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<sup>2</sup> Recall Henry Kissinger sought for extradition for violations of international law does not leave the U.S. without assurances of not being extradited. Moreover, “Secretary of State Colin Powell demanded that Belgium change its war crimes legislation in order to halt a case against Powell, George Bush senior, Vice President Dick Cheney and former US army commander Norman Schwarzkopf for committing war crimes during the 1991 Gulf War. Washington fears a similar lawsuit is about to be made against George W. Bush for human rights violations and civilian deaths in the current war” (Michaels 2003: 1).

extradition to other nations interested in prosecuting them.” And as Senator Helms

(June 2002: 2) recently noted:

[T]his year for the first time we have seen an international criminal tribunal investigate allegations that NATO committed war crimes during the Kosovo campaign. In addition, a month ago, in May, NATO Secretary General Lord Robertson submitted to a degrading written interrogation by a woman named Carla Del Ponte, chief prosecutor of the Yugoslavia War Crimes Tribunal.

Given geopolitical realities, it is unlikely that any international tribunal will ever judge whether the systematic cases of torture violated international treaties.

Moreover, historically, IMT’s have been victor’s courts. With the devastation of Afghanistan and Iraq, their ability to be a “victor” is rather dubious.

#### *The United Nations*

The purposes of the United Nations “are to maintain international peace and security” (UN 2005: 1). The potential for the UN as an institution of social control, however, is rather limited. For example, only the Security Council under Chapter VII of the UN Charter has the authority to enforce measures to “maintain or restore international peace and security.” These enforcement mechanisms or social controls range from economic sanctions to public symbolic shaming. This was case when Kofi Annan (September 2004), Secretary General of the UN, denounced the U.S. invasion of Iraq calling it illegal. Other symbolic controls included Annan’s statement on September 24, 2004 that cited the torture of Iraqi prisoners by U.S. forces as an example of how fundamental laws were being “shamelessly disregarded.”

As previously noted, the UN could potentially order sanctions against the U.S. until it changes its practice of utilizing expanded interrogation techniques that are viewed as torture under international law. Mandatory sanctions are used to apply pressure on states to comply with Security Council objectives. Such objectives may include interstate or intrastate peace when diplomatic means fail. The range of sanctions include comprehensive economic and trade sanctions and/or more targeted measures such as arms embargoes, travel bans, financial or diplomatic restrictions. Other targeted sanctions involve the freezing of assets (that the U.S. has used against alleged terrorist groups) and blocking the “financial transactions of political elites or entities whose behavior triggered sanctions in the first place” (UN 2005: 2). However, the structural limitations placed on the sanctions’ committee are great, as the Security Council must approve them. As such, with the power of veto of the Council, it is highly unlikely sanctions would be put on the U.S. for its role in the torture and abuses that occurred in the war on terrorism or more specifically, Abu Ghraib.

#### *State/Cultural Level Controls*

Controls at the state level include domestic law and legal sanctions. Pertinent to this case study are the domestic laws governing torture and abuse and the potential legal sanctions for their violation. However, as stated in Chapter I, law can serve to control actions, but also due to the unique position of a state vis-à-vis, its own domestic law and the problematic ways in which it is enforced, law may not hold the

same deterrent power over a political body as it does over citizen actors. Moreover, the state, as a self-regulator and lawmaker, is in the position to create or nullify laws governing it. Nonetheless, there are domestic laws governing state actions as well as those of individual state actors as witnessed by the prosecution of nine MPs for their involvement in the abuse and torture at Abu Ghraib.

The most powerful, though often disregarded, domestic law governing states is contained within the Constitution: the supremacy clause that holds

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (U.S. Constitution, Article VI, clause 2).

Under the Supremacy Clause, treaties form part of

the supreme law of the land. . . . However, treaties which are non self-executing (i.e., drafted so as to require Congressional implementation, or declared to be of such a nature by the Senate upon giving its advice and consent to ratification) have no *domestic* legal effect. (Laurence H. Tribe, American Constitutional Law (3d ed. Vol. I, 2000)

Any conflicting federal statute supersedes self-executing treaties. International treaties have no legal effect within the domestic territory, thus, requiring international response via the ICC, WCJ, or IMT. Customary international law is not mentioned in the Supremacy Clause, nonetheless with the Restatement 3 of the Foreign Relations Law of the U.S., §111 comment (d), the view is that customary international law has the domestic legal effect of federal common law. There are also many domestic laws that have been incorporated into U.S. law as part of international obligations, thus providing controls at the state level. For example, the War Crimes Act of 1996 and

the amended 1997 Act were created in response to U.S. obligations to prosecute individuals for war crimes, including torture.

There are also several other domestic and military laws governing acts of torture and abuse. These potentially provide legal sanctions for such behaviors. However, they do not cover those in the Executive Branch, the Pentagon, or high-ranking officials in the DOD. Simply stated, existing domestic law is for military personal. These laws include the Eighth Amendment of the Constitution, U.S. Torture Statute (18 U.S.C. & 2340) and the U.S. Code of Military Justice. Each of these laws has been thoroughly discussed in Chapter III. Infringement of these laws has resulted in the legal sanctions and prosecutions previously mentioned.

Another relevant law is The Alien Tort Statute, also known as the Alien Tort Claims Act (ATCA). Its origins date back to the first Judiciary Act of 1789, which created the U.S. court system. It provides that “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States” (National Law Journal 2004: 1). The ATCA grants U.S. courts jurisdiction in any dispute where it is alleged that the “law of nations,” or international laws, are broken. In June 2004, a Supreme Court ruling upheld the core principles of the 1789 Alien Tort Claims Act (ATCA). This was contrary to what the Bush Administration had hoped for. The Administration argued that the ATCA impeded the war on terror, and the U.S. Department of Justice claimed the act would interfere with the executive branch’s ability to conduct foreign policy. Potentially, individuals abused and tortured at Abu Ghraib (and in the war on

terrorism in general) would be entitled to bring a civil suit against the U.S. for alleged abuses. This would include being able to sue corporations whose employees took part in the systematic abuses and torture. Such is the case with CACI International and Titan who are named as defendants in a suit filed in Federal District Court in Washington, D.C. under the Alien Tort Claims Act, on behalf of four Abu Ghraib detainees. The Center for Constitutional Rights (CCR) and the Philadelphia law firm of Montgomery, McCracken, Walker and Rhoads filed a second lawsuit (a class action suit) on June 9, 2004, in federal court in San Diego. This action also utilizes the Alien Tort Claims Act (ATCA), along with the 8th, 5th, and 14th Amendments to the U.S. Constitution.

There are other controls at the state level involving Congress. For example, only Congress has the authority to declare war and to provide a check on Executive decisions. While Congress abdicated this responsibility by providing the President a blanket approval in the initial war on terrorism, the structure of Congressional controls and its legal obligations remain. In a memo from John Yoo and Patrick Philbin to General Counsel Haynes, the potential affects of Congress' renunciation of their responsibilities was pointed out, "a petitioner might even be able to question constitutional authority of the President to use force . . . and the legality of Congress' statutory authorization in place of a declaration of war" (December 28, 2001, Section III).

The idea of presidential power potentially overriding congressional responsibilities appeared shortly after the attacks on September 11, 2001. Several

memos circulated between John Yoo and Robert Delahunty to William Haynes proposing limitations of Congressional oversight when it comes to the president's authority to allow torture. For example, in a memo dated January 9, 2002, they state, "Restricting the President's plenary power over military operations including the treatment of prisoners would be constitutionally dubious." In August 2002, when talks of expanded interrogation techniques resurfaced, congressional check and balance powers were further dismissed as irrelevant. As Bybee (2002: 26) stated, "Any effort to apply criminal laws against torture in a manner that interferes with the President's direction of such core matters as the detention and interrogation of enemy combatants thus would be unconstitutional." The final discussion of presidential power occurred on March 2003 (1) in a DOD Memo that stated, "Any effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution's sole vesting of the Commander in Chief authority in the President."

As an after the fact control, on October 5, 2005 the Senate adopted a floor amendment (S. Amdt. 1977) that would require the DOD personnel to use the Army Field Manual Guidelines for interrogating detainees and prohibits the cruel and inhumane and degrading treatment of persons under detention or control of the U.S. Government. Senator McCain stated, "The Senate has an obligation to address the authorizing legislation, just as it has an obligation to deal with the issue that apparently led to the bill being pulled from the floor—America's treatment of its detainees" (McCain, October 5, 2005). The amendment, attached to the Department of Defense Appropriations bill attempts to regulate future interrogation techniques.

President Bush originally said he would veto such a bill if passed through both houses. However, due to the bipartisan support, the Administration did bend and negotiated on some specific terminology.

The Bill did not prohibit the Field Manual from being revised in the future to include more expansive techniques under its classified section (CRS Report for Congress RS223L12). Consequently, on December 13, 2005, the Army approved a new, classified set of interrogation methods. "The techniques are included in a 10-page classified addendum to a new Army field manual that was forwarded to Stephen A. Cambone, the under secretary of defense for intelligence policy, for final approval." (Schmidt, December 14, 2005: 1). With the revised manual being classified, it is highly unlikely the manual extends the wishes of the Senate and many within the Congress.

On December 30, 2005, President Bush signed the McCain Bill. However, he attached a signing statement declaring that he will view the interrogation limits in the context of his broader powers to protect national security. A signing statement is an official document that a president can attach to a new law stating his interpretation of the legislation. President Bush's statement is an attempt to waive the restrictions imposed by the legislation thus negating the intent of the law.

The Judicial Branch (Supreme Court) is an additional control for both the Executive and Legislative Branches. The Executive Branch is controlled to some degree by the judicial review process. This is contrary to the assertions of the memos that circulated discussing the President's authority to ignore international law that

“interferes with the President’s war power” (January 9, 2002). This premise of inherent executive power envisions a President in his role as the Commander-in-Chief as unaccountable to Congress or the Judiciary. This view has been firmly rejected by the U.S. Supreme Court in June 2004 (most notably, in the Hamdi and Rasul decision). Nonetheless, it failed to control Bush’s decision to classify detainees as enemy combatants.

### *Organizational Level Controls*

The most relevant variable of control at the organizational level is the code of conduct that governs those working within the organization, in this case Abu Ghraib. At Abu Ghraib, this would be the code governing the traditional role of military police as support of the Joint Task Force. The specific roles include the administrative processing of detention operations. Simply stated, MPs are to facilitate combat operations by providing the movement of prisoners from the battle area to holding areas and/or detention sites where they then guard the prisoners and maintain order. The specific code of conduct for MP operations is listed in the Code of Military Justice, which dictates that MPs must treat prisoners humanely and other pertinent rules governing the treatment and legality of MP behaviors. However, of the “38,000 trained military police in the Army, only about 970 have had specific training in running prisons” according to Washington Post Staff Graham and Ricks (May 4, 2004: A1). Moreover, General Karpinski had never run a prison system, and according to The Taguba Report (2004) “there is abundant evidence in the statements

of numerous witnesses that soldiers throughout the 800th MP Brigade were not proficient” in basic skills needed to operate a prison. Nonetheless, as U.S. soldiers, the Code of Military Justice binds them. Additionally, as has been discussed in several other sections, the organizational role of the MP’s had been altered so that they were aiding MI’s, OGA’s, and SAP forces. This led to an environment where the expected code of conduct was less than effective. The evidence shows that there was both a lack of doctrine governing MP’s and an environment wherein operations were improvised and ad hoc, making the code of conduct governing the traditional roles ineffective as a control at the organizational level.

These failures had a direct impact on internal controls. Expected controls within an organization lie in the command and supervisory structure. As previously discussed, the chain of command at Abu Ghraib was less than clear. This weakened the internal controls. As Karpinski has stated, it was difficult, if not impossible to know who was in charge, negating any internal control within the organization. Furthermore, as CIA and SAP forces were allowed to conduct interrogations in Abu Ghraib under different rules than MI’s and MP’s answered to, there was an additional loss of accountability, thus an additional lack of internal controls.

#### *Interactional Level Controls*

Individual level controls essentially draw upon the legitimacy or perceived legitimacy of the law and obedience to authority. This assumes there are laws pertaining to the individual actors. This is indeed the case for the military personnel.

While perceived legitimacy of authority is a part of personal morality, it is also separate. Recall Mathew Wisdom's testimony that he refused to participate because he did not want to be a part of anything that "looked criminal." Clearly, he accorded legitimacy to the laws governing interrogation methods.

As discussed under interactional opportunity, actors at Abu Ghraib experienced a separation from the consequences of their actions. Separation from consequences can be understood in two ways. First, it can be used to understand the disjuncture that occurs between a decision or act and the actual outcome of that action. This would include the separation of a CEO making a decision that harms consumers from the affects of that decision. This also occurred at Abu Ghraib. For example, General Miller was separated from the affects of his orders where he did not directly witness or take part in the torture and cruel and inhumane treatment of Iraqi detainees in Abu Ghraib.

Second, the term can be used to describe a lengthy time delay or lack of a consequence of an actor's actions. This can lead to a general lack of perceived legitimacy of law, as the actor is not held accountable. For example, Miller escaped disciplinary actions by his position and that of his network of ties. Investigators, Lieutenant General Randall Schmidt and Army Brigadier General John Furlow recommended Miller be disciplined for his role in Command for abuses, however, General Bantz Craddock rejected the conclusion on the grounds Miller did not violate U.S. policy of law (Mazzetti 2005: 2).

Recall that numerous reports from Afghan and American human rights groups and the Pentagon documented allegations of torture inside U.S. detention sites in Afghanistan. This was long before the Abu Ghraib scandal erupted; yet instead of disciplining those involved, the Pentagon transferred key personnel from Afghanistan to the Iraqi prison. More specifically, recall that the 519<sup>th</sup> MI Brigade under Captain Wood, originally stationed at Bagram Afghanistan was transferred to Abu Ghraib. During their service at Bagram, several soldiers were charged with torture and the killing of detainees. Nonetheless, once transferred to Abu Ghraib, these soldiers were allowed to continue conducting interrogations. This could have reduced the perceived legitimacy of laws governing military personnel in the eyes of these actors. Additionally, “[h]ad the investigation and prosecution of abusive interrogators in Afghanistan proceeded in a timely manner,” Human Rights Watch executive director Brad Adams noted in an open letter to Defense Secretary Donald Rumsfeld fall of 2004, “it is possible that . . . many of the abuses seen in Iraq could have been avoided” (Adams 2004: 1).

The perceived legitimacy of the Geneva Conventions was rather weak in most cases. For example, as Kenneth Roth (2004: 1), Executive Director of Human Rights Watch stated, “the brazenness with which these soldiers conducted themselves snapping photographs and flashing thumbs-up signs as they abused prisoners, suggests they felt they had nothing to hide from their superiors.” The Geneva Conventions were also viewed as ‘non-relevant’ and as a “joke” (Frontline PBS, October 18, 2005). Nonetheless, as discussed in previous chapters, there are well-

established laws governing military behaviors at both the state and international levels. With the punishment and prosecution of nine MPs, these domestic military laws were effective controls and illuminate the potential use of them in prosecuting other individuals that took part in abuse and torture.

Controls are also glaringly absent for the private contractors that were involved in the known cases of abuse and torture in Abu Ghraib as well as those not yet disclosed. Recall that two civilian employees, Steven Stefanowicz and John Israel, were specifically mentioned in the Taguba Report as being “directly responsible for the abuse at Abu Ghraib.” Nonetheless, both men and their corporations, CACI International and Titan, have not been held accountable. In part, this is due to the transnational loopholes of international law that guides traditional state actors during a conflict. As Singer (2005) stated:

Although private military firms and their employees are now integral parts of many military operations, they tend to fall through the cracks of current legal codes, which sharply distinguish civilians from soldiers. Contractors are not quite civilians, given that they often carry and use weapons, interrogate prisoners, load bombs and fulfill other critical military roles. Yet they are not quite soldiers, either.

Iraqi prosecutions of civilian contractors could have been an option as well. However, procedures were taken by Paul Bremer to ensure immunity from Iraqi prosecution for private contractors and agents working under the auspices of OGA or SAP forces. In June 2003, Bremer, through the Coalition Provisional Authority (CPA) handed down Memorandum 17, granting foreign contractor’s immunity from Iraqi law. The memo also put private contractors under the legal authority of their domestic national laws. In June 2004, Paul Bremer signed a revised version of

Memorandum 17, stipulating that the rule governing contractors immunity remain in effect until forces are withdrawn from Iraq. The Order grants immunity from “local criminal, civil and administrative jurisdiction and from any form of arrest or detention other than by persons acting on behalf of their parent states” (Memorandum 17, 2004: 3). While legal controls are said to exist for these contractors within their domestic laws, they are only bound when contracted by the DOD which most are not. However, U.S. contractors are subject to the Military Extraterritorial Jurisdiction Act (MEJA), which allows for the prosecution of civilians employed by or accompanying the military while overseas. President Bill Clinton signed the MEJA in October 2000. However, MEJA specifically states that it pertains only to contractors employed by the Department of Defense.

Consequently, many of the civilian employees escape domestic accountability because they were contracted under the Department of Interior (DOI), which provides another loophole whereby civilian contractors are not covered by U.S. law. This was the case with Titan and CACI, both operating under contracts from the DOI. Nonetheless, if corporations are under contract to the Pentagon they are required to follow a set of rules known as the Defense Acquisition Regulation Supplement (DFARS) that contains a section on “Contractor Standards of Conduct” covering proper behavior. DFARS was amended on June 6, 2005, to hold U.S. contractors deployed overseas accountable under U.S. and international laws as well as those of the host country. This had little effect, however, since immunity was granted from Iraqi law and international law fails to govern international corporations.

The exception to this is the recent Agreement by the Economic and Social Council (2003), to which the U.S. is a signatory, which addresses the criminal liability of transnational organizations. Furthermore, it specifically mentions that these organizations (actors within the organization) fall under the purview of international law and the ICC. The 2003 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights Agreement sets precedence for the suggestion made in Rothe and Mullins (2006) that transnational organizations should fall under the purview of the ICC and be defined as such in the Rome Statute. Thus, ideally, individuals such as Israel and Stefanowitz could be held accountable at the international level via the ICC (highly unlikely) or an international military tribunal.

The other variable of control at the interactional level is obedience to authority. This includes two views. The first view is associated with obeying higher orders such as those given, though not consistently, by the Administration to adhere to the Geneva Conventions for all Iraqi detainees. However, the orders were interjected with confusing and often ambiguous terminology as well as policy; nonetheless, established military doctrine does exist and soldiers should have obeyed. Secondly, the concept of higher authority relates to international law. There is international precedence, wherein amnesty or deniability based on this concept of obeying orders or higher authority is not valid, regardless of such arguments made by Legal Counsel to the President and other DOD personnel. Thus, the presence of legal precedent to such claims could potentially act as a deterrent. Furthermore, as Cohn

(2004) observed, the well-established doctrine of “command responsibility,” in both international law and U.S. military law

provides criminal liability for commanders whose underlings commit war crimes. Even if the superior officer did not personally carry out the criminal acts, he would be liable if he knew or should have known of the conduct, yet failed to take reasonable measures to prevent or repress the criminal behavior.

In the case of Iraqi prisoners in U.S. custody, there is significant evidence that immediate superior officers were aware that prisoners were being tortured, and that these practices were not limited to the Abu Ghraib prison (see Jehl and Schmitt 2004a; Wilkinson and Rubin 2004; Zernike 2004a, 2004b). And as the torture memos and other internal state documents show, responsibility for these abuses does not stop with superior officers in Iraq, but goes right to the top of the Pentagon and the White House (Danner 2004a; Greenberg and Dratel 2005; Hersh, 2004a; Kramer, Michalowski, and Rothe 2005). Moreover, as Levinson (2004: 139-140) states individuals are not “unthinking automatons whose ethics are confined to the single commandment of obeying orders from a military or bureaucratic superior.”

### *Summary*

Controls at all levels do indeed exist. However, their effectiveness as such was limited for several reasons. I noted at the international level, the inherent contradiction between state sovereignty and a universal international institution of social control has impeded efforts since WWII to hold states accountable for their illegal actions. Additionally, U.S. reluctance of being controlled was and continues to be a factor in the inability of international institutions of control to exert any form of

deterrence. Likewise, as a state, it is in a unique position to establish laws that can protect itself from accountability. Military doctrine and internal organizational controls also failed for a variety of reasons including the dysfunctional chain of command. At the interactional level, perceived legitimacy of law was accorded by a few actors thus acting as a control. On the other hand, perceived legitimacy of law did not occur for others.

Knowing how such acts of torture and cruel and inhumane acts occurred (and are occurring) we are left with the question of what can be done in an attempt to stop such actions in the future. In the following conclusion, I attempt to answer this larger question by offering several policy suggestions that could potentially act to restrain or control such actions in the future.

## CHAPTER VIII

### SUMMARY AND CONCLUSION

The goal of this dissertation has been to identify, explore, and explain why torture and cruel and inhumane treatment occurred at Abu Ghraib. Using a revised version of Kauzlarich and Kramer's (1998) integrated theoretical model I have shown how the torture and abuse at Abu Ghraib were inextricably linked to the Bush Administration's foreign policies and disregard for international law. While there are other motivations and influences that contribute to the overall production of torture as a social phenomenon, the theoretical model was able to incorporate and interpret these events also.

In Chapter I, I raised some critical questions regarding the current understanding of state theories. Specifically discussed were the contending views of a state's role and the problematic tendency to omit the operationalization of the state. I then provided a working definition of a state in an attempt to rectify this key absence. Included in this chapter is a review of the contributions of state and state-corporate crime scholars illustrating that critical criminologists have contextualized state behaviors that violate international or domestic law as state crime for nearly two decades.

Chapter II presented the theoretical frame that guides my analysis. Included in this section is a review of Kauzlarich and Kramer's (1998) integrated model that

framed the theoretical approach I utilized. This chapter suggested several revisions to the model. First, I argued for adding a fourth dimension, the international level, to address the culture and legal structure of international society. After all, state cultures and practices are often contradictory with the emergent culture and legalities at the international level. This was the case with the U.S. practices and foreign policy that led to the torture at Abu Ghraib. Additionally, I suggested that Kauzlarich and Kramer's operationality of control needed to be divided to account for differences between constraints and controls. Likewise, several factors were removed from the catalyst of opportunity and reconceptualized as constraints or controls.

Chapter III explored the nature of international law. This included a brief history followed by a more extensive look at the international laws relevant to the cases of Abu Ghraib torture. Specific legal issues concerning war crimes, torture, the status of detainees during times of conflict, and federal laws and military codes applicable to this case study were also considered.

In Chapter IV, I provided a descriptive account of historical events leading up to the torture and abuse that occurred at Abu Ghraib. This included charting the rise of the neo-conservative agenda in U.S. politics and the war on terrorism: specifically, the invasion of Afghanistan, the installation of detention camps at Guantanamo, and the onset of the war on Iraq. Chapter V described the events at Abu Ghraib that occurred leading up to the torture and/or cruel and inhumane punishment. I then provided a voice to victims of torture and abuse taken from testimony in investigative reports and the subsequent civil law suits against key actors (e.g., Secretary of State

Rumsfeld, General Karpinski and Sanchez, and Attorney General Gonzales) by the American Civil Liberties Union. That chapter concluded with an explanation of the Administration's responses to the abuse and torture that occurred at Abu Ghraib.

The theoretical analysis to explain why torture occurred at Abu Ghraib is started in Chapter VI. Specifically, the analysis in this section is organized according to the catalysts of motivation and opportunity. The chapter is further divided between general and specific motivations and opportunity. Simply stated, the general motivations and opportunities are viewed as necessary but not sufficient without the specific motivations and opportunities that occurred. Chapter VII continued the theoretical analysis by focusing on the catalysts of constraints and controls. These concepts were further delineated by levels of analysis. Specifically, I explored constraints and controls that were present at the international level, the state-structural level including the state political apparatus, the organizational level (Abu Ghraib), and the interactional level (actors immediately involved in the torture and abuse at Abu Ghraib).

Overall, the findings suggest that the torture and abuse was not the result of a few deviant soldiers as claimed by the Administration. Instead, it was the result of numerous key decisions and policies put in place by the Bush Administration. These included the decision to classify prisoners as enemy combatants in Afghanistan and Guantanamo, the desire for actionable intelligence, expanded interrogation techniques, the enhanced practice of using covert forces, organizational isomorphism, a dysfunctional organizational environment at Abu Ghraib, and untrained,

understaffed, and unsupervised low ranking military personnel. Taken together these factors that led to the torture and abuse of hundreds of detainees at Abu Ghraib prison.

Given these findings, various control policies are presented in the following section. State crime scholars have long recognized that policies specifically addressing individuals are not sufficient as long as the organization or institutional culture remains in place. Additionally, scholars have identified the problems associated with states monitoring or sanctioning their own illegal behaviors. Therefore, the following section suggests policies that take into account both individual and institutional accountability. The policies include external control mechanisms as well as a call to strengthen internal checks and balances. More specifically, I suggest that to constrain the phenomenon of torture and other violations of international humanitarian laws the International Criminal Court must be further empowered. Additionally, states and transnational corporations, such as CACI and Titan, must be held accountable by the Court along with the individuals representing them. Along with strengthening internal checks and balances, I also suggest ending Congressional abdication and limiting Executive power. Other suggestions include strengthening military training on international humanitarian laws, and reevaluating the emergent military practices and policies regarding interrogation and treatment of prisoners.

### Policy Suggestions

International law is fundamental to the control of crimes of the state. While the criminological literature shows limited deterrent effects of law in controlling street crimes, some work has shown that among white collar offenders (or more socially bonded offenders) there is a greater potential for law to control social actors and their decision making processes. Those actors most likely to be involved in state crime would seem to be those who are most susceptible to the deterrent effects of law. Clearly, especially within the cases discussed in this dissertation, the U.S. has engaged in criminal actions simply because they can. Current geo-political and international legal structures offer no threat of consequences; international law can be violated without threat of prosecution simply because there is no empowered institution to do so. When actors can act with impunity, some will chose to do so. Consequently, for the most egregious of crimes international law has historically done little to deter. This observation forms the foundation of my suggestions focused on the ability of the ICC to eliminate impunity and create a deterrent effect for international laws.

The question of whether or not the International Criminal Court will be able to do what existing structures (UN, WCJ, and IMT) have been unable to do is still an open question. Moreover, as the Court stands now, several limitations hinder its potential to be an effective control. As currently structured and empowered, the ICC cannot fulfill its potential or stated mission. Specifically, since nations must voluntarily come under the control of the court, the most powerful and potentially criminal states can avoid control simply by refusing participation. To remedy this situation the Court

must: (1) attain universal jurisdiction, (2) expand the scope of individuals to include state and transnational entities, (3) add the much needed definition of crimes of aggression, and (4) become fully empowered with its own enforcement agency. I see these modifications as necessary for the Court to attain a full level of legitimacy as a full-time institution of social control. Moreover, as the world and global capitalistic interests become more intertwined, a fully empowered universal court is necessary to deter and respond to the most heinous crimes against humanity as a whole.

One of the most significant potential policies which would ensure the Court becomes a more legitimate and fully empowered institution of social control would be to grant it universal jurisdiction. This could be achieved in several ways. First, recall that Article 123 of the Rome Statute allows for the Treaty to be altered in seven years from the date it went into action. Changes could include adding crimes covered by the Court (e.g. terrorism). The text of the Treaty could also be modified removing the condition of state acceptance, thus granting it universal jurisdiction. Secondly, the Court could attain the status of customary law. This could be accomplished by precedence set by an international military tribunal or the World Court of Justice (e.g., the ICJ ruling granting universal jurisdiction in the Pinochet case). Last and perhaps the least likely way for the Court to attain universal jurisdiction would be that nearly all nation-states consented to the Court's jurisdiction without reservations or the opt-out clause previously discussed. However, as the criminological research on state crime has shown, states with the most at risk economically, politically, and ideologically, such as the U.S., are highly unlikely to allow themselves to be regulated

by outside agencies (Rothe and Mullins 2006). This scenario also illuminates one of the weaknesses with Article 13 (b) wherein only the Security Council can agree to extend temporary jurisdiction to the Court beyond the conditions of other Articles to reach individuals not covered under the Court's current jurisdiction. Just as state compliance is unlikely by powerful nation-states, the same states sit on, or have allies on, the Security Council, utilizing their veto power in accordance with their political, economic, and ideological interests. For example, it is highly unlikely that the U.S. government or President Bush would have a case brought against it for the Iraq invasion and occupation as the U.S. has veto under Article 13 (b).

The potential of the Rome Statute reaching the level of customary law (*erga omnes*) is a realistic possibility according to precedence set by international law and the International Court of Justice. The International Court of Justice states:

With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable amount of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of states whose interests were especially affected. (ICJ: Continental Shelf Case, 1969)

Therefore, the Rome Statute in the future may be perceived as general customary law such as the Nuremberg Principles and reach a level of universal jurisdiction regardless of the wording or limitations of jurisdiction. The phrasing of the Treaty can then be altered under Article 123 of the Rome Statute. However, to make this a political reality, some entity within international society must attain a level of influence to rival that of the United States. As of this writing, I believe that the

European Union has such potential. The economic, political and military power represented by this trans-national governmental body could balance the undue influence the U.S. wields in world affairs.

The inclusion of states as criminally responsible actors, currently omitted from the ICC would eliminate state impunity. By including a state as criminally liable it would follow that, as acting Head of State, the individual(s) at the top of a political apparatus could also be held responsible. Thus, leaders cannot avoid responsibility through claims of ignorance, non-participation, hegemonic propagandized counter-claims, or plausible deniability. States could not protect both their inner circle and military leaders by limiting prosecutions to the lowest levels of involvement (Schmitt 2005a). Such additional prosecutorial possibilities will place a level of responsibility upon state leaders that should undercut existing criminal tendencies. It will also heighten the diligence governments practice in the oversight of their sub-units.

For the ICC to generate much needed general and specific deterrence among criminal states, it must be able to focus its prosecution on both the leaders of a given state as well as the state itself. A polity as an organization will not necessarily be deterred from criminal action if it can sacrifice individual agents to the court as it can sacrifice individual soldiers and units on a battlefield similar to what occurred at Abu Ghraib. Precedent was set at the Nuremberg Trials where both Germany and Hitler were considered criminally liable. Furthermore, both Kauzlarich and Kramer's (1998) work and this dissertation emphasize that the locus of state criminality is the state, not the individual. Structural and organizational conditions combine with individual

predilections and positions to generate these offenses; punishment of individuals alone will not be able to deter states themselves from offending. One can sanction numerous bureaucrats, soldiers and spies without eliminating a state's ability or motivation to engage in criminal behaviors. The most powerful motivational elements arise within the state itself, not within the state's agents (Mullins et al. 2004).

Additionally, holding states legally liable would further ensure victim(s) compensation and a sense of justice for those victimized. It also would allow for sanctions to be set against the state rather than utilizing the underpowered ICJ or trying to get the Security Council to act. Obviously, one cannot incarcerate a state. However, the ability to levy trade and other sanctions upon criminal states may act as controls. Restriction of trade, imposition of tariffs, denial of loans from foreign powers or the International Monetary Fund, or insistence upon collection of outstanding debts are all tools which the ICC could use to exert social control. This requires that there exist political and economic bodies capable of and willing to engage in such sanctioning.

The idea of the criminal liability of organizations is not new either. Within the scope of criminological research such claims have been made for several decades. Moreover, during the Rome Statute Preparatory Committee meetings the concept of organizations and states were added into one of the existing Drafts (Rothe and Mullins 2006). The recent Agreement by the Economic and Social Council (2003), to which the U.S. is a signatory, specifically addresses the criminal liability of transnational organizations. Furthermore, it mentions that these organizations (actors

within the organization) fall under the purview of international law and the ICC. The 2003 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights Agreement sets precedence for my policy suggestion that transnational organizations should fall under the purview of the ICC and be defined as such in the Statute.

Article 18 of this Agreement also sets up criminal liability for which the ICC could potentially have jurisdiction. It states: in connection with determining damages, in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law (E/CN.4/Sub.2/2003/12/Rev.2). My contention is that the Court should consider cases involving transnational organizations that are violating the laws covered in Rome Statute. Specifically in the case of Abu Ghraib, corporations such as CACI and Titan would no longer operate in legal ambiguity.

Wars of aggression are the most destructive and destabilizing of all state crimes. It is for this reason that the Nuremberg Charter defined wars of aggression as “the supreme international crime.” Moreover, the act of aggression has long been criminalized both customary law and the UN Charter. The specific prohibition of aggressive war is found in Article 2(4) of the Charter which reads: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or [behave] in any other manner inconsistent with the purposes of the United Nations.” Yet, the fact remains during the Rome Statute negotiations, at the insistence of the U.S. Ambassador, the

definition of aggression previously passed by the General Assembly of the United Nations was not carried over to the treaty. Thus, the issue was left undefined and failed to be settled prior to the final moments when the vote was taken to pass the Rome Statute (see Article 5 (2) for specific details). At this point, the crime of aggression cannot fall under the Court's jurisdiction until the original seven-year span is expired (from the signing of the Rome Statute) and additions can be made. Specifically, a new provision must now be adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.

The subject of enhanced empowerment is indeed controversial, as it would entail a further financial burden for the Court and supporting states as well as a commitment to the training and hiring of a sub-agency within the Court's purview. However, I believe it is a necessary step to ensure compliance to extant international law by states as well as to ensure that individuals are brought to the Court. Furthermore this agency could act to retrieve documentation and evidence (just as domestic policing agencies do), serve and/or arrest suspects, and ensure safe travel to and from detention during court proceedings. The ICC must have the authority to subpoena state records, non-accused witnesses and other currently "protected" sets of information crucial to any prosecution. While INTERPOL currently exists, I believe the enforcement agency of the Court should consist of independent agents, hired and trained for the specific duty of court enforcement.

Taken as a whole, the above suggestions are directed towards modifying existing Articles established in the Rome Statute in order to generate an international legal body that can produce significant reductions in state crime. Optimistically, I see the potential within the ICC to become a major instrument in the control and constraint of state crime and an institution providing much needed social justice on the international level. Even if it has no other current effects on the types of crime I have explored in this dissertation, minimally it provides the possibility for resolution, justice and restitution for victims of these acts of torture and abuse. Moreover, it does provide a formal historical record of the act in hopes it may remain part of the collective conscious of humanity.

At the domestic level, or structural level, legislation needs to be enacted that allows for the CIA, Special Forces, and the U.S. Government to be held accountable through domestic civil suits seeking restitution for victims. Foreigners have recently been banned from such victim's rights. Under the doctrine of sovereignty, the state may not be sued either. The Federal Tort Act also allows for broad waivers of immunity for most federal officials. This legislation needs to be changed to take into account domestic and foreign cases of torture. It should include any U.S. official, agents, or contractors who engage in torture practices whether within or out of the U.S. Along these same lines, a victims' advocacy group should be created to allow for proper compensation and voice within the proceedings.

The Constitutional system of checks and balances must be kept intact and strengthened. Congress should not abdicate its authority as it did regarding Executive

decisions to allow torture and the blanket powers extended to the Executive Branch for war making. Constituents of Congressional members must insist the checks and balances afforded by the Constitution are adhered to. Additionally, the Supreme Court needs to adhere to precedent and limit Executive power, thus reinforcing the significance of checks and balances.

The FOIA must not be reduced to a bureaucratic tool to disseminate partial news bytes to the public. Instead, it must operate as a system of transparency. Restricting previously declassified material when in the Administration's self-interest must not be allowed. Additionally, the use of the mosaic theory by administrators to pursue unwarranted state secrecy must not be allowed. Documents that are not relevant to national security must be released to the public upon request. Likewise, redactions must not be allowed that are not relevant to national security or the security of individuals. Specific to this case, all government files and investigations dealing with the cases of torture or murder during the war on terrorism needs to be declassified without redactions.

At the organizational level, there should be mandatory training for all military personnel that extensively covers international humanitarian laws. This process of socialization could potentially have an effect at the Interactional level. Moreover, a system of rewards and protections should be implemented for individual military personnel reporting cases of abuse to internal and external sources.

These suggestions are but a few to address the complexities involved in crimes of the state. I have offered several broad policy suggestions that pertain more

generally to cases of state crime involving war crimes in hope that someday such controls will effectively constrain or control acts such as torture.

### Limitations

As with any research, this thesis has limitations. Qualitative methods are considerably more valid than some forms of quantitative methods but lack reliability due to the inherent danger of subjective and speculative interpretations that cannot be completely controlled for. Most researchers attempt objective and value free interpretations; however, the effects of individual values and views are still present in the researcher's interpretations. Therefore, it must be understood that qualitative research does create the inherent danger of subjective interpretation. By acknowledging the inherent values and views a researcher brings with his/her interpretations and by proclaiming the theoretical notions and frameworks to be utilized in the process of interpretation safeguards can be established (Vaughn, 1982). Other limitations of this study include the claim that external validity, the inability to generalize, is of significance. However, Yin (1984) has refuted that by presenting an explanation of the difference between analytic generalization and statistical generalization: "In analytic generalization, previously developed theory is used as a template against which to compare the empirical results of the case study." Yin also suggests that generalization of results, from single designs, is made to theory and not to the specific population: in this case Abu Ghraib. Therefore, while specific

generalizations may not be able to be made, general theoretical and analytical generalizations remain valid.

With any case study, serious errors are possible when “official” reports and declassified materials are utilized. However, the potential for errors can be controlled through data triangulation. Nevertheless, these types of data still contain several innate flaws (Berg 1998). Examples of this include missing elements in documents or missing portions of such documents. For this reason any research utilizing declassified memos and documents as data is subject to receiving or obtaining only partial information. This then limits what can be analyzed. The other side to this limitation is that the researcher’s decision of what to analyze frames what is sought in the data collection.

Other limitations include the compartmentalization of social agencies and international organizations that contribute to the complex nature of assessing the intent, impact, and social context of the political decisions that created or enabled the events at Abu Ghraib to occur. Specifically, the multitude of actors, agencies, and interdepartmental organizations, can contribute to an overwhelming and complex context that will leave some areas of analysis inaccessible or incomplete. Finally, the recorded documentation within internal documents will seldom reflect the political and conflicting activity that occurs “behind the political curtain,” shrouding the political deliberations that may have influenced the policy makers decision (Bassiouni 1997). Specific commentaries and the subsequent military trials of those accused were

unattainable for this research. Consequentially, a complete documentation of the events at Abu Ghraib cannot be written at this time.

### Future Research

Building upon this dissertation, future research could include a deeper examination of the philosophical arguments for/against the use of torture. This could include a deeper historical analysis of the use of torture by states to achieve specific goals. Such an extension would strengthen findings of this dissertation that torture is often carried out by states and/or torturers claiming a higher virtue or greater good. Along these same lines, a deeper analysis of the historical uses of torture would be beneficial to a more holistic understanding of the practice itself.

This work also presents a larger question of the phenomenon of organizational isomorphism. As this analysis has shown, torture had been a practice of the CIA for decades. Additionally, specific techniques developed and used by the CIA over the past five decades were subsequently used by lower ranking military personnel at Abu Ghraib. As such, a study exploring these linkages could be beneficial for future policy suggestions.

With any case of state crime, the factors involved in each case are complex and often interwoven. As such, analysis of these phenomena can take multiple directions. Additionally, exploring different venues to answer why they occurred can help in developing theoretical patterns and correlations that can then be used in an attempt to generalize to other forms of state crime.

## Appendix A

### Kauzlarich and Kramer's 1998 State Crime Theoretical Model

### **Institutional Environment: history, political, economy, and culture**

#### **Motivation**

Culture of competition, Economic pressure, Organizational Goals, and Performance emphasis.

#### **Opportunity Structure**

Availability of legal and/or illegal means, Obstacles and constraints, Blocked goals/strain, and Access to resources.

#### **Operationality of Control**

International reactions, Political pressure, Legal sanctions, media scrutiny, Public opinion, and Social movements.

### **Organizational: structure and process**

#### **Motivation**

Corporate Culture, Operative goals, Subunit goals, and Managerial Pressure.

#### **Opportunity Structure**

Instrumental rationality, Internal constraints, Defective SOPs, Creation of illegal means, Role specialization, Task segregation, Computer, Telecommunications and network technologies, and Normalization of deviance.

#### **Operationality of Control**

Culture of compliance, Subculture of resistance, Codes of conduct, Reward structure, Safety and Quality control procedures, and Communication processes.

### **Interactional: Face to Face interaction**

#### **Motivation**

Socialization, Social meaning, Individual foals, Competitive individualism, and Material success emphasis.

#### **Opportunity Structure**

Definition of situation, Perceptions of availability and attractiveness of illegal means.

#### **Operationality of Control**

Personal morality, Rationalization and techniques of neutralization, Separation from consequences, Obedience to authority, Group think, and Diffusion of responsibility

Kauzlarich and Kramer (1998:149)

## Appendix B

### Revised Integrated Model

### **Integrated Model-Motivations and Opportunities**

International Level	Motivation	Opportunity
	Political Interests	International Relations
	Economic Interests	Economic Supremacy
	Resources	Military
	Ideological Interests	Supremacy
		Complimentary Legal System
State/Structural Level		
	Culture of Competition	Availability Illegal Means
	Economic Pressure	Access to Resources
		Classified
	Political Goals	Materials
	Ideological Goals	Media Censorship
		State Propaganda
		Role
		Specialization
Organizational Level		
	Corporate Culture	Subculture of Resistance
	Organizational Goals	Defective SOP
	Operative Goals	Illegal Means
		Role
	Sub-unit Goals	Specialization
	Managerial Pressure	Task Segregation
	Reward Structure	Instrumental Rationality
		Normalization of Deviance
Interactional Level		
	Socialization	Rationalization
	Social Meaning	Techniques of Neutralization
	Individual Goals	Group Think
	Individual Ideology	Separation Consequences
	Competitiveness	Diffusion of Responsibility
	Individualism	Definition Situation
	Material Success	Perceived Illegal Means
	Driven Goal Success	

### Revised Integrated Model-Constraints and Controls

Constraints	Controls
International Reaction	International Law
Political Pressure	International Sanctions
Public Opinion	Economic Institutions
NGO/Social Movement	
Oversight Agencies	
International Reactions	Legal Sanctions
Political Pressure	Domestic Law
Media Scrutiny	
Public Opinion	
Social Movements	
Obstacles	
Blocked Goals	
Culture of Compliance	Codes of Conduct
Internal Constraints	Internal Controls
Communication Process	
Reward Structure	
Safety and Quality Processes	
Personal Morality	<u>Obedience to Authority</u>
Religion	<u>Legitimacy of</u>
Socialization	<u>Law</u>
Employment Security	

Appendix C  
International Laws and Documents

### **International Humanitarian Law**

Hague Convention No. IV, 18 October 1907, Respecting the Laws and Customs of War on Land, T.S. 539, including the regulations thereof.

Hague Convention No. IX, 18 October 1907, Concerning Bombardment by Naval Forces in Time of War, 36 Stat. 2314

Geneva Convention, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31

Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members, August 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.S.T.S. 85

Geneva Convention, Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135

Geneva Convention, Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287

The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977, 16 I.L.M. 1391, DA Pam 27-1-1

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, January 13, 1993, 32 I.L.M. 800

1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972, 26 U.S.T. 583

Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, October 10, 1980, 19 I.L.M. 1523

*Breakdown of Core Conventions and Protocols:*

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949---provides for the care of the wounded and sick combatants to eliminate torture, murder, and biological experiments.

Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949—covers the wounded, captured or sick combatants at sea.

Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949---this covers prisoners of war to be treated humanely, adequate housing provided, food, clothing, and medical care. Prohibits torture, medical experiments, and acts of violence, insults and public curiosity against those captured.

Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949---This one includes civilians. Parties to the conflict must distinguish between civilians and combatants and direct their operations only against military targets. Civilians must be permitted to live as normally as possible and to be protected against murder, pillage, torture, reprisals, indiscriminate harm, indiscriminate destruction of property and being taken hostage. Their honor, family rights, and religious convictions must be respected. Occupying forces shall ensure safe passage of food and adequate medical supplies and establish safety zones for the wounded, sick, elderly, children, expectant mothers, and mothers of young children.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977--provides further details of civilian protections in international conflicts (the US signed but did not yet ratify this one, yet, this is considered to be codified via customary law – erga omnes). It states, in order to ensure necessary protection of the civilian population and civilian objects and military objects and accordingly direct their operations only against military objectives. It also includes indiscriminate attacks on civilians (Article 41 of Protocol I). Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

**Legal Documents Prohibiting Torture****International**

The Hague Convention Respecting the Laws and Customs of War on Land (IV), 1907.

The United Nations Universal Declaration of Human Rights, 1948.

Geneva Convention Relative to the Protection of Civilian Person in Time of War, 1949.

Geneva Convention Relative to the Treatment of Prisoners of War, 1949.

The Declaration on the Protection of All Persons from Being Subjected to Torture, UNGA 1975.

The American Convention on Human Rights, 1978.

The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, 1987.

The International Covenant on Civil and Political Rights, 1996.

The Rome Statue of the International Criminal Court. 1998.

**U.S. Domestic**

Eight Amendment of the U.S. Constitution.

U.S. Torture Statute: 18 USC 2340.

U.S.C. of Military Justice (Articles 93,118,124,128).

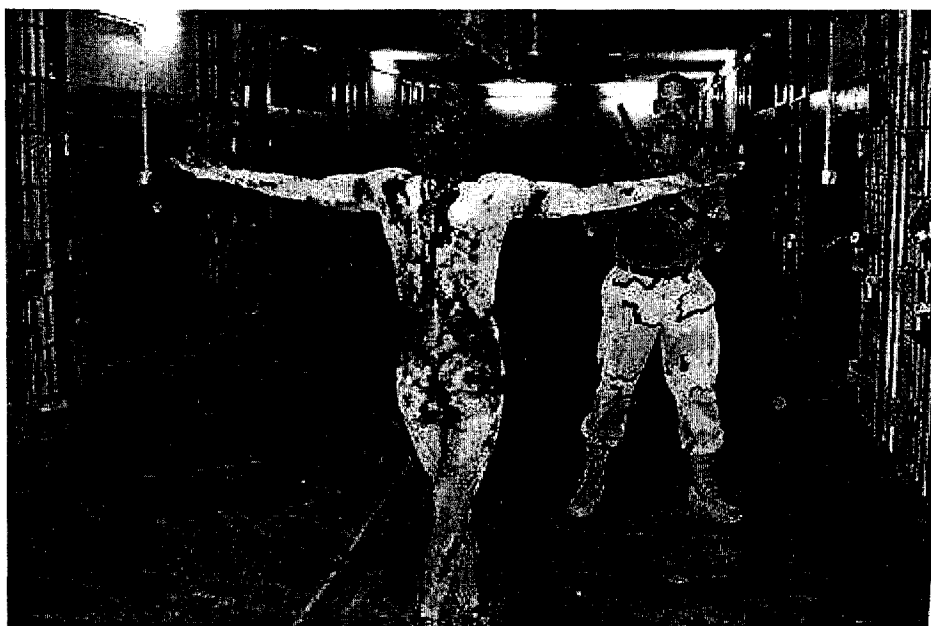
## Appendix D

### Images

### Photographs of Abu Ghraib Torture

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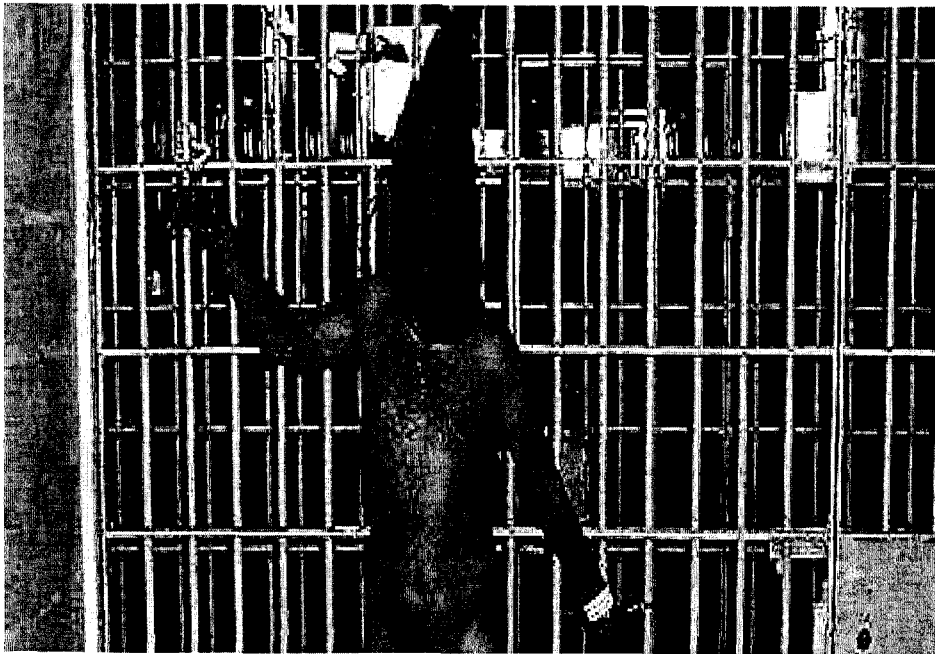




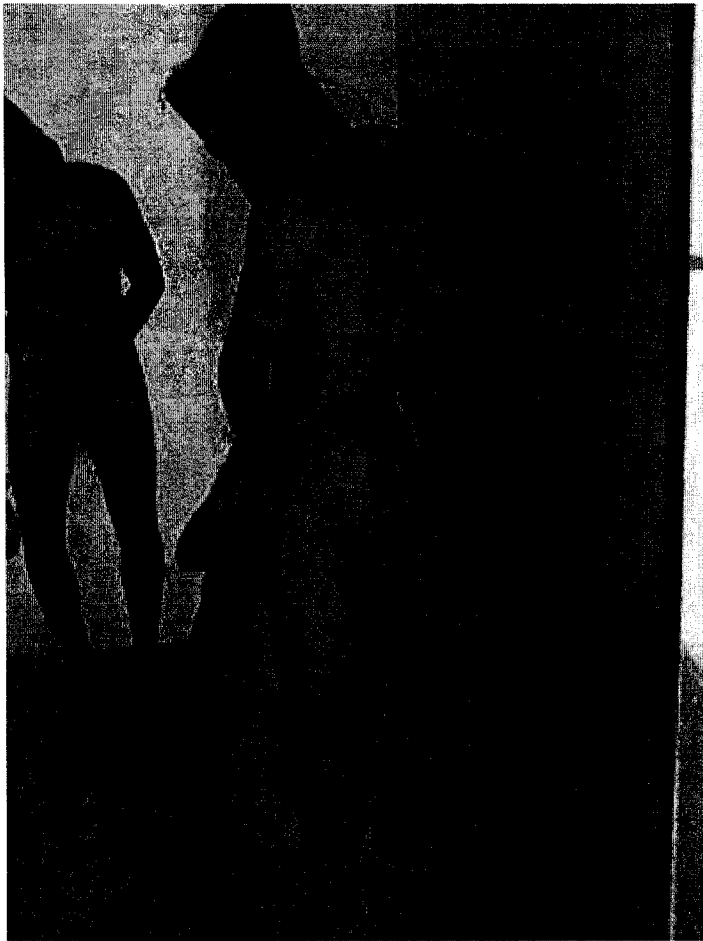








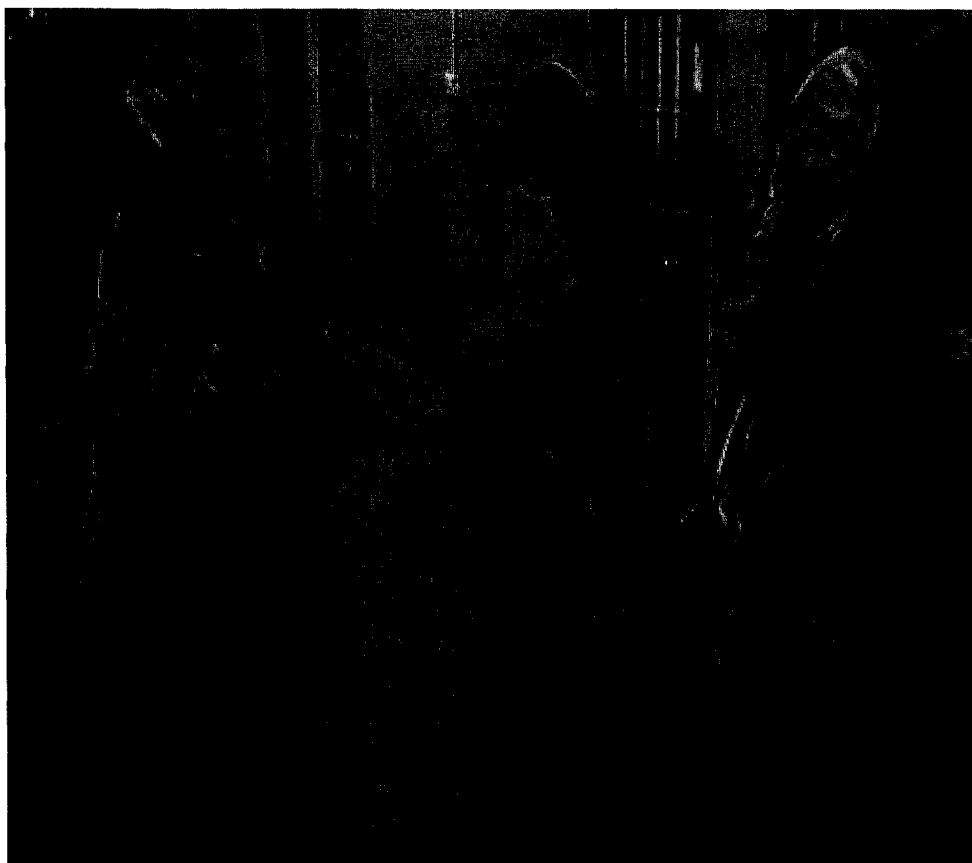




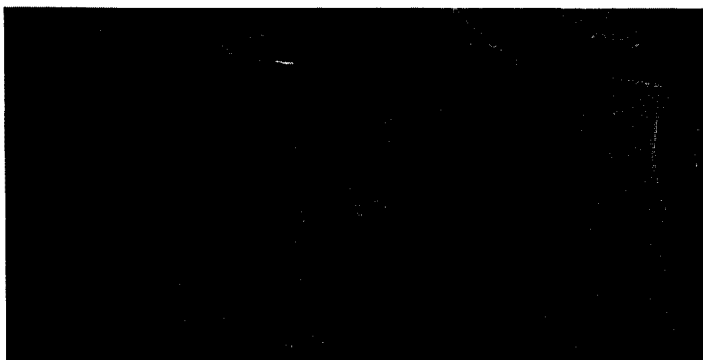




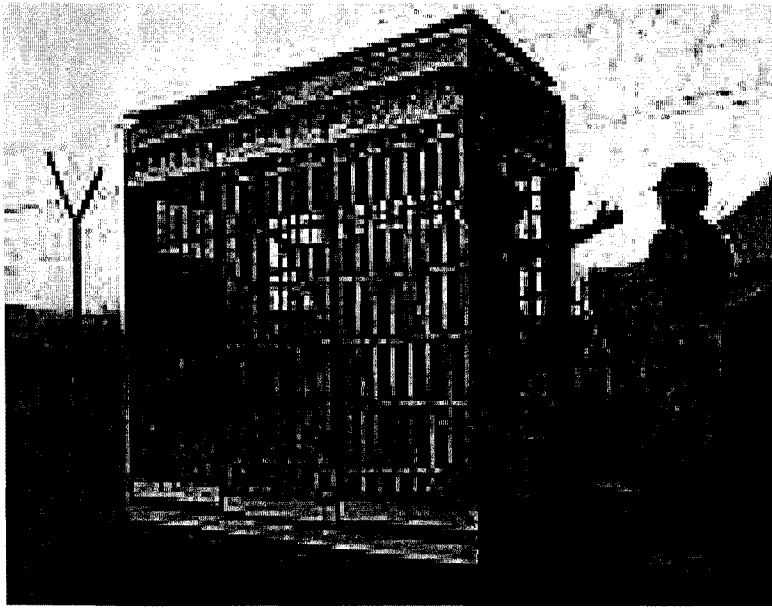








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MINUTES







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